

Abstract

Gift Failure versus Market Failure:

Analyzing the Generation and Circulation of Intellectual Products

Wendy J. Gordon, Boston U. Law School (Beck Professor of Law) & Fordham Law
(Bacon-Kilkenney Visitor)

Gifts and gift exchanges can serve a combination of economic, personal, social and humanitarian ends. This article explores how intellectual products are unusually capable of serving these ends through gift relations, and suggests ways in which the law can assist in this process.

The article defines "giving" to include the act of allowing people to copy or share when they have made no defined promise to pay. Under this stipulated definition, allowing copying counts as "gift" whether unrestricted, or restricted by limitations such as the GPL. Different forms of gift have differing effectiveness; for example, declining to enforce one's copyright counts as a "gift", but the gift gains strength and effectiveness when embodied in a creative commons license.

The article is indebted to Lewis Hyde's *The Gift* among other sources, but draws in particular on a concept originating with anthropologist Annette Weiner. This notion, which Weiner termed "keeping-while-giving", argues that central to gift circulation are the things *not* given, or only given to be eventually returned: the things to which personal, group or sacred history attaches. Because intellectual products are inexhaustible, they are particularly well suited to this function of "keeping-while-giving": Linked by the threads of attribution or memory, a work can both circulate and stay at home. Further, art and science already have institutions which function metaphorically as guardians of the sacred, enabling many practitioners in art and science to avoid commercialization while reaping economic gains.

Gifts are not always constructive; for example, they can serve as instruments of covert attack, encourage wasteful displays of wealth, or create dangerous vulnerabilities in the donor. But some gifts of intangible products have the potential for enriching the human capacities of both donors and recipients without impoverishing the donors or subordinating the donees. By identifying categories of circumstance that favor positive forms of gift-relations-- and making some comparisons among 'gift', 'commons' and 'contract' -- we can further the process of systematizing the large and growing literature on non-market dealings in the IP world. The article investigates what circumstances might give rise to "perfect gift situations", and identifies tolerable imperfections.

Part of the article's goal is rhetorical. Some policy-makers interpret the prevalent language of "market failure" to suggest that governmental intervention is proper only

when needed to remedy severe market inadequacies. By contrast, if some intellectual products possess unusually high promise under conditions of gift, then perhaps "gift" rather than "market" should be the proper default for these products of the mind. The article explores whether policy-makers should resist interfering with the noncommercial circulation of such intangibles except where intolerable "gift failures" are proven to exist.