

USER PATRONAGE: THE RETURN OF THE GIFT IN THE “CROWD SOCIETY”

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ABSTRACT

*In this work, I discuss the tension between the gift and market economies throughout the history of creativity. For millennia, the production of creative artifacts has lain at this intersection. From the time of Pindar and Simonides—and until Romanticism commenced a process leading to the complete commodification of creative artifacts—market exchange models ran parallel to gift exchange. From Roman *amicitia* to the medieval and Renaissance belief that *scientia donum dei est, unde vendi non potest*, creativity has been repeatedly construed as a gift. Again, at the time of the British and French “battle of the booksellers,” the rhetoric of the gift still resounded powerfully from the nebula of the past to shape the constitutional moment of copyright law. The return of gift exchange models has a credible source in the history of creativity.*

*Today, after long unchallenged dominance of the market, gift economy is regaining momentum in the digital society. The anthropological and sociological studies of gift exchange, such as Marcel Mauss’s *The Gift*, served to explain the phenomenon of open source software and hacker communities. Later, communities of social trust—such as Wikipedia, YouTube, and fan-fiction communities—spread virally online through gift exchange models. In peer- and user-generated production, community recognition supersedes economic incentives. User-based creativity thrives on the idea of “playful enjoyment,” rather than economic incentives.*

Anthropologists placed societies on an economic evolutionary scale from gift to commodity exchange, in a continuum from the clan

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to capitalist system of organization. I suggest that this continuum should now extend to the “crowd society,” which features new modes of social interaction in digital online communities. The networked, open, and mass-collaborative character of the crowd society enhances the proliferativeness of the gift exchange model that lies in what anthropologists and social scientists described as a debt-economy.

The exploration of the creative mechanics of online communities put under scrutiny the validity of utilitarian theories of copyright and traditional market economy models. From Émile Durkheim and Mauss to Alain Caillé, anti-utilitarian thought designed a new political economy that defines humans as a “cooperative species,” rather than *Homo economicus*. In this context, I look into commons theory, through the lens of Elinor Ostrom’s work, and its application to modern commons-based peer production with special emphasis on Yochai Benkler and Jerome Reichman’s work. In conclusion, I evoke Jean Baudrillard’s essential question: “Will we return, one day, beyond the market economy, to prodigality?” I consider whether the digital revolution that promoted the emergence of the networked information economy is that “revolution of the social organization and of social relations” that might bring about, according to Jean Baudrillard, “real affluence” through a return to “collective prodigality,” rather than our “productivistic societies, which [. . .] are dominated by scarcity, by the obsession with scarcity characteristic of the market economy.” I argue that a possibility for the reinstatement of Baudrillard’s “collective prodigality” might have materialized in the “crowd society” thanks to technological advancement and the emergence of a consumer gift system or “user patronage,” promoting an unrestrained, diffused, and networked discourse between creators and the public through digital crowd-funding.

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INTRODUCTION

The production of creative artifacts has lain for millennia at the intersection between the gift and market economies. According to the Latin brocard *scientia donum dei est, unde vendi non potest*, culture, knowledge, and creativity are gifts that cannot be sold on the market. This idea has strong roots in ancient and medieval times. In earlier times, the idea intertwined with a culture of kinship and friendship. Later, community appurtenance and its religious underpinnings represented the stronghold of the construction of creativity as a gift. Although any categorization is problematic, within the multiplicity of social and cultural settings, we can roughly identify three economic models in the production of creative artifacts: gift exchange, patronage or gift seeking immediate return,¹

1. Please note that, given the scope and length of this Article, it will be nearly impossible to provide a proper account of the innumerable nuances emerging from the review of a few thousand years of history of creativity. There may be a risk to wrap together several things that ought to be separated and treat as a gift economy what is in fact not. In particular, pure gift economy and post-archaic patronage models should not be lumped together. See generally, on patronage, S.N. EISENSTADT & L. RONIGER, *PATRONS, CLIENTS AND FRIENDS: INTERPERSONAL RELATIONS AND THE STRUCTURE OF TRUST IN SOCIETY* (Jack Goody & Geoffrey Hawthorn eds., 1984) (discussing case studies of patronage ranging from the

and market exchange. Throughout history, these models overlapped. Pure gift exchange models turned into more hierarchical forms of patronage, spanning from traditional decentralized aristocratic patronage, to centralized forms of state and royal patronage, to forms of participatory or planned economy. Eventually, the market took over almost entirely by the beginning of the nineteenth century.

The tension between market and gift economy will hardly go away. Today, this tension is felt with increasing intensity due to recent trends of enclosure of knowledge in the digital environment. However, the resurgence of gift exchange models in the networked information economy also suggests that the notion of creativity as a gift may still play a determinant role. As Steven Hatcher noted,

[w]hat is earth shattering about UGC [User-Generated Content] from this perspective is that because it is produced by literally millions of ordinary people, apparently without any expectation of economic gain, the very rationale for providing copyright protection to this growing body of creators and their works is called into question.²

Again, Mark Lemley explained:

[C]reativity is flourishing on the Internet as never before despite the absence of effective IP enforcement. That is a problem for IP theory, which may not be the main driver of creativity in a world where creation, reproduction, and distribution are cheap. That is increasingly the world in which we will live.³

In peer- and user-generated production, community recognition supersedes economic incentives. The exploration of the creative mechanics of online communities put under scrutiny the validity of utilitarian theories of copyright. In general, according to an emerging anti-utilitarian perspective, which builds on Marcel Mauss's gift studies,⁴ "[h]uman beings' first desire is to be recognized and valued as givers."⁵

In this Article, I consider whether the digital revolution that promoted the emergence of the networked information economy is

Mediterranean to the Near and Far East and Latin America); PATRONAGE IN ANCIENT SOCIETY 1-3 (Andrew Wallace-Hadrill ed., Routledge 1990).

2. Steven A. Hatcher, *Hume's Penguin, or, Yochai Benkler and the Nature of Peer Production*, 11 VAND. J. ENT. & TECH. L. 963, 965 (2009).

3. See Mark A. Lemley, *IP in a World Without Scarcity*, 90 N.Y.U. L. REV. 460, 460 (2015).

4. See MARCEL MAUSS, *THE GIFT: THE FORM AND REASON FOR EXCHANGE IN ARCHAIC SOCIETIES* (Routledge 1990) (1923).

5. ALAIN CAILLÉ, *REVUE DU MAUSS, ANTI-UTILITARIANISM, ECONOMICS AND THE GIFT-PARADIGM* 7 (n.d.), <http://www.revuedumauss.com.fr/media/ACstake.pdf>.

that "revolution of the social organization and of social relations" that might bring about, according to Jean Baudrillard, "*real affluence*" through a return to "*collective 'improvidence' and 'prodigality,'*" rather than our "productivistic societies which . . . are *dominated by scarcity*, by the obsession with scarcity characteristic of the market economy."⁶ Therefore, taking Baudrillard to cyberspace, I evoke his essential question: "Will we return, one day, beyond the market economy, to prodigality?"⁷

In fact, the return of the gift has a credible source in the history of creativity. In the following pages, I will review the tension between gift economy and market economy in the history of creativity⁸ in order to make a prediction on Baudrillard's question and the sustainability of modern creativity models based on collaboration, peer production, and gift exchange.⁹

I. ECONOMICS OF CREATIVITY BETWEEN MARKET AND GIFT

A. Pindar and Simonides or Poetry Between Market and Gift

For a very long time, models of gift exchange were commonplace in Greek protoeconomic relationship.¹⁰ Marcel Mauss argued that economic relationships evolved from gift to commodity exchange.¹¹ Gift exchange dominated the so-called clan society, such as the Greek aristocratic society, while the modern class society made private property and commodity the norm.¹² The social function and role of authors evolved with social changes together with new forms of economic support for creativity. The heroic age of the Achaeans of the twelfth century B.C. saw the emergence of artists and poets related to the entourage of kings and nobles.¹³ The production of creative artifacts in ancient Greece generally enjoyed a gift economy model up to the fifth century B.C. Homer, for example,

6. See JEAN BAUDRILLARD, *THE CONSUMER SOCIETY: MYTHS AND STRUCTURES* 66-68 (Mike Featherstone ed., Sage Publ. 1998) (1970).

7. *Id.* at 68.

8. See *infra* Parts I-II.

9. See *infra* Part III.

10. See generally Ian Morris, *Gift and Commodity in Archaic Greece*, 21 *MAN* 1 (1986).

11. See MAUSS, *supra* note 4, at 91-93.

12. See C.A. GREGORY, *GIFTS AND COMMODITIES* 17 (1982).

13. See I. ARNOLD HAUSER, *THE SOCIAL HISTORY OF ART* 52-53 (Stanley Godman trans., Routledge 3d ed. 1999) (1951).

“was never said to charge for his poems.”¹⁴ Instead, he is said to have given them away as a gift at least once.¹⁵ Gift exchange was framed along with the rules of hospitality of the heroic age. Gift exchange strengthened the personal bonds of ancient kinship by preserving a situation of everlasting and reciprocal indebtedness.¹⁶

A new authorial sensitivity towards compensation and remuneration emerged quickly, together with the slow demise of the clan society and the advent of the Greek Tyrants. Patronage of the arts rose to a new dimension.¹⁷ Courts became centers of creativity as part of a precise political design.¹⁸ The new social conditions changed the relationship between poet and patron. With the Tyrants’ patronage, a discourse about the authors’ rewards came about. The first mention of payment of a poet was made in reference to Pindar and Simonides, who—it is said—were paid by patrons for their poems.¹⁹ Pindar and Simonides exemplify the tension that characterized authorship through antiquity.²⁰ Although the two authors were contemporaries, Pindar still belonged to the old tradition of courtly poets of the heroic age. He was unquestionably a professional writer; however, he wrote for the exclusive circles of his fellow nobles. Pindar referred to himself as ξένοϛ, the Homeric guest–friend who was protected and offered gifts according to the rule of hospitality in the heroic age.²¹ Though he might have desired a reward, he praised himself with an amateurish flavor. Pindar have given the impression that he would have happily worked without

14. BARBARA GRAZIOSI, *INVENTING HOMER: THE EARLY RECEPTION EPIC* 41 (R.L. Hunter et al. eds., 2002).

15. *See id.* at 41, 186-93.

16. *See Morris, supra* 10, at 1-2.

17. *See HAUSER, supra* note 13, at 67.

18. *See id.*

19. *See HAUSER, supra* note 13, at 67; *see also* Leonard Woodbury, *Pindar and the Mercenary Muse: Isthm. 2.1-13*, 99 *TRANSACTIONS & PROCS. AM. PHILOLOGICAL ASS’N.* 527, 535 n.11 (1968) (noting that earlier poets were of course rewarded or compensated for their poems, but we do not hear before Simonides of poets who sold their verses for a price). As per the reward of earlier poets, Woodbury mentions Odysseus, in the *Odyssey* 8.474-81, sending a piece of meat to the bard, Demodocus; Diogenes Laertius reporting that public performances of the poet Xenophanes received a treatment comparable to that of athletic victors; and Herodotus telling that the poet Arion made a fortune in Sicily. *Id.*

20. *See HAUSER, supra* note 13, at 53-64.

21. *See Woodbury, supra* note 19, at 536-37.

compensation, simply for his own and his fellow nobles' pleasure.²² In one of his victory odes, Pindar recited:

To a poet's mind the gift is slight, to speak
A kind word for unnumbered toils, and build
For all to share a monument of beauty.²³

Simonides, instead, embodied the emergence of a trend toward literary professionalism. He wrote for a definite sum of money and for anyone who was willing to pay him. His greediness was proverbial. In *Peace*, a play by Aristophanes, one of the characters says of Simonides: "[H]e would put to sea on a hurdle to gain an obolus."²⁴ However, this uncovered interest in obtaining a profit from creativity may have had a negative connotation, at least for a period. Pindar expressed his criticism in a passage of one of his odes: "[T]he Muse was then not yet fond of profit, and did not work for hire; nor were the sweet, soft-voiced songs of honey-speaking Terpsichore for sale, their faces silvered over."²⁵ Besides the probable competition between the two poets that may have driven Pindar's inspiration,²⁶ the passage expressed a more profound cultural contrast. Pindar's ode criticized the commodification of poetry from a gift exchange between friends into an art whose products were to be sold in the marketplace.²⁷

B. "Hermodoros Trades in Tracts," Circulation of Knowledge, and Scribal Publishing in Ancient Greece and Rome

In ancient Greece, and most pre-modern civilizations, knowledge and information seem not to have been regarded as an

22. Cf. *id.* at 537 (noting also that "[p]oet and patron, in the Pindaric world, are bound together by traditional ties of religion, family, and society, and the commercial value of their exchange of goods and services has relatively small importance").

23. PINDAR, ISTHMIAN I, in *THE ODES OF PINDAR* 231, 235 (Geoffrey S. Conway trans., 1972).

24. ARISTOPHANES, *PEACE* 37 (Digireads.com Publ'g 2006) (1912).

25. PINDAR, ISTHMIAN II, in *1 GREEK MUSICAL WRITINGS* 58, 58-59 (Andrew Barker ed., 1989); see also Woodbury, *supra* note 19, at 528.

26. Woodbury, *supra* note 19, at 529.

27. See ANNE CARSON, *ECONOMY OF THE UNLOST: READING SIMONIDES OF KEOS WITH PAUL CELAN* 16-17 (1999) (comparing Simonides's greed with Pindar's gift exchange approach to creativity); Woodbury, *supra* note 19, at 535-36 (noting Simonides's market approach to poetry).

ownable commodity.²⁸ In this respect, the example of the Sophists' teaching activities may be instructive. They were perhaps the first group teaching in exchange for a reward, and many objected to the fact that they took fees for their teachings.²⁹ In any event, even in the case of the Sophists, no ownership was likely attached to the subject of their teachings.³⁰ Their audiences wrote a large number of manuals reporting their teachings, which others then copied.³¹ The Sophists did not report any objection to this practice. Conversely, they may have regarded these manuals as a form of publicity that expanded their reputation and perhaps increased the reward that they may have earned through their freelance teaching activities.³²

Again, a well-known story related to Plato's teachings seems to stress the ancient notion that knowledge was not to be treated as an ownable commodity. Undoubtedly, Plato taught first the subjects of his writings to a small circle of students. Plato's hearers appear to have first brought the material before the public by circulating the written reports of his lectures. Hermodoros of Syracuse, a student of Plato, is reported to have made a trade of the sale of Plato's lectures after preparing written reports of his instructor's talks.³³ It seems likely that Plato's teachings were gifts to his hearers. In contrast, Hermodoros carried the notebooks of Plato off to Sicily and secured from their sales certain profits.³⁴ Hermodoros' conduct was highly

28. See CHRISTOPHER MAY & SUSAN K. SELL, INTELLECTUAL PROPERTY RIGHTS: A CRITICAL HISTORY 46 (2006); see also Carla Hesse, *The Rise of Intellectual Property, 700 B.C.—A.D. 2000: An Idea in the Balance*, 131 DAEDALUS 26, 26-27 (2002) (noting that “[a]ncient Greeks did not think of knowledge as something that could be owned or sold,” and adding that “[a] tour of the . . . great civilizations of the pre-modern world—Chinese, Islamic, Jewish, and Christian—reveals a striking absence of any notions of human ownership of ideas or their expressions”).

29. See G.B. KERFERD, THE SOPHISTIC MOVEMENT 25 (1981); see also David L. Blank, *Socratic Versus Sophists on Payment for Teaching*, 4 CLASSICAL ANTIQUITY 1, 2-3 (1985) (discussing the Sophistic model as opposed to the Socratic one).

30. See Salathiel C. Masterson, *Copyright: History and Development*, 28 CAL. L. REV. 620, 621 (1940) (noting that Protagoras was the first who received pay for his lessons; however, “[h]is remunerative works [are] . . . an example of property produced from an intellectual product, but not yet of property resulting from the production of a work of literature”).

31. MAY & SELL, *supra* note 28, at 45.

32. See *id.*

33. See JOHN DILLON, THE HEIRS OF PLATO: A STUDY OF THE OLD ACADEMY (347-274 B.C.) 197-98 (2003).

34. See Jørgen Mejer, *The Platonic Corpus in Antiquity*, in PROCEEDINGS OF THE DANISH INSTITUTE AT ATHENS IV, at 30 n.15 (Jonas Eiring & Jørgen Mejer eds.,

condemned in the ancient world. The moral contemptibility of Hermodoros' activity lay in distributing Plato's works for a material gain.³⁵ The misconduct of Hermodoros earned such a widespread contempt to become proverbial—"Hermodoros trades in tracts"—as reported also by Cicero in a famous letter to Atticus.³⁶

For a very long period, works of literature were mainly recited or orally presented. Hearers, then, may have textualized the subject of the public presentation or declamation. Alternatively, at least in the beginning, the admirers of a poet or a philosopher supplied themselves with his work through their own handiwork, or that of their slaves, if educated enough, by copying the original manuscript. Demosthenes, for example, is reported to have transcribed the eight books of the *History of the Peloponnesian War* of Thucydides eight times.³⁷ According to others, Theompopus and Xenophon cared for the transcription, and other admiring readers surely contributed to the circulation of the historical accounts of Thucydides.³⁸ Later, slaves increasingly took up the work of copying, and teams of copyists were perhaps employed.³⁹ By the end of the fifth century B.C., booksellers had a special place at the market reserved for books trade, as reported by the comic poets Nicophon and Eupolis.⁴⁰ However, "it was . . . not until the time of Alexander the Great that the business of [book]making and selling" became more systematized and grew in importance.⁴¹ At the same time, there was a

2004) (citing PHILODEMUS, 6 INDEX ACADEMICORUM 6-10 (110-35 B.C. circa)); see also 4 WILLIAM MURE, A CRITICAL HISTORY OF THE LANGUAGE AND LITERATURE OF ANCIENT GREECE 39 (Longman et al. eds., 2d ed. 1854).

35. See Katharina de la Durantaye, *The Origins of the Protection of Literary Authorship in Ancient Rome*, 25 B.U. INT'L L.J. 37, 60-62 (2007).

36. MARCUS TULLIUS CICERO, CICERO'S LETTERS TO ATTICUS 533-35 (D.R. Shackleton Bailey trans., Penguin Books 1978) (June 30-July 1, 45 A.D.).

37. See GEO. HAVEN PUTNAM, AUTHORS AND THEIR PUBLIC IN ANCIENT TIMES: A SKETCH OF LITERARY CONDITIONS AND OF THE RELATIONS WITH THE PUBLIC OF LITERARY PRODUCERS, FROM THE EARLIEST TIMES TO THE FALL OF THE ROMAN EMPIRE 87 (3d ed. 1896) (1893).

38. See *id.*

39. *Id.* at 132.

40. WILLIAM V. HARRIS, ANCIENT LITERACY 85 n.92 (Harvard Univ. Press 1991) (1989) (reporting that a trade in books is first mentioned by Eupolis in the 420s or 410s, the dramatists Aristomenes and Nicophon referred to book-selling in 400 B.C. circa, and by the 370s an inner-city trade in books had become rather common). Additionally, Plato's *Apology of Socrates* mentions that anyone could buy the books of Anaxagoras for a drachma in the market. *Id.*

41. PUTNAM, *supra* note 37, at 104.

corresponding decrease in prices, which had remained prohibitive up to that point.⁴²

The center of Greek culture shifted to Alexandria after the Roman conquest of Greece. The market for books underwent a considerable change in Alexandria.⁴³ King Ptolemy largely extended the production of copies of literary works and gathered most existing works from Greece and Asia Minor to Alexandria.⁴⁴ Meanwhile, hordes of scribes moved to Alexandria, soon to become the first booksellers or publishers.⁴⁵ The labor of copyists was later organized in an entrepreneurial form.⁴⁶ The production of copies further expanded and a rudimentary publishing industry was born.⁴⁷ *Servi literati*—slaves educated in Latin and Greek and trained as scribes—became a very valuable commodity that constituted the backbone of the scriptoria set up by the scribal publishers.⁴⁸

The Alexandrian publishing model was later exported to Rome.⁴⁹ By the late first century A.D. the hub of literary activity was transferred to Rome, though Alexandria continued to play a very relevant role up to the middle of the third century A.D. At this time in Rome, Alexandria, and other literary centers of the later classical world, a system of compensation to authors gradually came into existence. Although fragmentary and inconclusive, the evidence of payments made to authors that can be traced in the Roman literature, especially in the Augustan age, are certainly more solid than the scattered references in the writings of the Greek authors.⁵⁰ In any event, payments received by Roman authors from publishers were not attached to any exclusive right. Roman authors, in fact, appeared to be happy with maximum distribution.⁵¹ The reaction of Pliny the Younger upon discovering that his work was being sold in Lyon

42. *See id.*

43. *Id.* at 127-48; Masterson, *supra* note 30, at 621.

44. *See* PUTNAM, *supra* note 37, at 131.

45. *Id.* at 131-32.

46. *Id.* at 132.

47. *Id.*

48. *Id.* at 181-83 (discussing in some detail use, education, and typologies of *servi literati* in Rome); *see also* Harold C. Streibich, *The Moral Right of Ownership to Intellectual Property Part I—From the Beginning to the Age of Printing*, 6 MEM. ST. U. L. REV. 1, 5 (1975).

49. *See* STRABO, BOOK XIII: ASIA, in 2 THE GEOGRAPHY OF STRABO 380 (H.C. Hamilton & W. Falconer trans., 1906), <http://www.strabo.ca/electronic.html>. *See generally* Felix Reichmann, *The Book Trade at the Time of the Roman Empire*, 8 LIBR. Q. 40 (1938).

50. *See* de la Durantaye, *supra* note 35, at 81.

51. *See id.* at 109.

seems to confirm this point: "I did not think there were booksellers at Lyons, and was all the more pleased to learn from your letter that my works have a ready sale there. I am rejoiced that such favour as they have acquired in town, continues to attend them abroad."⁵² From the excitement of Pliny, it seems plausible to think that, as a rule, authors were not offended by discovering about independent—and unauthorized—editions of their works; in fact, they may have been welcomed by the authors.⁵³

Authors' payments, however, remained attached to the fact that the scribal publishers may have had an interest in purchasing the original manuscript both because they wished to be the first to circulate the work and wanted the integrity of the manuscript to be guaranteed.⁵⁴ Special editions—including autographed manuscripts or manuscripts adorned with a special seal of quality called *sphragis*—may have been part of the deal, as reported by Seneca in connection with an agreement between Cicero and the *librarius* Dorus.⁵⁵ The information on the terms of the business relations of the Roman authors with their publishers is very fragmentary. Additionally, these terms and conditions were unconsolidated and uncertain at best, for they did not rely on any legal provisions. In the end, the compensation enjoyed by the authors may have resembled more a form of patronage than any type of publishing contract. As one historian noted:

Such compensation, doubtless at best but inconsiderable as it did not depend upon any legal right on the part of either author or publishers, must have varied very greatly according to the personality of the writer, the nature of the work, and the time and place of its production.⁵⁶

In late republican and imperial Rome, the relationship between publishers and authors may also have resembled more of a trusted friendship than a professional association. Atticus, for example, the renowned publisher of Cicero, was a patron of literature, rather than a businessman.⁵⁷

52. PLINY (THE YOUNGER), BOOK IX: 11 TO GEMINUS, in THE LETTERS OF THE YOUNGER PLINY 297 (John Delaware Lewis trans., 1890) (61-112 A.D. circa).

53. See de la Durantaye, *supra* note 35, at 77, 110.

54. See *id.* at 77-78.

55. See LUCIUS ANNAEUS SENECA, DE BENEFICIIS: BOOK VII, in 3 SENECA: MORAL ESSAYS 454, 471 (John W. Basore trans., 1935) (56-64 A.D. circa); see also de la Durantaye, *supra* note 35, at 75-76.

56. PUTNAM, *supra* note 37, at xi-xii.

57. See generally ALICE HILL BYRNE, TITUS POMPONIUS ATTICUS: CHAPTERS OF A BIOGRAPHY (1920).

C. Maecenas, Immortality, and *Amicitia*

The market was tangential in the life of Roman authors. They sought fame and reputation, rather than profit. Essentially, they sought immortality through their creations.⁵⁸ In Roman eyes, creativity became an instrument to defy death and live on in the minds of the living. Horace's immortal verses explained this quest for immortality:

I have completed a monument more lasting than brass, and more sublime than the regal elevation of pyramids, which neither the wasting shower, the unavailing north wind, nor an innumerable succession of years, and the flight of seasons, shall be able to demolish. I shall not wholly die; but a great part of me shall escape Libitina [*the goddess who presided over funerals*]. I shall continually be renewed in the praises of posterity, as long as the priest shall ascend the Capitol with the silent [vestal] virgin.⁵⁹

Ovid and Martial stressed the same point multiple times.⁶⁰ The prospect of eternal glory was also a substantial stimulus for patronage of art.⁶¹ Patrons were seeking immortality through celebration and dedication in the verses of their protégés.

However, Martial's epigrams manifested a tension between market and gift, monetary reward, reputation, and immortality in Roman literary tradition. Martial was a very active figure as an author marketing his own creations. Together with the invention of the word plagiarism,⁶² we also owe to Martial the first form of book advertising. At the beginning of his first book of epigrams, Martial tells the readers to go look for one Secundus behind the Temple of Peace if they want to have his latest success:

You who are anxious that my books should be with you everywhere, and desire to have them as companions on a long journey, buy a copy of which the parchment leaves are compressed into a small compass. Bestow book-cases upon large volumes; one hand will hold me. But that you may not be ignorant where I am to be bought, and wander in uncertainty over the whole town, you shall, under my guidance, be sure of obtaining me. Seek

58. See de la Durantaye, *supra* note 35, at 107-09.

59. QUINTUS HORATIUS FLACCUS, ODE XXX, in *THE WORKS OF HORACE* 93 (C. Smart trans., 1863) (footnote omitted) (23-13 B.C. circa).

60. See, e.g., PUBLIUS OVIDIUS NASO, *METAMORPHOSES: BOOK XV*, at ll. 875-76 (Forgotten Books 1936) (1916) (8 A.D. circa); MARCUS VALERIUS MARTIALIS, *EPIGRAMS: BOOK I*, in *THE EPIGRAMS OF MARTIAL* 22, 51 (1871) (Rome, 86-103 A.D. circa).

61. See Gordon Williams, *Phases in Political Patronage of Literature in Rome*, in *LITERARY AND ARTISTIC PATRONAGE IN ANCIENT ROME* 3 (Barbara K. Gold ed., 1982).

62. See MARTIALIS, *supra* note 60, at 52.

Secundus, the freedman of the learned Lucensis, behind the Temple of Peace and the Forum of Pallas.⁶³

By defining his poetry as material commodities available for purchase or theft, Martial commodifies it as an article of the marketplace.⁶⁴ In this respect, as Simonides earlier, Martial was a proto-modern author. However, Martial’s commodification of the book was in sharp opposition to the Augustan emphasis on poetic immortality, so that “[i]n Roman’s view, Martial’s materiality contrasts the tangible book with incorporeal song, the trendy notoriety of the present with the eternal glory of the future.”⁶⁵ The two models reflected also a different system of valuation. The market could economically quantify the book as a material object. In contrast, the incorporeal Augustan song derived his value from the audience aesthetic approval and patronage support. In this respect, Martial’s authorship model contrasted patronage’s gift economy. As with Pindar earlier, the “Augustan poets conventionally portray these transactions in a discourse of *amicitia* and gift exchange rather than mercenary accounting.”⁶⁶

Roman literary life was dominated by the conception of the great *domus* open to literary friends and the figure of the rich man surrounded by his *amici*.⁶⁷ As in the case of Gaius Cilnius Maecenas—the quintessential *dominus* who supported young artists and writers—the *dominus* is a host, critic, prompter, and provider. The relationship between the *dominus* and the artists is framed within the context of the institution of *amicitia*—or friendship. Horace described the house of Maecenas as a community of friends: “[T]here’s no place so free [f]rom intrigue as Maecenas’, no place so thoroughly honest. It just doesn’t matter to them whether someone is richer [o]r smarter than somebody else. Everyone gets along.”⁶⁸

As a result of the camaraderie of Roman literary circles, the Roman discourse of *amicitia* made monetary reward a rare

63. *Id.* at 24.

64. See J. Mira Seo, *Plagiarism and Poetic Identity in Martial*, 130 *AM. J. PHILOLOGY* 567, 568 (2009).

65. *Id.*

66. *Id.*

67. See Peter White, *Amicitia and the Profession of Poetry in Early Imperial Rome*, 68 *J. ROMAN STUD.* 74, 83 (1978); see also David Konstan, *Patrons and Friends*, 90 *CLASSICAL PHILOLOGY* 328, 330 (1995) (discussing the concept of Roman friendship in the literary field generally).

68. QUINTUS HORATIUS FLACCUS, *SATIRES: BOOK I*, in *THE SATIRES AND EPISTLES OF HORACE* 73, 75 (Smith Palmer Bovie trans., 1959) (35-30 B.C. circa).

occurrence for literary authors.⁶⁹ Although the writing of many Latin poems may have been prompted by special occasions, and on direct or indirect call of the *dominus* and *amicus*, a modern commission of work was out of question.⁷⁰ Modern forms of commission were to be excluded principally for the social stigma that the work for hire carried in Roman society.⁷¹ In this respect, poets differentiated themselves from the sculptors and the painters that worked for a reward and made no attempt to hide it.⁷² Additionally, recipients rarely offered a reward freely, to the utter disappointment of Martial.⁷³ “Outright gifts of money [we]re unusual,” casual, and sporadic.⁷⁴ Nevertheless, besides cash gifts, many benefits could have resulted to a Roman artist from the attachment to a wealthy friend, or to several friends. These included inheritances and bequests, loans at low or no interests, gifts in the form of land or a house, comfortable lodging in the town houses or the villas of the *dominus*, arrangements to hold sinecures and other desirable appointments, and even advantageous marriages.⁷⁵

Roman authors appeared to trust the indirect gain that could be achieved through enhanced reputation more than direct profit from the sale of books. In the *Ars Poetica*, Horace mentioned that a famous book of his, read across the Mediterranean, brought him long-lasting fame, but gained money for the publisher Sosii.⁷⁶ Martial appears to have received from the publishers some lump sum for each of his several works, generally a sum too small to make him happy.⁷⁷ Martial lamented that, though extremely wide, the circulation of his books did not make him rich:

It is not the idle people of the city only that delight in my Muse, nor is it alone to listless ears that these verses are addressed, but my book is thumbed amid Getic frosts, near martial standards, by the stern centurion;

69. See *id.* at 86.

70. See *id.* at 85.

71. See HAUSER, *supra* note 13, at 102-03.

72. *Id.* at 102.

73. See White, *supra* note 67, at 86.

74. *Id.* at 87 (noting that the poets could not have counted on those gifts as a steady income; in fact, most of the poets were knights and did not depend on the munificence of their friends as primary income).

75. *Id.* at 89-92.

76. QUINTUS HORATIUS FLACCUS, THE ART OF POERTY, in THE WORKS OF HORACE, *supra* note 59, at 299, 320 (18 B.C. circa).

77. See MARCUS VALERIUS MARTIALIS, EPIGRAMS: BOOK XI, in THE EPIGRAMS OF MARTIAL, *supra* note 60, at 500, 501; see also Masterson, *supra* note 30, at 622.

and even Britain is said to sing my verses. Yet of what advantage is it to me? My purse benefits nought by my reputation. What immortal pages could I not have written and what wars could I not have sung to the Pierian trumpet, if, when the kind deities gave a second Augustus to the earth, they had likewise given to thee, O Rome, a second Mæcenas.⁷⁸

Even Martial, the most market oriented of the Latin authors, sought a powerful patron to redress his misfortunes, rather than direct profits from the sale of his books. The most common tool to answer Martial's lamentation, propel circulation of an author's work, and augment the author's material wealth was indeed dedication.⁷⁹

Since the republican times, Roman authors traditionally dedicated their works to friends or literary models. The practice of dedications eventually evolved in the area of literary patronage. If initially, dedications were only intended to help an author find favor and advantage, later authors openly sought monetary gifts and rewards from the dedicatee. Perhaps patronage through dedication replaced contractual relationships between authors and scribal publishers in the market for books.⁸⁰ Under this model, the patron to whom the work was dedicated saw to the circulation of the author's work through either his own slaves or an arrangement with a scribal publisher.⁸¹ As Martial nicely put it, the better the patron, the better the edition of the book:

To whom, my little book, do you wish me to dedicate you? Make haste to choose a patron, lest, being hurried off into a murky kitchen, you cover tunnies with your wet leaves, or become a wrapper for incense and pepper. Is it into Faustinus' bosom that you flee? you have chosen wisely: you may now make your way perfumed with oil of cedar, and, decorated with ornaments at both ends, luxuriate in all the glory of painted bosses; delicate purple may cover you, and your title proudly blaze in scarlet. With him for your patron, fear not even Probus.⁸²

Moreover, the connection with the household of a *dominus* was an extraordinary opportunity to promote an author's work.⁸³ The great houses of Rome were busy places all year. In the large salons of the Roman *domus* and villas, visitors gathered for errands and celebrations. The reputation of a young artist could be made or

78. MARTIALIS, *supra* note 77, at 501 (footnote omitted).

79. See de la Durantaye, *supra* note 35, at 81-82 (discussing in some detail the practice of dedication from the republican to the imperial age).

80. *Id.* at 83.

81. *Id.*

82. MARCUS VALERIUS MARTIALIS, EPIGRAMS: BOOK II, in THE EPIGRAMS OF MARTIAL, *supra* note 60, at 131, 131.

83. See White, *supra* note 67, at 85-86.

destroyed in few meetings. The protection of a powerful man and his circle of *amici* against the bad publicity of jealous or malignant critics was a priceless benefit, as Martial points out once again:

If thou wishest to be approved by Attic ears, I exhort and advise thee, my little book, to please the learned Apollinaris. No one is more acute than he, or more learned, nor is any one more candid or more indulgent. If he shall receive thee to his heart, and repeat thee with his lips, thou wilt neither have to dread the sneers of the malignant, nor wilt thou furnish parchment coverings for anchovies. If he shall condemn thee, thou mayst run forthwith to the stalls of the salt-meat sellers, to have thy back scribbled upon by their boys.⁸⁴

Powerful and wealthy men with large followings were uniquely placed to promote the work of an author.⁸⁵ The business of promotion and circulation of an author's work was undertaken by the circle of *amici*, instead of the booksellers. Through the *amici*'s connections, the author found his readership. The *amici* praised and circulated the books, promoted recitations, and introduced the author's work to other useful friends. In an epigram addressed to his book, Martial exclaimed before sending his seventh book of epigrams to the local magnate in the Umbrian town of Sarsina: "Oh, what renown is in store for me! what glory! what numbers of admirers! You will be celebrated at feasts, at the bar, in the temples, the streets, the porticoes, the shops. You are sent to one, but you will be read by all."⁸⁶

D. *Scientia Donum Dei Est, Unde Vendi Non Potest*

In the sixth century A.D., an attempt to protect the open gift of knowledge from private enclosure has been reported to have precipitated a civil war.⁸⁷ During a visit to his ancient master, Abbot Finnian, the Irish Saint Columba decided to make a copy of the

84. MARCUS VALERIUS MARTIALIS, EPIGRAMS: BOOK IV, in THE EPIGRAMS OF MARTIAL, *supra* note 60, at 177, 217.

85. See White, *supra* note 67, at 85.

86. MARCUS VALERIUS MARTIALIS, EPIGRAMS: BOOK VII, in THE EPIGRAMS OF MARTIAL, *supra* note 60, at 303, 347.

87. See generally, reporting the anecdote, COUNT DE MONTALEMBERT, SAINT COLUMBA: APOSTLE OF CALEDONIA 17-25 (1868); EDWARD ALEXANDER COOKE, LIFE AND WORK OF SAINT COLUMBA 56-57 (1888); Streibich, *supra* note 48, at 10-11; Masterson, *supra* note 30, at 622-23.

Abbot's psalter.⁸⁸ Apparently, Finnian discovered Saint Columba clandestinely at work and demanded the return of the copy made.⁸⁹ Finnian contended that a copy made without permission belonged to the owner of the original.⁹⁰ Saint Columba refused to surrender the copy and the question was demanded to the King of Tara, one Diarmid or Dermot.⁹¹ The king decided in favor of Finnian by noting that "[t]o every book belongs its son-book (or copy), as to every cow belongs her calf."⁹² Angered with the decision, Columba started a rebellion that ended with the defeat of the king.⁹³ For once, copyright expansionism did not pay off. The copied manuscript, now on display in the Museum of the Royal Irish Academy, was later known as the *Catach*; or *Fighter*; or *Book of Battle*. Together with its silver case, the book was carried in battle by the O'Donnell clan to ensure victory as late as the end of the fifteenth century.⁹⁴ Saint Columba fought a lifelong battle for the right of transcribing other manuscripts. Perhaps his quest for open access to others' works and manuscripts played some role in the later capacity of monks to freely copy books and preserve ancient knowledge to future generations.

St. Columba's strenuous defense of open access to knowledge intertwined with the medieval belief that learning was to come as a gift. "[K]nowledge is a gift of God and should not be sold," a medieval proverb rang.⁹⁵ The proverb was actually an interpolation into canon law doctrine of a passage of the Book of Matthew in which Jesus exhorted the disciples to treat the knowledge they have received from him as a gift to be shared. In that passage, Jesus is recorded as saying: "Freely ye have received, freely give."⁹⁶ Again, according to Marie de France, the gift of knowledge was to be left open to seed and burst into flower. In the prologue of her tales, Marie de France described the productive web of reciprocations of knowledge exchange by stating:

88. In fact, the Psalms of Finnian were most like a copy of Jerome's Psalter made in Rome by the abbot. See JUNE S. SAWYERS, *PRAYING WITH CELTIC SAINTS, PROPHETS, MARTYRS, AND POETS* 61 (2001).

89. MONTALEMBERT, *supra* note 87, at 18.

90. *Id.*

91. *Id.*

92. COOKE, *supra* note 87, at 56.

93. *Id.* at 57.

94. *Id.* at 56 n.1.

95. See Gaines Post, Kimon Giocarinis & Richard Kay, *The Medieval Heritage of a Humanistic Ideal: 'Scientia Donum Dei Est, Unde Vendi Non Potest,'* 11 *TRADITIO* 195, 197 (1955).

96. Hesse, *supra* note 28, at 27 (citing *Matthew* 10:8).

To Whom God has given science
 And the eloquence of good speech
 Must not be silent or conceal it
 But willingly show it.
 When a great good is heard by many
 Then it begins to seed
 And when it is praised by many
 Then it bursts into flower.⁹⁷

The medieval canon law doctrine reinforced the Greek ideal embedded in the proverbial dictum “Hermodoros trades in tracts.” In medieval time, the Greek ideal was applied for a long time to storytellers, the sale of notarial and scribal productions, or professors, who were to take no fees for their teachings.⁹⁸ As late as the sixteenth century, students at Paris and Montpellier used to present gifts, such as banquets, fruits, sweets, and wine, to their professors after examinations and disputations.⁹⁹

The humanist ideal *scientia donum dei est, unde vendi non potest* was also reflected in the reproduction of manuscripts, at least within university settings. After universities took over the role of the monasteries beginning in the twelfth century,¹⁰⁰ they maintained a strict open-access policy towards intellectual resources. The university regulations excluded property rights over any written words by providing that manuscript dealers could not refuse to loan a copy to a member of the university even though the loan was requested for producing copies.¹⁰¹ Again, the so-called *pecia* system

97. Natalie Zemon Davis, *Beyond the Market: Books as Gifts in Sixteenth-Century France*, 33 *TRANSACTIONS OF THE ROYAL HIST. SOC'Y* 69, 71 (1983) (citing MARIE DE FRANCE, *LES LAIS DE MARIE DE FRANCE*, at Prologue ll. 1-8 (Jean Rychner ed., 1973)); see also Laurie A. Finke & Martin B. Shichtman, *Magical Mistress Tour: Patronage, Intellectual Property, and the Dissemination of Wealth in the Lais of Marie de France*, 25 *SIGNS* 479, 498 (2000) (discussing claims for literary credit in Marie de France).

98. See Davis, *supra* note 97, at 71 (noting, however, in the text of Luke that “the labourer is worthy of his hire . . . was finally used to justify some payments” for the teachers and scribes).

99. *Id.* at 71-72; see Post, Giocarinis & Kay, *supra* note 95.

100. See MAY & SELL, *supra* note 28, at 49-50; HAUSER, *supra* note 13, at 152.

101. See MAY & SELL, *supra* note 28, at 50; Masterson, *supra* note 30 at 624-25. But see MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* 9 (1993) (citing 2 *GEO. HAVEN PUTNAM, BOOKS AND THEIR MAKERS DURING THE MIDDLE AGES* 481-83 (Hillary House 1962) (1896-97) (noting that “[i]n the Middle Ages the owner of a manuscript was understood to possess the right to grant permission to copy it, and this was a right that could be exploited, as it was, for

was an example of a primitive peer-to-peer network, in which the copying of manuscripts was perceived as a meritorious and godly act.¹⁰² The *pecia* system was originally developed in European universities as a regulated procedure to reproduce books and to keep their prices as low as possible.¹⁰³ The *peciae* were sections into which the books were broken and then loaned, usually for a small fee, to be copied by students.¹⁰⁴ The distribution of the *peciae* among a large number of students working simultaneously permitted completion of the copies in a shorter amount of time than a copier working alone would have required.¹⁰⁵ Even after the emergence of commercial scriptoria, university authorities recognized that knowledge was a gift of God that should not be sold too dearly by implementing a careful regulation of the rates for the rental and sale of manuscripts.¹⁰⁶ The practice of supplementing the fixed prices with presents, rather than money, attested to the continued vitality of gift exchange mechanisms, if those prices were thought to be too low.¹⁰⁷

A long-lasting tradition of gift exchange emerges in the medieval mechanics of book distribution and circulation. Traditionally, medieval manuscripts included an illumination of the author on bended knee presenting the book to a patron.¹⁰⁸ The illuminations attested to a tradition of public gift in the exchange of books. As reported by Natalie Zemon Davis, gift exchange was the dominant modality of the initial diffusion of late-medieval writings.¹⁰⁹ The author used to send the work to a powerful and wealthy person who then sent back a gift, enhanced the lustre of the work through his reputation, and defended the work against

example, by those monasteries that regularly charge a fee for permission to copy one of their books").

102. See, e.g., Graham Pollard, *The Pecia System in the Medieval Universities*, in *MEDIEVAL SCRIBES, MANUSCRIPTS & LIBRARIES: ESSAYS PRESENTED TO N.R. KER* 145, 145-61 (M.B. Parkes & Andrew G. Watson eds., 1978); Alexander Gieysztor, *Management and Resources*, in *1 A HISTORY OF THE UNIVERSITY IN EUROPE: UNIVERSITIES IN THE MIDDLE AGES* 128-29 (Hilde De Ridder-Symoens ed., 2003); cf. Davis, *supra* note 97, at 72.

103. *Id.*

104. See *id.* at 152-53.

105. See *id.*

106. See Davis, *supra* note 97, at 72.

107. *Id.*

108. See, e.g., KARL JULIUS HOLZKNECHT, *LITERARY PATRONAGE IN THE MIDDLE AGES* 164-65 (Octagon Books, Inc. 1966) (1923); see also CLARK HULSE, *THE RULE OF ART: LITERATURE AND PAINTING IN THE RENAISSANCE* 44 (1990).

109. See Davis, *supra* note 97, at 73.

criticism, if necessary.¹¹⁰ Dedications within the tradition of gift exchange still played a relevant role after the advent of the printed book, though the character of the dedicated gift changed.¹¹¹ The language and iconography of deference was less marked.¹¹² The reciprocations of gifts initially overshadowed the commercial relations between authors and publishers. Manuscript and printed copy became the object of the gift reciprocation, strengthening a collaboration that could provide the publishers with new manuscripts in the future. To this end, the French publisher Guillaume Rouillé wrote to the literary Domenichi: “Accept this book with the same good heart in which you sent it. You presented it to me in a beautiful script and with pictures made by hand. I return it to you printed in beautiful characters and with engraved illustrations. Think of me . . . as your friend and brother.”¹¹³

E. Princely Culture, Propaganda, and the Rise of the “Empire of Things”

The tension between market and gift economy acquired special momentum in the Renaissance. On one side, Renaissance creativity is an idealistic public gift to be framed within the values of magnificence and magnanimity as the outcome of the special relationship between artist and patron. However, Renaissance patronage is also a form of consumption that set the emergence of a new consumerist market.

Renaissance patronage ranged from ecclesiastical to lay and public to private.¹¹⁴ Guilds, religious fraternities, or committees in republican states, such as Venice, are well-known examples of corporate patrons.¹¹⁵ Princely patronage lay at the intersection between public and private patronage. At court, kings or princes may have taken artists, writers, and musicians into their service on a

110. *Id.*

111. *Id.* at 74-75.

112. See RUTH MORTIMER, A PORTRAIT OF THE AUTHOR IN SIXTEENTH-CENTURY FRANCE (1980) (including illuminations depicting the donor striding, book in hand, up to a seated recipient, rather than kneeling).

113. NATALIE ZEMON DAVIS, THE GIFT IN SIXTEENTH-CENTURY FRANCE 46 (2000).

114. See PETER BURKE, THE ITALIAN RENAISSANCE: CULTURE AND SOCIETY IN ITALY 90-95 (Princeton Univ. Press rev. 2d ed. 1999) (1972).

115. *Id.* at 90-93 (noting that “[t]he importance of organizations like these in the history of art is that they made possible the participation in patronage of people who did not have the money to commission works individually”).

permanent basis or, alternatively, the artist may have worked on commission—keeping a shop, awaiting for the patrons' call, and seeking his reward.¹¹⁶ Together with these dominant so-called household and made-to-measure systems, however, a market system was emerging, in which the artist or writer tried to sell something "ready-made" directly to the public.¹¹⁷

Friendship and personal relations played an important role, as art patronage was part of a larger patron–client system.¹¹⁸ Within the framework of these relationships, gift exchange may have had a role well into the Renaissance. For example, Baccio Bandinelli, a sixteenth-century Tuscan artist, introduced himself to the brothers Giovanni and Giuliano de' Medici by offering them a gift and receiving a commission in return.¹¹⁹ Commissions from patrons, however, were generally obtained by self-promotion, through intermediaries, or occasionally through formal competitions, such as in the case of the Baptistery doors in Florence.¹²⁰

Especially competitive environments, such as Florence, boosted artistic innovation by forcing artists to capture the patrons' attention by devising new and imaginative solutions to their problems.¹²¹ "Vasari [reported] that Michelangelo's *Battle of Cascina* was done 'in competition' with Leonardo's *Battle of Anghiari*."¹²² The finally unfinished works were commissioned in 1503-1504 for the walls of the great hall of the Palazzo Vecchio, where the two

116. *Id.* at 95, 111-19; Guido Guerzoni, *Between Rome and Ferrara: The Courtiers of the Este Cardinals in the Cinquecento*, in *ART AND IDENTITY IN EARLY MODERN ROME* 3, 67-71 (Jill Burke & Michael Bury eds., 2008) (discussing the variety of economical and contractual arrangements under which artists, writers, and musicians were employed at the court of the Este cardinals).

117. See BURKE, *supra* note 114, at 89, 119-24 (mentioning a "fourth and fifth type[of patronage systems, which] had not yet come into existence [at this point in time]: the academy system," in which the government supports "an organization staffed by reliable artists and writers;" and "the subvention system[,] in which a foundation supports creative individuals [with] no claim on" their creative production).

118. *Id.* at 101-03; see also 2 ARNOLD HAUSER, *THE SOCIAL HISTORY OF ART* 37-39 (Routledge 1999) (1951) (noting that Lorenzo *il Magnifico* may have had privileged artists belonging to his personal circle of friendships and who were related to the Neoplatonic movement, while rarely employing artists of the caliber of Donatello or Leonardo, who apparently left Florence owing to lack of recognition).

119. See BURKE, *supra* note 114, at 89, 103.

120. *Id.* at 103-04 (noting that formal competitions took place "especially in Florence and Venice"); HAUSER, *supra* note 118, at 38-39.

121. See JOHN STEPHENS, *THE ITALIAN RENAISSANCE: THE ORIGINS OF INTELLECTUAL AND ARTISTIC CHANGE BEFORE THE REFORMATION* 80 (1990).

122. See *id.* at 74-75 (mentioning many other examples recorded by Vasari).

artists were supposed to work face to face in a sublime contest for beauty.¹²³ At the same time, patrons competed among themselves for enjoying the services of the best artists in order to achieve fame, prestige, and political recognition through magnificence and “magnanimity.”¹²⁴ In trying to convince Giovanni de’ Medici to rebuild the whole church of San Lorenzo, Brunelleschi described the mechanics of competition at work on the patrons’ side:

I am amazed that you, being a leader (*capo*) do not order the spending of few thousand scudi and build the body of the church if [the noble families of the neighbourhood] saw you begin they would follow with their chapels; especially since when no other memorial remains of us but ruins, they bear witness to the man who build them (*di chi n’è stato autore*) hundreds or thousands of years before.¹²⁵

The same mechanics were at work in the Italian communes, where often the rulers flattered the vanity of townspeople to surpass other communities, thus convincing the citizens to pay for the work of art in the end, as in the case of the erection of the Milan Cathedral.¹²⁶

In the Renaissance’s “empire of things,” however, where the multiplication of cultural artifacts reached an unprecedented extent, the market acquired special relevance and artistic consumption became a notable economic activity.¹²⁷ In Florence, the workshop of “Lippi and Pesellino Imitator” proved the emergence of a process of

123. *Id.* at 74.

124. *Id.* at 98-102 (discussing the meaning of the two terms and noting that, in light of the Latin Ciceronian tradition, “[s]uch patronage was not done for self-aggrandisement, but to be useful and magnanimous by devoting personal wealth to unselfish purposes . . . [t]he patronage of art should be seen less as consumption for pleasure, than as a newly conceived duty”); see also Richard Goldthwaite, *The Empire of Things: Consumer Demand in Renaissance Italy*, in PATRONAGE, ART, AND SOCIETY IN RENAISSANCE ITALY 153, 166-67 (F.W. Kent & Patricia Simons eds., 1987) (discussing the concept of magnificence in Italian Renaissance); BURKE, *supra* note 114, at 98-100; HAUSER, *supra* note 118, at 39-40.

125. 2 GIORGIO VASARI, LE VITE DE’ PIÙ ECCELLENTI PITTORI, SCULTORI ED ARCHITETTORI [LIVES OF THE MOST EMINENT PAINTERS, SCULPTORS AND ARCHITECTS] 369 (G.C. Sansoni ed., 1906).

126. See HAUSER, *supra* note 118, at 33 (reporting that, in contrast, the cost of the building of the Certosa of Pavia were met from the privy purse of the Visconti and the Sforza families).

127. See Goldthwaite, *supra* note 124, at 154 (noting that patronage of art in the Renaissance, especially in Italy, is to be regarded as a form of consumption that reached a unique qualitative and quantitative extent and is to be contextualized within the emergence of an “empire of things,” a consumer society that “had its first stirrings, if not its birth, in the new habits of spending that possessed the Italians in the Renaissance” and “these habits . . . set[] Italy off, economically as well as culturally, from the rest of Europe at the time”).

commodification of creativity that was packaged in multiple products to suit the needs of a range of consumers in an expanding market.¹²⁸ Initially, in Early Renaissance, as Hauser noted, "the market is . . . not yet determined by the supply but by the demand."¹²⁹ By the High Renaissance, however, a new relevant change in the appreciation of art came about. Artists and patrons came together on the common ground of connoisseurship of art.¹³⁰ Departing from a long tradition viewing art only for the purpose that it addressed, art came to be appreciated as an end itself.¹³¹ This primitive form of *l'art pour l'art* had relevant effects on the market for creativity.¹³² The emergence of the amateur, the *connoisseur*, and the collector created a new type of consumer willing to buy what was offered, rather than only order what he needed.¹³³ At the same time, the rise of the status of the artists from artisans to "divine stars" led to an increasing emancipation from direct commissions. The super-artist no longer felt compelled to seek the patrons' protection by conscientiously carrying out their orders, but began to undertake artistic tasks on his own.¹³⁴ Dürer discussed profit from the production of artworks as nobody else in the past. In a letter dated August 29, 1509 to Jacob Heller, Dürer motivated his final decision to choose engravings as his privileged medium of expression with the desire to earn the more lucrative returns:

In one year, I can make a pile of common pictures, . . . so that no one would believe it possible that one man could do them all. One can earn something on these. But assiduous, hair-splitting labor gives little in return. That's why I am going to devote myself to engravings. And had I done so earlier, I would be today one thousand florins richer.¹³⁵

128. See Megan Holmes, *Copying Practices and Marketing Strategies in a Fifteenth-Century Florentine Painter's Workshop*, in *ARTISTIC EXCHANGE AND CULTURAL TRANSLATION IN THE ITALIAN RENAISSANCE CITY* 38, 41, 64 (Stephen J. Campbell & Stephen J. Milner eds., 2004) (noting that "the workshop specialized in two categories of production: very close copies of notable paintings by Filippo Lippi and mass-produced Madonna panels based on compositions by Lippi and Pesellino").

129. HAUSER, *supra* note 118, at 35.

130. See STEPHENS, *supra* note 121, at 96.

131. *Id.* at 96-97.

132. HAUSER, *supra* note 118, at 36-37.

133. See *id.* at 36.

134. *Id.* at 58-59.

135. JOSEPH LEO KOERNER, *THE MOMENT OF SELF-PORTRAITURE IN GERMAN RENAISSANCE ART* 206-07 (1997) (citing ALBRECHT DÜRER, *1 SCHRIFTLICHER NACHLASS* 72 (1471-1528)).

In the sixteenth century, the art market became even more important. Merchants specialized in dealing with these new commodities and art dealers, such as Giovanni Battista della Palla in Florence or Giovanni Ram in Venice, made their appearance.¹³⁶ Artists exhibited their works at fairs—like the Ascension Week fair in Venice or the Saint Anthony fair at Padua—or other public places.¹³⁷ Advertising came to be used to boost the sale of the new commodities. Echoing a similar statement in one of Martial's epigrams several centuries earlier, Ludovico Ariosto reminded his readers in the *Orlando Furioso* that “[w]hoever wants to buy a *Furioso*, or another work by the same author, let him go to the press of the Bindoni twins, the brothers Benedetto and Agostino.”¹³⁸

With the advent of print, quite understandably, the market played an increasingly relevant role in the literary field. By the end of the fifteenth century, the commodification and standardization in size and price of the book was emerging.¹³⁹ The invention of printing affected the organization of literature with the creation of new occupations, such as librarians, editors, and correctors.¹⁴⁰ Towards the mid-sixteenth century, the professional writer came on the scene because of printers and publishers asking writers to write, edit, or translate books.¹⁴¹ In Venice, Pietro Aretino exemplified this emerging market-oriented professional writer. Beside being known for having marketed even his “private” letters, Aretino's professionalism seemed to free him from traditional patronage models.¹⁴² After wandering from court to court for several years, in 1527 Aretino moved to Venice, where he was almost independent, although the “protection from Doge Andrea Gritti and gifts from” Venetian aristocrats were still valuable assets he could count on.¹⁴³ The rise of the market and his exceptional writing and self-

136. See BURKE, *supra* note 114, at 121-22; HAUSER, *supra* note 118, at 37.

137. See BURKE, *supra* note 114, at 122.

138. *Id.* at 119; see also Paul J. Voss, *Books for Sale: Advertising and Patronage in Late Elizabethan England*, 29 *SIXTEENTH CENTURY J.* 733, 734 (1998).

139. See BURKE, *supra* note 114, at 119.

140. *Id.* at 72.

141. *Id.*; see also Joanna Kostylo, *From Gunpowder to Print: The Common Origins of Copyright and Patent*, in *PRIVILEGE AND PROPERTY: ESSAYS ON THE HISTORY OF COPYRIGHT* 21, 47-50 (Ronan Deazley, Martin Kretschmer & Lionel Bently eds., 2010).

142. See BURKE, *supra* note 114, at 72.

143. *Id.* at 118-19.

advertisement skills gave Aretino the opportunity to detach himself from patrons that may have become too invasive and exclusive.¹⁴⁴

F. Guez de Balzac, Gracefulness, and Interpersonal Relations

In a letter written July 15, 1621 from Jean-Luis Guez de Balzac to Cardinal La Valette, Guez de Balzac wrote:

Your banker has just delivered the sum that you ordered him to give me. . . . I would like to be able to thank you in an appropriate manner for this favor, but besides the fact that your generosity is too great and that you give so gracefully that you further enhance the value of your gifts, I would be presumptuous if I believed that any words I might say could match your actions. . . . I can say nevertheless without vanity that I have never been tempted by anything so base as a desire for material gain. I thus consider your generosity stripped down to its essence, and I cherish your esteem for me more than anything else, since it is a token of my merit, not my lack of means, and it comes from your judgment, which is greater than your fortune.¹⁴⁵

Guez de Balzac's letter has become a quintessential representation of the question of the gift and its relation to literary patronage. The letter is a manifesto against the impersonal logic of the market. The graceful performance of La Valette makes his gift something hardly calculable in term of loss and gain. Still, perhaps for the last time, the gift exchange challenged the premises of market economy based on calculation and self-interest.

The gift received by Guez de Balzac was primarily an instrument to establish and maintain social ties. In this sense, the gift that the patron offered to the protégé sealed the network of interpersonal relations that supported creativity throughout history. As Marcel Mauss noted, gifts lie at the intersection of the economic and the social and blur the distinction between people and things.¹⁴⁶ Specifically referring to gift exchange in the sixteenth and seventeenth centuries, Natalie Zemon Davis elaborated Mauss's insight by arguing that the true role of the gift was to open up "channels of communication . . . across boundaries of status and literacy" and give "expression to the highly strained but genuine reciprocity between unequals in the social and economic order."¹⁴⁷ In *Exchanging Gifts: the Elizabethan Currency of Children and Poetry*,

144. See *id.* at 124.

145. PETER W. SHOEMAKER, POWERFUL CONNECTIONS: THE POETICS OF PATRONAGE IN THE AGE OF LOUIS XIII 72-73 (2007).

146. MAUSS, *supra* note 4, at 44-45.

147. DAVIS, *supra* note 113, at 42.

Patricia Fumerton explains the value of the gift in literary exchange as a form of social currency that equalizes hierarchical differences.¹⁴⁸ In doing so, Fumerton noted that dedications of poetic works

hover on the threshold of [the] gift. . . . [P]oet and patron are simultaneously givers and takers, parents and children—both partners reap the sustaining communion of gift. In this sense, these “gift” dedications are as much equalizers as definers of hierarchical differences: both poet and patron enter the gift circle that consumes and dilates egos, mingling selves in the hope of self-growth, peace, and culture.¹⁴⁹

Actually, the print medium helped this equalizing gift exchange. In the early history of print culture, the efficacy of the print medium memorialized authors and patrons simultaneously by presenting authors not simply as dependents, but also as parties to a cultural exchange.¹⁵⁰ Print publications portrayed members of royalty and aristocracy as the authorizers and protectors of literary texts.¹⁵¹ Writers and publishers were correspondingly provided with the patrons’ “legitimacy, reward, and prestige.”¹⁵²

Despite the many critiques to the role of patronage in the *ancien régime*,¹⁵³ patronage turned out to be a dynamic cultural and intellectual force that fashioned the “literary ‘selves’ and even ‘communities’” because, as Shoemaker noted, “it was flexible and relatively diffuse, because it did not depend on rigid institutional hierarchies, and because it mobilized both self-interest and idealism.”¹⁵⁴

However, change was coming. Although the process had a different pace depending on the location and subject matter of artistic production, at least in the literary field—by the early part of the

148. Patricia Fumerton, *Exchanging Gifts: The Elizabethan Currency of Children and Poetry*, 53 *ELH* 241 (1986).

149. *Id.* at 270.

150. ARTHUR F. MAROTTI, *MANUSCRIPT, PRINT, AND THE ENGLISH RENAISSANCE LYRIC* 292 (1995).

151. *Id.*

152. *Id.* at 291-92.

153. See, e.g., ALAIN VIALA, *NAISSANCE DE L'ÉCRIVAIN: SOCIOLOGIE DE LA LITTÉRATURE À L'ÂGE CLASSIQUE* 51-84 (1985) (characterizing patronage as an obstacle to the “birth of the writer”).

154. SHOEMAKER, *supra* note 145, at 56; see also MARIO BIAGIOLI, *GALILEO, COURTIER: THE PRACTICE OF SCIENCE IN THE CULTURE OF ABSOLUTISM* 90 (1994) (noting that as part of a coordinated publicity program on behalf of princely patrons, patronage “propelled clients, fostered and structured their communication and debates, rewarded novelties, legitimized knowledge claims that would have been unacceptable elsewhere, and gave clients the resources to legitimize unconventional socioprofessional identities”).

seventeenth century—the old system of artistic clientage started to break down, and the reader came on the scene.¹⁵⁵ Due to the restricted resources of the aristocracy, the writers could expect little financial reward in exchange for dedications.¹⁵⁶ The economics of the emerging publishing industry also changed the patrons' traditional functions, as inherited from manuscript culture. Publishers used patrons' names to promote books' sales to a general readership, rather than to signal actual patronage.¹⁵⁷ Although the patronage system still offered some social and political benefits, the emerging authority of the author and the importance of the reader—especially the "educated 'Gentlemen'" becoming the real socio-literary center of culture—ultimately eclipsed the patron.¹⁵⁸

By the mid-eighteenth century, the transition was almost complete. Modern forms of cultural support, such as commercial publishing and state patronage, substitute the highly personalized culture of patronage.¹⁵⁹ The old patronage model underwent a phase of rapid decadence, as Jean le Rond d'Alembert discussed in an essay written in 1753.¹⁶⁰ In his "cynical portrait of the personal relationship[s] between men of letter and aristocratic[]" patrons, d'Alembert noted that the alliance between authors and aristocrats "revealed to be a ploy of vanity."¹⁶¹ Price tables for different kinds of dedications represented the culmination of the system's decadence.¹⁶² In reaction to these practices, d'Alembert spelled out the modern equation of aesthetic value: "If you want to demonstrate your abilities, you should not limit yourself to writing for a small circle of friends or accommodating admirers; instead, you should . . . expose your work to the light of public opinion[;] . . . [a] man who feels that his talents and genius should earn him fame need only let public

155. See, e.g., Voss, *supra* note 138, at 733; MAROTTI, *supra* note 150, at 292-93, 321; Alistair Fox, *The Complaint of Poetry for the Death of Liberality: The Decline of Literary Patronage in the 1590s*, in *THE REIGN OF ELIZABETH I: COURT AND CULTURE IN THE LAST DECADE* 229 (John Guy ed., 1995); HAUSER, *supra* note 118, at 145.

156. See MAROTTI, *supra* note 150, at 321-22.

157. See John Walsh, *Literary Patronage in Medieval England, 1350-1550*, 58 *LIBR. REV.* 451, 455-58 (2009); MAROTTI, *supra* note 150, at 321.

158. MAROTTI, *supra* note 150, at 292-93, 313-14.

159. See SHOEMAKER, *supra* note 145, at 228.

160. See *id.* at 229 (discussing JEAN LE ROND D'ALEMBERT, *ESSAI SUR LA SOCIÉTÉ DES GENS DE LETTRES ET DES GRANDS: SUR LA RÉPUTATION, SUR LES MÉCÈNES, ET SUR LES RÉCOMPENSES LITTÉRAIRES* (1753)).

161. *Id.* at 229.

162. See *id.*

opinion do its work.”¹⁶³ At the very same time, on February 7, 1755, Samuel Johnson spat out all his outrage against an increasingly decadent patronage system. Dr. Johnson’s letter to Philip Dormer Stanhope, fourth Earl of Chesterfield, marked the acquired independence of the author from affiliation to an aristocratic patron.¹⁶⁴ Johnson could turn his back to the delusional love with the Earl of Chesterfield because a new lover, far more rewarding, had come on the scene: the market. Soon thereafter, in the *Encyclopédie*’s entry of “men of letters,” Voltaire sanctioned the transition to a newer system of financial support of creativity:

Men of letters . . . are ordinarily more independent-minded than other men, and those who are born without a fortune to their name can easily use the foundations created by Louis XIV to strengthen this independence; we no longer see, as we once did, dedicatory epistles offered up to vanity by self-interest and servility.¹⁶⁵

The impersonal royal patronage offered more independence than the informal networks of nobiliary patronage. The *Académie Française* was one such example of institutionalized patronage that reduced some of the uncertainties and ambiguities of patronage culture and contributed to the literary space’s “autonomization.”¹⁶⁶ Impersonality and rationality would later characterize modern state patronage. As Shoemaker noted, however, “[p]atronage did not disappear in the eighteenth century The specifically local

163. See *id.* at 228-29 (quoting 4 JEAN LE ROND D’ALEMBERT, ŒUVRES 347 (1822)).

164. See Letter from Samuel Johnson to the Earl of Chesterfield (Feb. 7, 1755), <http://www.ourcivilisation.com/smartboard/shop/johnsons/patron.htm>. The letter was motivated by what Johnson felt to be Lord Chesterfield’s opportunistic endorsement of his Dictionary of the English Language. *Id.* In fact, the Earl did not seem to meet Johnson’s expectations of support when Johnson was more in need before becoming a renowned figure of English restoration literature after the publication of his Dictionary. More than the letter, which was indeed moved by personal grievances against the Earl of Chesterfield, it was perhaps Johnson’s definition of a patron in his Dictionary that defined a changing attitude. Johnson defined a patron as “[o]ne who countenances, supports or protects. [C]ommonly a wretch who supports with insolence, and is paid with flattery.” SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1755). See also, for a discussion of Johnson’s letter, ALVIN KERNAN, SAMUEL JOHNSON & THE IMPACT OF PRINT (1987).

165. SHOEMAKER, *supra* note 145, at 230 (quoting Voltaire, *Gens de Lettres*, in 7 ENCYCLOPÉDIE OU DICTIONNAIRE RAISONNÉ DES SCIENCES, DES ARTS ET DES MÉTIERS 599 (Denis Diderot & Jean Le Rond d’Alembert eds., 1753)).

166. See VIALA, *supra* note 153, at 50 (describing the “autonomization” of the literary space as the recognition of literature as an independent field of study and noting that the *Académie* finally provided the men of letters with a sort of official recognition as a “men of letters”); see also SHOEMAKER, *supra* note 145, at 193-208.

informal, particularistic, and hierarchical patronage characteristic of the early seventeenth-century, however, became progressively less visible and central to the self-image of writers and patrons."¹⁶⁷

G. The Rhetoric of the Gift Shaping the Question of Literary Property

In 1586, Simon Marion, a French barrister, sought before the Royal Council the annulment of a royal privilege over a work of Antoine Muret.¹⁶⁸ In order to seek the annulment, Marion promoted the emergence of the notion of authorial property. He famously stated that as "by a common instinct, each man recognises every other to be the master of what he makes, invents, or creates [T]he author of a book is entirely its master" in the same terms God is the master of his creations.¹⁶⁹ However, following the Latin tradition that "*oratio publicata res libera est*,"¹⁷⁰ Marion acknowledged that publication ended the property right enjoyed by the author in his work.¹⁷¹ In other words, the act of publishing the work made it a gift to the public. Notwithstanding the emergence of the market, the construction of creativity as a gift exchange still justified the entire privilege system. According to Marion, the privilege was the return gift granted by the State, on behalf of the public, within the context of a tacit social contract.¹⁷² As a result,

167. SHOEMAKER, *supra* note 145, at 230.

168. See Laurent Pfister, *Author and Work in the French Print Privileges System: Some Milestones*, in PRIVILEGE AND PROPERTY, *supra* note 141, at 115, 124-26.

169. See *Simon Marion's Plea on Privileges (1586)*, PRIMARY SOURCES ON COPYRIGHT (1450-1900) (Lionel Bently & Martin Kretschmer eds., Andrew Counter trans.), http://www.copyrighthistory.org/cam/tools/request/showRepresentation?id=representation_f_1586&pagenumber=2_1&show=translation (last visited Feb. 9, 2016).

170. See QUINTUS AURELIUS SYMMACHUS, BOOK XVIII: THE EPISTLES, in 2 AUSONIUS 3, 4-5 (Hugh G. Evelyn White trans., 1921) (summing up, in a notorious epistolary exchange with Decimus Magnus Ausonius, the conventional Latin social norms governing authorship with the words "a speech delivered is common property").

171. See Pfister, *supra* note 168, at 126 (reporting that "the idea of a property limited by publication predominates almost until the end of the seventeenth century"). Then in 1633, d'Aubignac wrote, "[W]hat is done cannot be undone, say our customs, and what we make print is not anymore with us," and shortly thereafter, Richelet provided similar testimony by saying "an author who gives the public his works gives it up and strips [the] property right." *Id.* at 126 & n.47.

172. *Id.* at 126 & n.46 (stating "[w]hich is effectively a contract without a fixed name, mutually binding, since there is a fair obligation on both sides, the one

pleading against renewed or perpetual privileges, Marion noted, “[I]t is ungrateful to contravene the law of benefit, and to attempt to steal from the public sphere something which the munificence of its creator has put there, in order to appropriate it for oneself.”¹⁷³

The rhetoric of the gift still resounded powerfully from the nebula of the past in the constitutional moment of modern copyright law. At the time of the British “battle of the booksellers,” Justice Yates—one of the finest pleaders against perpetuity—notoriously employed the gift metaphor once again by noting that, from the moment of publication, literary works are thrown into a state of universal communion; “like land thrown into the highway, it is become a gift to the public.”¹⁷⁴ In 1774, the House of Lords ruled out perpetuity of literary property in a case brought by the Scottish publisher Alexander Donaldson against the Londonian publisher Thomas Beckett.¹⁷⁵ Lord Cadmen addressed the House of Lords by noting that “science and learning are in their nature *publici juris*, and they ought to be as free and general as air or water.”¹⁷⁶ The discourse about the gift and communal knowledge won the day, and *Donaldson* shaped the future of copyright law.

In France, again, Jean-François Gaultier’s social contract made the mechanics of the gift and return gift the rationale for authors’ protection. As Gaultier and, in part, Condorcet argued, raw materials of creativity come from a common and cumulative pool of cultural resources.¹⁷⁷ Individual creativity was the result of the author drawing from these common resources. Therefore, each author was indebted to society for the gift of this common knowledge. In order to repay this debt, Gaultier and Condorcet assumed that once a work is published, it belongs to everyone, rather than to the author or the

not wishing to give to the public his personal property, unless the public grant him this prerogative in return” (emphasis omitted)).

173. *Id.* (emphasis omitted).

174. *Tonson v. Collins* (1762) 96 Eng. Rep. 169, 185; 1 Black W. 301, 334.

175. *Donaldson v. Beckett* (1774) 1 Eng. Rep. 837; 2 Brown 129. The *Donaldson* case was in fact an appeal of *Millar v. Taylor*, (1769) 98 Eng. Rep. 201; 4 Burr. 2303. *Id.* at 129. The case centered over the publication by Donaldson of an edition of James Thomson’s *The Seasons*, whose copyright was claimed to be originally owned by Andrew Millar, who died in 1768, and later by Beckett and a group of other Londonian booksellers and printers. *Donaldson v. Beckett, London (1774)*, PRIMARY SOURCES ON COPYRIGHT (1450-1900) (Lionel Bently & Martin Kretschmer eds.), http://www.copyrighthistory.org/cam/tools/request/showRepresentation.php?id=representation_uk_1774&pagenumber=1_15&imagesize=small (last visited Feb. 9, 2016).

176. *Donaldson v. Beckett, London (1774)*, *supra* note 175.

177. Pfister, *supra* note 168, at 131.

publisher.¹⁷⁸ For his original contribution to the cumulative stock of cultural resources, the author would be entitled to receive a reward:

We do not claim here to go against the just property which belongs to genius. Nothing belongs to us more than that which our labours, our devices, our observations and our calculations have allowed us to discover or imagine. But once we have received payment for them, be it in money, or in glory, all our fellow citizens, all men, have the right to freely enjoy *the gift* that we have given them.¹⁷⁹

The traditional mechanics of gift exchange aiming at preserving a situation of everlasting and reciprocal indebtedness characterize Gaultier's social contract. Individual contributions to the cumulative pool of knowledge would serve to return the initial gift endowed by the society to the individual author. Society then would provide individual authors with a return gift—"be it in money, or in glory"—to keep the mechanics of gift exchange in motion.¹⁸⁰ Gaultier emphasized the reputational value of the individual contribution so typical of a gift exchange model. Glory and reputation are valued as instruments of payment as much as money. The endowment of the publication to the public would provide added value to the author "for the more a Book will be multiplied and spread, the more the Author will find strength in the welcome of the Public and in the judgement that the large numbers of Readers will have made of it, to rework and improve his Work."¹⁸¹

In 1791, Le Chapelier powerfully restated Marion's ideas before the French Parliament. Le Chapelier warned that "[t]he most sacred, the most legitimate, the most unassailable, [and] if I may say so, the most personal of all properties, is the work, the fruit of the mind of a writer; yet it is a property of a *totally different kind* than other properties."¹⁸² Le Chapelier continued by arguing that once the

178. *Id.*

179. *Gaultier's Memorandum for the Provincial Booksellers, Lyon (1776)*, PRIMARY SOURCES ON COPYRIGHT (1450-1900) (Lionel Bently & Martin Kretschmer eds., Laura Hough trans.) (emphasis added), http://www.copyrighthistory.org/cam/tools/request/showRepresentation?id=representation_f_1776&pagenumber=1_1&show=translation (last visited Feb. 9, 2016).

180. *Cf.* GREGORY S. BROWN, A FIELD OF HONOR: WRITERS, COURT CULTURE AND PUBLIC THEATER IN FRENCH LITERARY LIFE FROM RACINE TO THE REVOLUTION 76-94 (2005) (noting that in eighteenth-century playwrighting for the Comédie Française, the transfer of the manuscript was construed as a gift).

181. *Gaultier's Memorandum for the Provincial Booksellers, Lyon (1776)*, *supra* note 179.

182. *La Chapelier's Report, Paris (1791)*, PRIMARY SOURCES ON COPYRIGHT (1450-1900) (Lionel Bently & Martin Kretschmer eds., Freya Baetens trans.) (emphasis

work is disclosed to the public, “it seems that from this moment, the writer has associated the public with his property, or rather he has transferred it entirely to it.”¹⁸³ Therefore, Le Chapelier concluded that the author’s work is public property, and its disposal is under the author’s dominion for the term established by law:

[A]s it is highly fair that the men who cultivate the domain of the mind, retrieve some fruits from their work But also, after the fixed delay, the property of the public commences, [and] everyone has to be able to print, publish the works which have contributed to enlighten the human spirit.¹⁸⁴

There are striking similarities between Thomas Jefferson and Le Chapelier’s warnings. Jefferson summed up the copyright utilitarian view by endorsing much of Le Chapelier’s conclusions regarding the public and communal nature of knowledge:

If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me.¹⁸⁵

Jefferson concluded by saying that intellectual property rights might be necessary and “[s]ociety may give an exclusive right to the profit arising from [inventions] as an encouragement to men to pursue ideas which may produce utility.”¹⁸⁶ In his last book *Common as Air*, Lewis Hyde stressed the focus of the U.S. founders on “collectively valued ends,” rather than private wealth on matters related to creativity.¹⁸⁷ Again, the wording of the Jefferson Warning closely resembled the Medieval and Renaissance language of gift exchange in the circulation of knowledge and books. A dedication by Pierre Robert Olivétan for his translation of the Bible in 1535 recited: “[This dedicated Bible] is made only to be given and

added), http://www.copyrighthistory.org/cam/tools/request/showRepresentation?id=representation_f_1791&pagenumber=1_1&show=translation (last visited Feb. 9, 2016).

183. *Id.*

184. *Id.*

185. Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813), in 8 THE WRITINGS OF THOMAS JEFFERSON 326, 333-34 (Albert Ellery Bergh ed., 1907); see also JAMES BOYLE, THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND 21-22 (2008) (explaining in detail the “Jefferson Warning” included in the letter to McPherson).

186. Letter from Thomas Jefferson to Isaac McPherson, *supra* note 185, at 334.

187. LEWIS HYDE, COMMON AS AIR: REVOLUTION, ART AND OWNERSHIP 215-16 (2010).

communicated . . . it enriches those to whom it is given, but does not impoverish in any way those who give it.”¹⁸⁸ Actually, the discourse about the gift, which shaped the emergence of copyright law, is nowhere to be found on the radar of modern copyright policy discourse.

II. PROPERTIZATION AND COMMONS

A. The Road to Propertization and the Digital Land Grab

From the time of Pindar and Simonides—and until Romanticism commenced a process leading to the complete commodification of creativity—market exchange models ran parallel to gift exchange. Commodification developed steadily from the emergence of the Roman scribal publishing industry to the rise of the “empire of things” in the Renaissance and the expansion of the “privileged” printing industry. The market took over almost entirely by the beginning of the nineteenth century.¹⁸⁹ In the past, “law and economics scholars . . . launched a crusade to expose the evil of the commons—the evil . . . of not propertizing.”¹⁹⁰ Since Harold Demsetz, economists have viewed property rights as a desirable tool to internalize the full social value of people’s actions and therefore maximize the incentive to engage in those actions.¹⁹¹ An influential article written by Garret Hardin in 1968 termed the evil of not

188. Davis, *supra* note 97, at 80 (citing LA BIBLE. QUI EST TOUTE LA SAINTE ESCRITURE (Pierre Robert Olivétan trans., 1535)).

189. See Mark Rose, *Nine-Tenths of the Law: The English Copyright Debates and the Rhetoric of the Public Domain*, 66 LAW & CONTEMP. PROBS. 75, 85 (2003) (noting that since its inception, the public domain discourse was comparatively weak against the rhetoric of property, as the law is mostly about property, or as the adage has it, possession is nine-tenths of the law).

190. Anupam Chander & Madhavi Sunder, *The Romance of the Public Domain*, 92 CALIF. L. REV. 1331, 1332 (2004); see H. Scott Gordon, *The Economic Theory of a Common-Property Resource: The Fishery*, 62 J. POL. ECON. 124 (1954); Anthony Scott, *The Fishery: The Objectives of Sole Ownership*, 63 J. POL. ECON. 116 (1955) (introducing an economic analysis of fisheries that demonstrated that unlimited harvesting of high-demand fish by multiple individuals is both economically and environmentally unsustainable); see also Lee Anne Fennell, *Commons, Anticommons, Semicommons*, in RESEARCH HANDBOOK ON THE ECONOMICS OF PROPERTY LAW 35 (Kenneth Ayotte & Henry E. Smith eds., 2011); Chander & Sunder, *supra*, at 1332-33 (discussing the move toward propertization).

191. See Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967); see also Eli M. Salzberger, *Economic Analysis of the Public Domain*, in THE FUTURE OF THE PUBLIC DOMAIN: IDENTIFYING THE COMMONS IN INFORMATION LAW 27, 33-36 (Lucie Guibault & P. Bernt Hugenholtz eds., 2006).

propertizing as the tragedy of the commons.¹⁹² The subject of Hardin's essay was the carrying capacity of the commons and its limits.¹⁹³ Hardin identified the tragedy of the commons in the environmental dysfunctions of overuse and underinvestment found in the absence of a private property regime.¹⁹⁴ Hardin made it clear that any commons open to all, ungoverned by custom or law, will eventually collapse.¹⁹⁵ Hardin's analysis shaped the debate to come.¹⁹⁶ The fear of the tragedy of the commons propelled the idea that more property rights necessarily lead to the production of more information along with the enhancement of their diversity. In this perspective, the prevailing assumption is that anything of value within the public domain should be commodified. This "cultural stewardship model," as Julie Cohen termed it,¹⁹⁷ regarded ownership as the prerequisite of productive management, assumed that any commons is inefficient, and promoted the idea that opposing the expansion of intellectual property is a mistake in economic terms.¹⁹⁸ As Paul Goldstein put it:

[T]he best prescription for connecting authors to their audiences is to extend rights into every corner where consumers derive value from literary and artistic works. If history is any measure, the results should be to promote political as well as cultural diversity, ensuring a plenitude of voices, all with the chance to be heard.¹⁹⁹

This statement justifies the recent tremendous expansion of intellectual property rights.

In recent years, however, a revisionist moment has started to ponder whether our copyright policies struck the right balance

192. See Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968).

193. See *id.* at 1244.

194. See *id.*

195. See *id.*

196. See James Boyle, *Foreword: The Opposite of Property?*, 66 LAW & CONTEMP. PROBS. 1, 7 (2003) (noting that "any discussion of intellectual property or the public domain proceeds in the shadow of the 'the tragedy of the commons'").

197. See Julie E. Cohen, *Copyright, Commodification, and Culture: Locating the Public Domain*, in THE FUTURE OF THE PUBLIC DOMAIN, *supra* note 191, at 121, 134-35.

198. See WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW (2003).

199. PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX 216 (2003); see also R. Polk Wagner, *Information Wants to Be Free: Intellectual Property and the Mythologies of Control*, 103 COLUM. L. REV. 995, 995 (2003) (arguing that "increasing the appropriability of information goods is likely to increase, rather than diminish, the quantity of 'open' information").

between protection, incentives to creation, access to knowledge, and finally, the circulation and cumulative production of knowledge. Modern technological advancement has increasingly disoriented the coordinates upon which the solution of the copyright paradox should be calculated and exacerbated the tension within it.²⁰⁰ Scholars and the civil society have warned that “[w]e are in the midst of an enclosure movement in our information environment.”²⁰¹ Professor James Boyle has talked about a second enclosure movement that is now enclosing the “commons of the mind.”²⁰² Similar to the natural commons, fields, grazing lands, forests, and streams—which were enclosed in the sixteenth to nineteenth century in England by landowners and the state—the relentless expansion of intellectual property rights is enclosing the intellectual commons.²⁰³ In a very similar fashion, Peter Drahos and John Braithwaite have spoken of “information feudalism.”²⁰⁴ As in the case of medieval feudalism, a redistribution of property rights involves a transfer of knowledge from the intellectual commons to “media conglomerates and integrated life sciences corporations rather than individual scientists and authors.”²⁰⁵ Authors argued that a mix of technology and legislation promotes this process of “commodification of

200. See BOYLE, *supra* note 185, at 54-82 (discussing the reaction to and the misperception of the “Internet threat”).

201. Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on the Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354, 354 (1999). David Lange first identified this trend toward greater “propertization” of information and recognized that copyright protection means enclosure of the public domain. See David Lange, *Recognizing the Public Domain*, 44 LAW & CONTEMP. PROBS. 147, 150 (1981). Nonetheless, as Professor Lange noted in his seminal work, the expansion of property rights in information products has been the subject of cautionary critique, at least since Benjamin Kaplan, *An Unhurried View of Copyright: Proposals and Prospects*, 66 COLUM. L. REV. 831 (1966), and Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281 (1970).

202. See James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 LAW & CONTEMP. PROBS. 33 (2003); BOYLE, *supra* note 185, at 42-53; see also Keith E. Maskus & Jerome H. Reichman, *The Globalization of Private Knowledge Goods and the Privatization of Global Public Goods*, 7 J. INT’L ECON. L. 279 (2004); DAVID BOLLIER, *SILENT THEFT: THE PRIVATE PLUNDER OF OUR COMMON WEALTH* (2002).

203. See Boyle, *supra* note 202, at 33-37.

204. See PETER DRAHOS & JOHN BRAITHWAITE, *INFORMATION FEUDALISM: WHO OWNS THE KNOWLEDGE ECONOMY?* (2002).

205. *Id.* at 2-3.

information.”²⁰⁶ According to P. Bernt Hugenholtz and Lucie Guibault, “[i]tems of information, which in the ‘old’ economy had little or no economic value, such as factual data, personal data, genetic information and pure ideas, have acquired independent economic value in the current information age, and consequently become the object of property rights making the information a tradable commodity.”²⁰⁷ The commodification of information is propelled by the ability of new technologies to capture resources previously unowned and unprotected, as in a new digital land grab.²⁰⁸ Professor Elinor Ostrom and her colleague Charlotte Hess reinforced this point by arguing that “[i]nformation that used to be ‘free’ is now increasingly being privatized, monitored, encrypted, and restricted. The enclosure is caused by the conflicts and contradictions between intellectual property laws and the expanded capacities of new technologies.”²⁰⁹ Extreme propertization and commodification of information seems to be a counterintuitive option for the networked information society in light of the opportunities that digitization and Internet distribution offer. As Professor Paul David argued:

Today, the greater capacity for the dissemination of knowledge, for cultural creativity and for scientific research carried out by means of the enhanced facilities of computer-mediated telecommunication networks, has greatly raised the marginal social losses that are attributable to the restrictions that those adjustments in the copyright law have placed upon the domain of information search and exploitation.²¹⁰

206. See Neil Weinstock Netanel & Niva Elkin-Koren, *Introduction: The Commodification of Information*, in *THE COMMODIFICATION OF INFORMATION*, at viii (Niva Elkin-Koren & Neil Weinstock Netanel eds., 2002).

207. P. Bernt Hugenholtz & Lucie Guibault, *The Future of the Public Domain: An Introduction*, in *THE FUTURE OF THE PUBLIC DOMAIN*, *supra* note 191, at 1, 1.

208. See Charlotte Hess & Elinor Ostrom, *Introduction: An Overview of the Knowledge Commons*, in *UNDERSTANDING KNOWLEDGE AS A COMMONS: FROM THEORY TO PRACTICE* 3, 12 (Charlotte Hess & Elinor Ostrom eds., 2007); see also Pamela Samuelson, *The Copyright Grab*, *WIRED* (Jan. 1, 1996, 12:00 PM), http://www.wired.com/wired/archive/4.01/white.paper_pr.html.

209. Charlotte Hess & Elinor Ostrom, *Ideas, Artifacts, and Facilities: Information as a Common-Pool Resource*, 66 *LAW & CONTEMP. PROBS.* 111, 112 (2003).

210. Paul A. David & Jared Rubin, *Restricting Access to Books on the Internet: Some Unanticipated Effects of U.S. Copyright Legislation*, 5 *REV. ECON. RES. ON COPYRIGHT ISSUES* 23, 50 (2008).

B. Commons, Tragedies, and Comedies

Actually, there seem to be sustainable options to the road to propertization, especially in light of the value of open access in the digital environment.²¹¹ Nobel laureate Elinor Ostrom powerfully advocated the cause of the commons against the mantra of propertization. Ostrom’s works showed the inaccuracies of Hardin’s tragedy of the commons.²¹² Empirical studies, which Ostrom has spearheaded, showed that groups of people can effectively manage common resources under “suitable conditions, such as appropriate rules, good conflict-resolution mechanisms, and well-defined group boundaries.”²¹³ Under suitable conditions and proper governance, the tragedy of the commons becomes “the comedy of the commons.”²¹⁴

This is especially true for cultural commons.²¹⁵ Culture, in fact, stands as a quintessential example of comedic commons because it is enriched through reference the more people consume it.²¹⁶ This is

211. See, e.g., Yochai Benkler, *A Political Economy of the Public Domain: Markets in Information Goods Versus the Marketplace of Ideas*, in EXPANDING THE BOUNDARIES OF INTELLECTUAL PROPERTY: INNOVATION POLICY FOR THE KNOWLEDGE SOCIETY 267, 270-72 (Rochelle Cooper Dreyfuss, Diane Leenheer Zimmerman & Harry First eds., 2001) (noting that no economic theory of intellectual property and commons management supports the prediction stated by the dominant law-and-economics position).

212. See ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION (1990); ELINOR OSTROM, ROY GARDNER & JAMES WALKER, RULES, GAMES, AND COMMON-POOL RESOURCES (1994); THE DRAMA OF THE COMMONS (ELINOR OSTROM et al. eds., 2002).

213. See Hess & Ostrom, *supra* note 208, at 11; RIGHTS TO NATURE: ECOLOGICAL, ECONOMIC, CULTURAL, AND POLITICAL PRINCIPLES OF INSTITUTIONS FOR THE ENVIRONMENT (Susan Hanna et al. eds., 1996); MAKING THE COMMONS WORK: THEORY, PRACTICE, AND POLICY (Daniel W. Bromley et al. eds., 1992); COMMONS WITHOUT TRAGEDY: PROTECTING THE ENVIRONMENT FROM OVERPOPULATION—A NEW APPROACH (Robert V. Andelson ed., 1991); David Feeny et al., *The Tragedy of the Commons: Twenty-Two Years Later*, 18 HUM. ECOLOGY 1 (1990).

214. See Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 767-68 (1986) (arguing that the commons, rather than ineludibly turning into a tragedy of underproduction, may turn into a comedy of efficient production if managed through the appropriate rules).

215. See GOVERNING KNOWLEDGE COMMONS (Brett M. Frischmann, Michael J. Madison & Katherine J. Strandburg eds., 2014) (updating and expanding Elinor Ostrom’s research framework, to provide a general perspective on commons governance for information, knowledge, and culture and to adapt Ostrom’s work from natural resources to knowledge resources).

216. See Lawrence Lessig, *Re-Crafting a Public Domain*, 18 YALE J.L. & HUMAN. 56, 64 (2006).

because the carrying capacity of cultural commons is endless and cultural commons are non-rivalrous. Unlike eating an apple, my listening of a song does not subtract from another's. Therefore, cultural commons unveil the inaccuracy of the tragedy of the commons more than any other commons. The cultural commons' comedic nature undermines the argument that the market will always serve us well.²¹⁷ As traditional economic analysis *à la* Adam Smith goes, propertization should aid market forces that manage efficiently scarce resources.²¹⁸ Propertization should facilitate transactions by defining and evaluating assets and thus making them transferable. Nevertheless, traditional market principles may become inefficient when applied to cultural commons that are never by nature scarce. As the argument goes, rather than being a solution to manage efficiently scarce resources, propertization and enclosure in the cultural domain may be a wasteful option by cutting down social and economic positive externalities²¹⁹—especially in peer-based production environments. Actually, reviewing the peculiar nature of cultural commons, the academic literature developed the idea of the tragedy of the anti-commons,²²⁰ which lies in the underuse of scarce scientific resources because of excessive intellectual property rights and all related transaction costs.²²¹ This is the case, for example, of overpatenting in biomedical research.²²²

Cultural commons are valuable from several perspectives. First, the public domain plays a relevant role in terms of market efficiency. From an economic standpoint, a market with a shrinking public domain would be especially inefficient. Nobel laureate Joseph Stiglitz stressed this point by noting that:

217. See *Cultural Commons*, LEWIS HYDE, <http://www.lewishyde.com/in-progress/cultural-commons> (last visited Feb. 9, 2016).

218. See Rose, *supra* note 214, at 711-12.

219. See Brett M. Frischmann & Mark A. Lemley, *Spillovers*, 107 COLUM. L. REV. 257 (2007).

220. See Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621 (1998); see also MICHAEL HELLER, *THE GRIDLOCK ECONOMY: HOW TOO MUCH OWNERSHIP WRECKS MARKETS, STOPS INNOVATION, AND COSTS LIVES* 2 (2008).

221. See JAMES BESSEN & MICHAEL J. MEURER, *PATENT FAILURE: HOW JUDGES, BUREAUCRATS, AND LAWYERS PUT INNOVATORS AT RISK* (2008) (arguing that the cost of litigation and the overall cost of the patent system overcome the advantages).

222. See Michael A. Heller & Rebecca S. Eisenberg, *Can Patents Deter Innovation? The Anticommons in Biomedical Research*, 280 SCIENCE 698 (1998).

It is imperative to understand the ways in which the production and distribution of knowledge and information differs from that of goods like steel and cars. . . . The fact that knowledge is, in central ways, a public good and that there are important externalities means that exclusive or excessive reliance on the market may not result in economic efficiency.²²³

Restricting access to information would increase the inefficiency of the market because perfect information makes the perfect market.²²⁴ A market that commodifies information excessively will be less efficient in allocating resources in our society since key information to facilitate that allocation will be more difficult to find.²²⁵ Second, the public domain is an engine of democratization by ensuring proper access to information regardless of the market power of the players. This democratic value of the public domain has been immensely enhanced by the ubiquity of the interconnected society and the power of propagation of digital networks.²²⁶ Third, propertization reduces the “public domain effect,” which is the value produced by a work entering into the public domain and the decreased deadweight loss coming from restricting access to it.²²⁷ Fourth, business models based on open access and public domain approaches would produce considerable economic and social value²²⁸ on many different levels.²²⁹ In the case of file sharing, for example, several studies found significant benefits of free access.²³⁰ Open

223. JOSEPH E. STIGLITZ, WORLD BANK DEP’T FOR TRADE & INDUS. & CTR. FOR ECON. POLICY RESEARCH, PUBLIC POLICY FOR A KNOWLEDGE ECONOMY 25-26 (1999), <http://akgul.bilkent.edu.tr/BT-BE/knowledge-economy.pdf>.

224. See Sanford J. Grossman & Joseph E. Stiglitz, *On the Impossibility of Informationally Efficient Markets*, 70 AM. ECON. REV. 393 (1980).

225. See Giancarlo Frosio, *Communia and the European Public Domain Project: A Politics of the Public Domain*, in THE DIGITAL PUBLIC DOMAIN: FOUNDATIONS FOR AN OPEN CULTURE 3, 13-14 (Melanie Dulong de Rosnay & Juan Carlos De Martin eds., 2012), <http://www.openbookpublishers.com/product/93> (making the same point with similar wording).

226. See *id.* at 14.

227. See *id.* at 10.

228. The research carried out by Brett Frischmann points exactly in this direction. See generally BRETT M. FRISCHMANN, *INFRASTRUCTURE: THE SOCIAL VALUE OF SHARED RESOURCES* (2012); Brett M. Frischmann, *An Economic Theory of Infrastructure and Commons Management*, 89 MINN. L. REV. 917 (2005).

229. See Pamela Samuelson, *Challenges in Mapping the Public Domain*, in THE FUTURE OF THE PUBLIC DOMAIN, *supra* note 191, at 7, 22 (identifying eight values of public domain works); see also RUFUS POLLOCK, *THE VALUE OF THE PUBLIC DOMAIN* 8 (2006).

230. See Frosio, *supra* note 225, at 11-12; GIANCARLO F. FROSIO, *COMMUNIA: FINAL REPORT* 12-13 (Mar. 31, 2011) (reporting for the European Commission on behalf of the COMMUNIA Network and the NEXA Center),

source software also exemplifies the value of an open approach to the production of information goods. The Internet and the World Wide Web are further examples of the great wealth that can be built upon open access models. These technologies were non-proprietary, and openness was the key to their revolutionary success. Again, online search engines, such as Google, produce relevant social benefits through their service and generate very large revenue by copying “open” information on the web.²³¹ Several studies highlighted that a public domain approach to weather, geographical data, and public sector information in general may yield a substantial long-run value, running into the tens of billions or hundreds of billions of dollars.²³² A recent study showed that industries based on or benefiting from fair use and copyright exceptions exceeded GDP, employment, productivity, and export growth of the overall economy.²³³ Further, the study revealed that fair use industries have grown dramatically within the past twenty years, since the advent of the Internet and the digital information revolution.²³⁴ These data may suggest that in the digital environment, open access and public domain business models may spur growth at a faster pace than traditional, proprietary business models.

<http://www.communia-project.eu/final-report>; see also Giancarlo Frosio, *Digital Piracy Debunked: A Short Note on Intermediary Liability and Digital Threats*, 5(1) INTERNET POL'Y REV. (forthcoming 2016).

231. See Frosio *supra* note 225, at 12.

232. See PIRA INT'L LTD., UNIV. OF E. ANGLIA & KNOWLEDGEVIEW LTD., COMMERCIAL EXPLOITATION OF EUROPE'S PUBLIC SECTOR INFORMATION (Sept. 20, 2000), http://ec.europa.eu/information_society/policy/psi/docs/pdfs/pira_study/commercial_final_report.pdf (reporting for the European Commission, Information Society DG); R.E.W. Pettifer, *Towards a Stronger European Market in Applied Meteorology*, 15 METEOROLOGICAL APPLICATIONS 305 (2008), <http://onlinelibrary.wiley.com/doi/10.1002/met.75/abstract>; see also PETER WEISS, NAT'L WEATHER SERV., BORDERS IN CYBERSPACE: CONFLICTING PUBLIC SECTOR INFORMATION POLICIES AND THEIR ECONOMIC IMPACTS, (Feb. 2002), http://www.nws.noaa.gov/sp/Borders_report.pdf.

233. See THOMAS ROGERS & ANDREW SZAMOSSZEGI, FAIR USE IN THE U.S. ECONOMY: ECONOMIC CONTRIBUTION OF INDUSTRIES RELYING ON FAIR USE (2007), <http://www.cciinet.org/wp-content/uploads/library/FairUseStudy-Sep12.pdf> (presenting a study prepared for the Computer & Communications Industry Association); see also Christophe Geiger, *Promoting Creativity Through Copyright Limitations: Reflections on the Concept of Exclusivity in Copyright Law*, 12 VAND. J. ENT. & TECH. L. 515 (2010) (discussing the promotional value of exception and limitation to the advancement of creativity from a more theoretical point of view, rather than through a quantitative analysis).

234. ROGERS & SZAMOSSZEGI, *supra* note 233, at 7.

C. Mass Collaboration, Decentralization, and Openness

Boosted by technological innovation, collaboration is regaining its natural role in human interactions. Recent empirical research found that rather than the *Homo economicus*, we are “a cooperative species.”²³⁵ Men are complex entities that cannot be explained only through economic incentives; instead, several other factors come into play, such as altruism.²³⁶ In his recent book *Together*, social scientist Richard Sennett emphasizes the role of collaboration in human life and reminds readers that “cooperation precedes individuation: cooperation is the foundation of human development, in that we learn how to be together before we learn how to stand apart.”²³⁷ Building upon Émile Durkheim’s and Marcel Mauss’s works,²³⁸ emerging anti-utilitarian schools designed and promoted a “new political economy,” whose specificity

is to link together the question of the political and religious foundation of societies with the question of the gift, of recognition and of the building of individual and collective identities. Its main hypothesis is that men are not only self-interested animals, eager only to get and own more and more things and riches, but that first of all they desire to be *recognized* The anti-utilitarian hypothesis is that Human beings’ first desire is to be recognized and valued as givers.²³⁹

235. See SAMUEL BOWLES & HERBERT GINTIS, A COOPERATIVE SPECIES: HUMAN RECIPROCITY AND ITS EVOLUTION (2011); see also New Economic Thinking, *The Death of “Homo Economicus,”* YOUTUBE (June 19, 2015), <https://www.youtube.com/watch?v=ParPPYMzfQM&feature=youtu.be>; ADAM SMITH, THE THEORY OF MORAL SENTIMENTS (1759); cf. JEREMY RIFKIN, THE ZERO MARGINAL COST SOCIETY: THE INTERNET OF THINGS, THE COLLABORATIVE COMMONS, AND THE ECLIPSE OF CAPITALISM (2014) [hereinafter RIFKIN, THE ZERO MARGINAL COST SOCIETY]; JEREMY RIFKIN, THE EMPATHIC CIVILIZATION: THE RACE TO GLOBAL CONSCIOUSNESS IN A WORLD IN CRISIS (2009); *The Zeitgeist Movement Defined: Realizing a New Train of Thought*, THE ZEITGEIST MOVEMENT, <http://thezeitgeistmovement.com/orientation> (last visited Feb 9, 2016).

236. See *The Zeitgeist Movement Defined*, *supra* note 235.

237. See RICHARD SENNETT, TOGETHER: THE RITUALS, PLEASURES AND POLITICS OF COOPERATION 13 (2012).

238. See ÉMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY (Steven Lukes ed., W.D. Hall trans., Free Press 2014) (assuming that humans are inherently egoistic but our collective consciousness, which is composed by norms, beliefs and values, overrides our egoism; in particular, according to Durkheim, it is the emotional part of our collective consciousness, culture, that overrides self-interest); MAUSS, *supra* note 4.

239. CAILLÉ, *supra* note 5, at 7; see also, e.g., ALAIN CAILLÉ, CRITIQUE DE LA RAISON UTILITAIRE (1989).

From *Life in a Day* (Ridley Scott's collaborative YouTube movie)²⁴⁰ and virtual choirs²⁴¹ to volunteer astronomers looking for new galaxies in the Galaxy Zoo,²⁴² taxonomists classifying images from collections of herbarium specimens in the *Herbaria@home* project,²⁴³ or millions of users enlisting in the *SETI@Home* project to search for signs of extraterrestrial life²⁴⁴—online collaboration has projected granular individual contributions in the kaleidoscopic multiplier of the Net.²⁴⁵ Likewise, collaborative authorship and social editing in Wikipedia and wiki environments have become increasingly influential models for content creation and dissemination, so that commentators are now talking about wikinomics or wikiborg.²⁴⁶ Sharing is a contagious process insofar as it has rapidly exploded on a previously unimaginable scale.²⁴⁷ It reaches beyond creative endeavors by moving to more and more areas of our lives. Recent research highlights the rise of collaborative

240. See *Life in a Day*, YOUTUBE (2011), <http://www.youtube.com/user/lifeinaday?gl=US>.

241. See Eric Whitacre, *About the Virtual Choir*, ERIC WHITACRE, <http://ericwhitacre.com/the-virtual-choir> (last visited Feb. 9, 2016).

242. GALAXY ZOO, <http://www.galaxyzoo.org/> (last visited Feb. 9, 2016).

243. HERBARIA@HOME, <http://herbariaunited.org/atHome/> (last visited Feb. 9, 2016).

244. See SETI@HOME, <http://setiathome.berkeley.edu> (last visited Feb. 9, 2016).

245. See Alex Wright, *Managing Scientific Inquiry in a Laboratory the Size of the Web*, N.Y. TIMES (Dec. 27, 2010), http://www.nytimes.com/2010/12/28/science/28citizen.html?_r=1; Mark Cooper, *From Wifi to Wikis and Open Source: The Political Economy of Collaborative Production in the Digital Information Age*, 5 J. TELECOMM. & HIGH TECH. L. 125, 126 (2006).

246. See DON TAPSCOTT & ANTHONY D. WILLIAMS, WIKINOMICS: HOW MASS COLLABORATION CHANGES EVERYTHING 10-11 (2008); Adam Hyde, *Experiences in Open Publishing*, FLOSS MANUALS (Aug. 27, 2009), <http://lists.flossmanuals.net/pipermail/discuss-flossmanuals.net/2009-August/002096.html> (presenting in Wikimania 2009 in a panel "Authorship, Copyright, and the Wikiborg"); see also Shun-ling Chen, *Collaborative Authorship: From Folklore to the Wikiborg*, 2011 J.L., TECH. & POL'Y 131, 147-50. For a discussion of Wikipedia and wiki environments as a sharing economy and a cultural commons, see Michael J. Madison, Brett M. Frischmann & Katherine J. Strandburg, *Constructing Commons in the Cultural Environment*, 95 CORNELL L. REV. 657 (2010); LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY 156-72 (2008). Cf. Jon M. Garon, *Wiki Authorship, Social Media, and the Curatorial Audience*, 1 HARV. J. SPORTS ENT. L. 95 (2010) (noting that the lack of attribution may be running counter to the developing social networking expectations and suggesting that collaborative authorship must adapt its normative expectations regarding attribution).

247. See LESSIG, *supra* note 246, at 143-76 (discussing sharing economies).

consumption.²⁴⁸ Swapping, sharing, bartering, trading, and renting have been reinvented through technology and peer-to-peer communities. Collaborative consumption is rising in enormous marketplaces, such as eBay and Craigslist, and emerging sectors such as peer-to-peer money lending (Zopa);²⁴⁹ “swap trading” (Swap);²⁵⁰ car sharing (Zipcar);²⁵¹ ridesharing (Zimride);²⁵² apartment sharing (Airbnb);²⁵³ skills sharing (Skillshare);²⁵⁴ time sharing (TaskRabbit);²⁵⁵ land sharing (Landshare);²⁵⁶ kid clothes sharing (thredUP);²⁵⁷ or anything else you may need (Share Anything).²⁵⁸

In cyberspace, human intelligence has become collective through user-generated mass collaboration,²⁵⁹ which—as several authors have increasingly noted—may produce social and economic enrichment to a far greater extent than in the past.²⁶⁰ The power of

248. See RACHEL BOTSMAN & ROO ROGERS, *WHAT’S MINE IS YOURS: THE RISE OF COLLABORATIVE CONSUMPTION* (2010); see also Michel Bauwens, *Scope, Not Scale: What Do Medieval Monks, Cuban Socialists and Wikipedia Have in Common?*, AL JAZEERA (Mar. 12, 2012, 11:31 AM), http://www.aljazeera.com/indepth/opinion/2012/03/2012319125340857774.html?utm_content=automateplus&utm_campaign=trial6&utm_source=SocialFlow&utm_medium=MasterAccount&utm_term=tweets (discussing the mutualizing of knowledge and the mutualizing of physical resources as the economies of scope of our age); Neal Gorenflo, *The New Sharing Economy*, SHAREABLE (Dec. 24, 2010), <http://www.shareable.net/blog/the-new-sharing-economy> (describing Sharing by Latitude, a study in collaboration with Sharable Magazine); *Sharing Is Contagious: An Infographic on the Rise of Collaborative Consumption*, GOOD MAG. (Sept. 5, 2010), <https://magazine.good.is/infographics/sharing-is-contagious-the-rise-of-collaborative-consumption>.

249. ZOPA, <http://uk.zopa.com> (last visited Feb. 9, 2016).

250. SWAP, <https://www.swap.com> (last visited Feb. 9, 2016).

251. ZIPCAR, <http://www.zipcar.com> (last visited Feb. 9, 2016).

252. ZIMRIDE, <http://www.zimride.com> (last visited Feb. 9, 2016).

253. AIRBNB, <http://www.airbnb.com> (last visited Feb. 9, 2016).

254. SKILLSHARE, <http://www.skillshare.com> (last visited Feb. 9, 2016).

255. TASKRABBIT, <http://www.taskrabbit.com> (last visited Feb. 9, 2016).

256. LANDSHARE, <http://www.landshare.net> (last visited Feb. 9, 2016).

257. THREDUP, <http://www.thredup.com> (last visited Feb. 9, 2016).

258. SHARE-ANYTHING, <http://www.share-anything.org> (last visited Feb. 9, 2016).

259. See PIERRE LÉVY, *L’INTELLIGENCE COLLECTIVE: POUR UNE ANTHOLOGIE DU CYBERSPACE* (1997).

260. A large quantity of literature has been produced on mass collaboration in the networked information society. See CLAY SHIRKY, *COGNITIVE SURPLUS: CREATIVITY AND GENEROSITY IN A CONNECTED AGE* (2010) (discussing the notion of “cognitive surplus” of online brainpower); CHARLES LEADBEATER, *WE-THINK: MASS INNOVATION, NOT MASS PRODUCTION* (2d ed. 2009); TAPSCOTT & WILLIAMS, *supra* note 246; CLAY SHIRKY, *HERE COMES EVERYBODY: THE POWER OF ORGANIZING WITHOUT ORGANIZATIONS* (2008); DAVID WEINBERGER, *EVERYTHING IS*

online collective intelligence may challenge the individualistic, post-romantic, creative paradigm; promoting the return of a pre-modern communitarian and collective approach to creativity and the emergence of a new cultural landscape.²⁶¹ Digital creativity is mass collaborative, shared, open, user-generated, and remixed. David Bollier described the Internet revolution as a monumental shift:

I believe we are moving into a new kind of cultural if not economic reality. We are moving away from a world organized around centralized control, strict intellectual property rights and hierarchies of credentialed experts, to a radically different order. The new order is predicated upon open access, decentralized participation, and cheap and easy sharing.²⁶²

Yochai Benkler defined the high generative capacity of online commons as the “wealth of networks.”²⁶³ In *The Wealth of Networks*, Benkler wrote: “Radical decentralization of intelligence in our communications network and the centrality of information, knowledge, culture, and ideas to advanced economic activity are leading to a new stage of the information economy—the networked information economy.”²⁶⁴ Benkler qualified the concept by saying that “[w]hat characterizes the networked information economy is that decentralized individual action—specifically, new and important cooperative and coordinate action carried out through radically distributed, nonmarket mechanisms that do not depend on proprietary strategies—plays a much greater role than it did, or could have, in the industrial information economy.”²⁶⁵

The wealth of networks lies in networked peer production that is highly generative because it is modular, granular, and cheap to integrate the results.²⁶⁶ To borrow Jerome Reichman’s categories, new forms of innovation allow the transformation of small grains of

MISCELLANEOUS: THE POWER OF THE NEW DIGITAL DISORDER (2008); CASS R. SUNSTEIN, *INFOTOPIA: HOW MANY MINDS PRODUCE KNOWLEDGE* (2006).

261. For a discussion of the tension between the pre-modern and post-romantic creative paradigms, see Giancarlo F. Frosio, *Rediscovering Cumulative Creativity from the Oral Formulaic Tradition to Digital Remix: Can I Get a Witness?*, 13 J. MARSHALL REV. INTELL. PROP. L. 341 (2014).

262. David Bollier, *The Commons as a New Sector of Value-Creation: It’s Time to Recognize and Protect the Distinctive Wealth Generated by Online Commons* (Apr. 22, 2008), <http://www.onthecommons.org/commons-new-sector-value-creation>.

263. See YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* (2006).

264. *Id.* at 32.

265. *Id.* at 3.

266. *Id.* at 91-127.

information and innovation into distributed and collective forms of intelligence.²⁶⁷ As Benkler puts it:

the networked environment makes possible a new modality of organizing production: radically decentralized, collaborative, and nonproprietary; based on sharing resources and outputs among widely distributed, loosely connected individuals who cooperate with each other without relying on either market signals or managerial commands. This is what I call "commons-based peer production."²⁶⁸

According to Benkler, the networked information economy improves individual capacities in three ways. First, individuals can "do more for and by themselves."²⁶⁹ Second, the networked information economy enhances individuals' "capacity to do more in loose commonality with others, without being constrained to organize their relationship through a price system or in traditional hierarchical models."²⁷⁰ Finally, "it improves the capacity of individuals to do more in formal organizations that operate outside the market sphere."²⁷¹

The new economics of digital distribution democratized innovation.²⁷² Flexibility, decentralization, cooperative creation, and customization out-performed corporate bureaucracies that were unwilling to experiment because it was thought to be too risky and costly. The *Charter for Innovation, Creativity and Access to Knowledge* declares:

We are in the midst of a revolution in the way that knowledge and culture are created, accessed and transformed. Citizens, artists and consumers are no longer powerless and isolated in the face of the content

267. See, e.g., J.H. Reichman, *Of Green Tulips and Legal Kudzu: Repackaging Rights in Subpatentable Innovation*, 53 VAND. L. REV. 1743 (2000).

268. BENKLER, *supra* note 263, at 60.

269. *Id.* at 8.

270. *Id.*

271. *Id.*; see also Yochai Benkler & Helen Nissenbaum, *Commons-Based Peer Production and Virtue*, 14 J. POL. PHIL. 394, 394-95 (2006); cf. Hetcher, *supra* note 2; STEVEN WEBER, *THE SUCCESS OF OPEN SOURCE 1* (2004).

272. See ERIC VON HIPPEL, *DEMOCRATIZING INNOVATION 2* (2005) (noting that "[o]pen, distributed innovation is 'attacking' a major structure of the social division of labor. Many firms and industries must make fundamental changes to long-held business models in order to adapt"); see also Robert Cunningham, *The Separation of (Economic) Power: A Cultural Environmental Perspective of Social Production and the Networked Public Sphere*, 11 J. HIGH TECH. L. 1, 55 (2010) (noting that social production "affords the possibility of harnessing the critical liberal function of separating (economic) power" by diversifying the modes of production).

production and distribution industries: now individuals across many different spheres collaborate, participate and decide.²⁷³

In the networked information economy, innovation and creativity are becoming independent from centralized company environments. According to Neil Netanel, “[m]ajor film studios, record labels, television and radio broadcasters, and print publishers came to dominate our cultural landscape because they have the funds and infrastructure to mass-produce, package, and distribute authors’ creations. But digital technology radically changes that equation by drastically reducing the cost of production and distribution.”²⁷⁴

In the emerging ecosystem of “commons-based peer production,” open access models play a pivotal role. In this respect, theoretical developments have been coupled with efforts to turn commons theory into practice. With technology facilitating a vast array of cooperative creative projects, community production has increasingly become a solution to cultural production’s free-rider problems by converging initiatives, such as open source software, Creative Commons, Wiki environments, or SSRN.²⁷⁵ Open access in academic publishing follows in the footsteps of these many other initiatives.²⁷⁶ Actually, Creative Commons, the open-source software movement, and the free software movement created a commons through private agreement and technological implementation.²⁷⁷ Again, private firms in the biotechnological and software fields have decided to forgo property rights to reduce transaction costs and

273. FCForum, *Charter for Innovation, Creativity and Access to Knowledge: Citizens’ and Artists’ Rights in the Digital Age*, FREE CULTURE F. (2010), <http://fcforum.net/en/charter>.

274. NEIL WEINSTOCK NETANEL, COPYRIGHT’S PARADOX 76 (2008).

275. See John Willinsky, *The Unacknowledged Convergence of Open Source, Open Access, and Open Science*, FIRST MONDAY (Aug. 1, 2005), <http://www.firstmonday.org/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/1265/1185> (discussing the need to emphasize the converging nature of these initiatives serving as an active resistance to the extension of intellectual property rights and the emersion of an approach treating intellectual properties as public goods); see also Lisa Mandrusiak, *Balancing Open Source Paradigms and Traditional Intellectual Property Models to Optimize Innovation*, 63 ME. L. REV. 303, 304-05 (2010).

276. See GIANCARLO F. FROSIO, OPEN ACCESS PUBLISHING: A LITERATURE REVIEW 23-82 (2014), <http://www.create.ac.uk/publications/open-access-publishing-a-literature-review> (study prepared for the RCUK Centre for Copyright and New Business Models in the Creative Economy discussing the open access publishing movement and several open access initiatives and projects).

277. See *id.* at 29-35.

circumvent any “anti-commons” failure.²⁷⁸ As Reichman noted, property rules when applied to small grains of creativity create “legal kudzu.”²⁷⁹ Therefore, small grains of innovation are best together in a contractually reconstructed commons governed by liability rather than property rules.²⁸⁰

Technology has made possible large-scale cooperative behavior and gift exchange that was previously limited to rarified groups.²⁸¹ Initially, the large-scale cooperative behavior emerged and evolved in software communities²⁸² and academia.²⁸³ Benkler describes open source software as the “quintessential instance of commons-based peer production.”²⁸⁴ However, these cooperative and participative behaviors have spread far beyond the initial, rarified communities. From open source, we have been moving to open culture.²⁸⁵ Open

278. See Robert P. Merges, *A New Dynamism in the Public Domain*, 71 U. CHI. L. REV. 183, 186-91 (2004); see also Eli M. Salzberger, *Economic Analysis of the Public Domain*, in THE FUTURE OF THE PUBLIC DOMAIN, *supra* note 191, at 27, 36 (noting that these phenomena of de-propertization can also be seen as responses to the inefficient expansion of intellectual property rights).

279. See Reichman, *supra* note 267, at 1747-53.

280. For a review of the notion of contractually constructed commons, see J.H. Reichman & Paul F. Uhlir, *A Contractually Reconstructed Research Commons for Scientific Data in a Highly Protectionist Intellectual Property Environment*, 66 LAW & CONTEMP. PROBS. 315 (2003); see also JEROME H. REICHMAN, PAUL F. UHLIR & TOM DEDEURWAERDERE, GOVERNING DIGITALLY INTEGRATED GENETIC RESOURCES, DATA, AND LITERATURE: GLOBAL INTELLECTUAL PROPERTY STRATEGIES FOR A REDESIGNED MICROBIAL RESEARCH COMMONS (2016); LAWRENCE LESSIG, THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD (2002); Madison, Frischmann & Strandburg, *supra* note 246; Molly Shaffer Van Houweling, *Cultural Environmentalism and the Constructed Commons*, 70 LAW & CONTEMP. PROBS. 23 (2007).

281. See LEWIS HYDE, THE GIFT: CREATIVITY AND THE ARTIST IN THE MODERN WORLD (Vintage Books 2d ed. 2007) (1979) (describing creativity exchange among artists); ROBERT K. MERTON, THE SOCIOLOGY OF SCIENCE: THEORETICAL AND EMPIRICAL INVESTIGATIONS 273-75, 339 (Norman W. Storer ed., 1973) (exploring norms of sharing among scientists).

282. See BENKLER, *supra* note 263, at 63-68; Yochai Benkler, *Sharing Nicely: On Shareable Goods and the Emergence of Sharing as a Modality of Economic Production*, 114 YALE L.J. 273 (2004) [hereinafter Benkler, *Sharing Nicely*]; Yochai Benkler, *Coase's Penguin, or, Linux and The Nature of the Firm*, 112 YALE L.J. 369, 374 (2002).

283. See Michael J. Madison, Brett M. Frischmann & Katherine J. Strandburg, *The University as Constructed Cultural Commons*, 30 WASH. U. J.L. & POL'Y 365 (2009).

284. BENKLER, *supra* note 263, at 63.

285. See Lee Davis, *Should the Logic of 'Open Source' Be Applied to Digital Cultural Goods? An Exploratory Essay*, in COPYRIGHT AND OTHER FAIRY TALES: HANS CHRISTIAN ANDERSEN AND THE COMMODIFICATION OF CREATIVITY 129 (Helle

networks and networked peer collaboration have transformed markets by enabling amateurs to innovate.²⁸⁶ David Bollier described this process as a “viral spiral” by which Internet users come together to build digital tools and share content on self-created online commons.²⁸⁷ Individual experimentation, sub-cultures, and a community of social trust created Linux, Wikipedia, Facebook, YouTube, and major political websites.

III. THE RETURN OF THE GIFT

A. The Return of the Gift from Clan to Crowd Society

As was discussed at length, gift exchange models always played a very relevant role in the history of creativity. Several examples emerge from antiquity, such as the negative reaction to the Sophists teaching in exchange of a reward, the contraposition between Pindar and Simonides, Hermodoros selling Plato’s lectures and earning such widespread contempt as to become proverbial, or the emphasis on *amicitia* of the Roman authorial experience. Later, Saint Columba’s strenuous defense of open access to knowledge exemplified the medieval and Renaissance belief that *scientia donum dei est, unde vendi non potest*. Gift exchange had a relevant role well into the Renaissance. In the sixteenth and seventeenth centuries, the role of the gift was to open up channels of communication and seal

Porsdam ed., 2006). These cooperative behaviors reach beyond the content level into the infrastructural level with grassroots community networks or mesh networks. See Primavera De Filippi & Félix Tréguer, *Expanding the Internet Commons: The Subversive Potential of Wireless Community Networks*, J. PEER PRODUCTION (Jan. 2015), <http://peerproduction.net/issues/issue-6-disruption-and-the-law/peer-reviewed-articles/expanding-the-internet-commons-the-subversive-potential-of-wireless-community-networks> (discussing the phenomenon of decentralization in telecommunications networks and the revival of grassroots (Wireless) community networks, which (i) “are deployed *by* the community and *for* the community at the local or regional level,” (ii) “rather than being driven by profits, they focus on the actual needs of the needs of its participants,” and (iii) “experiment with novel models of distributed governance relying on cooperation and sharing among a community of peers”).

286. See Stefan Thomke & Eric von Hippel, *Customers as Innovators: A New Way to Create Value*, 80 HARV. BUS. REV., Apr. 2002, at 74.

287. See DAVID BOLLIER, *VIRAL SPIRAL: HOW THE COMMONERS BUILT A DIGITAL REPUBLIC OF THEIR OWN* (2008), https://www.jus.uio.no/sisu/viral_spiral.david_bollier/landscape.b5.pdf; see also Madison, Frischmann & Strandburg, *supra* note 246, at 657 (discussing, together with other examples, jam-band fan communities as a constructed cultural commons).

the network of interpersonal relations. At the time of the British and French "battle of the booksellers," the rhetoric of the gift still resounded powerfully from the nebula of the past in the words of Justice Yates or Jean-François Gaultier and shaped the constitutional moment of modern copyright law. In this sense, the return of gift exchange models has a credible source in the history of creativity.

Anthropologists and social scientists have long studied reciprocity and gift exchange in ancient and modern society.²⁸⁸ The anthropological studies of gift exchange have been very influential in research into the phenomenon of open source software and hacker communities. Anthropologist Steve Mizrach's early study distilled a set of common ethical practices in hacker communities.²⁸⁹ They build upon sharing and freedom of information according to the maxim that "[i]nformation increases in value by sharing it with other people. Data can be the basis for someone else's learning; software can be improved collectively."²⁹⁰ Hacker ethics' *grundnorm* is "[t]he belief that information-sharing is a powerful positive good, and that it is an ethical duty of hackers to share their expertise by writing free software and facilitating access to information and to computing resources wherever possible."²⁹¹ According to Andrés Guadamuz González, "hackers achieve a sense of community in which sharing of information becomes essential."²⁹² In *The Cathedral and the Bazaar*, Eric S. Raymond analyzed "the hacker culture as a 'gift culture' in which participants compete for prestige by giving time, energy, and creativity away."²⁹³ Yochai Benkler extended the same conclusions to the open source movement.²⁹⁴

288. See, e.g., MAUSS, *supra* note 4; CLAUDE LÉVI-STRAUSS, *THE ELEMENTARY STRUCTURES OF KINSHIP* (Rodney Needham ed., James Harle Bell & John Richard von Sturmer trans., Beacon Press 1969) (1949).

289. See Steve Mizrach, *Is There a Hacker Ethic for 90s Hackers?*, HACKER KULTURE, <http://www.dvara.net/hk/90shackers.asp> (last visited Feb. 9, 2016).

290. Jonas Löwgren, *Hacker Culture(s)*, HACKER KULTURE (Feb. 23, 2000), <http://www.dvara.net/hk/hackerculture.asp>.

291. ERIC S. RAYMOND, *THE NEW HACKER'S DICTIONARY* 234 (3d ed. 1996).

292. Andrés Guadamuz González, *The Digital Divide: It's the Content, Stupid—Part 2*, 11 *COMPUTER & TELECOMM. L. REV.* 113, 115 (2005).

293. ERIC S. RAYMOND, *THE CATHEDRAL AND THE BAZAAR: MUSINGS ON LINUX AND OPEN SOURCE BY AN ACCIDENTAL REVOLUTIONARY* 65 (2001); see also MCKENZIE WARK, *A HACKER MANIFESTO* (2004); Hillary Bays & Miranda Mowbray, *Cookies, Gift-Giving, and the Internet*, *FIRST MONDAY* (Nov. 1, 1999), <http://journals.uic.edu/ojs/index.php/fm/article/view/700/610>.

294. See, e.g., Benkler & Nissenbaum, *supra* note 271, at 407-11; see also DOUGLAS RUSHKOFF, *OPEN SOURCE DEMOCRACY: HOW ONLINE COMMUNICATION IS CHANGING OFFLINE POLITICS* 25 (2003) (discussing sharing and early gift economies

Today, after long unchallenged dominance of the market and a steady trend toward propertization of knowledge-based outputs, gift economy is regaining momentum in the networked information economy. Gift culture may soon expand to encompass networked peer collaboration and user-generated creativity at large. Communities of social trust—such as Wikipedia, YouTube, and fan-fiction communities—have spread virally online through gift exchange models. The Internet and digitization have produced a great value shift that is reversing what Karl Polanyi termed the “Great Transformation”—the nineteenth century rise of the Market Society when market activity took a life of its own and overpowered the other social institutions.²⁹⁵ In online interaction, there is a growing recognition that value can be created by social practices that cannot be explained by standard market economic focus on quantification. The uncompensated users’ contributions in developing free software, or updating Wikipedia, Facebook, and YouTube are reversing the logics of the market economy. Gift economy is emerging as a new practice of value exchange. Consumer or user gift systems are taking over traditional market systems in many sectors of cultural production and creativity exchange.²⁹⁶

In the entertainment industry, new business models switch the focus from the content to the container.²⁹⁷ Artists have come to realize that free content drives valuable secondary markets, such as live performances, special editions, bonus material, and merchandise.²⁹⁸ Sharing content leads to increased revenue streams due to the reputational value that can be extracted from broader content distribution. Giving away music records may increase concerts’ attendance and help in building the artists’ fan base.²⁹⁹

in the Internet); Magnus Bergquist & Jan Ljungberg, *The Power of Gifts: Organizing Social Relationships in Open Source Communities*, 11 INFO. SYS. J. 305 (2001).

295. See KARL POLANYI, *THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME* 3-5 (2001).

296. See Markus Giesler, *Consumer Gift Systems*, 33 J. CONSUMER RES. 283, 289 (2006).

297. Cf. FROSIO, *supra* note 276, at 129-47 (mapping open access business models).

298. See CHRIS ANDERSON, *FREE: THE FUTURE OF A RADICAL PRICE* 153-58 (2009).

299. Mark F. Schultz, *Live Performance, Copyright, and the Future of the Music Business*, 43 U. RICH. L. REV. 685, 726 (2009); DEBORA J. HALBERT, *RESISTING INTELLECTUAL PROPERTY* 81-86 (2005).

Some examples of artists experimenting with gift economy business models include Radiohead, Nine Inch Nails, Coldplay, and the Arctic Monkeys.³⁰⁰ As *The Economist* noted, thanks to technological advancement, “a lot of things are making money” in the music business, notwithstanding the decline in sales of recorded music.³⁰¹

Starting with a very influential essay from Marcel Mauss, societies have been placed on an economic evolutionary scale from gift to commodity exchange.³⁰² The so-called clan society was dominated by gift exchange, while the modern class society made private property and commodity the norm.³⁰³ Chris Gregory described the process as a continuum from the clan system of organization to the proletarian or capitalist system of organization and noted that “[a]s one moves from one extreme to the other, equality and unity give way to inequality and separation.”³⁰⁴ I suggest that the continuum from clan to class society, mentioned by Chris Gregory, now extends to the “crowd society,” which features new modes of social interaction in digital online communities. As discussed in the preceding pages, the crowd society is open and decentralized, thus equalitarian, collaborative, and coordinated—thus united. In this respect, the crowd society resembles more the mechanics of the clan society, rather than the class society. Equality and unity are defining characters of digital communities, rather than inequality and separation.

The emergence of the crowd society in the digital environment, together with the inherent abundance of digital, knowledge-based goods, makes plausible the revival of gift economy models of production, rather than a continuation of traditional market economy. The networked, mass-collaborative character of creativity in the crowd society enhances the proliferativeness of the gift exchange model that lies in what anthropologists and social scientists described as a debt-economy.³⁰⁵ The goal of a gift economy is never to have

300. See, e.g., Victoria Gu, *Neo-Patronage: The New Fan–Artist Connection*, THE SMOKE SIGNAL (Sept. 15, 2008, 10:09 AM), https://web.archive.org/web/20081005031009/http://thesmokesignal.org/news/index.php?option=com_content&task=view&id=648&Itemid=1.

301. *Having a Ball: In the Supposedly Benighted Music Business, a Lot of Things Are Making Money*, THE ECONOMIST (Oct. 7, 2010), http://www.economist.com/node/17199460?story_id=17199460.

302. See MAUSS, *supra* note 4, at 91-93; see also MAURICE GODELIER, *THE ENIGMA OF THE GIFT* 205-10 (Nora Scott trans., Univ. Chi. Press 1999) (1996).

303. See GREGORY, *supra* note 12, at 17-18.

304. *Id.* at 37.

305. *Id.* at 19.

debts paid off, but to reinforce a recurring cycle of personal indebtedness.³⁰⁶ In contrast to market economy, gift economy, by definition, is never a proportionate exchange. Its inner scope is to outweigh the previous giver to keep the donors entangled in an endless web of reciprocation, and thus achieve accrued reputational status. A mere compensation in exchange for the pristine gift would do nothing to enhance the social status of the giver. Absent a repeatedly unequal exchange, the system would soon reach a stalemate, or at least would lose the dynamic and inertial effect of continual reciprocations, which are aimed at matching and surpassing the largess of the preceding gift giver, thus improving the reputational status of the reciprocator. According to Alain Caillé, under the gift's paradigm—the third paradigm, in addition to use and exchange value—goods and services enjoy a different, additional value, which is connected with their capacity to create social relationships.³⁰⁷ The gift becomes a tool through which men *create* their own society by promoting social relationships.³⁰⁸ Gift exchanges can produce value on three distinct levels: individual economic value, individual social value, and public social value. The donor receives value from the exchange of gifts, for example, the code that each software developer may contribute to free or open source software projects.³⁰⁹ Each instance of reciprocation leaves the giver with reputational value. Additionally, a public social value will remain as a surplus of each gift transaction.³¹⁰ Gift economy could lower social tensions, therefore reducing the related social costs and producing additional economic surplus.

The crowd society's networked peer production merges modern and pre-modern creative models together. Decentralization places the individual user at the core of the creative process, whereas collaboration and resource-sharing emphasize the role of the community. The networked information economy multiplies individual contributions by merging them into the community. As a result, similar to pre-modern creativity, networked peer production is

306. *See id.*

307. *See* ALLAIN CAILLÉ, ANTHROPOLOGIE DU DON: LE TIERS PARADIGME 79-80 (2000); *see also* GODELIER, *supra* note 302, at 141.

308. *See* CAILLÉ, *supra* note 307, at 79-80.

309. *See* Duran Bell, *Modes of Exchange: Gift and Commodity*, 20 J. SOCIO-ECON. 155, 159 (1991).

310. *See id.* at 156 (noting that “a gift implies an intention to develop or maintain a *social relationship* between parties to the exchange”; therefore, gifts help build a relationship between individuals or groups and make people work together).

an inclusive creative process, rather than exclusive.³¹¹ The return to an inclusive paradigm of knowledge production may suggest that exclusive rights do not efficiently fit creative processes in cyberspace. The networked information economy challenges the conventional notion of property, as "[p]roperty in [this economy] is configured fundamentally around the right to distribute, not the right to exclude."³¹² As discussed earlier, there is a dystonic relationship between propertization and the networked information economy. In the digital environment, we are moving beyond a utilitarian theory of creative production.³¹³ The new sharing economy eroded some of the justifications for intellectual property by proving that people are willing to create without hope of remuneration.³¹⁴ Rather, information exchange—and "playful enjoyment"³¹⁵—has become the ultimate goal in the digital economy.³¹⁶ The role of non-instrumental motivations forms the basis for a "social" model of intellectual production.³¹⁷ The virtue of sharing is regaining its role because people return to value the positive externalities that sharing and collaborating ethics bring about.³¹⁸ In addition, cyberspace limits the

311. See Frosio, *supra* note 261, at 390-95; Giancarlo F. Frosio, *A History of Aesthetics from Homer to Digital Mash-Ups: Cumulative Creativity and the Demise of Copyright Exclusivity*, 9 LAW & HUMAN. 262, 263 (2015).

312. WEBER, *supra* note 271, at 228; see also John P. Ulhøi, *Open Source Development: A Hybrid in Innovation and Management Theory*, 42 MGMT. DECISION 1095 (2004).

313. Cf. CAILLÉ, *supra* note 239; CAILLÉ, *supra* note 5.

314. See, e.g., Lemley, *supra* note 3, at 463-64.

315. See David Lange, *At Play in the Fields of the Word: Copyright and the Construction of Authorship in the Post-Literate Millennium*, 55 LAW & CONTEMP. PROBS. 139, 139, 142 (1992); David Lange, *Reimagining the Public Domain*, 66 LAW & CONTEMP. PROBS. 463, 475 (2003); Eben Moglen, *Anarchism Triumphant: Free Software and the Death of Copyright*, in THE COMMERCIALIZATION OF INFORMATION, *supra* note 206, at 107, 127-29; Julie E. Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. 1151 (2007); Cohen, *supra* note 197.

316. See ALEXANDER BARD & JAN SÖDERQVIST, NETOCRACY: THE NEW POWER ELITE AND LIFE AFTER CAPITALISM 126-35, 254-55 (2002).

317. BENKLER, *supra* note 263, at 63; see also Paul A. David & Joseph S. Shapiro, *Community-Based Production of Open-Source Software: What Do We Know About the Developers Who Participate?*, 20 INFO. ECON. & POL'Y 364 (2008) (discussing and collecting empirical data regarding the motivations, personal attributes, and behavioral patterns of those who are engaged in producing free/libre and open source software (FLOSS)); Mark Cenite et al., *More Than Just Free Content: Motivations of Peer-to-Peer File Sharers*, 33 J. COMM. INQUIRY 206 (2009).

318. See Benkler, *Sharing Nicely*, *supra* note 282. For a discussion on intellectual property spillovers and externalities, see Frischmann & Lemley, *supra*

negative externalities that may follow from the web of obligations on which traditional gift economies are based.³¹⁹ In the digital environment, humans can be enmeshed with a web of obligations and gift reciprocations, while still being “aliens and strangers.”³²⁰

B. Baudrillard in Cyberspace: Taming Limitless Power with Artificial Scarcity

The re-emergence of a gift economy in the crowd society revives Jean Baudrillard’s dream of prodigality and abundance, as opposed to our reality of artificial scarcity. Baudrillard urged us to “abandon the received idea we have of an affluent society as a society in which all material (and cultural) needs are easily met.”³²¹ He continued, “We should rather espouse the notion . . . that it is our industrial and productivist societies which, unlike certain primitive societies, are *dominated by scarcity*, by the obsession with scarcity characteristic of the market economy.”³²² As Baudrillard argued:

The *collective* ‘improvidence’ and ‘prodigality’ characteristic of primitive societies are the sign[s] of *real* affluence. We have only the *signs* of affluence. Beneath a gigantic apparatus of production, we anxiously eye the *signs* of poverty and scarcity. But poverty consists, says Sahlins, neither in a small quantity of goods, nor simply in a relation between ends and means: it is, above all, a *relation between human beings*. The basis for the confidence of primitive peoples and for the fact that, within hunger, they live a life of plenty, is ultimately the transparency and reciprocity of social relations. It is the fact that no monopolization whatever of nature, the soil, the instruments or products of ‘labour’ intervenes to obstruct exchange and institute scarcity. There is among them no accumulation, which is always the source of power. In the economy of the gift and symbolic exchange, a small and always finite quantity of goods is sufficient to create general wealth since those goods pass constantly from one person to the other. Wealth has its basis not in goods, but in the concrete exchange between persons. It is, therefore, unlimited since the cycle of exchange is endless, even among a limited number of individuals, with each moment of the exchange cycle adding to the value of the object exchanged. It is this concrete and relational

note 219; Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031 (2005).

319. Cf. MAUSS, *supra* note 4, at 83 (noting that people may not want to be enmeshed with the feeling bond that a gift creates, as “[t]he unreciprocated gift still makes the person who has accepted it inferior”).

320. HYDE, *supra* note 281, at 88 (pointing out that “[t]here are times when we *want* to be aliens and strangers” and do not wish the personal bond of the gift to get into the privacy of our lives).

321. BAUDRILLARD, *supra* note 6, at 66.

322. *Id.*

dialectic which we find inverted, as a *dialectic of penury* and unlimited need, in the process of competition and differentiation characteristic of our civilized, industrial societies. Where, in primitive exchange, every relationship adds to the social wealth, in our ‘differential’ societies every social relationship adds to individual lack, since every thing possessed is relativized in relation to others (in primitive exchange, it is *valorized* by the very relationship with others).

It is not, therefore, paradoxical to argue that in our ‘affluent’ societies abundance is *lost* and that it will not be restored by an interminable increase in productivity, by unleashing new productive forces. Since the structural definition of abundance and wealth lies in social organization, only a revolution of the social organization and of social relations could bring those things about.³²³

In Baudrillard’s opinion, structural scarcity, rather than abundance, characterizes our society. Rather than satisfying humankind’s material and cultural needs, the consumer society feeds a relentless hunger for production.³²⁴ In order to keep that hunger in place, the consumer society is based on the artificial creation of a system of needs.³²⁵ This fabricated system of needs serves the production system, rather than the opposite. The full emergence of this system can be located around the time of the publication of Edward Bernays’s *Propaganda*. In *Propaganda*, Bernays took Sigmund Freud’s ideas and showed American corporations for the first time how they could make people want things they didn’t need by linking mass-produced goods to their unconscious desires.³²⁶ According to Baudrillard, this system of production, then, has the function of generating privileges and maintaining them in place beyond the ancillary function of producing goods. For Baudrillard, therefore, the consumer society is an “organized reign of scarcity,” perpetuating a social model where power is based on accumulation on one hand and obsession with scarcity of goods and means on the other hand.³²⁷ In modern times, this “organized reign of scarcity” is epitomized by the kilometeric lines forming outside Apple Stores in every city around the globe before the release of the latest version of an iconic electronic gadget. Baudrillard argues that the emancipation from this state of collective foolishness may happen only through the subversion of the present social structure that the system of needs has

323. *Id.* at 67-68.

324. *Id.*

325. *See id.* at 66.

326. *See* EDWARD L. BERNAYS, PROPAGANDA 51-61 (1928).

327. BAUDRILLARD, *supra* note 6, at 66-67.

the function to keep in place.³²⁸ Seeking a revolution of “social relations” that can restore the true affluence, Baudrillard wondered:

Will we return, one day, beyond the market economy, to prodigality? Instead of prodigality, we have ‘consumption,’ forced consumption in perpetuity, twin sister to scarcity. It was social logic which brought primitive peoples the ‘first’ (and only) affluent society. It is our social logic which condemns us to luxurious and spectacular penury.³²⁹

The crowd society’s economics of commons-based peer production perfectly adjusts to Baudrillard’s revolutionary call for “prodigality” beyond market economy. Taking Baudrillard’s ideas to cyberspace, digital technology inherently brings about affluence instead of scarcity.³³⁰ Ubiquitous digital networks have instated new economics of content reproduction and distribution with marginal cost getting close to zero.³³¹ Also, networked peer and mass collaboration is first and foremost a revolution of “social relations.” As McKenzie Wark noted, the core of the social movement around free information is “about new kinds of social relations,” because

[t]hings being free isn’t enough. It is also about making social relations that bind people with a weak but widespread obligation to treat what each other does as more than just objects, more than just stuff. It’s about thinking of oneself as something besides a consumer.³³²

The Internet has emerged in our society of scarcity as an ecosystem that has allowed the public to experiment with an alternative social model, which is based on equality between peers; exchange rather than differentiation; and decentralization rather than power concentration. The networked peer collaboration’s “revolution of social relations” may dry out the power source of the “organized reign of scarcity.” First, the emergence of an alternative symbolic

328. *Id.* at 67-68.

329. *Id.* at 68.

330. See Lemley, *supra* note 3, at 461 (“[A] series of technological changes is underway that promises to end scarcity as we know it for a wide variety of goods. The Internet is the most obvious example The Internet has reduced the cost of reproduction and distribution of informational content effectively to zero. In many cases it has also dramatically reduced the cost of producing that content. And it has changed the way in which information is distributed, separating the creators of content from the distributors.”).

331. *Id.*; see also Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. CHI. L. REV. 263, 300-05 (2002).

332. McKenzie Wark, *Copyright, Copyleft, Copygift*, in FREEDOM OF CULTURE: REGULATION AND PRIVATIZATION OF INTELLECTUAL PROPERTY AND PUBLIC SPACE 22, 24, 26 (Jorinde Seijdel & Liesbeth Melis eds., 2007).

economy challenges the power of capital and accumulation.³³³ Additionally, the new social model defies the system of fabricated needs and the obsession with scarcity by turning consumers into users and then creators.³³⁴ In the crowd society, there are structural preconditions for a return to prodigality beyond the market economy.

Baudrillard’s categories may serve to explain the conundrum that the emergence of networked peer collaboration and user-generated creativity has brought about. Overbroad commodification of information and copyright expansion might be construed as a reaction to the digital revolution. In this sense, copyright expansion serves to tame the limitless power of networked peer production with artificial scarcity in order to maintain in place the structural scarcity of the consumer society and prevent the return to “prodigality” beyond the market economy. As propertization hinders the potentials for growth of open, decentralized, and collaborative digital communities, commodification of knowledge-based goods could be one way to prevent the emergence of the crowd society as a new social paradigm that might undermine, or oust altogether, the present rivaling class, capitalist and consumerist social paradigm.

C. User Patronage

A possibility for the reinstatement of Baudrillard’s “collective prodigality” might have materialized in the crowd society thanks to technological advancement. Together with other changes,³³⁵ the future of creativity may lean toward a consumer gift system³³⁶ or user patronage, promoting an unrestrained, diffused, and networked discourse between creators and the public through digital crowd-sourcing. The idea of user patronage has been emerging on the Internet in the last few years, such as the Street Performer Protocol,

333. See, e.g., RIFKIN, *THE ZERO MARGINAL COST SOCIETY*, *supra* note 235; MICHAEL STRANGELOVE, *THE EMPIRE OF MIND: DIGITAL PIRACY AND THE ANTI-CAPITALIST MOVEMENT* 3-13 (2005).

334. See, e.g., Yochai Benkler, *From Consumers to Users: Shifting the Deeper Structures of Regulation Toward Sustainable Commons and User Access*, 52 FED. COMM. L.J. 561, 561-63 (2000); Joseph P. Liu, *Copyright Law’s Theory of the Consumer*, 44 B.C. L. REV. 397, 397-401 (2003).

335. As I argued elsewhere, the emergence of user patronage should hypothetically complement the demise of the principle of copyright exclusivity and the introduction of a system of open reuse and apportionment of profits. See Frosio, *supra* note 261, at 390-95.

336. See Giesler, *supra* note 296, at 283.

written by John Kelsey and Bruce Schneier,³³⁷ or the “neo-patronage” model offered by Another Sky Press. Another Sky Press defines neo-patronage as:

[A]n (r)evolution of patronage enabled by the connectivity between artist and audience offered by today’s technologies. At its core, neo-patronage is an honor/trust based system of financial support for an artist that comes from the artist’s collective audience, rather than a single individual or organization. The sum of all patron contributions becomes the means and incentive for the artist to continue his or her work.

....

In practice, the money the artist receives via neo-patronage serves two purposes:

1. It is payment and ‘thank you’ for work already completed.
2. It is the funding that allows the artist to continue to produce new works.³³⁸

As Yochai Benkler explained in his recent book *The Penguin and the Leviathan: How Cooperation Triumphs over Self-Interest*, experiments with pay-as-you-wish pricing in the music industry reveal that fans will voluntarily pay far more for their favorite music than economic models would ever predict.³³⁹ For example, Bandcamp—a platform that lets musicians set up simple content stores for their works and allows for streams, pay-what-you-want, and free or conditional downloads—helped artists to make over \$1 million a month. Bandcamp states that when given the option of paying-what-you-want for albums with a suggested price, fans pay an average of 50% more than the minimum price, and in any other instances, fans pay more than the minimum price 50% of the time.³⁴⁰

337. See John Kelsey & Bruce Schneier, *The Street Performer Protocol and Digital Copyrights*, FIRST MONDAY (June 7, 1999), <http://www.firstmonday.org/ojs/index.php/fm/article/view/673/583>; JOHN KELSEY & BRUCE SCHNEIER, ELECTRONIC COMMERCE AND THE STREET PERFORMER PROTOCOL (1998), <http://www.schneier.com/paper-street-performer.pdf>.

338. *Neo-Patronage / Pay What You Want*, ANOTHER SKY PRESS, <http://anothersky.org/asp/main/our-beliefs/neo-patronage> (last visited Feb. 9, 2016).

339. See YOCHAI BENKLER, *THE PENGUIN AND THE LEVIATHAN: HOW COOPERATION TRIUMPHS OVER SELF-INTEREST* 147-48 (2011); see also ANDERSON, *supra* note 298, at 153-55; Chris Anderson, *Free! Why \$0.00 Is the Future of Business*, WIRED (Feb. 25, 2008, 12:00 PM), http://www.wired.com/techbiz/it/magazine/16-03/ff_free?currentPage=all; CHRIS ANDERSON, *THE LONG TAIL: WHY THE FUTURE OF BUSINESS IS SELLING LESS OF MORE* 1-13 (2006).

340. See *Bandcamp for Artists*, BANDCAMP, <http://bandcamp.com/artists> (last visited Feb. 9, 2016); see also MICHAEL MASNICK & MICHAEL HO, *THE SKY IS*

Magnatune, whose business model now moved to subscription-only, used to permit users to choose the amount they were willing to pay for a high-quality album, whereas low-quality albums were given out for free.³⁴¹ The free offers ranged from \$5 to \$18.³⁴² Quite surprisingly, the average payment was \$8.20, well above the minimum payment and even higher than the recommended price of \$8.³⁴³ The data from each of these enablers suggest that artists have increasingly valuable opportunities to go directly to fans, rather than surrendering revenue streams to gatekeepers. Consumers are “often willing to spend more, if they feel that they’re really getting something of value and there is a direct connection to the artist.”³⁴⁴

In this sense, TopSpin Media—a company providing tools to content creators to allow them to promote a direct-to-fan marketing and retail—is another interesting example. According to TopSpin Media, the average transaction price increased from \$22 to \$26 over a year, with a peak price of \$88 for offers including a ticket for a live event.³⁴⁵ The ubiquitous power of Internet networks has made possible a direct connection between artists and the public to support the creative process in new ways. In particular, digital crowdfunding is an increasingly popular tool to raise money online.³⁴⁶

On Kickstarter and similar platforms, people can pledge for an economic goal, which is set up in advance by the project developer.³⁴⁷ Kickstarter works by giving artists a way to let fans crowdfund the creation of new works. It lets artists offer different tiers, through which fans can help fund a project, in the hope of

RISE: A DETAILED LOOK AT THE STATE OF THE ENTERTAINMENT INDUSTRY 5-6 (Jan. 2012), <http://www.techdirt.com/skyisrising>.

341. Tobias Regner, *Why Consumers Pay Voluntarily: Evidence from Online Music 2* (Jena Econ. Research Papers, Paper No. 2010-081), http://pubdb.wiwi.uni-jena.de/pdf/wp_2010_081.pdf.

342. *Id.*

343. *Id.*

344. MASNICK & HO, *supra* note 340, at 6.

345. See TOPSPIN MEDIA, <http://www.topspinmedia.com> (last visited Feb. 9, 2016); see also MASNICK & HO, *supra* note 340, at 5.

346. For a general overview of crowdfunding and literature review, see Alexandra Moritz & Joern H. Block, *Crowdfunding: A Literature Review and Research Directions*, in CROWDFUNDING IN EUROPE: STATE OF THE ART IN THEORY AND PRACTICE 25 (Dennis Brüntje & Oliver Gajda eds., 2015), http://link.springer.com/chapter/10.1007%2F978-3-319-18017-5_3.

347. See KICKSTARTER, www.kickstarter.com (last visited Feb. 9, 2016); see also MASNICK & HO, *supra* note 340, at 5.

reaching a funding threshold.³⁴⁸ Only after the threshold is met does the money change hands.³⁴⁹ As of February 2016, over \$2 billion have been pledged to artists through Kickstarter.³⁵⁰ There are 283,514 launched projects with a success rate of 36.18%.³⁵¹ Kickstarter's stats also report that 100,509 projects were successfully funded and approximately \$1.91 billion made to successful projects.³⁵² Kickstarter funds all sorts of creative works, and so far, almost \$460 million was pledged to games, almost \$325 million was pledged to film and video, over \$165 million pledged to music, and nearly \$90 million pledged to publishing.³⁵³

Of course, Kickstarter is just one of a number of similar platforms, such as ArtistShare, SellaBand, IndieGoGo, PledgeMusic, AfricaUnsigned, MyMajorCompany, Mobcaster, TubeStart, Pozible, Wishberry, CentUp, Crowdfunder, or Ulule.³⁵⁴ These services may apply an "all or nothing" or a "keep it all" model. In the latter case, the funds collected are handed over to the campaigner, regardless of whether the project goal is met or not. Other crowdfunding platforms such as Bountysource, Patreon, or Sprked, allow for a continuous funding model, rather than one-time donations, for those creators making content on a regular basis.³⁵⁵ There are also services allowing

348. *Kickstarter Basics*, KICKSTARTER, <https://www.kickstarter.com/help/faq/kickstarter+basics?ref=footer> (last visited Feb. 9, 2016).

349. *Id.*

350. *See Stats*, KICKSTARTER, <https://www.kickstarter.com/help/stats> (last visited Feb. 9, 2016).

351. *Id.*

352. *Id.*

353. *Id.*

354. *See* ARTISTSHARE, www.artistshare.com (last visited Feb. 9, 2016) (music); SELLABAND, www.sellaband.com (last visited Feb. 9, 2016) (music); INDIEGOGO, www.indiegogo.com (last visited Feb. 9, 2016) (miscellaneous); PLEDGEMUSIC, www.pledgemusic.com (last visited Feb. 9, 2016) (music); AFRICAUNSIGNED, www.africaunsigned.com (last visited Feb. 9, 2016) (music); MyMajorCompany, www.mymajorcompany.com (last visited Feb. 9, 2016) (film and video); MOBCASTER, <http://mobcaster.com> (last visited Feb. 9, 2016) (TV shows); TUBESTART, www.tubestart.com (last visited Feb. 9, 2016) (YouTube video Creator); POZIBLE, www.pozible.com (last visited Feb. 9, 2016) (creative projects); WISHBERRY, www.wishberry.in (last visited Feb. 9, 2016) (creative projects); CENTUP, www.centup.org (last visited Feb. 9, 2016) (blogger, podcasters, and web-based publishers); CROWDFUNDER, www.crowdfunder.co.uk (last visited Feb. 9, 2016) (miscellaneous); ULULE, www.ulule.com (last visited Feb. 9, 2016) (miscellaneous).

355. *See* BOUNTYSOURCE, www.bountysource.com (last visited Feb. 9, 2016) (open-source software); PATREON, www.patreon.com (last visited Feb. 9, 2016)

users to award creators after the works have been published. Flattr, for example, is a microdonation application that displays a link to make a donation alongside the content.³⁵⁶

Obviously, today players like Kickstarter are far smaller than the old gatekeepers, but they only appeared in the last few years and the trend lines are already extraordinarily important.³⁵⁷ Kickstarter launched in April 2009.³⁵⁸ At the close of 2011, Kickstarter announced that, over the course of the year, about \$100 million had been pledged to artists through its crowdfunding platform.³⁵⁹ “[A]pproximately \$84 million did . . . make it to those content creators whose projects were successfully funded.”³⁶⁰ In about three years, those figures grew nearly twenty times.³⁶¹ Most successfully funded projects raise less than \$10,000, but a growing number have reached six and even seven figures.³⁶² About 152 projects raised more than \$1 million with the largest successfully completed Kickstarter project totaling \$20,338,986 pledged in March 2015.³⁶³ Projecting these figures into the future, we may predict that crowdfunding may become a viable option for all sort of creativity, including large and expensive productions, such as blockbuster movies.

In the future, user patronage might take several forms. Obviously, authors can connect directly with the public through self-publishing or self-producing in platforms, like Amazon market place or Bandcamp, charging a small price or asking for a donation or a pay-as-you-wish price. Online self-publishing has been emerging as a solid alternative to traditional publishing.³⁶⁴ On a more structured

(music, podcasts, vloggers, YouTube videos, and webcomics); SPRKED, <https://sprked.com> (last visited Feb. 9, 2016) (gaming content).

356. See FLATTR, <https://flattr.com> (last visited Feb. 9, 2016).

357. See MASNICK & HO, *supra* note 340, at 6.

358. *What Is Kickstarter?*, KICKSTARTER, <https://www.kickstarter.com/about> (last visited Feb. 9, 2016).

359. *Id.* at 5.

360. *Id.*

361. See *Stats*, *supra* note 350.

362. See *id.*

363. *Pebble Time—Awesome Smartwatch, No Compromises*, KICKSTARTER, https://www.kickstarter.com/projects/597507018/pebble-time-awesome-smartwatch-no-compromises?ref=most_funded (last visited Feb. 9, 2016).

364. See, e.g., Ed Pilkington, *Amanda Hocking, the Writer Who Made Millions by Self-Publishing Online*, THE GUARDIAN (Jan. 12, 2012, 3:00 PM), <http://www.theguardian.com/books/2012/jan/12/amanda-hocking-self-publishing> (reporting that Amanda Hocking made \$2.5 million by self-publishing her books on Amazon after being rejected for years by book agents and publishing houses); see

level, authors can collect resources in advance to support a project through crowd-sourcing platforms like Kickstarter. In time, authors might approach generalist user patronage communities. After raising the necessary funds, the authors will provide a digital copy of the work to the pledging patrons. A digital copy, possibly including advertising, might circulate through open access channels. Authors might internalize the advertising revenues or share them with user patronage groups. Authors might enjoy the revenue stream coming from special or non-digital editions, or licensing or apportionment of profits from derivative works.³⁶⁵ Seemingly, the reputational value enhanced by wider open access distribution will promote public performances or other lucrative appointments. Hypothetically, authors might access their user base to fund larger projects. Individual authors, artists, or movie directors' fan-sites might serve as online hubs to advertise the project and collect the necessary resources. In the case of a movie, for example, user-patrons will receive a digital copy that might be circulated online open access or viewed from the fan site supporting the project.³⁶⁶ As with Kickstarter, user-patrons can pledge for additional or bonus material, such as a director's-cut special edition; merchandise related to the movie; a seat at the theatrical premiere; a dinner with the director, actors, or crew members to discuss the movie; or a cameo in the movie. Again, the movie producers will internalize the revenue stream from theatrical releases, advertising, merchandise, or licensing or apportionment of profits from derivative works, and so on.

Cooperative creativity and the interaction of groups of users and creators on a voluntary but structural basis is becoming a new model for creativity. Wikipedia, the fifth most visited website and the first online encyclopedia, exemplifies the power of ubiquitous digital user patronage. Wikipedia is being completely crowdsourced both as to intellectual and economic contributions, increasing its

also Alison Flood, *Four Self-Published Authors on New York Times eBook Bestseller List*, THE GUARDIAN (Aug. 2, 2012, 10:59 AM), <http://www.guardian.co.uk/books/2012/aug/02/self-published-authors-bestseller-ebooks?newsfeed=true>.

365. For a discussion of the introduction of a system of apportionment of profits in substitution of the present licensing arrangements governed by the principle of copyright exclusivity, see Frosio, *supra* note 261, at 390-95.

366. In fact, the film industry is already making huge amounts of money from products and services based on content, in addition to the content itself. According to Disney, licensed merchandise alone generated \$30 billion in 2008. See Joe Karaganis, *Rethinking Piracy*, in MEDIA PIRACY IN EMERGING ECONOMIES 45 n.43 (Joe Karaganis ed., 2011), <http://www.scribd.com/doc/50196972/MPEE-1-0-1>.

annual fundraising from \$8 million in 2009 to \$75 million in 2015.³⁶⁷ Digital crowdfunding shows that there are new business models circumventing traditional gatekeepers by building upon the increasing willingness of users to support artists and creativity directly. New businesses, which act as enablers rather than gatekeepers, might promote democratization by providing the authors with enhanced artistic freedom. The emergence of mechanisms to support and stimulate creativity based on user patronage will work towards the goal of empowering the public as the central figure of the creative process. User patronage might reconnect creativity with its cumulative and public nature. It shall restore centrality to the rhetoric of the gift in the discourse about creativity and to Gaultier’s idea of a social contract between authors and public.³⁶⁸ Volker Grassmuck noted:

[A] new Social Contract between creatives and audiences has to be negotiated, a new arrangement for the reciprocal “creative contributions” by authors and by society.

The current debate on culture is focused on property rights and their enforcement. The Social Contract is intended to refocus the debate on the issues behind the existing legal rules. The shift from the analogue to the digital knowledge order calls into question the boundaries between private and public, professional and non-professional, commercial and non-commercial.

....

The Social Contract encompasses the whole range of transactions: in markets, through public funding for arts and culture (collective redistribution through taxation and broadcast fees and the provision of a public knowledge infrastructure for science and education, libraries, museums, archives etc.), through voluntary action (free-licensing and donations (Wikipedia), street performer protocol-style pre-payments and pledges) and through legal regulations (limitations and exceptions in copyright law, including the proposals for a Culture Flat-Rate and the public domain).³⁶⁹

367. See *Fundraising Reports*, WIKIMEDIA FOUND., https://wikimediafoundation.org/wiki/Fundraising_reports (last updated Oct. 2, 2015, 5:26 PM).

368. See *supra* Part I.G.

369. VOLKER GRASSMUCK, IP4D – SUSTAINABLE PRODUCTION OF AND FAIR TRADE IN CREATIVE EXPRESSIONS 1-2 (2009), http://cyber.law.harvard.edu/fcrw/sites/fcrw/images/Grassmuck_09-10-23_Free-Culture_Berkman_txt.pdf. (paper presented at the Research Workshop on Free Culture, Berkman Center for Internet & Society, Harvard University, Cambridge, Massachusetts).

According to Baudrillard's categories, the social contract that a user patronage model implies would subvert the present social structure that the system of needs has the function to keep in place through a "revolution of social relations" between creators and users. Digital crowdfunding would help to blur the distinction between users and creators even further, thus making the role of gatekeepers, intermediaries, and distributors less and less relevant. Even if this is not yet the return to prodigality that Baudrillard sought, it may be a step toward the demise of push marketing strategies in favor of the advent of pull marketing.³⁷⁰ User patronage may set the advent of a web 3.0 and the transition from a corporate-driven culture to a user-driven culture. Users' centrality—or the centrality of human relationships—and the demise of push marketing would dispossess gatekeepers of the capacity of maintaining an "organized reign of scarcity" through a system of artificial needs.³⁷¹ Transparent and reciprocal "relation[s] between human beings"³⁷² within a networked information economy based on commons-based peer production and user patronage would make concentration of power through monopolization of resources and accumulation harder. Perhaps, the widespread emergence of user patronage may be a step toward a transition from a consumer society to a networked user community or crowd society.

370. See WILLIAM PATRY, MORAL PANICS AND THE COPYRIGHT WARS 31 (2009) (noting that "in contemporary marketing lingo, the copyright industries practice 'push' and not 'pull' marketing"). "Push marketing is top-down and hierarchical. With push marketing, businesses create products or services based on what they want to sell to consumers and not based on what consumers want to buy." *Id.* See also John Seely Brown & John Hagel III, *From Push to Pull: The Next Frontier of Innovation*, 2005 MCKINSEY Q. 83, <http://www.johnseelybrown.com/pushpull.pdf> (discussing in general terms the push–pull marketing model that Patry then applies to the copyright market).

371. BAUDRILLARD, *supra* note 6, at 66.

372. *Id.* at 67.