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Articles

CYBER COMMODIFICATION

MIRIAM A. CHERRY*

INTRODUCTION

Last year, the *Huffington Post* blog 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;² other posts have featured more ideological content aimed at a liberal audience.³ Leading up to the 2008

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* 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, Robert L. Rogers, Peter Salsich, Anders Walker, and Jarrod Wong for their helpful insights and encouragement. Further, I wish to express my deep appreciation to Winifred Poster, who provided valuable commentary to the Article when it was in its formative stages. Thanks to Gregory Goodwin, Kristen Henke, William Kellner, Ameya Patankar, and Erin Petersen for their able research assistance, and to the editors of the *Maryland Law Review* for their hard work.

1. Paul Farhi, *Unpaid Bloggers Plan to Sue HuffPo*, *AOL*, WASH. POST (Apr. 12, 2011, 11:38 AM), http://www.washingtonpost.com/blogs/the-buzz/post/unpaid-bloggers-plan-to-sue-huffpo-aol/2011/04/12/AFFSIZQD_blog.html.

2. See, e.g., Daniel Bukszpan, *The Most Expensive NFL Tickets of the Season*: *CNBC*, HUFFINGTON POST (Sept. 10, 2012, 11:57 AM), http://www.huffingtonpost.com/2012/09/09/most-expensive-nfl-tickets_n_1865589.html?utm_hp_ref=business (noting the top NFL tickets in terms of price).

3. See Tim Ruten, *AOL? HuffPo. The Loser? Journalism*, *L.A. TIMES*, Feb. 9, 2011, at 15, available at <http://articles.latimes.com/2011/feb/09/opinion/la-oe-ruten-column-huff>

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.⁴ Regardless of one's personal political leanings, 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.⁵ Freshly updated content helped attract an additional audience to the blog, which grew rapidly, reaching fifteen million hits per weekday.⁶

In March 2011, media giant AOL submitted a \$315 million acquisition bid for the *Huffington Post*.⁷ The *HuffPo* website, and the traffic driven to that site, was valuable to AOL, a company that had been searching for more content providers and an expanded audience for existing content.⁸ Arianna Huffington and her financial backers

ington-aol-20110209 (stating that the *Huffington Post* tailors its content to its "overwhelmingly liberal audience").

4. 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 (criticizing the Bush administration on its operation of Guantanamo Bay). For the *Huffington Post*'s current stance on this issue, see Ben Fox, *Guantanamo Closure Hopes Fade as Prison Turns 10*, HUFFINGTON POST, (Jan. 10, 2012, 4:21 PM), http://www.huffingtonpost.com/2012/01/10/guantanamo-closure-anniversary_n_1195984.html.

5. See Class Action Complaint at ¶¶ 56–61, *Tasini v. AOL, Inc.*, 851 F. Supp. 2d 734 (S.D.N.Y. 2011) (No. 11 Civ. 2472(JGK)), 2011 WL 1366476 (alleging that the *Huffington Post* recruited professional journalists and authors to generate high quality content without compensation).

6. See Nate Silver, *The Economics of Blogging and the Huffington Post*, N.Y. TIMES (Feb. 12, 2011, 12:28 PM), <http://fivethirtyeight.blogs.nytimes.com/2011/02/12/the-economics-of-blogging-and-the-huffington-post/> (estimating fifteen million page hits per weekday on *HuffPo* and analyzing the types of posts and attention the site was typically attracting).

7. *Id.*; see also Julianne Pepitone, *Huffington Post Blogger Sues AOL for \$105 Million*, CNN MONEY (Apr. 12, 2011, 2:58 PM), http://money.cnn.com/2011/04/12/technology/huffington_post_blogger_lawsuit/index.htm (noting that AOL had acquired *Huffington Post* for \$315 million).

8. See Jeremy W. Peters & Verne G. Kopytoff, *Betting on News, AOL is Acquiring Huffington Post*, N.Y. TIMES, Feb. 7, 2011, at A1 (describing AOL's reasons for purchasing the *Huffington Post*, including its desire for more news content and a broader audience).

stood to make a handsome profit from the acquisition.⁹ The bloggers, on the other hand, who had built the blog's readership by dint of their hard work, were to receive nothing.¹⁰ Frustrated, Jonathan Tasini, a journalist and labor activist,¹¹ along with other unpaid bloggers, filed a lawsuit challenging the terms of the deal.¹² The bloggers claimed that their hard work had built the blog's value, entitling them to a share of the profits by virtue of a contract claim or a claim for unjust enrichment and restitution.¹³

The heart of the *Huffington Post* bloggers' claims seemed to rest, as many contract-related 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.¹⁴ Retroactively, the bloggers learned that the site's founders were to profit from the blog, and they therefore felt exploited.¹⁵ The *Huffington Post* contended that the bloggers undertook their writing with no expectation of compensation.¹⁶ Further, they claimed that the bloggers did receive a substan-

9. See *id.* ("The sale means a huge payout for *Huffington Post* investors and holders of its stock and options . . .").

10. See Class Action Complaint, *supra* note 5, at ¶ 3 (alleging that none of the profits from AOL's purchase of the *Huffington Post* were shared with its bloggers); see also Rutten, *supra* note 6 ("To grasp its business model . . . you need to picture a galley rowed by slaves and commanded by pirates.").

11. Jonathan Tasini was previously 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. *N.Y. Times Co. v. Tasini*, 533 U.S. 483, 506 (2001).

12. Class Action Complaint, *supra* note 5, at ¶ 3.

13. *Id.* at ¶ 2. 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. Ashby Jones, *Do Huffington Post Bloggers Deserve to Get Paid?*, WALL ST. J. LAW BLOG (Apr. 12, 2011, 4:01 PM), <http://blogs.wsj.com/digits/2011/04/12/should-huffington-post-bloggers-get-paid/>.

14. See *infra* Part IV.

15. The unpaid bloggers posted on the Twitter account #huffpuff, claiming that *HuffPo* "built a blog-empire on the backs of thousands of citizen journalists." Silver, *supra* note 6. Ironically, liberal ideology generally tends to support organized labor and workers' rights.

16. Memorandum of Law in Support of Defendants' Rule 12(b)(6) Motion to Dismiss the First Amended Complaint at 1, *Tasini v. AOL, Inc.*, 851 F. Supp. 2d 734 (S.D.N.Y. 2011) (No. 11 Civ. 2472(JGK)), 2011 WL 8198300.

tial 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.”¹⁷ 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.¹⁸ On March 30, 2012, the district court sided with the *HuffPo* blog and dismissed the bloggers’ complaint.¹⁹ The decision was later affirmed on appeal by the United States Court of Appeals for the Second Circuit.²⁰

While the *Huffington Post* dispute is a new context for examining the monetization of Internet websites and online activities, the fact is that this question—whether a website is or should be commercialized—is becoming an increasingly common and vexing one. For the past decade, technology has fundamentally shaped and restructured the ways in which many markets function.²¹ Indeed, certain 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

17. Jeremy W. Peters, *Huffington Post Is Target of Suit on Behalf of Bloggers*, N.Y. TIMES (Apr. 12, 2011, 12:49 PM), <http://mediadecoder.blogs.nytimes.com/2011/04/12/huffington-post-is-target-of-suit-on-behalf-of-bloggers/>.

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

19. *Tasini v. AOL, Inc.*, 851 F. Supp. 2d 734, 745 (S.D.N.Y. 2012), *aff’d*, No. 12-1428-CV, 2012 WL 6176559, at *1 (2d Cir. Dec. 12, 2012).

20. *Tasini v. AOL, Inc.*, No. 12-1428-CV, 2012 WL 6176559, at *1 (2d Cir. Dec. 12, 2012).

21. For example, computerized trades have replaced the loud, frantic atmosphere of the “trading pit” where stockbrokers traditionally executed buy-sell orders. See Graham Bowley, *The New Speed of Money, Reshaping Markets*, N.Y. TIMES, Jan. 1, 2011, at BU1 (noting that most stock trading in the United States is conducted via computer); Michael J. De La Merced & Jack Ewing, *A German Bid to Take over the Big Board*, N.Y. TIMES, Feb. 10, 2011, at A1 (“[I]ncreasingly trades are being executed by computers far from Wall Street.”); see also Margaret Jane Radin, *Property Evolving in Cyberspace*, 5 J.L. & COM. 509, 509 (1996) (noting, presciently, that “the way we think about property is changing in light of the technological and social realities of the global flow of digital information over linked computer networks”); M. Ryan Calo, *People Can Be So Fake: A New Dimension to Privacy and Technology Scholarship*, 114 PENN ST. L. REV. 809, 850–52 (2010) (describing psychological literature on how humans are interacting with robotic devices, such as global mapping programs and Roomba housekeepers).

market by intermediaries such as eBay,²² Amazon.com,²³ and craigslist,²⁴ as these platforms²⁵ have either minimized or removed various transaction costs.²⁶ Further, items that have traditionally been seen as non-monetizable, such as predictions about future events,²⁷

22. EBAY, <http://www.ebay.com> (last visited Sept. 11, 2012). 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. 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, eBay removed the auction but not before bids had reached several million dollars. *See id.* (noting that the National Organ Transplant Act, 42 U.S.C. § 274e (2006), criminalizes the sale of human organs). Since that time, eBay has attracted more than its share of nontraditional 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 C18; Mary Ann Georgantopoulos, *Student's eBay Stint Pays the Bills, Makes a Friend*, BOS. GLOBE, Aug. 12, 2007, at 4 (describing a vacationing student who sold himself—or at least one week of his labor—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 one's forehead to sport a tattoo with the name of a corporation, the *literal* sale of one's soul is forbidden on Internet auction sites. *Compare*, Andrew Adam Newman, *The Body as Billboard: Your Ad Here*, N.Y. TIMES, Feb. 17, 2009, at B3 (noting the legal business of tattoo advertising), *with Soul Seller*, CHI. TRIB., June 14, 2004, at 49 (describing auction for a soul that slipped past eBay's rules; the price of a soul in that auction was a mere \$400).

23. AMAZON, <http://www.amazon.com> (last visited Sept. 11, 2012).

24. CRAIGSLIST, <http://www.craigslist.org> (last visited Sept. 11, 2012).

25. I use this term throughout the article even though it has many meanings, including 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 & SOC'Y (2010) (discussing the use of the term “platform”); Niva Elkin-Koren, *User-Generated Platforms*, in WORKING WITHIN THE BOUNDARIES OF INTELLECTUAL PROPERTY (Rochelle Dreyfuss et al. eds., 2010), available at <http://ssrn.com/abstract=1648465> (discussing social media platforms).

26. *See infra* Part II.B.

27. *See generally* MICHAEL ABRAMOWICZ, PREDICTOCRACY (Yale Univ. Press 2008) (describing the benefits of prediction markets). For the author's discussion prediction markets, see generally Miriam A. Cherry & Robert L. Rogers, *Prediction Markets and the First*

tasks performed in minutes or even seconds of leisure time,²⁸ or the friendship and connections that comprise social capital,²⁹ are all now rapidly in the process of being valued, monetized, globalized,³⁰ and marketed online. At times these shifting boundaries have resulted in legal disputes.³¹

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.³² Newspaper classified advertisements are definitely commercial, but their equivalent on Craigslist was mostly non-commercial—until the Delaware Chancery Court stepped in.³³ Selling your organs is prohibited in the United States, whereas selling hair promises to rescue third-world citizens from poverty.³⁴ Selling sex is illegal as prostitution, but selling adultery online is a hot new business model.³⁵ And a small company offering a free service to academics has quietly become the dominant method for disseminating academic legal research, beating massive commercial data providers without anyone initially noticing.³⁶ This Article will explore 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. Funda-

Amendment, 2008 U. ILL. L. REV. 833 (2008) [hereinafter Cherry & Rogers, *Prediction Markets*] (discussing the legal issues surrounding prediction markets); 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) (discussing the application of prediction markets to Supreme Court decisions); Miriam A. Cherry & Robert L. Rogers, *Markets for Markets: Origins and Subjects of Information Markets*, 58 RUTGERS L. REV. 339 (2006) (analyzing the history and evolution of prediction markets).

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

29. See *infra* Part III.B.

30. See, e.g., Miriam A. Cherry, *The Global Dimensions of Virtual Work*, 54 ST. LOUIS U. L.J. 471, 472–73 (2010) [hereinafter Cherry, *Virtual Work*] (noting the increasing trend toward globalization in online work).

31. See *infra* Part IV.

32. See *infra* Part III.B.

33. See *infra* Part III.A.

34. See *infra* Part I.

35. See *infra* Part II.A.2.

36. See *infra* Part IV.B.

mental questions remain as productive collaborative uses of the Internet continue to develop: How will the lines between monetized and free goods and services be drawn in cyberspace? How will technology be used to shape or change existing norms about what is and what is not commodified? As new technologies are created, disputes arise about how and when marketization could or should occur.³⁷ On one hand, money can attract participation in ways that purely fun activities might not be able to, and it can provide important incentives for engaging users.³⁸ On the other hand, the Internet has as part of its ethos an “open access” ethic³⁹ 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.⁴⁰

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 300 years ago.⁴¹ 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.⁴² Accompanying advances in communication and information technology is a dramatic expansion of online trade and

37. See *infra* Part IV.

38. See *infra* Part II.

39. See, e.g., GOOGLE MAPS, <http://www.googlemaps.com> (last visited Sept. 11, 2012); MAPQUEST, <http://www.mapquest.com> (last visited Sept. 11, 2012).

40. WIKIPEDIA, <http://www.wikipedia.org> (last visited Sept. 11, 2012).

41. For example, the doctrine on the foreseeability of contract damages comes to us from the case *Hadley v. Baxendale* (1854) 156 Eng. Rep. 145 (Exch.), 9 Ex. 341. Richard Danzig, *Hadley v. Baxendale: A Study in the Industrialization of the Law*, 4 J. LEG. STUD. 249, 253 (1975). As noted by Professor Danzig, the case was part of a sea change in commerce that came along with the advent of mass production. *Id.* at 250–51.

42. 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 waggons, stage coaches, and a creeping post—and of swift, luxurious Railroads, and lightening Telegraphs. All is altered: material, inducing corresponding social and moral changes.

SAMUEL WARREN, A POPULAR AND PRACTICAL INTRODUCTION TO LAW STUDIES AND TO EVERY DEPARTMENT OF THE LEGAL PROFESSION 12 (3d ed. 1863).

commerce.⁴³ As such, it is important to think of contract law's place in this new world of networked trade and commerce.⁴⁴ This Article will identify current developments and analyze 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.⁴⁵

This Article will make a unique contribution to the theoretical work surrounding commodification.⁴⁶ In *The Wealth of Networks*, Professor Yochai Benkler extols the virtues of free collaboration in cyberspace, via what he describes as open-source or "commons-based peer production."⁴⁷ Professor Margaret Radin also expresses skepticism about markets in relation to unconventional markets.⁴⁸ On a first examination, choices about commodification seem binary—an on or off switch—and as such they are in fundamental tension.⁴⁹ With a deeper examination, however, I believe this is a false dichotomy.⁵⁰ Commodification is more of a continuum, with many portions of the Internet existing in states of what Professor Radin might term "incomplete commodification."⁵¹ While Professors Benkler and Radin are skepti-

43. See *supra* Part II.

44. See *infra* Part V.A.

45. See *infra* Part V.A.

46. See *infra* Part V.B.

47. 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, 969–78 (2009) (discussing, *inter alia*, Benkler's theory of peer production).

48. See *infra* Part V.B.

49. See *infra* Part V.B.

50. See *infra* Part V.B.

51. Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1917–20 (1987); see also Margaret Jane Radin & Madhavi Sunder, *The Subject and Object of Commodification*, in *RETHINKING COMMODIFICATION* 8, 25 n.16 (Martha M. Ertman & Joan C. Williams eds., 2005) (noting that 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 Radin, a pioneer of commodification theory in legal literature, noted that the Internet and other computer technology was helping to

cal of marketization of the Internet, that skepticism is, in my view, mostly unjustified.⁵² 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.⁵³ 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.⁵⁴

Keeping this thesis in mind, while scholars have provided narrow telescopic glimpses into isolated components of cyber commodification, this piece will aim 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 will seek to provide a rough exploratory map of this new terrain.

This Article will proceed in five parts and will use both illustrative examples and broader theoretical material to map the concept of cyber commodification more fully. Part I will explain how cyber commodification is *different* from earlier forms of commodification that are more familiar to us. As such, it will seek insights from the first wave of commodification theory, which grew out of advances in medical technology and enabled us to think about reproduction, organ sales, and other biologic components associated with the body in

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* 3, 4 (Niva Elkin-Koren & Neil Weinstock Netanel eds., 2002).

52. See *infra* Part V.B.

53. See *infra* Part V.B.

54. See *infra* Part V.B.

market terms. From this more historical and theoretical background, Part II will discuss 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 Part range all the way from an online market for adultery to Chinese “goldfarmers” who play video game characters for a living, what they share is that they explain why the cyber commodification phenomenon has become ubiquitous. Part III will discuss the *process* of cyber commodification, using the business model of craigslist as an illustrative example, and will examine prediction markets, which monetize knowledge and information. Part IV will move on to *contests and disputes* that have arisen from differing expectations that parties bring with them into various transactions. Finally Part V will explore the greater *implications* of cyber commodification, including its various associated costs and benefits.

I. DIFFERENTIATING CYBER COMMODIFICATION

Scholars have studied and analyzed the 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 often referred to as taboo trades,⁵⁵ “repugnant markets,”⁵⁶ or, humorously, “ick-onomics.”⁵⁷ While these matters have been at least partially analyzed by courts and academic commentators, the markets between monetized and non-monetized transactions are still being clarified.⁵⁸ Indeed, it is important to realize that these delineations are often contextually and culturally dependent.⁵⁹ For example, pay-

55. Alvin E. Roth, *Repugnance as a Constraint on Markets*, 21 J. ECON. PERSP. 3, 40 (2007) (quoting Alan P. Fiske & Philip E. Tetlock, *Taboo Trade-Offs: Reactions to Transactions that Transgress Spheres of Justice*, 18 POL. PSYCHOL. 255, 255–97 (1997)) (internal quotation marks omitted).

56. *Id.* at 39–42.

57. Josephine Marcotty, *Kidney Failure, Part 3: A Revolution: Trading Donors*, STAR TRIB., Sept. 29, 2009, at 1A.

58. See Roth, *supra* note 55, at 44–45 (discussing some of the uncertainties surrounding monetary and nonmonetary transactions).

59. See *id.* at 42–44 (describing how transactions can be judged differently in different contexts and cultures).

ment for organs is forbidden in the United States but is permitted in Iran;⁶⁰ markets in fossils are outlawed in many European countries but they thrive in the lightly regulated market of the United States.⁶¹

So, what can we learn from these examples for our present purposes of exploring cyber commodification? 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?

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,⁶² 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, although these statutes are more about regulation than forbidding particular market activity.⁶³ Finally, other common law 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 nonmarket activity.⁶⁴

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

61. See Miriam A. Cherry, *A Tyrannosaurus-Rex Aptly Named "Sue": Using a Disputed Dinosaur to Teach Contract Defenses*, 81 N.D. L. REV. 295, 295–97 (2005) (describing lightly regulated fossil markets in the United States).

62. U.S. CONST. amend. XIII (banning the institution of slavery); Mario L. Barnes & Erwin Chemerinsky, *The Once and Future Equal Protection Doctrine?*, 43 CONN. L. REV. 1059, 1067 (2011).

63. See Joel Seligman, *The Changing Nature of Federal Regulation*, 6 WASH. U. J.L. & POL'Y 205, 207–10 (2001) (discussing statutes enacted to create a national system of securities regulation).

64. See Radin, *supra* note 51, at 1855–59 (discussing the concept of inalienability).

Constitutional provisions or criminal statutes can put certain activities off-limits for exchange in a market.⁶⁵ Constitutional provisions can be used to outlaw a market for a good entirely, which was the case with the prohibition of alcohol.⁶⁶ 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.⁶⁷ But other banned drugs, specifically marijuana, are permissible with the presence of particular medical conditions in certain states.⁶⁸ Sexual activity, which would otherwise be legal, is criminalized if it involves the exchange of money.⁶⁹ And

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

66. U.S. CONST. amend. XVIII (instituting prohibition along with the Volstead Act), repealed by U.S. CONST. amend. XXI; see also Lloyd C. Anderson, *Direct Shipment of Wine, the Commerce Clause and the Twenty-First Amendment: A Call for Legislative Reform*, 37 AKRON L. REV. 1 (2004) (discussing the impact on the shipment of wine as a result of the Twenty-First Amendment of the U.S. Constitution); 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) (same).

67. See, e.g., Steven Wisotsky, *Exposing the War on Cocaine: The Futility and Destructiveness of Prohibition*, 1983 WIS. L. REV. 1305, 1310–13 (describing the criminalization of cocaine in the United States).

68. See, e.g., Michael Berkey, *Mary Jane's New Dance: The Medical Marijuana Legal Tango*, 9 CARDOZO PUB. L. POL'Y & ETHICS J. 417, 428–31 (2011).

69. Andrew Gilden, *Sexual (Re)consideration: Adult Entertainment Contracts and the Problem of Enforceability*, 97 GEO. L.J. 541, 553 (2007). Anti-prostitution laws criminalize the payment of money for sexual services. This rule, however, 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*, 808 P.2d 314 (Ariz. Ct. App. 1990) (introducing this legal distinction). Recently, Professor SpearIt 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. SpearIt, Assistant Professor of Law, Saint Louis University School of Law, Presentation at the Saint Louis University School of Law: Vice-versa: Reframing, Reforming, Pornography Through Prostitution Law (July 20, 2011).

federal anti-gambling laws have recently been strengthened as a reaction to the growth of Internet gambling.⁷⁰

In other instances, state or federal statutes do not prevent a market from existing or an activity from taking place, but instead they regulate who may participate in the market or otherwise prescribe rules to which market participants must adhere.⁷¹ At times, the regulation largely replicates the role of custom.⁷² In other instances, regulations exist for advancing consumer or investor protection. Examples of such statutes include the Magnuson-Moss Act,⁷³ which governs the form and structure of warranties provided for consumer goods, or the rules regarding accredited investors under the Securities and Exchange Act.⁷⁴

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.⁷⁵ Long the bane of first-year law students, the doctrine is littered with moral commitments⁷⁶ and promises to make charitable donations.⁷⁷

70. Cherry & Rogers, *Prediction Markets*, *supra* note 27, at 834–35.

71. See, e.g., Lawrence A. Cunningham, *The Sarbanes-Oxley Yawn: Heavy Rhetoric, Light Reform (And It Just Might Work)*, 35 CONN. L. REV. 915, 919–20 (2003) (listing all of the groups subject to regulation by the Sarbanes-Oxley Act).

72. *Id.* at 969–70. Indeed, one commentator has noted that certain provisions of the Sarbanes-Oxley Act inscribed into law the “best practices” that existed at the time. *Id.* at 918.

73. Magnuson-Moss Warranty—FTC Improvement Act, Pub. L. No. 93-637, § 106(b), 88 Stat. 2183, 2188–89 (1974) (codified as amended at 15 U.S.C. § 2306 (2006)).

74. Securities and Exchange Act, 15 U.S.C. § 77c (2006); see also *In re Integrated Res. Real Estate Ltd. P’ships Sec. Litig.*, 815 F. Supp. 620, 628 (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).

75. OLIVER WENDELL HOLMES, *THE COMMON LAW* 230 (Mark DeWolfe Howe ed., Belknap Press of Harvard Univ. Press 1963) (1881).

76. See *Hamer v. Sidway*, 27 N.E. 256, 256 (N.Y. 1891) (involving a nephew’s promise to refrain from vices).

77. See *Johnson v. Otterbein Univ.*, 41 Ohio St. 527, 530 (Ohio 1885) (analyzing consideration in the context of a charitable gift).

While not often litigated,⁷⁸ 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 what trades are unenforceable. Public policy is another ill-defined doctrine⁷⁹ but it too has formed the basis for striking down particular private bargains.⁸⁰ 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,⁸¹ sex,⁸² surrogate pregnancy,⁸³ and even the online sale of virginity.⁸⁴ 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.⁸⁵ Proposals

78. 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.

79. *Shaheen v. Knight*, 11 Pa. D. & C.2d 41 (Pa. C.P. 1957).

80. *Matter of Baby M*, 537 A.2d 1227, 1246–50 (N.J. 1988); RESTATEMENT (SECOND) OF CONTRACTS §§ 178–79 (1981).

81. 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 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 REBECCA SKLOOT, *THE IMMORTAL LIFE OF HENRIETTA LACKS* 315–28 (2010).

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

83. See, e.g., Carol Sanger, *Developing Markets in Baby-Making*: In the *Matter of Baby M*, 30 HARV. J.L. & GENDER 67 (2007) (analyzing how the market for surrogacy developed).

84. See Kimberly D. Krawiec, *A Woman’s Worth*, 88 N.C. L. REV. 1739, 1740 (2010) (recounting the story of a 2008 virginity auction at the Moonlite Bunny Ranch in Nevada).

85. See, e.g., Elisabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323 (1978) (analyzing the nonmarket regulation of child adoptions); RICHARD A. POSNER, *SEX AND REASON* 409–17 (1992) (same). The secondary literature that has developed in response to this provocative argument has been extensive. See gener-

surrounding markets for human organs have also sparked serious debate.⁸⁶

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.⁸⁷ 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 the 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, some are concerned that markets can be coercive and play on the desperation that arises from abject poverty and economic inequality.⁸⁸ 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."⁸⁹ 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 offered and questions whether

ally Kimberly D. Krawiec, *Altruism and Intermediation in the Market for Babies*, 66 WASH. & LEE L. REV. 203 (2009) (collecting sources).

86. See Roth, *supra* note 55, at 45–50 (discussing issues surrounding the compensation of organ donors); 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 & n.10 (2009) (describing a proposed bill in South Carolina that would have provided good time credit for prisoners who became kidney donors (citing S.B. 480, 117th Gen. Assemb., Reg. Sess. (S.C. 2007))).

87. See generally, RETHINKING COMMODIFICATION (Martha M. Ertman & Joan C. Williams eds., 2005) (addressing commodification in a feminist context).

88. Michael J. Sandel, *What Money Can't Buy, The Moral Limits of Markets*, in RETHINKING COMMODIFICATION, *supra* note 87, at 122.

89. *Id.*

the purchase and sale of those goods will produce good results for society overall.⁹⁰

Other feminist theorists, including Professors Martha Ertman⁹¹ and Katherine Silbaugh,⁹² 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.⁹³

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.⁹⁴ 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."⁹⁵ 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 consider 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.⁹⁶ While "Differentiated Ties" is an awkward terminology that does not seem to capture fully Williams's concept, the questions she poses are important, and I return to these insights in the last portion of the Article.

How does the further development of Internet technology impact some of these unconventional markets? What is marketable has always been contextually and culturally dependent, and has been sub-

90. *Id.* at 124.

91. Martha Ertman, *Marriage as a Trade: Bridging the Private/Private Distinction*, 36 HARV. C.R.-C.L. L. REV. 79 (2001) (discussing how business models are similar to cohabitation, marriage, and polyamory to justify importing elements of business law to improve domestic relations law).

92. Katherine Silbaugh, *Marriage Contracts and the Family Economy*, 93 NW. U. L. REV. 65 (1998) (discussing the selective enforcement of premarital agreements).

93. Krawiec, *supra* note 84, at 1768–69.

94. Joan C. Williams & Viviana A. Zelizer, *To Commodify or Not to Commodify That Is Not the Question*, in RETHINKING COMMODIFICATION, *supra* note 87, at 362, 368.

95. *Id.* at 368–69.

96. *Id.* at 375–77.

ject 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 seems to encourage commodification. Would even Landes and Posner have predicted an online market for human hair?⁹⁷

In dealing with sales that concern the body, the Internet reduces 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, how does the theory surrounding the first generation of commodification analyses apply to the questions of Internet commodification? Let us turn to some examples that illustrate the forces pushing toward cyber commodification. I 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, the 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.

97. On BuyandSellHair.com, sellers can create listings for their hair, including color and length. See *Listings for Hair for Sale*, BUYANDSELLHAIR.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*, 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.

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 the medium through which interaction is facilitated. . . . [T]he identity of each individual is removed either completely or in part.”⁹⁸ The concepts of anonymity and deindividuation have been used as frameworks to analyze the proliferation of various types of conduct in cyberspace including defamation,⁹⁹ software piracy,¹⁰⁰ gambling,¹⁰¹ and harassment and cyberbullying.¹⁰²

Numerous studies indicate that people behave differently when they believe their identity is anonymous.¹⁰³ The role anonymity plays in a person’s decisionmaking, however, is subject to debate. One

98. Sameer Hinduja, *Deindividuation and Internet Software Piracy*, 11 CYBERPSYCHOL. & BEHAV. 391, 392 (2008).

99. Diane Rowland, *Gripping, Bitching and Speaking Your Mind: Defamation and Free Expression on the Internet*, 110 PENN ST. L. REV. 519, 530–32 (2006).

100. Hinduja, *supra* note 98, at 392.

101. Mark Griffiths et al., *Internet Gambling: An Overview of Psychosocial Impacts*, 10 UNLV GAMING RES. & REV. J. 27, 30 (2006).

102. Warren Chik, *Harassment Through the Digital Medium: A Cross-Jurisdictional Comparative Analysis on the Law on Cyberstalking*, 3 J. INT’L COM. L. & TECH. 13, 13–14 (2008); Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61, 63–64 (2009); cf. Frank Pasquale, *Beyond Innovation and Competition: The Need for Qualified Transparency in Internet Intermediaries*, 104 NW. U. L. REV. 105, 113 (2010) (describing ways in which negative terms can be searched).

103. See, e.g., Katherine S. Williams, *On-Line Anonymity, Deindividuation and Freedom of Expression and Privacy*, 110 PENN ST. L. REV. 687, 691 (2006) [hereinafter Williams, *On-Line Anonymity*] (citing GUSTAVE LE BON, *THE CROWD: A STUDY OF THE POPULAR MIND* (Transaction Publishers 1995) (1895)) (describing Le Bon’s theory about the actions of people in crowds as an individual going on a “moral or ethical holiday” when “he or she is part of a larger and different whole”); M.E. Kabay, Dir. Of Educ., Int’l Computer Sec. Ass’n, Presentation at the Annual Conference of the European Institute for Computer Anti-Virus Research: Anonymity and Pseudonymity in Cyberspace: Deindividuation, Incivility and Lawlessness Versus Freedom and Privacy (Mar. 16, 1998), <http://www.mekabay.com/overviews/anonpseudo.pdf> (citing Phillip G. Zimbardo, *The Human Choice: 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) (noting Zimbardo’s suggestion that anonymity is a contributing factor to antisocial behavior)).

predominant theory¹⁰⁴ 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.”¹⁰⁵ Early research focused on an individual losing self-awareness due to participation in a large group.¹⁰⁶ Even absent group membership, however, anonymity may be a contributing factor to deindividuation because anonymity results in a lack of self-awareness.¹⁰⁷ This resulting lack of self-awareness can lead to disinhibited or anti-normative behavior.¹⁰⁸ For example, from the relative anonymity of a car, a driver is more likely to drive aggressively,¹⁰⁹ 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,¹¹⁰ and anonymous students are more likely to write cruel comments about instructors in their teaching evaluations.¹¹¹

Evidence supporting a causal link between anonymity and certain behavior on the Internet is lacking, but several otherwise important

104. Social Identity Theory of Deindividuation is particularly relevant in the Internet context. The theory 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, *On-Line Anonymity*, *supra* note 103, at 692–93. Deindividuation results when an individual abandons the personal identity for the social identity and the norms and frames of reference from different groups. *Id.* While anonymity may not cause antinormative behavior, it can facilitate acting on impulses or lowering inhibitions, which allow a person to behave in a way she would not if she was not anonymous. John Suler, *The Online Disinhibition Effect*, 7 CYBERPSYCHOL. & BEHAV. 321, 322 (2004). Most likely, anonymity is simply the best option for someone predisposed to antinormative behavior, because it is less likely that he or she will be 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).

105. Rowland, *supra* note 99, at 531.

106. *Id.*

107. See Edward Diener, *Deindividuation: Causes and Consequences*, 5 SOCIAL BEHAV. & PERSONALITY 143, 146 (1977) (noting that several studies have indirectly suggested that anonymity “sometimes produces an internal deindividuated state”).

108. *Id.* at 149.

109. Williams, *On-Line Anonymity*, *supra* note 103, at 692 & nn.16, 18 (citing P. Ellison, *Anonymity and Aggressive Driving Behaviour: A Field Study*, 10 J. SOC. BEHAV. & PERSONALITY 256 (1995)).

110. *Id.* (citing Zimbardo, *supra* note 103, at 237).

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

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.¹¹² Anonymity allows individuals to engage in a behavior without the fear of stigma associated with that behavior.¹¹³ Further, individuals may act online without receiving disapproval or judgment.¹¹⁴ Most importantly, computer-mediated communication brings individuals into online groups where they may potentially act on the norms espoused by the group, thereby losing their sense of self-awareness.¹¹⁵ 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 anonymity can 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, de-individuation, and behavior on the Internet is in the context of free speech and defamation.¹¹⁶ Commentary has focused on harassment and its proliferation due to the anonymity of cyberbullies.¹¹⁷ The Internet and other technological advances allow bullying to continue around the clock, anonymously, and more maliciously.¹¹⁸ With a feel-

112. Williams, *On-Line Anonymity*, *supra* note 103, at 696.

113. Griffiths et al., *supra* note 101, at 30.

114. *Id.*

115. Williams, *On-Line Anonymity*, *supra* note 103, at 694.

116. See generally Lyrissa Barnett Lidsky, *Anonymity in Cyberspace: What Can We Learn from John Doe?*, 50 B.C. L. REV. 1373 (2009) (examining the evolution of the law governing libel suits against anonymous defendants based on Internet speech); Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855, 855 (2000) (noting that when corporations bring defamation suits against Internet users, these suits threaten to suppress legitimate criticism); Susanna Moore, *The Challenge of Internet Anonymity: Protecting John Doe on the Internet*, 26 J. MARSHALL J. COMPUTER & INFO. L. 469 (2009).

117. See Citron, *supra* note 102, at 83 (noting that cyberbullies writing under pseudonyms “have little fear that victims will retaliate against them or that they will suffer social stigma for their abusive conduct”); Darby Dickerson, *Cyberbullies on Campus*, 37 U. TOL. L. REV. 51, 56 (2005) (noting that cyberbullies are “emboldened by the anonymity and pseudonymity that e-mail and the Internet can provide”); Ari Ezra Waldman, *Hostile Educational Environments*, 71 MD. L. REV. 705, 749 (2012) (discussing cyberbullying in an educational context).

118. See Dickerson, *supra* note 117, at 56 (noting that “[t]echnology affords bullies 24/7 access to potential victims”); Mark Franek, *Rise of the Cyberbully Demands New Rules*, CHRISTIAN SCI. MONITOR, May 10, 2004, at 9 (noting that cyberspace is accessible “just

ing of anonymity, bullies on the Internet act on impulse.¹¹⁹ 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 and punished.”¹²⁰

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 sellers, other proxies for trust have emerged via intermediaries. For example, seller ratings on platforms such as eBay and Amazon.com signal to buyers whether a seller is trustworthy.¹²¹ If goods are shipped late, damaged, or broken, a seller may receive poor ratings, which would warn other purchasers to avoid that merchant.¹²²

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

about anywhere, anytime”); Glenn R. Stutzky, *Cyber Bullying Information*, INST. FOR PUB. POLICY AND SOC. 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) (noting that cyberbullying is “not bound by time or geography”); Waldman, *supra* note 117, at 711-15 (defining and distinguishing cyberbullying and cyberattacking).

119. Franek, *supra* note 118.

120. Dickerson, *supra* note 117, at 56.

121. See Lior Jacob Strahilevitz, “How’s My Driving?” *For Everyone (and Everything?)*, 81 N.Y.U. L. REV. 1699, 1703 (2006) (discussing eBay’s reputation system as a successful means of ensuring the reliability of sales in the online marketplace).

122. *Seller Performance Standards*, EBAY, <http://pages.ebay.com/help/policies/seller-non-performance.html> (last visited Mar. 2, 2012).

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.¹²³ 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, is more likely to 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 deindividuation and a loss of self-awareness. 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 that are driven by anonymity: the online market for adultery and the market for baby naming rights.

1. The Market for Adultery

With its branding tagline, "Life is short[, h]ave an affair,"¹²⁴ the dating website Ashley Madison focuses on a specific demographic:

123. Indeed, pornography does a brisk online business. In 2006, for example, Internet-based porn sales reached \$2.8 billion. Jon Swartz, *Purveyors of Porn Scramble to Keep up with Internet*, USA TODAY, June 12, 2007, at 4B.

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

those who are married.¹²⁵ 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.¹²⁶ 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.¹²⁷ Users can look at other member's profiles and "test the waters," but if they want to initiate contact, they have to purchase access.¹²⁸ 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.¹²⁹ Customers can also pay using other means, such as a money order, electronic funds transfer from their bank, or pre-paid gift card.¹³⁰ 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; the website therefore strongly promotes the concept of privacy and anonymity as a key selling point for its customers. The home page for the website features a woman holding her finger over her lips, illustrating the privacy the website offers.¹³¹ The tagline under the website reads, "The world's leading married dating service for *discreet* encounters," with the word *discreet* emphasized.¹³² A *Time* article discussed the latest marketing tactic used by Ashley Madison and other similar websites: mobile cheating.¹³³ The

125. See *id.* ("Ashley Madison is the world's leading married dating service for discreet encounters.").

126. *Adulterers Only*, SYDNEY MORNING HERALD, Aug. 18, 2012, at 20.

127. *Frequently Asked Questions*, ASHLEY MADISON, *supra* note 124.

128. *Id.*

129. *Adulterers Only*, *supra* note 126.

130. Information on payment methods is available to male users who create a profile at ASHLEY MADISON, *supra* note 124.

131. *Id.*

132. *Id.*

133. 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>.

websites have created mobile applications or “apps” to allow users to search online profiles via their cell phones without leaving suspicious electronic trails on their home computer.¹³⁴ Anonymity on the Internet, however indirectly, has led to the monetization of adultery.

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. Online 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 as a way to make money. Despite that, today some parents are selling the rights to name their children online.¹³⁵

There is historical precedent addressing the sale of baby names in the context of the consideration doctrine. In an influential 1882 case, *Wolford v. Powers*,¹³⁶ the Indiana Supreme Court held that the right to name a child constituted good consideration.¹³⁷ 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.¹³⁸ Although the court viewed this agreement as similar to a gift to the child, it concluded 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.¹³⁹ Thus the court enforced the promise, holding that consideration existed.¹⁴⁰ A decade later in *Diffenderfer v. Scott*,¹⁴¹ an Indiana Appeals

134. *Id.*

135. *What’s in a Name? Four Thousand and Fifty Dollars*, FREAKONOMICS.COM (Jan. 13, 2009, 9:40 AM), <http://www.freakonomics.com/2009/01/21/whats-in-a-name-four-thousand-and-fifty-dollars/?scp=1&sq=baby+naming+rights&st=nyt>; Matthew Purdy, *Our Towns; A Boy Named Soup?*, N.Y. TIMES, Aug. 1, 2001, at B1; 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>.

136. 85 Ind. 294 (1882).

137. *Id.* at 303–04.

138. *Id.* at 294–95.

139. *Id.* at 308.

140. *Id.* at 303–04.

141. *Id.* at 303–04.

Court treated the consideration question as settled, citing *Wolford v. Powers*.¹⁴² Similar decisions in other jurisdictions followed, resting upon the same logic.¹⁴³

For example, the Massachusetts Supreme Judicial Court adopted the *Wolford* rule, noting in *Eaton v. Libbey*,¹⁴⁴ 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.”¹⁴⁵ Further, in 1914, the Supreme Judicial Court of Massachusetts noted in *Gardner v. Denison*¹⁴⁶ that the “privilege of naming a child is a valid consideration for a promise to pay money,” and that the child “loses the opportunity of receiving a more advantageous name, and is compelled to bear whatever detriment may flow from the name imposed upon him.”¹⁴⁷ 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 there is a correlation between a person’s name and his or her job and financial prospects.¹⁴⁸

141. 32 N.E. 87 (Ind. App. 1892).

142. *Id.* at 88.

143. *See, e.g.,* Whyner v. Berg, 231 P.2d 39, 44 (Cal. 1951) (collecting cases that demonstrated that “[t]he privilege of naming a child is valid consideration for a promise”); Daily v. Minnick, 91 N.W. 913, 914 (Iowa 1902) (citing *Wolford v. Powers* as one of the cases establishing that “the privilege of naming a child is a valid and legal consideration for a promise”); Babcock v. Chase, 36 N.Y.S. 879, 879 (N.Y. Gen. Term 1895) (using the *Wolford* doctrine to determine that naming a child was “sufficient consideration” for a promise).

144. 42 N.E. 1127 (Mass. 1896).

145. *Id.*

146. 105 N.E. 359 (Mass. 1914).

147. *Id.* at 360.

148. *See* STEVEN D. LEVITT & STEPHEN J. DUBNER, *FREAKONOMICS* 179–204 (2005) (discussing earning prospects for job seekers on the basis of their names); *see also* 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 names); Angela Onwuachi-Willig & Mario L. 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 (using the results of Bertrand and Mullainathan’s

Many of these well-established precedential cases, however, involved a close relationship, at times with a blood tie, between a family and an older, wealthier individual, often a widow or widower without children. For example, in *Gardner*, the court mentioned that the elderly man who made the promise regarding the child's name lived with the family of the child's father.¹⁴⁹ After the will was read, the man died without making any provision for the child that had been named after him.¹⁵⁰ 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 probably from parents in difficult financial circumstances who would be willing to name their child "Xanax" or "Clorox" for the right amount of money.¹⁵¹ But at the present time, that money does not seem to be forthcoming from corporations.¹⁵² On the one hand, corporations may sense that these types of auctions are still somewhat gauche or taboo and would not result in the type of "good press" that most businesses 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.¹⁵³

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 decreasing relevance of geography and even national borders,

investigation to analyze "the effectiveness of Title VII as a remedy for and deterrent to race discrimination in the hiring market").

149. *Gardner*, 105 N.E. at 360.

150. *Id.*

151. Purdy, *supra* note 135.

152. 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, at C10; Matthew Kauffman, *Newborn Naming Game: No Takers*, HARTFORD COURANT, Aug. 15, 2001.

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

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, these developments have forged 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,”¹⁵⁴ but which has also been alternately described as “labor as a service,” “peer production,” or “playbor.”¹⁵⁵ 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.¹⁵⁶ After the tasks are farmed out to individual workers, they are then re-aggregated and the overall job is completed. This is the process known as crowdsourcing.¹⁵⁷

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.¹⁵⁸ Be-

154. Cherry, *Virtual Work*, *supra* note 30, at 483–84.

155. See Trebor Scholz & Laura Liu, *From Mobile Playgrounds to Sweatshop City*, in SITUATED TECHNOLOGIES PAMPHLETS 7, 10–25 (2010), <http://www.situatedtechnologies.net/?q=node/105> (discussing the evolution of virtual work and various forms of it).

156. See Stross, *supra* note 28, at A (discussing the development of small-task labor conducted over the Internet and comparing it to “Ford’s assembly lines”).

157. 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); Debora 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.”).

158. EDWARD CASTRONOVA, SYNTHETIC WORLDS: THE BUSINESS AND CULTURE OF ONLINE GAMES 2–3 (2005); *Amazon Mechanical Turk*, AMAZON, <https://www.mturk.com/mturk/welcome> (last visited Dec. 19, 2012).

cause the money in virtual worlds is convertible to real world money, virtual work is having an impact on real world economies.¹⁵⁹ One economist, Edward Castronova, has estimated that the economy of Sony's game EverQuest and its world, Norrath, has a per capita GNP equivalent to that of Bulgaria.¹⁶⁰ 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 economy, where there is a demand for something of value and someone willing to supply it, a market will form.¹⁶¹

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

159. See CASTRONOVA, *supra* note 158, at 2 (noting that annual exchange of virtual money and goods are estimated at \$30 million in the United States, and \$100 million globally).

160. *Id.* at 19.

161. Michael Risch, *Virtual Rule of Law*, 112 W. VA. L. REV. 1, 6 (2009) (footnotes omitted); see also Michael Capiro, *Virtual Worlds with Real-World Losses*, 56 FED. LAW. 12 (2009) (reporting estimate from investment banking firm Piper Jaffray that virtual sales of goods were estimated to be \$621 million in 2009 and were expected to grow to nearly \$2.5 billion by 2013); 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); Theodore P. Seto, *When Is a Game Only a Game? The Taxation of Virtual Worlds*, 77 U. CIN. L. REV. 1027 (2009). Professor Seto notes that Ailin Graef,

a Chinese-born citizen and resident of Germany, had parlayed an initial investment of \$9.95 into virtual planned communities and other virtual holdings having a real-world fair market value, in the aggregate, of more than one million U.S. 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 eighty-employee real-world company.

Id. at 1027 (footnote omitted).

virtual worlds such as Second Life.¹⁶² 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.¹⁶³ 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.”¹⁶⁴

Recently, Professor Jonathan Zittrain noted that the advent of virtual work simultaneously provides immense promise and peril for workers in the new digital economy.¹⁶⁵ 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. Employ-

162. Manpower and Randstad have advertisements posted on YouTube touting their recruiting services in Second Life. See, e.g., *Virtual Jobs at Ranstad*, YOUTUBE (Apr. 12, 2007), http://www.youtube.com/watch?v=k5xF43POYv8&feature=PlayList&p=7B20448ABA3A94B8&playnext=1&playnext_from=PL&index=43; *Manpower's Machinima on the World of Virtual Work*, YouTube (July 12, 2007), <http://www.youtube.com/watch?v=sNjxucDI8bo>.

163. 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, at 6 (noting that the poor economy has pushed many employers into hiring virtual office assistants).

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

165. Jonathan Zittrain, *Work the New Digital Sweatshops*, NEWSWEEK, Dec. 7, 2009. According to Professor Zittrain:

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.

Id.; see also Robert D. Hof, *The End of Work as You Know It*, BUS. WK., Aug. 19, 2007, at 80. Hof asks:

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?

Id.

ers can use virtual spaces to make contacts and recruit talent, without spending money on transportation.¹⁶⁶ Certainly, the possibility of matching workers and jobs in cyberspace creates more opportunities and more efficient labor markets.¹⁶⁷ 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.¹⁶⁸ In addition, employees have used virtual worlds as part of their protected right to organize and protest.¹⁶⁹ For example, in September 2007, over 2,000 employees protested IBM Italy's pay package by appearing at IBM's headquarters in Second Life.¹⁷⁰

Virtual work, however, presents many of the same enduring problems that workers' rights advocates have struggled with over the years. Gold farming operations¹⁷¹ and other types of virtual work have been criticized by commentators as creating new "virtual sweatshops."¹⁷² For years corporations have engaged in races to the bottom, not only in selecting the jurisdiction of incorporation that will govern their in-

166. See, e.g., Joel Dresang, *Manpower Opens Office in Online Virtual Society*, MILWAUKEE J. SENTINEL, July 13, 2007, at D1 (noting that the Manpower recruiting agency opened an office within Second Life); 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).

167. See Kermit Pattison, *How to Enlist a Global Work Force of Freelancers*, N.Y. TIMES (June 25, 2009), <http://www.nytimes.com/2009/06/25/business/smallbusiness/25freelance.html?fta=y> (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).

168. Carol Sladek & Ellie Hollander, *Where is Everyone? The Rise of Workplace Flexibility*, 25 BENEFITS Q. 17, 17–18 (2009) (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.").

169. See 29 U.S.C. §§ 151–169 (2006) (federal laws regarding the rights of workers to organize and protest).

170. *On Strike, Virtually*, ECONOMIST, March 13, 2008, at 87.

171. For a definition of "gold farming," see *infra* note 191 and accompanying text.

172. See David Barboza, *Ogre to Slay? Outsource it to Chinese*, N.Y. TIMES, Dec. 9, 2005, at A1 (explaining how gold farming works); cf. Wendy N. Duong, *Ghetto'ing Workers with Hi-Tech: Exploring Regulatory Solutions for the Effect of Artificial Intelligence On "Third World" Foreign Direct Investment*, 22 TEMPLE INT'L & COMP. L.J. 63 (2008) (discussing the impact of virtual work in developing countries).

ternal corporate affairs,¹⁷³ but also to find the jurisdictions with the cheapest labor and the least regulation of employment relationships.¹⁷⁴ 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.¹⁷⁵

In a popular press article, Professor Zittrain set out a useful typology of crowdsourcing based on the level of knowledge required to complete a given work task.¹⁷⁶ In the level requiring the most skill, companies post difficult scientific problems and promise a reward for the answer.¹⁷⁷ For example, on the Innocentive website,¹⁷⁸ highly skilled scientists try to solve complicated problems 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.¹⁷⁹ For example, on LiveOps,¹⁸⁰ telephone calls are routed to individual customer service workers on their cell phones. 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

173. 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, 683–89 (2003) (describing the process of choosing a jurisdiction of incorporation).

174. See, e.g., Archie A. Alexander III, *American Diagnostic Radiology Moves Offshore: Is This Field Riding the "Internet Wave" into a Regulatory Abyss?*, 20 J.L. & HEALTH 199, 199–205 (2006/2007) (analyzing outsourcing of medical services); Christina Laun, *The Central American Free Trade Agreement and the Decline of U.S. Manufacturing*, 17 IND. INT'L & COMP. L. REV. 431, 431–32 (2007) (considering the impact of Central American Free Trade Agreement on U.S. manufacturing industries); Raul Delgado Wise & James M. Cypher, *The Strategic Role of Mexican Labor under NAFTA: Critical Perspectives on Current Economic Integration*, 610 ANNALS 120, 120–22 (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 BYU L. REV. 483, 483–86 (2007) (discussing the legal and ethical implications of outsourcing legal work).

175. Katherine Van Wezel Stone, *To The Yukon and Beyond: Local Laborers in A Global Market*, 3 J. SMALL & EMERGING BUS. L. 93, 95–104 (1999) (describing the race to the bottom phenomenon within global labor markets).

176. Zittrain, *supra* note 165.

177. *Id.*

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

179. Zittrain, *supra* note 165.

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

mouse in a second or two.¹⁸¹ Regardless of the level of skill involved, crowdsourcing takes the products of many workers to create something greater than the sum of its parts.¹⁸²

Crowdsourcing and other types of distributed work are likely to increase in frequency in the years to come. While Amazon's Mechanical Turk was once synonymous with crowdsourcing, there are now many more websites that promise to help users harness the power of the crowd.¹⁸³ The tasks that can be assigned through crowdsourcing are virtually limitless.¹⁸⁴ 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.¹⁸⁵ The reCAPTCHA software uses this anti-spam device to digitize books and newspapers by aggregating them one word at a time.¹⁸⁶ 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 determine how proteins fold.¹⁸⁷ Crowdsourcing has been used to check surveillance cameras at the United States-Mexico border to look for aliens, and to use computers to help SETI in its search for a different type of alien.¹⁸⁸

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.¹⁸⁹ Known as "gold farmers," these

181. Zittrain, *supra* note 165.

182. Howe, *supra* note 157.

183. *See id.* (discussing various forms of crowdsourcing).

184. 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 (discussing the use of technology to involve students in science work involving Mars).

185. For an explanation of this process, see Jonathan Zittrain, *Privacy 2.0*, 2008 U. CHI. LEGAL F. 65, 76.

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

187. FOLDIT, fold.it/portal/ (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.

188. BENKLER, *supra* note 47, at 81-83.

189. Barboza, *supra* note 172.

workers are paid to harvest virtual treasures for online gamers in the developed world.¹⁹⁰ These affluent 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.¹⁹¹ As a result, gold farming operations have appeared in many developing countries, where labor costs are low.¹⁹² 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.¹⁹³ Acting as an intermediary, Blacksnow later resold these virtual objects on eBay¹⁹⁴ and other online exchange sites to high bidders in developed countries, thereby taking advantage of lower labor costs in developing nations.¹⁹⁵

190. *Id.*

191. According to another recent article on 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 "power 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 player to the highest levels and then let the player receive the most valuable objects (which cannot be sold). See Julian Dibbell, *The Life of a Chinese Gold Farmer*, N.Y. TIMES MAG., June 17, 2007, at 36.

192. *Id.*

193. 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. See Richard Raysman & Peter Brown, *Novel Legal Issues in Virtual Property*, 234 N.Y. L.J., Aug. 10, 2005, at 28, col. 1 (describing the complaint and the legal issues surrounding the complaint).

194. eBay is a well-known Internet auction website. EBAY, <http://www.ebay.com> (last visited Mar. 2, 2012).

195. Class Action Complaint at ¶ 27, *Hernandez v. Internet Gaming Entm't, Ltd.*, No. 07-21403-Civ (S.D. Fla. May 31, 2007). 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.*; see also Complaint, *Blizzard Entm't, Inc. v. In Game Dollar, L.L.C.*, No. 07-0589 (C.D. Cal. May 22, 2007) (terminated after permanent injunction granted, Jan. 28, 2008) (alleging abuses

Another model that uses these relative differences in wages is to have computer workers in developing countries “play” the characters of gamers in developed countries while they sleep.¹⁹⁶ Workers in developing countries are playing these online games not as entertainment, but as a means of making a living.¹⁹⁷ Their alternatives may include far more dangerous work in a dirty, crowded, and unsafe factory or barely scraping by as a subsistence farmer.¹⁹⁸

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.¹⁹⁹ As Professor Lior Strahilevitz has described, one of the models for click-work depends on collaboration, and this collaboration is not always successful if the market economics are subtracted from the equation.²⁰⁰ It may be that virtual worlds could be big enough for several economies (or non-economies, as the case may be) to co-exist with each other. Here is a controversial question: Could non-

of workers in developing countries); Complaint, MDY Indus., L.L.C. v. Blizzard Entm’t, Inc., No. 06-2555 (D. Ariz. Oct. 25, 2006) (same).

196. Dibbell, *supra* note 191.

197. See David Barboza, *Video Game Sweatshops? Chinese Players Toil for Virtual Booty*, INT’L HERALD TRIB., Dec. 9, 2005, at 1 (describing factories in China where gold farmers work to earn their living).

198. According to an ILO survey that tracked changes in average weekly working hours in manufacturing between 1995–2004, average employees in different countries work varying numbers of hours. In the United States, the average employee working in manufacturing worked slightly less than forty hours per week as of 2001. Americans worked more than the French, whose workers averaged 35.65 hours, and worked more than most of the average workers in countries in industrialized Europe. Workers in the developing world worked much harder, with more hours worked in Argentina, Hong Kong, and Mexico. The hardest working country was Turkey where employees worked on average 51.3 hours per week. SANGHEON LEE ET AL., WORKING TIME AROUND THE WORLD: TRENDS IN WORKING HOURS, LAWS AND POLICIES IN A GLOBAL COMPARATIVE PERSPECTIVE 28–31 (2007).

199. 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, 371–74 (2002), many aspects of virtual worlds or crowdsourcing are commodified.

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

commodification lead to the exploitation of virtual workers? I return to this question in the last Part 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.²⁰¹

Crowdfunding appeals to those with small amounts of money to invest.²⁰² Crowdfunding websites allow entrepreneurs to communicate information about their businesses and endeavors to a larger audience.²⁰³ 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.²⁰⁴

Pooling their money allows individuals with only small amounts to invest the ability to join in the market, often helping artists and

201. See David Lavinsky, *Funding Fathers*, SMART BUSINESS (Aug. 27, 2010), <http://www.sbaonline.com/2010/08/funding-fathers-the-birth-of-business-crowdfunding-is-providing-new-ways-to-get-money/> ("Crowdfunding turns the tables, because there are now more potential investors than entrepreneurs.").

202. *Jobs Act Opens Doors for Smaller Investors to Boost Crowdfunding Appeal*, COLUMBUS BUS. FIRST (Apr. 27, 2012), <http://www.bizjournals.com/columbus/print-edition/2012/04/27/jobs-act-opens-door-for-smaller.html?page=all>.

203. C. Steven Bradford, *Crowdfunding and the Federal Securities Laws*, 2012 COLUM. BUS. L. REV. 1, 5 [hereinafter Bradford, *Crowdfunding*].

204. KEVIN LAWTON & DAN MAROM, THE CROWDFUNDING REVOLUTION 1 (2010) (internal quotation marks omitted).

musicians produce their work or helping charitable organizations get off the ground.²⁰⁵

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.²⁰⁶ As a result, in recent years crowdfunding websites turned to alternative and creative investment forms. For example, some crowdfunding websites followed the model of the website Kiva,²⁰⁷ which promotes microfinance and promises no return or interest on the amount, just a return of the capital.²⁰⁸ 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.²⁰⁹ Other websites, like Kickstarter²¹⁰ and IndieGoGo,²¹¹ provided those who put up money receive a return in the form of discounted products or free merchandise, but not the customary monetary dividend traditionally associated with stock.²¹²

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 investor based on annual income or net worth, and with particular requirements that crowdsourcing websites and

205. Thomas Lee Hazen, *Crowdfunding or Fraudfunding? Social Networks and the Securities Laws—Why Any Specially Tailored Exemption Should Be Conditioned on Meaningful Disclosure*, 90 N.C. L. REV. 1735, 1736–37 (2012).

206. For a comprehensive analysis of the Securities and Exchange Act provisions pre-existing the JOBS Act, see Joan MacLeod Heminway & Shelden Ryan Hoffman, *Proceed at Your Peril: Crowdfunding and the Securities Act of 1933*, 78 TENN. L. REV. 879, 885–927 (2011); see also Bradford, *Crowdfunding*, *supra* note 203, at 5 (discussing whether crowdfunding investments are subject to the Securities Act and other regulatory issues).

207. KIVA, <http://www.kiva.org> (last visited Sept. 7, 2012).

208. *How Kiva Works, The Long Version*, KIVA, <http://www.kiva.org/about/how/even-more> (last visited Sept. 7, 2012).

209. See *infra* notes 272–275 and accompanying text.

210. KICKSTARTER, <http://www.kickstarter.com> (last visited Sept. 8, 2012).

211. INDIEGOGO, <http://www.indiegogo.com> (last visited Sept. 8, 2012).

212. Nikki D. Pope, *Crowdfunding Microstartups: It's Time for the Securities and Exchange Commission to Approve a Small Offering Exemption*, 13 U. PA. J. BUS. L. 973, 977–78 (2011); *Learn Why*, INDIEGOGO, <http://www.indiegogo.com/learn/why> (last visited Sept. 8, 2012); *Terms of Use*, KICKSTARTER, <http://www.kickstarter.com/terms-of-use?ref=footer> (last visited Sept. 8, 2012).

companies using those websites must meet.²¹³ Needless to say, the regulatory atmosphere for crowdfunding has now changed dramatically. Professor Steven Bradford notes, however, 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.²¹⁴ 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 cell phones and their relationship to the earlier ham radio operators on the autopatch.²¹⁵ 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. This Part examines the business model of craigslist, the monetization of Facebook, and the growth of social entrepreneurship.

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

In 2004, online auction giant eBay²¹⁶ sought to acquire craigslist,²¹⁷ the largest online site for classified advertisements in

213. Jumpstart Our Business Startups (JOBS) Act, Pub. L. No. 112-106, § 301-05, 126 Stat. 306, 315–23 (2012).

214. C. Steven Bradford, *The New Federal Crowdfunding Exemption: Promise Unfulfilled*, 40 SEC. REG. L.J. 1, 3–4 (forthcoming Fall 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2066088.

215. Marc Stern, *Autopatching May Have Been Parent of Cell Phone System; At Least It Seems So*, EXAMINER (July 27, 2012), <http://www.examiner.com/article/autopatching-may-have-been-parent-of-cell-phone-system-at-least-it-seems-so> (describing the development from Ham radios that were available for free to the public to the development of today's cell phone business).

216. eBay, <http://www.ebay.com/> (last visited Sept. 7, 2012).

217. *Factsheet*, CRAIGSLIST, <http://www.craigslist.org/about/factsheet> (last visited Sept. 7, 2012).

North America.²¹⁸ 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 shopping his shares.²¹⁹ Understanding that they would only acquire a minority holding of 28.4%, eBay sought to protect its interests through cumulative voting rights.²²⁰ Mathematically, cumulative voting would give eBay one seat on the three-person craigslist board, with Newmark and Buckmaster as the two other directors.²²¹ From their perspective, Newmark and Buckmaster were concerned that eBay would use the information they learned as shareholders to compete with craigslist.²²² As such, they built in provisions to remove certain rights from eBay's equity shares if eBay started a competing business.²²³

From the beginning, the relationship between eBay and craigslist was particularly fraught. In his 2010 opinion, Chancellor Chandler of the Delaware Court of Chancery categorized the two companies as "[o]il and [w]ater."²²⁴ Expounding upon this theme, Chancellor Chandler explained:

[E]ven 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

218. *eBay v. Newmark*, 16 A.3d 1, 8 (Del. Ch. 2010).

219. *Id.* at 9–10.

220. *Id.* at 11.

221. *Id.* at 13.

222. *Id.*

223. *Id.*

224. *Id.* at 7.

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.²²⁵

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 suggestions.²²⁶ Meanwhile, eBay decided to launch its own competing platform for online classifieds, Kijiji.com.²²⁷ 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.²²⁸ 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.²²⁹

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

225. *Id.* at 7–9.

226. *Id.* at 15.

227. *Id.* at 17.

228. *Id.* at 20.

229. *Id.* at 33, 48.

of the corporation for the benefit of its stockholders. The “Inc.” after the company name has to mean at least that.²³⁰

Here, the court privileged eBay’s more traditional business model and the concept of shareholder primacy above craigslist’s “public service” business model.²³¹ 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 might pay a few cents to query directions from an online GPS mapping program each time we use it. Others might pay to get information that is now freely available on Wikipedia or other websites.²³² Instead, however, these services choose not to monetize, opting to build a free, open access service.

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.²³³ 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

230. *Id.* at 34.

231. For commentary on the dueling business models involved in the case, see Steven M. Davidoff, *What’s Next for eBay, Craigslist and Poison Pills*, N.Y. TIMES (Sept. 13, 2010), <http://dealbook.nytimes.com/2010/09/13/whats-next-for-eBay-Craigslist-and-poison-pills/> (noting that even charitable activities are usually done in the context of increasing for-profit business, but craigslist is far below its profit-making potential); *Craigslist Meets the Capitalists*, N.Y. TIMES (Dec. 8, 2006), <http://dealbook.nytimes.com/2006/12/08/Craigslist-meets-the-capitalists/> (noting the existence of a “culture clash” between Wall Street’s focus on maximizing revenue and craigslist’s disinterest in monetizing the website); Joshua Fershee, *Philanthropy as a Business Model: Comparing Ford to Craigslist*, BUSINESS LAW PROF BLOG (Sept. 10, 2010), http://lawprofessors.typepad.com/business_law/2010/09/philanthropy-as-a-business-model-comparing-ford-to-craigslist.html (noting that craigslist’s unique business strategy may run counter to the strategies used by other online commerce companies).

232. See, e.g., Claire Cain Miller, *Paying for Ads When Craigslist Is Free*, N.Y. TIMES BITS (Nov. 11, 2008, 2:22 PM), <http://bits.blogs.nytimes.com/2008/11/11/paying-for-ads-when-Craigslist-is-free/> (noting that web surfers will pay for better user experiences).

233. *eBay*, 16 A.3d at 8.

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.²³⁴ 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.²³⁵ Whether this default is normatively desirable may be another question.²³⁶ The monetization of friendship is also a part of the process of cyber commodification, and I turn to that discussion next.

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,²³⁷ Facebook can be both a valuable personal and business networking application.²³⁸ Indeed, in both the for-profit and non-

234. *Id.* at 34–35.

235. *See* Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919). According to the court:

The difference between an incidental humanitarian expenditure of corporate funds for the benefit of the employees . . . and a general purpose and plan to benefit mankind at the expense of others, is obvious. . . . A business corporation is organized and carried on primarily for the profit of stockholders.

Id.

236. *See* Judd Sneirson, *Green is Good: Sustainability, Profitability, and a New Paradigm for Corporate Governance*, 94 IOWA L. REV. 987, 987 (2009) (noting that sustainable businesses can thrive under current law); Lynn A. Stout, *Why We Should Stop Teaching Dodge v. Ford*, 3 VA. L. & BUS. REV. 163, 164 (2008) (noting that the idea of corporations existing only to make profit for shareholders has been largely ignored other than by academics writing in specialized journals); Lynn A. Stout, *Bad and Not-So-Bad Arguments for Shareholder Primacy*, 75 S. CAL. L. REV. 1189, 1189–90 (2002) (“[T]he debate over the social role of the corporation remains unresolved.”).

237. John Blackstone, *Can Facebook Justify Its \$100 Billion Valuation*, CBS NEWS (May 17, 2012, 7:17 PM), http://www.cbsnews.com/2102-18563_162-57436724.html?tag=contentMain;contentBody.

238. Facebook has “over one billion monthly active users,” according to its estimates. *Key Facts*, FACEBOOK, <https://newsroom.fb.com/content/default.aspx?NewsAreaID=22>

profit sectors, social networking is hailed as a major trend.²³⁹ Traditionally, friendship is seen as a gift freely given, separate and apart from money.²⁴⁰ 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.²⁴¹ The commodification of friendship may, however, have some unintended consequences.

As Stephanie Rosenbloom reports in the *New York Times*, “[i]magine a world in which we are assigned a number that indicates how influential we are.”²⁴² New businesses such as Klout,²⁴³ PeerIndex,²⁴⁴ and Twitter Grader²⁴⁵ datamine social media activities and assign those who use them so-called influence scores.²⁴⁶ 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.²⁴⁷ 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

(last visited Dec. 22, 2012); see also Stephanie Rosenbloom, *On Facebook, Scholars Link up with Data*, N.Y. TIMES, Dec. 17, 2007, at A1.

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

240. See Ethan J. Leib, *Friendship and the Law*, 54 UCLA L. REV. 631, 642–47 (2007) (describing characteristics of friends; money conspicuously absent from this description).

241. See Sandy Carter, *Opinion: Boost Business, Let Your Workers Socialize Online*, CNN OPINION (June 19, 2012), http://articles.cnn.com/2012-06-19/opinion/opinion_carter-social-business_1_social-networking-social-business-business-value?s=PM:OPINION (“Enterprise social networking tools are fundamentally changing the processes through which we do business.”).

242. Stephanie Rosenbloom, *Got Twitter? You’ve Been Scored*, N.Y. TIMES, June 25, 2011, at SR8.

243. *About Us*, KLOUT, <https://www.klout.com/corp/about> (last visited Sept. 7, 2012).

244. *About PeerIndex*, PEERINDEX, <http://www.peerindex.com/help/about> (last visited Sept. 7, 2012).

245. TWITTER GRADER, <http://tweet.grader.com/> (last visited Sept. 7, 2012).

246. Rosenbloom, *supra* note 242.

247. *Id.*

using Klout's data, including companies as diverse as Audi and the Las Vegas Palms.²⁴⁸

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.²⁴⁹

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 additional users help expand the monetization as they represent an addition to the audience for potential advertising.²⁵⁰ 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.²⁵¹

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, 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

248. *Id.*

249. 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>.

250. See Somini Sengupta, *So Much for Sharing his "Like,"* N.Y. TIMES, June 1, 2012, at A1 (noting that marketers "leverag[e] one [Facebook] user's stated preference . . . and spread[] the word to that user's friends").

251. *Id.*

and social in nature, but also groundbreaking in scale and effect.”²⁵² Professor Celia Taylor notes that for a business model to qualify as social entrepreneurship, an “entity must engage in ordinary, viable business enterprise. . . . [H]owever, a social business must be created and run for the express purpose of pursuing specific, articulated social goals, rather than maximizing profit.”²⁵³ The concept is somewhat related to corporate social responsibility (“CSR”), because social entrepreneurs like those who believe in CSR, aim to provide two interrelated goals, financial profit and social progress.²⁵⁴ 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.”²⁵⁵ Without the social goal, the socially entrepreneurial business would not exist.²⁵⁶

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.²⁵⁷ 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.²⁵⁸ 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,

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

253. Celia R. Taylor, *Berle and Social Business: A Consideration*, 34 SEATTLE U. L. REV. 1501, 1505 (2011).

254. 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) (discussing legal aspects of social entrepreneurship); see also *What Is Social Entrepreneurship? The New Heroes*, PBS (2005), <http://www.pbs.org/opb/thenewheroes/whatis/> (describing social entrepreneurship movement).

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

256. *Id.* at 4.

257. S. Travis Certo & Toyah Miller, *Social Entrepreneurship: Key Issues and Concepts*, 51 BUS. HORIZONS 268 (2008).

258. *Biography of Dr. Muhammad Yunus*, GRAMEEN BANK (Oct. 2011), http://www.grameen.com/index.php?option=com_content&task=view&id=329&&Itemid=363.

a small amount of money could yield large social dividends.²⁵⁹ 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.²⁶⁰ 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.²⁶¹

Individuals will likely donate either their money or their time to socially entrepreneurial ventures for purely philanthropic reasons 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, “[s]ocial ventures can provide important access to markets, which companies can then capitalize on with their profit-maximizing operations.”²⁶² 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.²⁶³

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 regis-

259. *What Is Microcredit?*, GRAMEEN BANK (Oct. 2011), http://www.grameen-info.org/index.php?option=com_content&task=view&id=28&Itemid=108.

260. *Id.* In contrast, Professor Kerr attributes social entrepreneurship to philanthropy by wealthy technology investors. As she puts it:

[The] idea of social entrepreneurship was born in the early 1990s 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 254, at 624 (second alteration in original).

261. *See, e.g., Grameen Families Organizations*, GRAMEEN BANK (Aug. 23, 2011), http://www.grameen-info.org/index.php?option=com_content&task=view&id=465&Itemid=547 (discussing a non-profit initiative to provide renewable energy resources in rural areas of Bangladesh).

262. Taylor, *supra* note 253, at 1507.

263. *Id.* at 1508.

tered as B Corporations.²⁶⁴ The desire 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. Disputes tend to occur, however, 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 website in mind. In this Part, I will examine some of the instances where there have been contests and disputes over cyber commodification. 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.

264. 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 its efforts to maintain B Corporation status. Michael R. Deskins, *Benefit Corporation Legislation, Version 1.0—A Breakthrough in Stakeholder Rights?*, 15 LEWIS & CLARK L. REV. 1047 (2011); Antony Page & Robert A. Katz, *The Role of Social Enterprise*, 35 VT. L. REV. 59, 63 (2010); Danielle Douglas, *Benefit Corporations Sign up*, WASH. POST, Jan. 24, 2011, at A11.

A. Prediction Markets

Prediction markets, also known as information markets, or idea futures, are a relatively new technology that allows many individuals to express their opinions on the Internet in a market setting.²⁶⁵ 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.²⁶⁶ These markets are more than games of chance or entertainment, as they draw on the unique information, knowledge, and skills that individual participants bring with them to the market. Prediction markets enable everyone to reap the benefit of the participants’ collective wisdom and, in so doing, advance utilitarian goals, creating social welfare and monetary value that go beyond the amounts invested in the markets.

Prediction markets organize and aggregate individual knowledge into a collective result.²⁶⁷ 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. In his popular book, *The Wisdom of Crowds*, James Surowiecki explains numerous ways in which such collective knowledge can be employed.²⁶⁸ Whether individuals are asked to estimate the location of a sunken submarine,²⁶⁹ to guess the weight of an ox,²⁷⁰ or to help a contestant on the game show *Who Wants to Be a Millionaire*,²⁷¹ groups provided accurate answers to questions that most individuals would not have been able to answer on their own. In a prediction market,

265. ABRAMOWICZ, *supra* note 27, at 1–8.

266. *Id.* at 8.

267. *See id.* (noting that a prediction market, “can serve as a relatively simple technology for aggregating individual probability assessments”).

268. JAMES SUROWIECKI, *THE WISDOM OF CROWDS* xiv, 3–4 (2004).

269. *Id.* at xx–xxi.

270. *Id.* at xi–xiii.

271. On the television program *Who Wants to Be a Millionaire*, contestants answer trivia questions in multiple-choice format. Each contestant has several “lifelines” they can use, including narrowing the options, telephoning a friend, and polling the audience. Although the first two options are often helpful, the audience for the television program is the most helpful of all, achieving a ninety-one percent success rate. *Id.* at 3–4.

individuals are given incentives to trade and contribute their knowledge in a formalized setting.²⁷²

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.²⁷³ The price of a security on the market encodes a significant amount of information, including beliefs about the efficacy of management, the potential for future products, or market expansions.²⁷⁴ In other words, most markets have a “price discovery” function, aggregating information and predictions into the current price of that security.²⁷⁵ 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.

At present, there are numerous information markets successfully making predictions. Perhaps most notably, especially during past hotly contested presidential elections, is the Iowa Electronic Markets (“IEM”).²⁷⁶ 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.²⁷⁷ An individual trader is 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 mak-

272. Joshua Blackman et al., *Fantasy Scotus: Crowdsourcing a Prediction Market for the Supreme Court*, 10 NW. J. TECH & INTELL. PROP. 125, 130 (2012).

273. 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).

274. See Fama, *supra* note 273, at 383.

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

276. See, e.g., Jordan Erin, *Iowa Electronic Markets Yield Near-Accurate Result*, DES MOINES REG., Nov. 10, 2004, at B5 (discussing the relative accuracy of online futures markets compared to polls).

277. JOYCE BERG ET AL., RESULTS FROM A DOZEN YEARS OF ELECTION FUTURES MARKETS RESEARCH 1 (2000) [hereinafter BERG ET AL., RESULTS], available at http://www.biz.uiowa.edu/iem/archive/BFNR_2000.pdf. The IEM has also expanded into predictions further afield from its base of political predictions. *Id.* at 7 n.10; see also Jordan Erin, *U of I Markets Tapped to Predict Flu Activity*, DES MOINES REG., Nov. 22, 2004, at B1 (discussing the use of IEM to predict flu activity).

ing a correct prediction.²⁷⁸ The IEM has predicted the outcomes of elections more accurately than polls have, beating the polls seventy-six percent of the time.²⁷⁹ This accuracy occurs despite the fact that researchers at the University of Iowa have concluded that many of the market participants exhibit a strong bias toward one candidate or other.²⁸⁰ Apparently, the market is able to correct for these biases through arbitrage;²⁸¹ sensing an opportunity for profit, arbitrageurs temper the ideological biases that some of the participants bring with them when they make their initial investment in the IEM.²⁸² Other similar political prediction markets have appeared to predict the outcome of elections in Austria,²⁸³ Germany,²⁸⁴ and Canada.²⁸⁵

At the same time that prediction markets started to become more common, the legal regime surrounding “real” money markets became

278. 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) (explaining that the IEM “is a controlled environment . . . which allows participants to invest modest amounts of (real) money in certain ‘decision markets.’”).

279. JOYCE BERG, ET AL., ACCURACY AND FORECAST STANDARD ERROR OF PREDICTION MARKETS 12–13, 33 tbl.3. (2003) [hereinafter BERG ET AL., ACCURACY], available at <http://www.biz.uiowa.edu/iem/archive/forecasting.pdf>.

280. BERG ET AL., RESULTS, *supra* note 277, at 5. The average trader is younger, more likely to be a white male, Republican, and of a higher socio-economic status than the average voter. BERG, ET AL., ACCURACY, *supra* note 279, at 10.

281. See, e.g., Donald C. Langevoort, *Taming the Animal Spirits of the Stock Markets: A Behavioral Approach to Securities Regulation*, 97 NW. U. L. REV. 135, 140 n.15 (2002). Professor Langevoort defines arbitrage as the

process by which informed traders buy or sell in such a way as to eliminate any mispricing caused by uninformed trading. For example, when a stock becomes overvalued because uninformed traders are bidding it up, informed traders would sell, hence moving the price back to its rational expectations equilibrium.

Id.

282. BERG ET AL., RESULTS, *supra* note 280, at 6.

283. AUSTRIAN POLITICAL STOCK MARKETS / AUSTRIAN ELECTRONIC MARKETS, <http://www.ebweb.at/apsm/> (last visited Feb. 7, 2013) (information markets predicting outcomes of Austrian elections).

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

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

more chilly.²⁸⁶ In 2006, an online gambling ban enacted in the United States had a devastating effect on the growth of publicly available prediction markets.²⁸⁷ Although prediction markets are not the same as betting in a horse race, 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.²⁸⁸ 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.²⁸⁹

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 return to in Part 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 affected in this instance was not even truly the

286. Miriam A. Cherry, *Morality and Markets: A Comment on Predicting Crime*, 52 ARIZ. L. REV. 73, 73–74 (2010).

287. 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, 1952. See Cherry & Rogers, *Prediction Markets*, *supra* note 27, at 840–46 (analyzing impact of the Unlawful Internet Gaming Enforcement Act).

288. See Cherry & Rogers, *Prediction Markets*, *supra* note 27, at 835 (“[I]n the congressional zeal to stamp out Internet gambling, information markets are in danger of being trampled.”); see also Joshua Blackman et al., *Cutting Access to InTrade Violates Americans’ Free Speech Rights*, HOUS. CHRON. (Dec. 7, 2012), available at <http://www.chron.com/opinion/outlook/article/Cutting-access-to-InTrade-violates-Americans-4100729.php> (noting the injustice in enforcement against prediction market headquartered in the United Kingdom).

289. See Emile Servan-Schreiber et al., *Prediction Markets: Does Money Matter?*, 14 ELECTRONIC MARKETS 243, 243 (2004) (conducting an experiment to determine whether the accuracy of prediction markets are affected by play money versus real money).

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 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.²⁹⁰ Such a system leads to consistency of results, and with consistency comes stability. Access to justice, therefore, 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.²⁹¹ While some law libraries feature open access to the public, others are privately run.²⁹² 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.²⁹³ 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.²⁹⁴

290. See, e.g., Brian G. Slocum, *The Importance of Being Ambiguous: Substantive Canons, Stare Decisis, and the Central Role of Ambiguity Determinations in the Administrative State*, 69 MD. L. REV. 791, 843 (2010) (“Traditionally, in statutory interpretation cases, the Court accords ‘special force’ to its precedents, unlike its decisions interpreting the Constitution where stare decisis principles are not as strong.”).

291. See Michael W. Carroll, *The Movement for Open Access Law*, 10 LEWIS & CLARK L. REV. 741, 742–43 (2006) (discussing the history of the movement for open access law).

292. See *id.* at 743–44 (“In 1990, the Court cooperated with the Hermes project at Case Western Reserve University to make the Court’s opinions freely available on the Internet.”).

293. See *id.* at 742 (“[Y]ou do not have sufficient time to go to a law library in the hopes that such an article might lie within.”).

294. See Carroll, *supra* note 291, at 742–43 (describing the difficulty of finding materials before computerized access became available).

For years, for-profit companies have filled this gap in access to online resources. Various CDs with legal information are available for purchase from a variety of vendors.²⁹⁵ For the most part, however, the need for computerized research has been filled by two for-profit companies, Westlaw²⁹⁶ and Lexis.²⁹⁷ These two providers feature searchable databases in which users can enter Boolean searches to find applicable case law, statutes, law review articles, and newspaper articles. Further, users of both these databases can perform an automated check to see what other cases have cited any case they are examining and to see, ultimately, if any particular case has been overruled or otherwise had its authority called into question.²⁹⁸ These commercialized databases were problematic for access, however, in that they have historically charged a substantial sum for their services.²⁹⁹ As more and more other services migrated online, Lexis and Westlaw also moved to a world-wide-web model, which meant that their 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.³⁰⁰ Paradoxically, access to materials written by judges and legislators—all of which was meant to be open to the public—became proprietary and commercialized simply because Westlaw and Lexis allowed users to search effectively and conveniently.³⁰¹

295. See Cary Griffith, *Two Legal-Specific Sites Are Meant to Make Life Easier*, CORP. LEGAL TIMES, June 1, 2001 (explaining that legal information is available in a variety of formats including CDs).

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

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

298. See Jonathan Gaw, *The Struggle to Innovate*, STAR TRIB., April 13, 1998 (explaining the process of cite checking using these online legal databases).

299. See Ashlee Vance, *Legal Sites Plan Revamps as Rivals Undercut Price*, N.Y. TIMES, Jan. 24, 2010, at B5 (discussing online legal database pricing); Ashby Jones, *Can Bloomberg Compete with Westlaw and LexisNexis?* WALL ST. J. LAW BLOG (July 8, 2010), <http://blogs.wsj.com/law/2010/07/08/can-bloomberg-law-compete-with-westlaw-and-lexisnexis/> (same).

300. See Daniel Fisher, *Open-Sourcing the Law*, FORBES, June 20, 2008 (“Big law firms will continue to use Westlaw and Lexis for a long time.”).

301. See Vance, *supra* note 299 (noting that Westlaw and Lexis contain various types of legal documents in addition to cases).

The same access problem is also present with academic legal research.³⁰² In the field of legal studies, law review articles and other legal academic writing has historically been difficult for the public to access freely.³⁰³ 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 a year or more would often pass between the time authors submitted their work to the law review and the time when the article actually would be available on the electronic database.³⁰⁴

More recently, many law reviews began making published articles available for free on their websites.³⁰⁵ 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.³⁰⁶

Enter the Social Science Research Network (“SSRN”), which touted its website³⁰⁷ as a free platform for housing academic research

302. See Carroll, *supra* note 291, at 748 (“Prices of scholarly journals outpaced costs, however, and concerns about maintaining affordable access to the scholarly literature began to grow.”).

303. 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).

304. See 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 [hereinafter Grimmelmann, *Why I No Longer Post*] (“The online services—Lexis, Westlaw, and Hein[—]add their own lag time . . .”).

305. See, e.g., MD. L. REV., <http://digitalcommons.law.umaryland.edu/mlr/> (last visited Dec. 22, 2012).

306. See Grimmelmann, *Why I No Longer Post*, *supra* note 304 (“Law reviews run on a delay between acceptance and final publication that can easily exceed a year.”).

307. *Home Page*, SOC. SCI. RES. NETWORK, <http://www.ssrn.com> (last visited Mar. 4, 2012).

in the social sciences.³⁰⁸ The SSRN website is a platform that allows registered users to post drafts of their articles to the Internet.³⁰⁹ 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. The fact that it is a free service 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.³¹⁰ Legal academics were able to point others to their work quickly and for free, expanding their readership and the audience for their ideas.³¹¹

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, the website is actually structured as a for-profit corporation.³¹² Many academics found out about the for-profit nature of SSRN in surprising ways. First, there was a false alarm that SSRN was going to charge for access to papers. It was then learned that SSRN would not charge for Internet viewing but would sell bound hard copies of papers to those who wanted such a printout.³¹³ 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

308. See Hunter, *supra* note 303, at 617 (“SSRN is an organization that acts as a free online repository for scholarly papers in the social sciences.”).

309. *Id.*

310. See *id.* (“‘Open access’ is the label for the principle that scholarly publishing should be freely available to everyone, without charge, political censorship, or commercial interference.”).

311. *Id.*

312. Matthew Bodie, *An Interview with SSRN's Gregg Gordon*, PRAWFSBLAWG (June 15, 2006, 11:49 AM), http://prawfsblawg.blogs.com/prawfsblawg/2006/06/an_interview_wi.html (questioning SSRN's commitment to open access scholarship given the for-profit nature of its business).

313. 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/>.

form of advertising.³¹⁴ Through 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 their postings were 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.³¹⁵

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

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

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

315. Grimmelmann, *Why I No Longer Post*, *supra* note 304.

charge customers for access. Within the last year or so, however, the market has undergone a paradigm shift, with large chains now offering free Wi-Fi.³¹⁶ Meanwhile, small businesses, perhaps because of the challenging economic environment during the recession, have started charging for their Wi-Fi services.³¹⁷

Wi-Fi, which had existed on some university campuses, started to see more widespread adoption around the turn of the century.³¹⁸ Among one of the first commercial users of this new technology was Starbucks, 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.³¹⁹ The results were incredible: By the end of the year, over five hundred Starbucks had installed Wi-Fi and had high transmission speeds.³²⁰ Access to the 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 fifteen minutes.”³²¹ 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.³²² 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.³²³

By 2003, news accounts noted that Wi-Fi access in commercial space had increased to include the now-defunct Borders Books and

316. Claire Cain Miller, *Aiming at Rivals, Starbucks Will Offer Free Wi-Fi*, N.Y. TIMES, June 15, 2010, at B1 [hereinafter Miller, *Aiming at Rivals*].

317. See, e.g., *Coffee Houses Divided on Wi-Fi*, CHI. TRIB., Mar. 5, 2012, at 1 (noting that some small businesses are limiting Wi-Fi use to customers unless they make purchases after certain lengths of time).

318. See Vikas Bajaj, *Starbucks to Serve Faster Wireless Internet Connections*, DALL. MORNING NEWS, Jan. 4, 2001, at 1D (noting the anticipated expansion, in 2001, of Wi-Fi from universities and corporate campuses to broader audiences).

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

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

321. *Id.*

322. Mark Kellner, *MobileStar Killed by Its Own Greed*, WASH. TIMES, Oct. 15, 2001, at D6.

323. See Michelle Megna, *Wireless Areas Around the City Let You Access the Internet for Free*, DAILY NEWS (N.Y.), Oct. 21, 2001, at 6 (discussing the grassroots efforts of NYCwireless to create free Wi-Fi zones).

McDonald's, smaller retailers, and some locations in Canada.³²⁴ Pricing structure was in a state of flux, likely due to the new players entering the market.³²⁵ While retailers like Starbucks still charged access fees, McDonald's and retailers like it provided an hour of free access with the purchase of certain meals.³²⁶ 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.³²⁷ At least some of these providers saw themselves in direct competition with the older market participants, like Starbucks.³²⁸ 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.³²⁹

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.³³⁰ The media portrayed the payment model as facing stiff competition from those providing free Wi-Fi, both intentionally³³¹ and accidentally.³³² Small businesses proclaimed they would use free Wi-Fi access as a loss-leader to draw in business—sometimes evoking Starbucks directly in

324. David Akin, *Do You Want Wi-Fi to Go with Those Fries?*, GLOBE AND MAIL, Mar. 12, 2003, at B5.

325. *Id.*

326. *Id.*

327. Rob Wright, *Wireless for Free—Solution Provider Invents an Innovative Marketing Approach*, VARBUS., May 26, 2003, at 62.

328. *Id.*

329. Karen Lowry Miller, *The Wi-Fi Bubble*, NEWSWEEK, Aug. 3, 2003, at 36.

330. Matt Richtel, *Where Entrepreneurs Go and the Internet is Free; Wi-Fi Providers Rethink How to Make Money*, N.Y. TIMES, June 7, 2004, at C1.

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

332. See Jefferson Graham, *Businesses Cast Wi-Fi Lures to Hook Customers*, USA TODAY, Sept. 13, 2004, at 5B (quoting a customer as saying: "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").

comparison.³³³ However, by 2005, a report by JiWire, Inc. seemed to dampen those projections, noting that of the 34,544 Wi-Fi hotspots listed, only ten percent were free, while Starbucks and McDonald's maintained about half of those hotspots.³³⁴

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.³³⁵ Shortly thereafter, AT&T partnered with Starbucks to service its Wi-Fi and offered two free hours of access, then a first for Starbucks.³³⁶ 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 woo visitors from Starbucks.³³⁷ Interestingly, soon after partnering with AT&T, Starbucks announced it would attempt to fuse both price structures by granting limited free access to customers who used a loyalty card at least once per month.³³⁸ *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 customers and profits.³³⁹

Anecdotal evidence suggests that independent coffee shop owners, at least those in New York City, are starting to reverse course and

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

334. 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*, DALL. MORNING NEWS, Feb. 26, 2006, at 5D.

335. Elena Malykhina, *AT&T's Broadband Customers Get Unlimited Wi-Fi*, INFO.WK., Jan. 23, 2008.

336. W. David Gardner, *AT&T Pushes Wi-Fi Into Starbucks*, INFO.WK., Feb. 11, 2008.

337. W. David Gardner, *Wi-Fi Cafes; Easy to Find, but Free is Fading Away*, INFO.WK., Apr. 29, 2008.

338. Susan Stellin, *Free Wi-Fi, but Not for All*, N.Y. TIMES, May 6, 2008, at C6.

339. Bruce Horovitz, *Starbucks' New Flavor: Free Wi-Fi; Chain Hopes to Perk up Traffic*, USA TODAY, June 3, 2008, at 9A. Interestingly, less than a month after the free AT&T Wi-Fi program, T-Mobile, Starbucks's former Wi-Fi provider, filed suit against Starbucks claiming a breach of contract. *T-Mobile Sues Starbucks over Hot Spots*, N.Y. TIMES, June 7, 2008, at C2. Three days later, the parties entered into a memorandum of understanding. W. David Gardner, *Starbucks And T-Mobile Settle Dispute over Wi-Fi*, INFO.WK., June 12, 2008.

remove free Wi-Fi due to a tightening economy and increased costs.³⁴⁰ Further evidence suggests that smaller owners do not see their customer base becoming disillusioned with these developments, seemingly believing that focusing on locality and small businesses will keep their customers spending.³⁴¹ 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 to allow unrestricted free access.³⁴²

Despite nearly ten years of technological development and consumer demand, no clear consensus on Wi-Fi pricing structure exists. 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 2010, 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 they will receive free access.³⁴³ From these lessons, we turn next to the larger doctrinal and theoretical implications of cyber commodification.

V. 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 Parts, I have provided examples of how different aspects of monetization or non-monetization—predicting it, policing it, advocating for one situation or another—have been fairly confounding. In this Part, I extrapolate several larger

340. David Usborne, *US Coffee Shops Pull Plug on Laptop Lounging; Owners Fed up with Patrons Buying a Coffee and Then Surfing Web for Hours*, INDEP., Aug. 8, 2009, at 30.

341. Miller, *Aiming at Rivals*, *supra* note 316.

342. *Id.*

343. More recently, with the advent of smartphones, many rely on their phones to check email and surf the web, independent of Wi-Fi. See Stan Freeman, *Smartphone Users Rise in Numbers*, REPUBLICAN, Aug. 1, 2011, at A1 (claiming that one in four smartphone users in America do most of their online browsing through their smartphones).

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 (“IP”) 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 incentive to copyright.³⁴⁴ Similar argumentative tropes might be applicable in the context of cyber commodification. 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 a personal invention.³⁴⁵

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.”³⁴⁶ In her book, *Collateral Knowledge*, Professor Annelise Riles provides further anthropological insights into the social construction of markets.³⁴⁷ Professor 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.³⁴⁸ 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 characteris-

344. See, e.g., Brett M. Frischmann, *An Economic Theory of Infrastructure and Commons Management*, 89 MINN. L. REV. 917, 921 (2005) (discussing the difficulty that Americans face in deciding between open access and restricted access with respect to various resources); Michael J. Madison et al., *Constructing Commons in the Cultural Environment*, 95 CORNELL L. REV. 657, 666–67 (2010) (same).

345. See *id.* at 672 (suggesting that a collaborative environment within an intellectual property framework necessitates the sharing and borrowing of ideas and resources from one another).

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

347. ANNELISE RILES, *COLLATERAL KNOWLEDGE: LEGAL REASONING IN THE GLOBAL FINANCIAL MARKETS* 54–55 (2011).

348. *Id.*

tics 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.³⁴⁹

In other words, some of the cyber-exchanges I discuss in this 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 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 Article, we may want to look to well-known doctrines of contract law to help us resolve many of these questions. Earlier, I discussed the fact that some services, such as mapping programs and social networking, 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* 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 conflicting expectations and therefore 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.³⁵⁰ In many instances, a website might be providing users with valuable services but they may not receive anything directly in return from the users. On the one hand, 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, the website is gaining control of the con-

349. ZELIZER, *supra* note 346, at 18.

350. See RESTATEMENT (SECOND) OF CONTRACTS § 71 (1981) (“To constitute consideration, a performance or a return promise must be bargained for.”).

tent 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 action might qualify as receiving something tangibly valuable for consideration purposes under existing caselaw.³⁵¹

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.³⁵² The doctrine recognizes that, technically, assent is missing and contractual bargaining has been defective but, nonetheless, unfairness has occurred and one party has been enriched.³⁵³ In other words, many cases in this area discuss the “hypothetical bargain” model, that is, 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 *Huffington Post* bloggers lost this argument, 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.

351. See *Dahl v. Hem Pharmaceuticals Corp.*, 7 F.3d 1399, 1404–05 (9th Cir. 1993) (holding that information gathered in a clinical drug trial could constitute consideration necessary to finding of a contractual relationship, in a case where a pharmaceutical company promised study participants free drug treatment in exchange for participation but later reneged on its promise by arguing that provision of the medicine was only gratuitous).

352. 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”).

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

For the future, an important issue will be to determine who is participating in crowdsourcing websites or other virtual work for fun and in some unpaid capacity and those who are opting to work in the market economy, perhaps in a lower-skilled capacity, and thus arguably should receive the traditional legal protections for employment activity. As an example of the first category, we might think about unpaid editors and writers of Wikipedia who volunteer their time; and as an example of the second, clickworkers working on a crowdsourcing website performing low-skilled tasks. Under current law and practice, however, the distinction between these two categories has been an uncertain and difficult determination. In fact, in earlier work I discussed this matter in some depth.³⁵⁴

At the moment, there is little regulation and instead this area has been left to the realm of voluntary, contractual private ordering. Assuming that contract and voluntary agreements will remain of primary importance in determining the commodified or non-commodified nature of these relationships, the operative question would be what the best default rule would be: payment in the market or the assumption that these are free activities performed on a volunteer basis. If the majority of users participate on a website 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. In contrast, 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. As I have stated in previous work, I believe that 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 regulation, with clear assent needed in order to disclaim the protections.

How to implement such consent, however, presents its own set of problems. Many would suggest that clickwrap agreements would provide users with the information they need in order to know what kind of relationship they are getting into. All Internet users are fairly familiar with such clickwrap agreements, as users must necessarily see and agree to clickwraps in order to use many websites, receive free

354. 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). My analysis of the contractual issues involved has remained constant, and therefore I have adapted my earlier reasoning to the realm of cyber commodification.

downloads, or order products.³⁵⁵ Clickwraps, however, have serious problems and have been subject to a withering critique.³⁵⁶ Commentators have noted that clickwraps incorporate some of the worst characteristics of adhesion contracts,³⁵⁷ allowing for “acceptance” or “rejection” of the terms as a whole only on a take it or leave it basis.³⁵⁸ Many of the boilerplate terms contained in online agreements are often harsh, some so much so that they may be unconscionable.³⁵⁹ There thus is a real concern that these types of “agreements” may not embody a worker’s true assent, or represent any kind of an informed decision about the terms. This may not be the type of “assent” or “agreement” that is needed in order to inform workers of their rights, especially since workers tend not to understand many of the basic rights and responsibilities governing the employment relationship in any case.³⁶⁰

In the employment realm, contractual ordering is somewhat difficult in part because the minimum wage law, the Fair Labor Standards Act (“FLSA”),³⁶¹ is an immutable default rule—normally it cannot be waived, by clickwrap or other contract. After all, if employers and employees could simply opt out of the minimum wage, the law would cease to have any meaning. Companies might choose to exploit such an exemption opportunistically, not just to apply to those who participate as volunteers and for entertainment.

Given the problematic nature of private ordering by contract, might some other solution be found? As I have argued elsewhere,

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

356. *Id.* at 440–41.

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

358. *Id.* at 1174.

359. 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); Juliet M. Moringiello & William L. Reynolds, *From Lord Coke to Internet Privacy: The Past, Present, and Future of the Law of Electronic Contracting*, 72 MD. L. REV. 452, 468–69 (2013).

360. 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).

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

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. One factor to consider would be the question of whether the activity is considered paid work in other context. If that is the case, perhaps commodification is an indication that the market activity that goes on there 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 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 voluntary effort 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 attempts 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 core set of expectations to 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 crowdsourcing and prediction markets is that both acknowledge that large groups, when properly harnessed, can result in better outcomes than the efforts of individuals.³⁶²

362. See *supra* Parts II.B.1, IV.A (discussing crowdsourcing and prediction markets); see also CASS SUNSTEIN, INFOPTIA: HOW MANY MINDS PRODUCE KNOWLEDGE 3–5 (2006) (discussing uses of crowdsourcing and prediction markets in public institutions and noting that “[c]ollaborative projects, often involving numerous strangers, are growing in both scale and quality, to the benefit of millions of people”).

These various websites, programs, and crowdsourcing tools are only valuable because of their scale.³⁶³ 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 there will be no 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.³⁶⁴ 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.³⁶⁵ Like Facebook, so too Wikipedia, craigslist, Amazon’s Mechanical Turk, and countless other websites that are either commercial, or not, depend on vast numbers of eyeballs and users. In other words, the sites depend on harnessing the collective knowledge, skills, and time of their user base.³⁶⁶

In examining these questions, I am largely interested in two legal theorists, Professors Margaret Jane Radin and Yochai Benkler, whose works inform and provide 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.³⁶⁷ 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.³⁶⁸

363. See Teppo Felin & Todd R. Zenjer, *Information Aggregation, Matching and Radical Market-Hierarchy Hybrids: Implications for the Theory of the Firm*, 9 STRATEGIC ORG. 163, 163–64, 166 (2011) (noting that both crowdsourcing websites and prediction markets harness the power of the crowd and also perform information aggregating and matching functions).

364. See Hetcher, *supra* note 49, at 995 (“[T]he more people who are on Facebook, the more it is in one’s interest to be on Facebook.”).

365. See, e.g., John Cassidy, *Me Media*, NEW YORKER, May 15, 2006, at 50 (describing the lucrative advertising opportunities on Facebook and the idea that the more views a site has, the greater the revenue it will generate).

366. See Jenny Preece, *Sociability and Usability in Online Communities: Determining and Measuring Success*, 20 BEHAV. & TECH. 347, 347–48, 51 (2001) (discussing how the number of participants and their contributions determine the success of online communities).

367. See *supra* note 51 (listing several of Professor Radin’s works).

368. See, e.g., Benkler, *supra* note 199, at 372 (discussing 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.”³⁶⁹ 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.³⁷⁰ In fact, one question she raises is whether these other ills are the real concern, not commodification itself.³⁷¹ Professor 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.³⁷² As such, she focuses not so much on the dichotomy between commodification and non-commodification but with the concept of human flourishing.³⁷³

Although Professor 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.³⁷⁴ 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.³⁷⁵ She holds this view 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*,³⁷⁶ and an accompanying law review article,³⁷⁷ Professor Yochai Benkler focuses on the potential for collaborative work in cyberspace.³⁷⁸ In both pieces, Professor Benkler

369. MARGARET JANE RADIN, *CONTESTED COMMODITIES* 154–55 (1996).

370. *Id.* at 154–59.

371. *Id.* at 155.

372. *Id.* at 131–36.

373. *Id.* at 79–80.

374. *See, e.g., id.* at 79–80 (noting that some commentators have “maintained that commodification is inimical to the flourishing of human beings”); *id.* at 94 (“If commodification is bad in itself, it is bad for everything.”).

375. *Id.* at 95–96.

376. BENKLER, *supra* note 47.

377. Benkler, *supra* note 199, at 372–76.

378. *See, e.g.* BENKLER, *supra* note 47, at 9. Professor Benkler argues:

regales the reader with rich descriptions of the Linux operating system, Wikipedia, Project Gutenberg, and the NASA Mars project.³⁷⁹ 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.³⁸⁰ Throughout 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.³⁸¹ Rather, he claims, users are motivated by intellectual joy, pride, excellence, giving back to the community, and other similar non-monetary interests.³⁸² 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.³⁸³ He suggests that projects allowing users to harness their talents and match them with available tasks will be the most efficient for the peer production

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.

Id.

379. Benkler, *supra* note 199, at 371–72, 384, 386, 398.

380. *See id.* at 404–06 (discussing peer production as an "important mode of information production").

381. *See id.* at 372 ("But the critical mass of participation in projects cannot be explained by the direct presence of a command, a price, or even a future monetary return . . .").

382. *See, e.g., id.* at 392–93 (discussing the Open Directory Project, and noting that volunteers "manage the directory out of the joy of doing so or for other internal or external motivations").

383. *See id.* at 379 (noting that peer production will thrive where, among other things, "production [is] incremental and asynchronous, pooling the efforts of different people, with different capabilities, who are available at different times").

model.³⁸⁴ Professor 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 successfully broken down and then later integrated into the larger project.³⁸⁵ 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, Professors Radin and Benkler have made outstanding contributions to commodification theory but at the same time seem 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 workers in developing countries. A norm of non-commodification does not take the rather unique status of these 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 allocation as well as a coordination function. A market orders and organizes what otherwise would be random activity. Money might incentivize people to reveal their knowledge. Further, a living wage for work performed is important. Contrary to what Professors Radin and Benkler seem to advocate, money itself is not the problem in some of the scenarios set out in this

384. See *id.* at 376 (discussing the importance of efficiency of self-identifying tasks in peer production).

385. *Id.* at 378–79.

Article.³⁸⁶ In fact, the lack of money for work on the Internet—especially when it concerns the meager wages paid to workers in developing countries 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.³⁸⁷ 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.³⁸⁸ There is a complicated series of motivations that drive any one person, including a mixture of altruism and self-interest. Further, while certain tasks might be freely volunteered, other tasks are simply too boring, mundane, annoying, or time-intensive that people will not do them unless they are paid.³⁸⁹

Despite the warnings from Professors Benkler and Radin about commodification, there are certain areas where we should not be worried about monetization, but instead worried about non-monetization. For example, failing to pay workers minimum wage online should not be praised as a new method of peer production—it should be viewed skeptically, in some instances even condemned in the event 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 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.³⁹⁰ Perhaps through efforts such as social entrepreneurship, we can change the way we think about the very concept of monetization.

386. See generally Yochai Benkler & Helen Nissenbaum, *Commons-Based Peer Production and Virtue*, 14 J. POL. PHIL. 394 (2006) (arguing that unpaid peer production is morally virtuous).

387. See Benkler, *supra* note 199, at 372 (discussing Coase's theory of the firm).

388. RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE* 6–7 (2008); DANIEL KAHNEMAN & AMOS TVERSKY, *CHOICES, VALUES, AND FRAMES* (2000).

389. See Arlene Kaplan Daniels, *Invisible Work*, 34 SOC. PROBS. 403, 403–11 (1987) (discussing society's conceptions of "work" and what "work" should be compensated).

390. See *supra* note 349 and accompanying text.

Therefore, I would suggest that, unlike the Delaware Chancery Court's conclusion, 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 freedom 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?³⁹¹

VI. CONCLUSION

Ultimately, our journey across the Internet shows us that cyberspace is in a state of incomplete commodification. 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, such as social entrepreneurship, can potentially reframe the ways that we look at the nature of markets and the theory of the firm.

391. RADIN, *supra* note 369, at 79–80.