



The Law and Economics of Catalyzing Fans

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In the past decade new technologies have enabled large groups of people, separated by geographical distance and sometimes even national boundaries, to join together for pursuit of social good or economic gains. For example, we have seen thousands of participants engage in the editing of Wikipedia, contributing their expertise to build a base of knowledge on the web.¹ Charities, artists, and now even for-profit businesses are able to use crowdfunding to raise financial support for their endeavors.² Prediction markets allow participants to forecast outcomes of future events, creating incentives for accuracy either through monetary rewards or reputational advantage.³ Crowdsourcing websites have allowed thousands of workers to complete small tasks which in the aggregate tackle large-scale problems,

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¹ WIKIPEDIA, www.wikipedia.org (last visited Mar. 15, 2015). The development of Wikipedia as a type of collective knowledge base is detailed in YOCHAI BEN-KLER, *THE WEALTH OF NETWORKS* 9 (2006).

² Many artists, musicians, and filmmakers will put their projects up for funding on Kickstarter. Those who donate enough money will not receive any sort of return, but they may receive a print of artwork, a CD, a DVD copy of the film or perhaps other perks, such as a personalized gift from the artist or filmmaker. Note that some websites like “Go Fund Me” are non-profit only in the sense that users band together to help other participants, but the individuals who solicit donations through posting on the website are not representatives of 501(c)(3) non-profits and those who make donations through the website do not receive a tax deduction.

³ See generally MICHAEL ABRAMOWICZ, *PREDICTOCRACY* (2008) (describing the benefits of prediction markets). For the author’s discussion of the legal issues surrounding prediction markets, see Miriam A. Cherry & Robert L. Rogers, *Prediction Markets and the First Amendment*, 2008 U. ILL. L. REV. 833 (2008); Miriam A. Cherry & Robert L. Rogers, *Tiresias and the Justices: Using Information Markets to Predict Supreme Court Decisions*, 100 NW. U. L. REV. 1141 (2006); Miriam A. Cherry & Robert L. Rogers, *Markets for Markets: Origins and Subjects of Information Markets*, 58 RUTGERS L. REV. 339 (2006).

whether those are for altruistic purposes (e.g., performing search and rescue for the downed Malaysian jetliner in 2014 by having many volunteers scan satellite footage of large areas of water)⁴ or for-profit businesses on Amazon Mechanical Turk.⁵ Through gamification certain types of mundane computer work can be made fun, rendering it far more enjoyable.⁶

The common link between these diverse ideas and models is that they use technology to facilitate what author James Surowiecki has termed “the wisdom of crowds.”⁷ I have long been fascinated with collaborative technologies on the Internet and indeed, have written on many of these issues over the years. In previous writing I have examined why some of these collaborative technologies have become commodified while others remain non-profit and largely appeal to the altruism of participants.⁸ I am also intrigued with how new collaborative technologies and endeavors interact – or fail to interact - with existing laws and regulatory regimes.

Coming from this perspective, when I first read “*Catalyzing Fans*”⁹ in draft last year, I responded by emailing my friend Dan Markel comments. As I let the authors know, I found their proposal for Fan Action Committees (FACs) to be intriguing, and fitting within the developing area of online collaborative tools that I have been studying and thinking about. As the authors explain in extensive detail in their article, FACs allow fans to join together to express their appreciation. That appreciation could be for a favorite television show or movie, a beloved actor or actress, support for a talented sports figure or a home team more generally, or perhaps even a favorite professor. FACs could step in to provide the proper incentives to influence producer, talent, or corporate behavior in a way that is consistent with the collective wishes of the fan base.¹⁰ As the authors note, FACs could

⁴ Charlie Campbell, *Missing Jet Sparks “World’s Largest Crowd-Sourcing Project,”* TIME, March 18, 2014, available at <http://time.com/28332/missing-jet-crowd-sourcing-project/>.

⁵ Crowdfunding, 78 Fed. Reg. 66 (proposed Oct. 23, 2013) (to be codified at 17 C.F.R. pts 200, 227, 232, 239, 240, and 249) available at <http://www.sec.gov/rules/proposed/2013/33-9470.pdf> (proposed SEC rules creating limited crowdfunding exemption to registration under the JOBS Act); On the development of crowdfunding, see KEVIN LAWTON & DAN MAROM, *THE CROWDFUNDING REVOLUTION* 1-2 (2010); Joan MacLeod Heminway & Shelden Ryan Hoffman, *Proceed at Your Peril: Crowdfunding and the Securities Act of 1933*, 78 TENN. L. REV. 879, 961 (2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1875584.

⁶ Miriam A. Cherry, *The Gamification of Work*, 40 HOFSTRA L. REV. 851 (2012).

⁷ JAMES SUROWIECKI, *THE WISDOM OF CROWDS* xiv, 3-4 (2004).

⁸ See, e.g. Miriam A. Cherry, *Cyber Commodification*, 72 MD. L. REV. 381 (2013).

⁹ Dan Markel, et al., *Catalyzing Fans*, 6 HARV. J. SPORTS & ENT. L. 1 (2015).

¹⁰ *Id.*

manifest their wishes in many ways, e.g., retaining a popular athlete on a home team (either through direct transfer payments or to a charity foundation), backing the creation of more episodes of a favorite television show, or creating a sequel for a favorite movie.¹¹ To summarize by restating it in law and economic terms, FACs would allow fans to fill in the gaps when markets typically fail and fan preferences are not reflected.

This response to *Catalyzing Fans* examines two topics. First, I note that the paper is overly humble, thus understating its contributions. While humility is generally a virtue, the paper seems to understate its own implications and the potential impact of the proposal. The proposed FACs could eliminate massive transaction and agency costs in any number of sports and entertainment contexts, and thus it deserves serious consideration and analysis. To this end I provide a justification of FACs from a law and economics perspective. Law and economics has long recognized the importance of transaction and agency costs in analysis of legal and regulatory proposals. Second, I believe that the “rich get richer” objection to FACs raised and rebutted by the authors is a genuine concern. This potential objection, however, could be addressed through a thoughtful design process that could improve the structure of FACs. The “rich get richer” objection is an important enough concern that it might be best – at least to begin - by implementing a charity-based FAC. With these two goals in mind, I will start by advocating for the importance of the authors’ contribution.

FACs SOLVE AGENCY PROBLEMS AND REDUCE TRANSACTION COSTS

At various points in their paper, the authors downplay the importance of their contribution. For example, at the start of their paper, the authors characterize the FAC proposal as a solution in search of a problem.¹² At another point in the article they provide this summary of FACs: “Given the various ways people spend their money foolishly, crowdfunding mechanisms to benefit talent or their charities) constitute a relatively *harmless perversion*.” (emphasis added).¹³ Casting the FAC proposal this way unfortunately does the authors’ ideas a disservice.

As I noted in the introduction, FACs are yet another way for people with a common interest to band together on the Internet to express themselves in a collective fashion. As such, FACs are part and parcel of the use of

¹¹ *Id.*

¹² *Id.* at 24.

¹³ *Id.*

collaborative tools and technologies, like crowdsourcing, Wikipedia, and prediction markets. As Professor Yochai Benkler has put it:

As collaboration among far-flung individuals becomes more common, the idea of doing things that require cooperation with others becomes much more attainable, and the range of projects individuals can choose as their own therefore qualitatively increases. The very fluidity and low commitment required of any given cooperative relationship increases the range and diversity of cooperative relations people can enter, and therefore of collaborative projects they can conceive of as open to them.”¹⁴

Applying Professor Benkler’s words to this context, enhanced communications technologies are helping us to connect with each other, and we have just begun to explore these technologies. Interest-based FACs would further both individual and group expression.

Further, fans themselves are important. It is almost axiomatic that without an audience, even the best performance is irrelevant. In writing, the creative endeavor I am most familiar with, addressing and engaging one’s audience is critical. The same could be said of many other creative fields. Whether in an argument before a judge or an interview on television, the speaker’s success depends on the ability to connect with an audience. Of course this is well-trodden territory. While a rather extreme example, in ancient Rome, gladiators would live or die based on the reactions of the crowd. Of course the crowd might have been too powerful, but the overall point here is that the question of audience is an important one.

In modern times, fans do have some limited power in what happens in sports and entertainment, but it is diluted and diffuse. In the sports context, fans have a limited say in a team’s success by supporting the team financially through the purchase of tickets and merchandise. But aside from being asked for attendance and financial support, fans are generally not consulted about strategic decisions. Television shows can be cancelled despite a robust audience and even vigorous fan-led campaigns to save them. Sometimes this is because of a disconnect with advertisers, other times because of conflict with talent, and sometimes because network executives are not listening to their audiences.

FACs provide a way for fans to be heard collectively, just as prediction markets allow large numbers of people to express their predictions online. Further, FACs could be a resource that producers or talent could draw on in negotiations with networks or advertisers. And sometimes, just like in a

¹⁴ See, e.g. YOCHAI BENKLER, *THE WEALTH OF NETWORKS* 9 (2006). See also Steven A. Hetcher, *Hume’s Penguin, or, Yochai Benkler and the Nature of Peer Production*, 11 *VAND. J. ENT. & TECH. L.* 963 (2009).

Kickstarter or Indiegogo campaign, fans could either guarantee an audience or provide the financing for continuing on with their favorite show or movies. Most recently Amazon sent out a call on email to its “Prime” subscription members asking for votes on pilot shows. Prime members got to vote on which pilots they wanted to see developed into full series. By all account this increased audience engagement and also pulled in new viewers for these shows.

In the terminology of law and economics, the proposed FACs would similarly lower the transaction costs associated with audience involvement. Reducing transaction costs in this context would be utility maximizing. While network executives and team managers would still obviously have a say in filtering and interpreting information, FACs would provide a wealth of information about fan preferences. Reducing agency costs and improving utility is a worthy goal, and thus the authors deserve credit for a worthy idea.

IMPROVING THE DESIGN OF FACs: CHARITABLE PURPOSES

The authors flag several counter-arguments against FACs within their article, rebutting them in turn. In general, the authors do excellent work explaining their idea and then defending it from potential objections. One of the most important objections (the “inequality” or “rich get richer” objection) is, however, a legitimate concern. The “rich get richer” objection is that the fans – many of whom are not wealthy, some of whom are children – will be making payments that they can ill-afford to sports superstars or celebrity actors who make a great deal of money already. As the authors vividly describe, “there is something facially unseemly about little Timmy breaking open his piggybank to enrich already-wealthy stars.”¹⁵ When coupled with rising social inequality, the authors are rightly troubled with the idea of providing more compensation to talent that is already well-compensated.

While “the rich get richer” is a legitimate concern, with proper design and planning, FACs can address and prevent it. The authors themselves advocate that when it comes to the idea of compensation for already well-paid talent, a charitable or non-profit model would be the best choice for the FAC. *Design* is a crucial topic in thinking about human-computer interaction, because the way that the “rules” or the structure of a technology are set up may in fact nudge or even dictate particular results or outcomes. Not all collaborative design is equal.

¹⁵ Markel, et al. *supra* note 9 at 20.

For example, crowdsourcing websites like Amazon's Mechanical Turk match workers with those who need services.¹⁶ At present, few of these crowdsourcing labor markets contain safeguards to establish that workers receive minimum wage, and at least one start-up company has been sued as a result.¹⁷ Many crowdworkers have become frustrated because pay is low and the tasks are not transparent – it is difficult to estimate how long a job might take from the descriptions. Because crowdsourcing websites make money from the listings, but do not pay workers themselves, they argue that the posters, and not the website, should be responsible for any minimum wage violations. In essence, the *design* of current crowdsourcing websites contributes to lack of transparency and shifting of legal responsibility. Imagine, however, what a worker-friendly or even a worker-run crowdsourcing website would look like.

Design can therefore have a dramatic effect on user experience – in both subtle and obvious ways. If a straight money-transfer scheme to well-compensated talent, then FACs indeed might help the rich get richer. The authors defend monetary compensation in FACs by stating that, after all, people are free to spend their money in any way they deem fit.¹⁸ In addition, the authors note, giving money to an individual entertainer or athlete is no different (really) than giving money to a sports team.¹⁹ The transfer payment just happens to be more direct. Despite these arguments in defense of the purely monetary payment from fans to talent directly, the authors ultimately seem to prefer and favor the version of FACs that provide money to charity.

This preference is also utility and social welfare maximizing. Rather than creating a climate of “boosters,” a charitable goal would not only help retain talent, it would also increase donation to worthy causes. Since the authors seem to be hinting that this is the best option anyway, why not use a default rule? The default rule would be that, above a certain level of pre-existing income, FAC payments would be converted to donations. Would donations still influence behavior in the same way as transfer payments? We have no answers now, but behavior economics would lead to the idea that altruistic goals may also motivate players or performers. The charitable donations that would be generated would let talent know that they are appreciated and valued. In other words, we may abandon the “rich getting

¹⁶ See Miriam A. Cherry, *Working for (Virtually) Minimum Wage: Applying the Fair Labor Standards Act in Cyberspace*, 60 ALA. L. REV. 1077, 1087-89 (2009).

¹⁷ See *Otey v. Crowdfunder, Inc.*, No. 3:12-cv-05524-JST, 2013 WL 1915680 (N.D. Cal. May 8, 2013).

¹⁸ Markel, et al. *supra* note 9 at 21.

¹⁹ *Id.*

richer” concern if the design of the website incorporates charitable contributions as its default.

CONCLUSION

This response stresses the importance of the authors’ proposal and situates it within the larger context of collaborative technology. The proposed FACs would reduce agency and transaction costs, and fans would no longer find themselves getting the short end of the stick. Treating certain FAC contributions and charitable giving would allow fans to express themselves while simultaneously creating positive action in the world. FACs have found a fan.

