Modern Consumer Law

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Part Five. Consumer Law Policymaking

Assignment 27. The Future of Consumer Law

Two major forces have disrupted consumer law in the last decade. The first is the creation of the Consumer Financial Protection Bureau. Its role as a regulator is evolving. In its early years, the CFPB focused on rulemakings that were required by the Dodd-Frank Act, and its touch in some markets remains light. In the coming years, subsequent directors will provide new priorities and leadership. Its partnerships with other federal and state agencies will mature, as efforts to join forces prove fruitful or strained. The existence of the CFPB also will change the agenda of other federal and state regulators. The “law” aspect of consumer law is in motion as at no other time since the 1970s.

The other major force reshaping consumer law is operating on the “consumer” aspect of the deal. Technology is the main driver, as platforms and applications increasingly blur the lines between commercial and consumer activity. Connectivity, data, and analytics are uniting people who want to engage in for-profit transactions with each other. Recall that in the first assignment of this book, a core definition of “consumer law” was the existence of a transaction in which a business was one party and a consumer was the other party. The swell of consumer-to-consumer transactions makes it an exciting time to study, and practice, consumer law.

This Assignment looks at three emerging topics in consumer law. Whether these trends endure or fade, the fundamental challenges of consumer law are likely to remain:

- What does the good or service do and why does it appeal to consumers?
- How do consumers engage or act if they purchase the good or service?
- What is the existing law that applies? Is it adequate and how would one measure that?
- What are the unsolved problems for consumers with the good or service?
- Is the law an appropriate vehicle to address these problems? Or should they be left to the market?
- If law is the solution, how should the substantive law and enforcement mechanisms be crafted so as to be effective?

The topics below give a chance to think about these issues, but this assignment is as much about trying your hand at asking these questions in the context of nascent markets, as it is about reasoning to any firm conclusions.

A. Future Money

Technology is driving changes in payments and banking as discussed in Assignment 19, but even more fundamentally, it may transform the nature of money itself. In some ways, this is a return to the past (or a leap to a different culture) where money was something other than government-backed paper currency or coinage. “Money” eludes easy definition. Perhaps its most common use is as a means of exchange. It solves the problem of barter when one party wants to buy something, but the counterparty does not want the “thing” that the buying party is offering. Money’s value is not intrinsic. It comes from institutions, often but not necessarily, including legal institutions. As money has adapted to the digital world, innovations have created products that are outside the bounds of consumer protection law. That is unlikely to remain the situation, however, if digital currency becomes more widespread.

1. Bitcoin

Bitcoin is a private digital currency. It is “mined” by individuals who allocate their computer resources to solving complex algorithms. The resulting product is a “cryptocurrency” that has no physical presence. The open source algorithm permits the creation of new bitcoins at an ever-decreasing rate, with an estimated upper limit of 21 million bitcoin. It is similar to gold in the sense that the amount of currency is finite. As it has grown in popularity, exchanges for trading bitcoin have developed, including those that allow for currency swaps between U.S. dollars and bitcoin.

To spend a bitcoin, one must authenticate it using a virtual “key,” which is essentially a very large number. The ledger of bitcoin transactions is public, although users retain a high degree of anonymity. Because everyone has a copy of all transactions in a shared database, and all transactions are continuously verified, there is little risk of duplication—essentially counterfeit bitcoin. This digital trail is called the “blockchain.” Another prominent feature of bitcoin is the lack of government involvement. Bitcoins have no inherent value and no central entity that manipulates their price. Supply and demand entirely determines the worth of bitcoin. In these regards, bitcoin is not unlike ancient currencies. *See* Bill Maurer, *How Would You Like to Pay? How Technology Is Changing the Future of Money*, Tbl 2.1 (2015) (analyzing common features of Bitcoin and Mesopotamian Contracts as forms of money).

Bitcoin does not fit easily into commercial law’s definition of money. *See, e.g.,* U.C.C. §1-201(a)(24) (defining money as a medium of exchange current authorized or adopted by a domestic or foreign government). Bitcoin also does not meet the legal definition of negotiability under the Uniform Commercial Code, meaning that the rules of loss and risk that govern the presentment and honoring of checks and other negotiable instruments do not apply. *See* Jeanne L. Schroeder, *Bitcoin and the Uniform Commercial Code* (Cardozo Leg. Stud. Research Paper No. 458, 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2649441.

2. Digital Fiat

Bitcoin is not fiat money, which is made legal tender through an act of government. Neither its manufacture nor its distribution is a public function. In the future, governments may move to digital currency that is "coined" via code created by a central bank. Because the government would control the software that minted the digital money, it could control the amount of currency released in accordance with its monetary policy. A major benefit of such a move is cost. Estimates are that digital money would equal only 10 percent of the costs of minting paper bills. Ryan Tracy, *Central Bankers Explore Response to Bitcoin: Their Own Digital Cash*, WALL ST. J. (Dec. 9, 2015). A start-up, eCurrency Mint, has proposed a currency product that would centralize the creation and management with government but maintain anonymity of users. Its digital "cryptocomplex" would move via existing money delivery systems and be loaded by commercial banks and financial products into their networks. Penny Cronman, *A Digital Currency a Banker Could Love*, AMERICAN BANKER (Dec. 15, 2015). As of 2015, Ecuador and Canada have experimented with government-issued digital currency, but no country has adopted it as a full-fledged companion to, or replacement for, tangible currency.

In lieu of outright digital fiat money, the government may take on only certain functions of digital currency. One commentator has suggested that government should avoid involvement in systemic operation of digital currency, but could usefully enact and enforce laws that protect end-users. *See* Mark Edwin Burge, *Apply Pay, Bitcoin, and Consumers: The ABCs of Future Public Payments Law*, 67 HASTINGS L.J. __ (2016). An analogous approach is the way in which the FDIC does not dictate bank operations but does provide insurance on deposits.

3. Consumer Protection Issues

Lawmakers' initial engagement with digital currency stemmed from its anonymity. That feature made it useful for criminal enterprises, and drew interest from the FBI and other law enforcement agencies. The Financial Crimes Enforcement Network, an arm of the U.S. Treasury, has issued guidance on virtual currency and the U.S. Department of Justice has brought enforcement actions, such as efforts to subject bitcoins to criminal forfeiture.

Obviously most consumers are not criminals, so the more pertinent worries for a typical consumer who adopted a digital currency would be fraud and loss. These problems are compounded by limited regulatory oversight and uncertainty about which laws apply. Some of the problems are uniquely digital, such as the funds being rendered worthless by a virus. Other potential sources of loss have equivalents to paper money. If you delete your bitcoin, it is like cash in an envelope that is accidentally tossed out with the trash. Similarly, if you do not keep your private key to the currency confidential, it is analogous to someone taking cash out of an unguarded wallet. In fact, one can probably think about hacking bitcoin as a less physically dangerous, but no less costly, version of being mugged for one's wallet.

The companies that create and manage digital wallets also pose risks. These companies could fail, making it difficult to access digital funds. In 2015, the

New York Superintendent of Financial Services issued the first license to a company that plans to offer a bitcoin-based mobile payment system. The FTC encourages consumers to file complaints about bitcoin if they encounter problems, and the CFPB has issued four (admittedly vague) principles for digital currency: 1) control, 2) privacy, 3) fraud protection, and 4) transparency. Consumer Financial Protection Bureau, *Consumer Protection Principles: CFPB's Vision of Consumer Protection in New Faster Payment Systems* (July 9, 2015) http://tinyurl.com/j4t4jll. These principles are the likely pillars of any consumer protection regime that may develop.

Existing laws may sweep in digital currency but many unknowns exist. Conventional money transmitter statutes, which exist in nearly all states, do likely apply. The Uniform Money Services Act, section 102(14), defines a "money transmission" to include "receiving money or monetary value for transmission." These typically require licensing of the business and reporting suspected criminal activity, but provide little else in the way of consumer protections. The applicability of the Electronic Funds Transfer Act (EFTA) to digital money is much less certain. The definition of "account," 15 U.S.C. §1693a(2), does not seem to include something like bitcoin, for which the digital code is itself the repository of value. Advocates for bitcoin have argued that specialized regulation for digital currency would violate the idea of "technological neutrality," (not that this idea has ever particularly applied to payments in the United States as checks, electronic transfers, and credit cards have long had specific rules). Jim Harper, *Consumer Protection in the Bitcoin Era*, AMERICAN BANKER (May 14, 2014). Industry preference seems to be that existing legal and regulatory regimes adapt to digital currency. The Bitcoin Foundation actually has pointed to two facets of private digital currency that improve consumers' ability to oversee currency: 1) the cryptographic proof of reserves in a public ledger permits an audit by any interested party; and 2) "multisignature" transactions can allow consumers to require more layers and parties to assent to control their funds. *Id.*

If you could not follow these two purported consumer protections, consider how a typical, non-law-educated person will fare in a world of digital currency. Innovation has a dark side in the consumer world, which is the capacity for scammers to exploit consumer confusion. Already, the FTC has gone after an unscrupulous bitcoin operation. The company, Butterfly Labs, marketed "BitForce" mining computers powerful enough to quickly manufacture bitcoin, selling them for prices ranging from $149 to $29,889 based on purported computing power. In fact, the company failed to deliver many computers or delayed in delivery so long as to render the computers nearly obsolete for bitcoin generation due to improvements in processing speeds. FTC Press Release, *At FTC's Request, Court Halts Bogus Bitcoin Mining Operation* (Sept. 23, 2014).

B. Digital Media: Video Games

Just as books and music are increasingly purchased solely in digital format, video games are moving in that direction too. The digitalization of any media can be potentially disruptive to settled law, but because video gaming itself is a far newer creation than books or music, the issues are less resolved. The lack of legal clarity also could stem from the fact that video game purchasers may not be litigious types, or more likely because few judges are big “gamers” (in the sense of video games; this assignment excludes gambling from the concept of gaming).

Gaming is big business to the companies involved and to its billions of users. In 2005, the U.S. video game industry surpassed the U.S. movie industry for total revenue, and in 2007, it passed the music industry as well. Valuations of the global video gaming market put it between $45 and $50 billion, with rapid growth forecast to continue. The rise of the nerds has begun.

1. Intangible Digital “Goods”

Digital video games illustrate the multiple areas of law involved in consumer conflicts with businesses. As is often true, contract law is foundational, but digital game purchases twine together contract and property, specifically licenses and intellectual property. Digital purchases challenge conventional ideas of rights and ownership. With a tangible object that contains intellectual property content, such as a novel, the author retains the copyright, and the purchaser has the good. For example, when a consumer goes to a big box retailer and purchases a physical copy of a game, that purchaser owns the right to play the game at any time at will, to resell the game, or to lend it to a friend.

Compare that to when a consumer visits a game studio’s website, pays online to purchase the game, and downloads the content from one of the game studio’s digital distribution channels. Video games may be single-player or multi-player. If the latter, the consumer needs to connect with other users and would expect to either need to be physically connected to friends (local multiplayer) or need an Internet connection (online multiplayer). Many single-player games have identical Internet connectivity requirements, however, which can be a surprise to those who downloaded the game without reading the clickwrap contract. In such a situation, the consumer cannot access the game without online access. There is no option to convert the game to a tangible form or play it without online personal validation. Without these abilities, the consumer also cannot resell or gift the game. The digital game is inextricably tied to the consumer’s account, verified and validated solely through online means. In this sense, many digital game purchases are more akin to a non-transferrable license such as with software, than a full-fledged purchase as with tangible medium games.

At the heart of the problem with digital video games is that first word: digital. Aside from reaching out and touching the screen, the consumer does not have something that is tangible. Instead the digital nature of the purchase takes it outside the definition of goods and into the realm of an intangible. The Uniform Commercial Code defines “general intangibles” as any personal property, including software. U.C.C. §9-102(a)(42). Software “means a computer program and any supporting information provided in connection with a transaction relating to the program. The term does not include a computer program that is included in the definition of goods." U.C.C. §9-102(a)(76). Does a digital mode of purchase change the law's treatment of a consumer's rights? Christine Jackson, *Consumer Rights Act—How Will It Affect Developers and Their Gamers?* (June 2015), https://www.wrighthassall.co.uk/knowledge/legal-articles/2015/06/19/consumer-rights-act-developers. ("The key concern…[is] whether 'digital content', e.g. mobile phone apps and virtual in-app purchases, fell within, or outside of, consumer law.")

To see the issues in more detail, consider the following scenario. In March 2014, Blizzard Entertainment launched an online collectible card game called Hearthstone, modeled after physical trading card games such as Magic the Gathering and Yu-Gi-Oh. In July 2014, Blizzard released an expansion to the base game called "Curse of Naxxramas," which players could purchase for $20. For some, the purchase of the expansion was uneventful. For others, however, the transaction "bugged up," and although the consumers had already paid $20 for the expansion, the entire game told them that it was locked, unplayable, and unpurchaseable. Mark Judge, *Hearthstone Players Experiencing "Purchase Failed" Error in Curse of Naxxramas*, LoadtheGame.com (Jul. 30, 2014), http://tinyurl.com/hkuvznq. If the game had been a physical deck of cards with an expansion pack, the consumer could have continued to enjoy the initially purchased cards and returned the defective expansion pack (say, with half the cards printed blank) to the store. Under the U.C.C., the consumer would have been entitled to an immediate refund, backed by the warranty of merchantability that accompanies goods.

With digital game purchases, the consumer may need to rely on the means of payment for a remedy. As discussed in Assignment 15, the Truth in Lending Act gives consumers the right to withhold payment to a card issuer based on a dispute with a merchant. *See* 15 U.S.C. §1666i; 12 C.F.R. §1026.12(c). The exercise of this "chargeback" right, however, can create more problems than it solves for a consumer. Gaming companies typically suspend an entire account or ban a person from being a player in any game when a consumer initiates a chargeback. To illustrate the breadth of this remedy, imagine a consumer who complained to a store retailer about a defective disc of a movie produced by Studio X, and in response, upon learning of the complaint, Studio X seized all discs owned by the consumer that contained Studio X content. Further, Studio X would have a mechanism to prevent the consumer from purchasing more discs until the dispute was resolved.

From a consumer perspective, the above example is horrifying. The offense may be particularly deep if the consumer actually contributed content to the game, such as by designing a character or virtual world, or had some type of game "currency" earned but not redeemed. From the business perspective of a game developer, however, the policies around digital game purchases are in place to protect the business *from* consumers. Piracy and fraud are serious risks of loss. An unscrupulous individual may purchase a digital product and file a chargeback, asserting that the product was defective but actually have tried the game and not liked it—or worse, somehow copied it. Initially, the rationale for requiring online access even to play an offline, single-player game was to permit video game developers to authenticate legitimate purchases. The point was to eliminate the opportunity to torrent (illegally copy or download) a game and use it without the company's knowledge.

2. Legal Framework

The United States has not yet adopted legislation on digital media and digital transactions. The most recent venture to create consumer law protections for digital media is a decade old. This effort at "modernization" of the law was the debate over the Digital Media Consumers' Rights Act. H.R. 107, 108th Cong. (2003). The legislation focused on copyright protections and deceptive labeling practices for CDs and did not address online digital transactions. Ultimately, the bill died but portions touching upon copyright were enacted in broader intellectual property reforms. In terms of the issues discussed above, the bill largely was a misnomer.

In 2011, the European Council of Ministers adopted the EU Consumer Rights Directive. Aimed at a broad swath of online markets, not solely digital video game, the Directive created new obligations for "traders" that included online sellers. *See generally* European Union Council Directive 2011/83/EU, available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011L0083&rid=1. This was a crucial step towards subjecting the online economy to existing consumer law. In October 2015, the UK Consumer Rights Act provided even greater clarity and rights (albeit only for residents of the United Kingdom). "The Act applies to business-consumer transactions where a digital game is bought from a store (Steam, etc.), in-game purchases within Free-to-Play games, and even digital 'Early Access' games." Peter Parrish, *UK Consumer Rights Act 2015: What It Means for Digital Game Purchases* (Oct. 1, 2015), http://www.pcinvasion.com/uk-consumer-rights-act-2015-what-it-means-for-digital-game-purchases. Digital content must be of satisfactory quality, fit for a particular purpose, and as described in any marketing material. Thomas Coe, *Summary Guide to the Consumer Rights Act 2015,* WrightHassal.co.uk, (Oct. 1, 2015), http://tinyurl.com/zg9xd3a. The Act provides remedies for defective digital content, including repair or replacement, price reduction, a claim for damages, or a full refund. The law purports to apply whenever a customer is located in the UK, regardless of where the seller is located, although its reach is uncertain. The EU Consumer Rights Directive and the UK Consumer Rights Act should encourage game developers to move towards consistent global standards on how they distribute games and handle disputes. Gaming is a global enterprise, with players connecting online from around the world to play with each other. The community is international, even if the law is not yet there. Cutting against global standards, however, is the relatively small size of the EU markets (and within that, the even smaller UK market). In 2015, China topped the game market with $22.23 billion in revenue. *Leading Game Countries Worldwide by Revenue 2015*, Statista.com, http://tinyurl.com/hzmjszb. The U.S. came in second with $21.96 billion; the UK was 6th, bringing in only $3.53 billion. To the extent that consumers in the U.S. and China generate gaming revenues that dwarf other countries, gaming companies are likely to focus their compliance on U.S.

and Chinese law. Neither country provides significant rights to consumers who make digital game purchases.

3. Consumer Protection Issues

As technology advances, the legal issues related to digital gaming also advance. Even the U.K.'s 2015 law fails to tackle the newest problems and allegations of consumer exploitation. The gaming companies in the U.S. seem to be floating along on a sea of misunderstanding and apathy from lawmakers about the nature of gaming.

With any game release, a consumer takes a gamble on the game's quality. The EU Directive and the UK Consumer Rights Act of 2015 give the consumer remedies if the game is defective or the quality is poor. Built into the regulations is the pervasive consumer expectation that every game will have "bugs"—glitches in the game. Some bugs do not noticeably detract from game play and therefore are not deemed significant. Other bugs "break the game" in the gaming lingo. The player is either unable to play the game at all, or unable to play it properly. "Patches" or updates are often released with online digital games to address bugs. Other games run on annual release dates, with minor bugs addressed in the new release. These fixes are not free for consumers, however, as the new content is considered an expansion that is a new product bearing a new purchase price. Under the EU and UK regulations, a consumer who buys a defective or poor quality game has a solution. The law gives the right to a refund or a repair of a "buggy" game.

When consumers could use some assistance—and when there has yet to be any intervention from regulators—is in the above-mentioned scenario about lock-outs from content based on a single game issue. A consumer whose entire account with a developer is suspended has no clear rights and no clear remedy. Indeed, it is not even clear to what regulator a consumer should turn to complain (the FTC? the state attorney general?). It is similarly unclear which policymakers should be evaluating whether legal rights are needed. The intellectual property community does have advocates for end users, but that frame for thinking about protection may differ from those who work on defective products or financial transactions as matters of consumer protection. As of 2015, purchases of digital content occur in the Wild West for consumers, who remain at the mercy of developers until either U.S. regulators catch up with digital developments or the marketplace evolves to provide contractual rights as a matter of competition.

Game developers are likely to push back against consumer protection regulation on the grounds that licensing law is adequate to cover disputes. From this perspective, a digital game purchase is a consumer paying for a license to use software. As with word processing programs or operating systems, there are updates to the software available to the licensee, and eventually the developer may stop releasing updates for old 'software' because a newer version has been released and the older one is no longer kept up. The available remedies come from terms of the licensing agreement, but when one studies that fine print, there are in fact few to no consumer protections. The added complication for games is the degree to which players themselves create content. Gamers' play of the game contributes to the product in a way that is more creative and additive than a computer user typing up a private document in Microsoft Word.

Another area of concern for consumers is new pricing models. Increasingly, the gaming industry makes a profit by initially giving the game away for free and then later profiting handsomely when consumers charge "in-game" fees. These purchases are known as microtransactions because they may cost only a dollar or two, but the overall cost can aggregate quickly. As discussed in Assignment 20, several lawsuits have been filed against mobile app developers for the ease of making microtransactions in mobile apps, particularly for not policing purchases by children. Video game developers are hearing a similar buzz of feedback from consumers regarding microtransactions that are embedded in personal computer or console games (not just mobile games). Electronic Arts was criticized in 2015 "for removing content form the original [Star Wars: Battlefront] game only to sell it back later as downloadable content you have to pay for." Dave Smith, *I Miss the Days When I Only Had to Pay Once for a Video Game,* BUSINESS INSIDER, (Apr. 22, 2015), http://tinyurl.com/z3ugtu7. The game developers are trying to hit the maximum ceiling price that a consumer is willing to pay for a game, without making that final cost obvious to consumers. Consumers that would balk at a $60 boxed console game may quickly exceed that in six months of playing a $19.99 game that required many microtransactions to unlock features.

The stakes are high in getting the pricing correct. Game development costs have soared with game sophistication and consumer expectation. As an illustration, Rockstar Games, the developer of Grand Theft Auto V, spent $265 million to create and market the game, but brought in $800 million in the first 24 hours of its release for sale. *Id.*, http://tinyurl.com/z3ugtu7; *see also* Patrick Dane, *'Grand Theft Auto V' Makes $800 Million in Its First 24 Hours,* Gamerant.com, http://gamerant.com/grand-theft-auto-5-sales-first-day (last visited Jan. 14, 2015). Not all games do so well, however, and then developers may face fierce consumer pressure to remedy problems. Final Fantasy XIV, a "massively" multiplayer online roleplaying game, was heavily criticized by consumers for poor quality upon its initial release. The developer's response was to completely overhaul the game, even working the "redo" into the plot of the rereleased game. Like any market, the gaming industry has some incentive for self-regulation from consumer behavior. Word of mouth and large participant bases are important. Unlike a novel that may only have one appreciative reader, most games require mass participation for any player to benefit. If consumers lose trust or the company's reputation plunges, consumers will move on to another developer or game series.

C. Socialization of Finance

Consumers can prevent scams, frauds, mistakes, or imprudent decisions by communicating with other consumers about their experiences with a particular business. The word-of-mouth tradition of consumer protection is old. It gave rise to much of the common law of slander and libel, which can give a merchant a way to silence or punish a consumer that wrongfully attacked a reputation. In a small village, bad actors were quickly ferreted out through word of mouth. As the geography and economy of the United States expanded, consumers had a harder time keeping up with businesses and communicating with each other across the expanded market. Government also had trouble keeping tabs products and transactions, especially as westward settlement—and commerce—outpaced government and law enforcement.

Internet technology is reconnecting consumers, providing avenues for consumer-generated feedback about dealings with businesses. In fact, the top consumer watchdog in the U.S. is probably either Yelp or Google, not the CFPB or the FTC. While this idea may seem strange from a legal perspective, the reality is that only a pittance of society engages with government for consumer advice, compared to millions a day who search online or leave feedback. Innovations in technology are driving a new era of socialization.

In consumer finance, social connectivity is creating opportunities for consumers to engage in borrowing, lending, and investing that required a business as intermediary in the 20th century. Technology can increase transparency for regulators and consumers alike, and allow consumers to join forces to move markets in ways favorable to them. The outcomes could be democratic and empowering for consumers, but also could go the other direction. Greater socialization of finance creates risks for consumers. They can more easily enter into transactions but may be unable to assess its potential downsides or protect against harms. The ease of interface, driven by technology, can mask risks and prompt consumers to feel safe even in unfamiliar transactions.

1. Crowdfunding

This book has distinguished an individual's identity as an investor from that of identity as a consumer. Crowdfunding, in which consumers make contributions outside traditional investment platforms, blurs the investor versus consumer distinction. The idea of crowdfunding is that people contribute financial support for a project. If this sounds like what happens when a pension fund buys corporate bonds to lend a corporation cash to expand, there are certainly similarities. But bond offerings and pension funds are highly regulated; they reside squarely in the world of high finance. Those who participate in crowdfunding are termed "supporters" and what they earn are called "rewards." Contrast this to "investors" who earn "profits" when they contribute capital to a business venture. In Silicon Valley lingo, crowdfunding enables creators to disrupt finance channels through social networks. At the core, the difference may be primarily one of scale. Most platforms for crowdfunding have dollar caps, partly to avoid more stringent regulation. The aggregate dollars are significant, however, with an estimated $10 billion in contributions in 2014.

Crowdfunding can operate using two types of business models. In the first, the support is functionally a charitable contribution or a donation to personal fundraising. The proponent may offer a reward, such as a DVD of a film after it is produced or recognition as a contributor at an art showing. Kickstarter and

Gofundme are large players as of 2016. The other model is closer to traditional equity investing, in the sense that the reward is a partial ownership interest in the company. Prominent companies are AngelList, Fundable, and Crowdfunder. In either model, social networks are crucial. An entrepreneur will start a campaign, choosing a site that permits the kind of project that is contemplated (for example, Kickstarter only allows projects related to arts and technology, such as game design, music, or publishing). Once consumers discover the campaign and donate, they can use social networking tools to publicize their contributions. If a friend of a supporter also makes a donation, and in turn spreads the word, additional traffic is driven to the crowdfunding campaign. The more visitors, the more contributions, and as the site's reputation grows for successfully funding, more entrepreneurs list their projects and more supporters visit. These strong network effects permit rapid, viral growth as compared to in-person, targeted pitches for funding.

Crowdfunding sites typically generate income through a fee that corresponds to a percentage of the transactions. This revenue stream provides a consistent incentive to exaggerate the investment opportunities and downplay the risks. The platforms disclaim responsibility for the information presented by fundseekers and typically exercise only minimal controls over listings. By comparison, for public equities investments traded on the New York Stock Exchange, the exchange itself has minimum requirements designed to limit participation to higher-quality investments (on top of SEC-required disclosures for public securities.) To date, the platforms have succeeded in eliminating liability for the actions of fundseekers. Additionally, the platforms must mitigate any insolvency risk by only serving as an intermediary—not a holder—of funds and must safeguard consumer financial data collected via the site.

2. Peer to Peer Lending

Peer to peer lending is ancient, and it has never disappeared from U.S. society. Particularly for borrowers outside a bank's comfort zone, such as students or undocumented individuals, family and friends are valuable lenders. Peer to peer lending is different, however, because it uses technology and big data to create "peer" relationships outside real-world social networks. That is, instead of asking your rich uncle Jimmy for a loan, you can ask your classmate's rich aunt Joan in a network of connections.

In its truest form, peer to peer lending occurs across a platform that connects willing individual lenders with needy individual borrowers. The platform's role is to facilitate—not fund—the transaction. It provides technology that may verify a borrower's information such as name and social security number, standardize loan requests such calculating an accurate APR, and gathering or analyzing data on repayment risk. Online-only data such as IP addresses and web browsing patterns feed new analytical models for assessing risk, and social media platforms can provide real time monitoring of borrowers. A prospective lender may see photographs of borrowers and be able to read narratives about the reasons that loans are desired. Examples of borrower activity that may raise red flags are posting to Facebook about a car breakdown, using all capital letters in a loan request, or jumping quickly when browsing the platform to high-dollar loans. Elizabeth Dwoskin, *'Big Data' Doesn't Yield Better Loans: Consumer Group Says Crunching Such Numbers Doesn't Make a Big Difference; Lenders Disagree*, WALL ST. J., Mar. 17, 2014. Peer to peer lending generally ignores or relies much less heavily on traditional credit reports than bank or finance company lending.

These consumer (borrower) to consumer (lender) transactions are different than broader "marketplace" lending, which usually denotes a non-bank, technology-driven lender that offers up its own capital or draws funding in from relativelysophisticated, larger-scale private investments. Both Prosper and Lending Club started as peer to peer but now attract investments from hedge funds and use a bank intermediary to process loans. They are still available to individual investors who do not qualify as institutional or accredited investors, designations requiring that a showing of entity formation or significant assets as proxies for financial sophistication.

Peer to peer platforms earn money in ways similar to crowdfunding sites. They usually charge an origination fee of 1 percent to 2 percent of the loan amount and a servicing fee, typically 1 percent of the outstanding balance, for the duration of the loan. Peer lenders have no physical branches, which lowers costs, but they also enjoy significant operational savings from not having to hold capital as a bank does when a loan is on its books. In the peer to peer context, the company is an intermediary.

SoFi is an exemplar of the evolution of peer to peer lenders. It began with student loans, targeting those who attended Ivy League schools and earned degrees in typically high-paying fields, such as MBAs. Its initial funding came from graduates of the schools for which SoFi was willing to facilitate refinancing of student loans. SoFi even matched students with potential lenders based on shared interests, such as major. The alumni also were asked to act as informal mentors to borrowing and to help them locate job opportunities. SoFi now offers higher education loans for students, parents, and alumni, as well as personal loans. In 2015, it became the first U.S. peer to peer lender to offer mortgages. It is a nonbank, advertising "[t]his is the beginning of a bankless world." However, it must hold one or more state licenses in each place where its borrowers reside.

In the future, peer to peer financial services may extend beyond loans. Companies have launched applications that permit peer to peer ATM transactions. A consumer with some cash to spare can direct an ATM to permit a withdrawal for a selected peer. Philip Ryan, *Peer-to-Peer Lending Gets Real With a P2P ATM*, BANK INNOVATION (Jan. 14, 2014), http://tinyurl.com/jjk93vg. The transaction may be validated via an authorization code or QR code on the consumer's mobile phone. Peer to peer lenders have even cropped up to make loans in bitcoins. Combining two innovative finance industries together may be genius—or just double the risks to all involved.

3. Consumer Protection Issues

The legal issues in crowdfunding and peer lending are similar but not identical. The commonality is that from a consumer protection standpoint, it is not clear which consumer needs protecting. Is it the quasi-investor/ loan funder? Or the fundseeker/borrower? On both ends of these transactions are consumers, in the sense of individuals acting on their sole behalf. Admittedly, one consumer has funds to spare and the other consumer needs money. Both sides, however, lack the legal protections of entity status and the experience that comes with a larger-scale business. Socialized finance shakes up the core ideas of consumer law discussed in Assignment 1, What Is Consumer Law and Assignment 2, Who Is a Consumer?

From a legal standpoint, crowdfunding and peer lending sites/applications repeatedly and loudly have proclaimed that they are mere “platforms.” They argue that all transactions are solely between the creator/borrower and backer/lender, and that they bear no liability for losses by either party to any transaction. Kickstarter, for example, has disavowed any role akin to a securities broker. Peer lenders have taken care to avoid becoming banks, avoiding holding deposits or loans on their books, even if they need to partner with a bank to avoid doing so.

Traditional contract law clearly applies that apply to social finance transactions. Even then, however, the platform is arguably not a party to a contract. In the strongest form of the argument, these companies are just digital equivalents of the landlord that provides offices for loan officers at a bank, the printing company that produces loan application forms, or the manufacturer of secure collection boxes for charitable donations. The reality is more complicated, however, as intermediaries in financial transactions often are subject to regulations that would not exist outside in non-financial contexts.

Peer lenders and crowdfunders reside presently in a kind of regulatory purgatory. On the one hand, agencies have made noises that they could assert authority over social finance companies. On the other hand, they have been slow to actually do so. There are very few promulgating regulations that address the particulars of consumer-to-consumer funding via a platform model. Congress added a provision to a financial stimulus law in 2012 that exempted crowdfunded projects under $1 million from most securities laws, including registration. Peer to peer lenders arguably are covered by this law’s definition of crowdfunding. Lending platforms usually take responsibility for producing disclosures and advertisements, have systems to protect data, and some controls to guard against money laundering. Compliance in areas such as credit discrimination, debt collection, and underwriting is much less certain. While some of these laws may apply only to those engaging in a certain volume of business, other laws such as usury statutes and unfair or deceptive acts and practices may apply to anyone making a profit, including the platform and consumer on the funding side of the transactions.

In 2015, regulators started to bring suit against crowdfunders. The Washington Attorney General obtained a default judgment against an individual who failed to deliver his crowdfunding project. The “consumer” raised $25,000 on Kickstarter to create a card game and then disappeared without delivering refunds. The lawsuit raised eyebrows because of the actual damages to Washington residents: $664 in contributions from 31 backers. The judgment was for $50,000, however, with $1,000 in statutory damages for 31 harmed consumers under the state’s UDAP law and attorneys’ fees. The Washington Attorney General characterized the defendant’s actions as “crowdfunding theft” and was explicit that the lawsuit was designed to send a message to people seeking consumer's money in what he called a "new frontier." Taylor Soper, *Kickstarter Fraud: Washington Files First Consumer Protection Lawsuit Involving Crowdfunding*, GEEKWIRE.COM (May 1, 2014), http://tinyurl.com/lyzcfm9. The FTC also acted in 2015 against a person who raised crowdfunds to create a board game but abandoned the project. It sued under its unfair or deceptive acts or practices authority and obtained a settlement that included a monetary judgment of over $110,000.

The SEC could act to monitor potential risks to consumers who contribute by treating these people as investors, but it seems that "borrower" protections in crowdfunding would remain under the jurisdiction of state regulators. Similarly, the CFPB could declare that crowdfunding projects and peer loans are "consumer financial products." Even then, the CFPB may be more likely to focus on examination and supervision of the platform business, leaving most of the work of stopping scams and seeking restitution for consumers to state attorneys general or the SEC.

With an undefined legal framework, consumers on both sides of social finance are largely required to rely on their own judgment about who to trust. It is precisely the social nature of these transactions, however, that facilitates such a willingness to trust. The additional information and real time feedback from technology-driven social networks is substituting for reliance on legal systems and regulatory actors to vet and police.

A final note: Social networks are themselves dependent on the law. While the U.S. Constitution may have seemed distant from the financial and commercial transactions studied in this book, free speech is a powerful form of consumer protection. In countries in which speech is curbed, consumers lack an important way to protect each other from scams and frauds. Vibrant speech, stemming in part from comparatively weak laws on libel and slander, allow U.S. consumers to sound off about their consumer rights in ways that are unthinkable (due to the threat of prison, for example) in some countries. Consumer protection in buying and borrowing may depend on political freedoms as well as economic ones.

D. Conclusion

It is incorrect to conclude that the new forms of money, digital gaming, and social or peer lending are "outside the law." Principles of consumer law run deep in tort and contract doctrines, and by their nature as part of the common law, such laws can be applied to any dispute brought to a court. The more pressing question is when regulation is appropriate. In the United States, the approach usually is to wait until a product or transaction establishes a firm place in the market, and then have the federal or state legislature act to create statutes that provide product-specific boundaries. The drawback to this after-the-fact approach is that the common law may leave consumers with no rights or remedies in the intervening period. That fact may, in turn, influence how the product or transaction develops. Without strong and widely accepted consumer protection norms at the outset, the law is positioned to be reactive to unchecked market behavior that initially favors businesses. Perhaps this is inherent in the nature of capitalism and is an acceptable cost to bear for the prosperity and opportunity created in a free market system. The scammed consumers may see it differently, however, and depend on government to curb market forces.

Economic and social forces will continue to push consumer law in new directions, as the three topics in this assignment illustrate. Yet, recall the common lesson of *Carbolic Smoke Ball* and *Airborne*. As long as there are gaps in experience, knowledge, technology, and the like between buyers and sellers (or between lenders and borrowers), there will be consumers who feel cheated. The question for consumer policymaking is whether the consumer should be given a right and corresponding remedy, or be left with only regret. Lessons learned the hard way may stick with us in a way that no legal effort—even a textbook on consumer law—ever can.

Problem Set 27

27.1. Think about yourself, friends, and family members as consumers. Now think about consumers that you may infrequently observe: those purchasing a Bugati car, those who pawn goods one month only to redeem them in the next month, those who carry a $13,000 balance on their credit cards but never seem to make a dent in it, those young veterans trying to buy a first home. Are the topics discussed in this final assignment important to your network? Are they important to these “other” consumers? Which issues and in what ways? Do you think consumer law in the future will be more focused on higher-income, sophisticated consumers or lower-income, less-experienced consumers? Assuming that equal attention cannot be paid to all consumers, which group do you think is the harbinger? In selecting a group of consumers, think beyond income to other characteristics. Articulate an argument to your class about which consumers should be the focus of the next wave of consumer protection and why.

27.2. You were excited about the final assignment for Consumer Law, and not just because a TV binge or a night out drinking was your planned reward for wrapping up classes. Instead, you put faith in the author that the last assignment would cover the topics that you had been waiting to learn about all semester. To your chagrin, the topics seemed so “yesterday.” And all that, despite an Assignment title of “The Future of Consumer Law.” In response to your dissatisfaction, your professor suggested that you take up your rights as a consumer. (No, there are no refunds for purchasing this book.) The professor noted that the author invited your feedback as a reader. Outline the content for a topic that you think should be included in this Assignment on future consumer law. For your topic, address briefly the following: What is the consumer need that this product or business fulfills? What are analogous goods, services, or market leaders being displaced? What applicable law exists? (Name some specific statutes or common law doctrines.) What are the key consumer protection issues that any new law for this topic should address?

27.3. Once upon a time, your law school offered a Consumer Law course. You remember it fondly, especially now that the studying and exam are years behind you. In your decade of general litigation practice at a mid-sized firm, you have handled some consumer matters over the years, including cases alleging breach of warranty, unfair and deceptive practices, false advertising, and disclosure violations. You've learned from interviewing students at the local law school for summer jobs that a consumer law course never has been offered (or at least not in the memory of the octogenarian registrar). You think this is a shame, but upon raising this with the dean at a cocktail mixer are told that the best solution is for you to propose teaching a Consumer Law course as an adjunct instructor. Prepare a one-paragraph course description that describes the two or three main themes of the course and lists at least a half-dozen specific topics to be covered. You can rethink the course that you took, or engage in a *Back to the Future* exercise and guess what will be the most salient topics in twenty years. Be prepared to read your description in class.