DE JURE NEXUS LAW JOURNAL

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THE ROLE OF CONTRACT LAW IN SHARING ECONOMY

ABSTRACT

Technology and the rise of the on-demand or sharing economy have created new and diverse structures for how businesses operate and how work is conducted. Some of these matters are intermediated by contract, but in other situations, contract law may be unhelpful. For example, contract law does little to resolve worker classification problems on new platforms, such as ridesharing applications. Other forms of online work create even more complex problems, such as when work is disguised as an innocuous task like entering a code or answering a question, or when work is gamified and hidden as a leisure activity. Other issues involve internet users making contributions to online communities, believing their efforts are volunteer, when in fact they are being monetized by others.

To date, courts in the United States have largely failed to recognize what is happening in these new online work cases, and plaintiffs have yet to find a solid doctrinal ground for recovery. Contract law is stymied in many of these online work situations because assent — widely acknowledged as foundational to contract — is generally absent. In some of these situations, one party was unaware that work was even being performed, or that their work might later be monetized. A comparative approach with law in the United Kingdom is therefore helpful. Even though the U.S. courts that have examined these cases have purported to use an unjust enrichment or restitution formulation to analyse the issues, in reality they are defaulting to traditional notions of agreement or assent that are grounded in contract law.

Referring to the more richly nuanced and developed law of unjust enrichment and restitution in U.K. law may result in a more fruitful and well-reasoned analysis of online work cases.

INTRODUCTION

Most internet users are familiar with the process in which they are asked to retype a distorted display of letters and numbers to sign up for an email list or post a comment on a blog. These garbled sequences are known as "Captchas."1 The word "Captcha" is an acronym, which stands for Completely Automated Public Turing Test To Tell Computers and Humans Apart.2 The reference to "Turing" in the acronym is based on the famous test used to distinguish answers to questions given by humans from answers given by computers. 3 Captchas help to distinguish internet users who are real 4 Such safeguards protect websites from spammers or hackers who might otherwise try to overwhelm or take down blogs, email lists, or websites with automated comment posts or requests.5 Most users understand that they are inserting the letters and numbers as a type of security measure, which is worth the time and minor inconvenience.

Captchas have long been a fixture of the web since they were invented in 2000 by a Carnegie Mellon computer science graduate student, Luis von Ahn.7 Users have become accustomed to the idea that they need to fill in a Captcha code to gain access to various website services, but this has shifted to being asked to insert a second verification. These second verifications, known as "reCaptchas," also look like random combinations of numbers and letters.8 But these "reCaptchas" are far from random. Rather, they are small bits of transcription that could not be identified by computer scanners and need a human eye to do the work. 9 After the Captcha technology was sold to Google in 2009, Google expanded upon the original idea, enlisting its millions of users to do free work for both Google Books and Google Maps. 10 While filling out the second code takes only a few additional seconds for the individual user, when multiplied by millions of users, the aggregate amount.

OVERVIEW OF THE SHARING ECONOMY

The so-called "shared," "sharing," "gig," or "on-demand" economy43 has its roots in longstanding community exchange structures in the United States. While often informal and based on religious community, kinship, or frontier ties, many communities set up exchange systems based on time sharing or barter.44 Tool exchanges and book lending libraries were

prototypes of these collective efforts that depended upon a mix of altruism, government funding, and community initiative. 45 The internet, mobile phones, and computer technology provided a boost forms of sharing and business structures, matching providers or sellers with those eager for goods and services.46 Transaction costs fell, and entering the 2010s, average computer users were able to create markets for used or specialty goods on outlets such as Amazon, Etsy, and eBay.47 Underutilized or unused resources (like an extra room or above-garage apartment) could be rented out through space-sharing website AirBnB.48 Many people began to buy and sell small pieces of their time and labor through mobile cell-phone platforms or online marketplaces for work. Technological platforms offered innovations; instead of buying or selling a good, users of certain platforms could rent access to what they needed.49 A driver with a private car could transform an ordinary morning commute into a profit-generating enterprise by picking up a passenger through Uber or Lyft.50 Other websites, like Amazon's Mechanical Turk, crowdsourced computer tasks to a global market of workers, using only very small slices of time.51 Websites that were part of "prosumer" movements involved customers in design or marketing decisions, only to then sell those same consumers products.52 On-demand services seemed to thrive in an environment that was increasingly globalized, anonymous, and—with lowered transaction costs—more efficient. Despite their "shared" roots, the irony is that many of these newest services or marketplaces are for-profit entities that are highly commodified; everything and anything is now being monetized, from slices of time, to what were formerly shared or open access resources. Back in 2013, the author examined how some parts of the internet were based on a "sharing" model while others were highly commoditized. 53 While many businesses, like Craigslist, struggled with these issues of community access and profit throughout the early and mid 2000s, many later businesses, like Uber, had the pursuit of profit as their mainline goal. 54 Despite an outward veneer of sharing and an appeal to the community, many of these newest crowdsourcing and labor sites were focused on profit maximization, to the detriment of labor standards.55 The next Section looks at the legal treatment of for-profit platforms that are used to intermediate work and labor relations, providing a comparative assessment of the United States and the United Kingdom

THE LEGAL TREATMENT OF PLATFORM WORK IN THE U.S. AND U.K

. A 2016 survey by TIME Magazine revealed that approximately 45 million people had participated in some way in the on-demand economy.56 While some have quibbled with these statistics, 57 most would readily agree that there has been rapid growth in the on-

demand sector. The new companies responsible for such growth include those sites that offer services in the real world, like Handy58 and Instacart, 59 as well as well-known ridesharing services like Uber and Lyft. They also include platforms where the work takes place wholly online, like the crowdsourced computer tasks on Amazon Mechanical Turk. 60 These platforms tend to classify their workers as "independent contractors" under their terms of use, even if that description may not be legally accurate.61 Workers have struck back by bringing class action lawsuits, claiming they should rightfully be classified as employees.62 This question of misclassification is particularly important because employee status is a "gateway" to many of the rights and benefits provided under employment law.

LITIGATION IN THE UNITED STATES

Although the ridesharing cases involving Uber and Lyft have been the most high profile on-demand economy cases, there are many other ongoing cases in the United States regarding the employee status of platform workers.64 The author has been following many of those cases and has described the stories and trends in these litigations in other published work.65 These platform workers perform home repair services,66 cleaning services,67 grocery delivery and errand services,68 and piecemeal computer tasks intermediated by a platform.69 Despite the varying nature of these tasks, the central issue in all of these cases is the same: whether the contract's description of the work as that done by an "independent contractor" should control, or whether the control or economic realities test would lead to a different result. Some of these cases have been sent to arbitration, per the terms and conditions, never to be heard from again; others have settled without resolving the question of employee status.70 The lawsuits over transportation service networks have certainly received a large share of attention. In the two cases Cotter v. Lyft, Inc. 71 and O'Connor v. Uber Technologies, Inc.72 drivers filed class action wage and hour claims in the Northern District of California.73 The availability of a remedy under wage and hour laws, however, depends upon employee status.74 As will be discussed in more depth below, U.S. law does not depend simply on the label assigned by the parties, but rather whether a worker is an employee or independent contractor is determined through one of two 75 Deriving from cases and decisions in the area of agency law, the control test, as its name hints, focuses on a principal's right to control the agent working on its behalf. 76 The right to control is the hallmark or cornerstone of being an employer, and a multifactored test for measuring the indicia of control has developed through the caselaw. Some of these indicia of control that lead to a finding of employee status are the ability to control the method and ways in which the work

is performed, ability to set the hours of work, and the ability to provide the employee with direction.77 On the other hand, elements that lean toward classification as an independent contractor include work that requires high skill, the workers' provision of their own instruments and tools of the trade, workers being able to set their own schedules, and payment per project, not per hour.78 In the entrepreneurial activities test, courts examine the economic realities of the working relationship to determine whether the worker is acting as an entrepreneur.79 This might include an opportunity for both financial gain and loss from the work.80 Such indicia of entrepreneurial activity could justify the label of independent contractor. On the other hand, if the worker is financially dependent, and there is no potential downside to the relationship, that tends to resemble the traditional employee-employer relationship. 81 In both the control and entrepreneurial activities tests, the label affixed to the relationship is one factor in the outcome, but it is certainly not dispositive to the determination, as courts will look further into the 82 In any event, both tests are known for being notoriously malleable, even when dealing with what should be a fairly straightforward analysis.83 As the tests themselves are difficult to apply, the federal judges of the Northern District of California struggled in the ridesharing cases for the appropriate way to characterize the drivers' triangular working relationship with the customers and the platforms. 84 This issue is especially difficult given the binary nature of employee status.85 In the ridesharing cases, some of the factors in the control test point toward an employee relationship, while others could be viewed as fitting into an independent contractor relationship.86 For example, crowdworker drivers have more flexibility in setting their schedules than workers in a traditional taxi environment who work a set shift. Drivers also provide their own cars and their own cellular telephones, i.e., tools and instrumentalities of the work. Finally, and for further discussion later in the Article, EULAs contractually label drivers as "independent contractors."87 Many factors, however, point toward employee status. Ridesharing platforms exert significant control over drivers, given that both Uber and Lyft use customer ratings in order to maintain what amounts to constant surveillance over quality of service; customers are essentially deputized to run the workforce. 88 Many on-demand companies spend a great deal of time and effort to implement quality control policies.89 Further, in turning to the entrepreneurial activities test, it would seem very difficult to say that there is truly the opportunity for entrepreneurial expansion, or gain or loss. As noted in an earlier article, the "terminology in a EULA is far from dispositive, as such online contracts are known to be extremely one-sided and are construed against the drafter. The possibility for exploitation is high, and low-skilled workers are those that are

most in need of [labor law] protection." 90 The uncertainty of the legal test combined with a difficult set of facts meant that the judges in the ridesharing cases were left with a major problem.91 As Judge Vince Chhabria in Cotter v. Lyft, Inc. noted, "the jury . . . will be handed a square peg and asked to choose between two round holes. The test the California courts have developed over the 20th Century for classifying workers isn't very helpful in addressing this 21st Century problem."92 The court denied Lyft's motion for summary judgment, and for a time at least, the case seemed to be headed to trial.93 Faced with the uncertainty of jury verdicts, perhaps a settlement was unsurprising. In January 2016, Lyft agreed to pay $12.25 million to resolve their wage and hour claims.94 In addition, Lyft pledged to provide drivers with additional due process rights before termination. Many drivers had complained about the previous summary method of dismissal, especially because the threshold rating for dismissal was actually quite high. Out of a five-point scale, with one being "terrible" and five being "terrific," drivers were at risk of being terminated from the app if they fell below a threshold rating of 4.8.95 Under the settlement, rather than being summarily deactivated (i.e., kicked off) from the app with no explanation, the settlement required the platform to provide a driver with the reason for termination.96 Further, if the reason given is low user ratings, the driver would be given an opportunity to improve. Finally, drivers would have the ability to challenge a deactivation through an arbitration proceeding if they believe they were deactivated outside the permitted reasons. 97 Despite the terms of the proposed settlement on compensation and deactivation, the underlying issue of employee status remained unresolved.98 Only a few months later, Judge Chhabria rejected the Lyft settlement as inadequate and sent the parties back for additional negotiations, which resulted in a financially enhanced settlement for the drivers of $27 million. 99 Still, there is no more certainty about the employment status of Lyft drivers than before the lawsuit began.

LITIGATION IN THE UNITED KINGDOM

Unlike the U.S. Uber and Lyft settlements, which do not provide much in the way of resolution to the employee status issue, a recent decision from the Employment Tribunal in London reached a more definitive answer. In the case of Aslam v. Uber B.V., 110 the London Employment Tribunal ruled that the drivers were employees of Uber. At first the Tribunal considered, but rejected, Uber's contention that it was merely a software company, not a provider of labor services. The Tribunal noted that it would be unreal to deny that Uber is in business as a supplier of transportation services. Simple common sense argues to the contrary. . . . One might ask: Whose product range is it if not Uber's? The "products" speak

for themselves: they are a variety of driving services. Mr. Aslam does not offer such a range. Nor does Mr. Farrar, or any other solo driver. . . . "Uber does not simply sell software; it sells rides. Uber is no more a 'technology company' than Yellow Cab is a 'technology company' because it uses CB radios to dispatch taxi cabs."111 Rather, the Tribunal felt that Uber's basic business model involved the provision of transportation. The Tribunal also suggested that the attempt to circumvent an employment relationship by using online contracts and inventing new terminology seemed to be a form of legerdemain.112 The Tribunal also spent a good deal of time analyzing the web of contracts between Uber and its drivers as well as Uber and its passengers. Regarding the former relationship, the Tribunal was extremely critical, noting that the terms on which Uber rely do not correspond with the reality of the relationship between the organisation and the drivers. Accordingly, the Tribunal is free to disregard them. As is often the case, the problem stems at least in part from the unequal bargaining positions of the contracting parties . . . . Many Uber drivers (a substantial proportion of whom, we understand, do not speak English as their first language) will not be accustomed to reading and interpreting dense legal documents couched in impenetrable prose. This is . . . an excellent illustration . . . of "armies of lawyers" contriving documents in their clients' interests which simply misrepresent the true rights and obligations on both sides.

The litigations in Otey v. CrowdFlower and those against Netflix largely fit into the same mode as the earlier litigations about crowdwork and platform workers who perform tasks in the real world. In addition to these computer work cases, there are other methods of accomplishing computerbased tasks online that comprise novel forms of work that are just beginning to be explored. Let's return for a moment to the CrowdFlower CEO's comments about giving workers "a virtual tractor" in exchange for their time and labor.142 In the new forms of work discussed below, the work activity is often disguised as a different task, sometimes as a chore, but sometimes as a game or a leisure activity.143 Increasingly, as work becomes sliced up, broken down, and crowdsourced as part of an "open call," it is not always apparent, even to the worker, what exactly their goal is by completing a task.144 In other instances, the participants are unclear even as to whether the activity they are engaging in is one requiring remuneration or that actually is considered "work" per se.145 A new management trend is "gamification," with some websites using fun games to entice users to work for them.146 For example, one website presents players with puzzles, the answers to which help scientists to determine how proteins fold.147 Other games ask users to match themselves in a vocabulary game with the computer, which then "learns" from the responses

that they give.148 In Reality is Broken, Jane McGonigal suggested that harnessing the power of games could help us fix problems and issues in the real world.149 After all, people spend billions of hours playing solitaire each year.150 If only a fraction of the time spent on games were spent on productive uses, there would be potential for solving many other types of problems. The introduction to this Article and the discussion of the reCaptcha codes note that work may be disguised. Indeed, the inventor of reCaptcha went on to found the company Duolingo, which helps users learn another language.151 At the same time, users "practice" their new language skills by helping to translate portions of the web, with the translation work generating revenue for the company.

THEORIES OF UNJUST ENRICHMENT AND RESTITUTION APPLIED TO ONLINE AND VIRTUAL WORK

Problems with Applying Existing Contract, Restitution, and Unjust Enrichment Law Online

The on-demand economy is part of an ongoing digital transformation of work with technology as its catalyst.217 Some of these fast-paced changes are creating forms of work that many may not recognize, or that may be indistinguishable from other forms of work due to their mimicry of other activities, including those that people do as mundane tasks or chores, or those that people engage in for fun or leisure.218 At present, however, part of the issue is that people may not even be aware that they are "working" or that activities that they take part in are being monetized or commodified.219 Some of this commodification activity online may result in contests, disputes, and even legal battles. 220 Contract law is stymied in many of these online work situations because assent, widely acknowledged as the underpinning of contract, is generally absent. In many of the examples provided in Part III, there was technically no "contract," if only because one party was unaware that work or monetized activity was being performed. Although the United States courts that have examined these cases have purported to use an unjust enrichment or restitution formulation to analyze the issues, they seem to have defaulted to what they know—i.e., a traditional contract analysis. For example, in Tasini

AOL, the court fell back on the question of what the Huffington Post and the bloggers had agreed to in the first instance.221 Because there was no remuneration promised up front, the court reasoned, that meant that the bloggers could not have expected payment for their work.222 Never mind the contributors' beliefs that they were contributing to a community rather than a money-making endeavor

Of course, people may choose to volunteer their time or money, but many people would recognize that the decision to volunteer must be based on accurate information.223 That is why charity watchdogs and websites that monitor charitable donations exist.224 People want to know that if they are going to give time or money, it goes to a cause that they believe in, and not to extraneous activities like enrichment of the charity's founders or to marketing activities. The same is true for donations of time and effort in cyberspace. Unfortunately, contract law and theory as applied in the United States has largely proven to be a dead-end for these unpaid "work-like" monetized activities on the internet. Due to the adhesion and boilerplate structures inherent in the EULAs, discussed earlier, the terms and conditions on many of these websites are far removed from "agreement" that forms the bedrock notion of voluntary assent inherent in contract law. 225 In many instances, the platforms or websites claim full rights over anything that is produced on their website, deeming the labor that users provide to be part of a different, separate contract that they have no concern with, or to be volunteer work. The idea of agreement to these terms is a fiction; the terms are those of a EULA which is essentially a one-sided boilerplate. In the instances where platforms are used, but the tasks are performed in the real world, courts have expressed a willingness to look at the substance of the relationship beyond the EULA.226 The question is why courts are unwilling to undertake the same type of searching analysis when tasks are performed wholly within cyberspace, on an unknowing basis

Keep in mind that the U.K. treatises on restitution and unjust enrichment were formulated in a time before such online work structures existed, and before the "sharing economy," "gamification," or digital work had any attention whatsoever. There do not appear to be any decided cases in this area in the United Kingdom; a complete analysis must therefore be left to the future and the elaboration of U.K. judges and legal scholars. At present, the U.S. decisions about payment for online labor ultimately seem to revert to notions of contract, based on free and voluntary agreement and assent. While courts say that they are engaging in an unjust enrichment analysis (for that is how the claims are brought and styled), courts instead reflexively default to issues like a priori remuneration or whether the parties had assented. These assumptions about unjust enrichment and restitution seem to give short shrift to what those causes of action stand for, and why they exist—i.e., that they are formulated to address injustices even when there is no contract and there is no assent. At present, many of these types of cases are being litigated in the United States; yet, because judges seem to be unfamiliar with restitution and unjust enrichment concepts, they fail to draw on this body of

law that would be highly applicable. The United Kingdom has a great deal of applicable law on the books, but no cases that pertain to disguised online labor as of yet.

CONCLUSION

Technology and the rise of the sharing economy have given us new and diverse structures for how businesses operate and how work is conducted. As noted in the first part of this Article, courts are beginning to examine more closely the central question of whether workers are independent contractors or employees, regardless of the label affixed to the relationship in a EULA on a website. In the absence of a definitive answer to the characterization question through contract law, courts will analyze the substance of the relationship using factors that attempt to determine a right of control over an employee or by looking at indicia of entrepreneurial activities test, to see if indeed the worker is engaged in a wholly separate business. Other forms of online work create even more difficult problems than classification. As described above, in some instances, work is disguised as an innocuous task, such as entering a code or answering a question. In other instances, work could be hidden as a leisure activity, such as in gamification Still other disputes involve internet users making contributions to online activities, believing that they are contributing to an online community or non-profit. To date, plaintiffs in these new online work cases in the United States have had their cases dismissed in part because they have yet to find a solid doctrinal ground for recovery. Contract law is stymied in many of these online work situations because assent—widely acknowledged as foundational to contract—is generally absent. Assent is lacking because, in these situations, one party was unaware that work was being performed, or that their work might later be monetized. Even though the United States courts that have examined these cases have purported to use an unjust enrichment or restitution formulation to analyze the issues, in reality they are defaulting to traditional notions of agreement or assent that are grounded in contract law. Referring to the more richly nuanced and developed law of unjust enrichment and restitution in U.K. law may result in a more fruitful and well-reasoned analysis of these cases.