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Kristen E. Killian

I. INTRODUCTION

Law firms have begun unbundling their work within their firms.¹ Nonlawyers now do many tasks typically done by lawyers in a bundled services regime. Just one example is the time-intensive due diligence for mergers and acquisitions.² As unbundling proceeds, the door has been opened for new legal technology companies driving a business model in which no one, not even a lawyer, assists the consumer with basic legal tasks such as creating and completing form legal documents. In short, software replaces certain transactional work done by lawyers and nonlawyers alike.

Transactional legal work, as the term will be used in this note, describes both transactional legal services and products. “Transactional legal services” encompasses legal work for a client’s unique circumstances that require the handcrafting of a solution for a particular legal issue by a lawyer—the “bespoke” legal services Richard Susskind describes in Tomorrow’s Lawyers.³ In addition, transactional legal services includes some less unique, more

standardized legal work, such as drafting venture capital financing agreements on standard form documents. These kinds of transactional legal work still require lawyer involvement and thus cannot be fully automated (at this time).

In contrast, “transactional legal products” are truly replicable legal documents, some of which are already available to consumers who complete them without individually consulting a lawyer. That is, generally speaking, a lawyer is not needed to effect the document’s creation and completion. Such legal documents are widely available through platforms like LegalZoom. So, for purposes of this note, we will assume that once a lawyer is removed from the document creation, the legal work is a legal product, and is no longer amenable to being categorized as a legal service. Susskind dubs this “commoditized legal work.”

We can envision all transactional legal work along a continuum of deliverability replicability. The least-replicable work, the bespoke legal services, on one end; the most-replicable legal work, commoditized legal products, on the other. While the result, whether achieved via legal services or legal products, the result may be identical—for example, a final written and executed contract—but the quality, efficiency, time required, cost, and thus the accessibility to the layperson of that final contract—differ greatly between these two modalities of legal work. With these two characterizations of legal work, I seek to isolate and capture the needs of very different

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6. However, LegalZoom offers access to LegalZoom’s “plan” attorneys for a flat, monthly fee to assist clients in completing these forms. See LegalZoom Business: Business Legal Plan Page, LEGALZOOM, https://www.legalzoom.com/attorneys-lawyers/legal-plans/business (last visited Jan. 19, 2014).

7. LEGALZOOM, supra note 5.

8. While beyond the scope of this note, differentiating on a legal product versus legal service continuum is an effort to acknowledge the violation of unauthorized practice of law statutes if these new companies purported to deliver legal services. By denoting the legal deliverables as legal products, this note attempts to acknowledge that this kind of legal work is beyond the reach of typical unauthorized practice of law statutes. Again, further discussion of current case law surrounding this issue would be needed to make any affirmative statement on the unauthorized practice of law liability of these companies.

9. SUSSKIND, supra note 3, at 25.
consumers, even where the final deliverable is, or appears to be, the same.

This note focuses on contract generation as an exemplar of transactional legal work that could be either a legal service (requiring a lawyer) or a legal product (automated online form).

Since the 2008 financial crisis and subsequent recession, consumer behavior has shifted to embrace simplicity and value economizing.\(^{10}\) Companies delivering low-cost, or no-cost, simplified legal products serve these new behavioral norms of post-recession consumers. Since many consumers are unable to evaluate the potential for increased quality of a contract drafted by a lawyer \textit{vis-à-vis} the do-it-yourself website (if there is any), and since they are unable to afford a lawyer to draft or even review such a contract, these value economizing legal consumers tend to either choose the free, do-it-yourself contract or forego a formal contract altogether.\(^{11}\) While perhaps better than no written agreement at all, the do-it-yourself choice puts consumers at risk from what may be a poorly drafted contract. However, without a well-known and reliable measure of quality for contracts, consumers readily embrace these new companies' legal products to formalize (reduce to writing) their previously informal (usually oral) agreements.

This note looks at those new legal technology companies that are innovating transactional legal products, but not legal services. The term Legal Tech Innovation Company ("LTIC") will be used here to describe this category. The LTICs represent an innovative leap in how companies that are not law firms provide legal products directly to a consumer. Although these companies are not yet disrupting the core of the legal marketplace, they are meaningfully lowering cost and increasing efficiency through both simplification and speed. To be sure, LTICs have the potential to disrupt legal services with increased sophistication of software to produce certain legal work on par with that of a lawyer's work while continuing to lower cost.\(^{12}\)

\(^{12}\) However, the closer the software approaches lawyer legal analysis and decision-making, the more like the company will be liable for the unauthorized practice of law. \textit{See}, e.g.,
Innovation creates demand when it shows consumers, sometimes quite suddenly, something that they did not realize they were missing.\textsuperscript{13} Two classic examples are Federal Express and the smartphone.\textsuperscript{14} By creating transactional legal products that are inexpensive and provide meaningful value to consumers, LTICs are creating demand where there once was none.

This note proceeds in four parts. Part I describes the type of legal consumers for whom LTICs are creating demand for their legal products. Part II describes a few LTIC exemplars in greater detail. Part III addresses policy considerations for the transactional legal product and creation of demand. Part IV concludes with some projections for our legal profession in this burgeoning environment of legal technology innovation.

II. THE LONG TAIL

General consumer attitudes have changed as a response to the 2008 financial crisis.\textsuperscript{15} As the neoclassical economist would claim, the queen of the economy is the consumer.\textsuperscript{16} To capture the nascent, long tail market of unsophisticated legal consumers, LTICs are creating legal product offerings to align with these changes in consumer attitudes. The heightened consumer value of economizing opens a market for the LTIC offering a low-cost legal product as an


\textsuperscript{13} Thomas Overthun Interview, IDEO Associate Partner + Design Director, DESIGNBLOOM (Feb. 28, 2014), http://ht.ly/ul8ro.

\textsuperscript{14} Dean Foust, Frederick W. Smith: No Overnight Success, BLOOMBERG BUSINESSWEEK M\textit{AG.}, Sept. 19, 2004, available at http://www.businessweek.com/stories/2004-09-19/frederick-w-dot-smith-no-overnight-success. (“Merrill Lynch & Co. (‘MER’) execs even discovered employees were using FedEx to deliver documents between floors of its Manhattan headquarters building because it was faster and more reliable than the interoffice mail.”). A recent example of smartphone demand can be seen in the overwhelming sales numbers for the recently released Apple iPhone 6 and 6 Plus. See Brian X. Chen & Mike Isaac, \textit{First-Weekend Sales of Apple’s iPhone 6 Models Top 10 Million}, N.Y. TIMES, Sept. 23, 2010, at B1.

\textsuperscript{15} Flatters & Willmott, supra note 10.

alternative to often high-cost traditional legal services.¹⁷

A. LEGAL CLIENTS AS POST-RECESSION CONSUMERS

The financial crisis and subsequent recession exposed “inefficiencies that have long plagued large firms.”¹⁸ Faced with ever-tightening budgets, sophisticated legal clients seek to reduce their legal expenses by negotiating lower or blended contingency rates, proactively controlling the services they purchase, bringing more lawyers in-house to perform similar work, or foregoing some legal services altogether.¹⁹ Cost-cutting measures coupled with technological developments in computing allow niche markets to form and bear fruit—for example, online platforms for in-house legal departments to track and manage the company’s legal expenses.²⁰ Research supports the conclusion that not just sophisticated legal clients are seeking new ways to increase efficiency in their legal services purchasing, but a much broader potential client base is “foregoing the assistance of lawyers when confronted with a civil legal issue and addressing their matters through self-representation,” including through “alternatives . . . available over the internet.”²¹

In 2009, the Harvard Business Review published an article by two consumer trends experts, Paul Flatters and Michael Willmott. They describe post-recession consumer trends based on two decades of forecasting and analysis to advise global companies across sectors on the recession’s likely impacts on long-term consumer behavior.²² The authors argue that while recessions may differ in their causes, depth, and duration, it is possible to anticipate consumer behavior by

²². Id.
understanding three key themes: how previous downturns have altered consumer psychology and activity; how this recession compares with previous ones; and the journey that consumers have taken to the present.  

Through their analysis, Flatters and Willmott identified four key trends in consumer behavior that accelerated after the recession: (1) consumer demand for simplicity, (2) a call for ethical business governance, (3) a desire to economize, and (4) a tendency to flit from one offering to another (willingness to try new brands).

The change in consumer attitude identified in this current business scholarship is apt in describing legal consumer behavior as well. These new behavioral norms directly address some traditional barriers that contribute to a consumer’s decision to forgo legal counsel: legal services as cost prohibitive; fear and anxiety over information asymmetry when creating an attorney-client relationship (the “lemons problem”); and consumer ignorance in knowing when, optimally, a legal issue should be confronted.

First, post-recession consumers demand simplicity. For transactional legal consumers, this desire translates into an affinity for simplified choice making and an enthusiasm for less complicated, more user-friendly technologies. Because the law is a complex industry with a historic information asymmetry between lawyer and non-lawyer client, legal consumers are drawn to companies that introduce simple, user-friendly technologies to facilitate the delivery of transactional legal products. Consumer appreciation for simplicity in these products may also be due to a possible added benefit of alleviating some of the consumer’s anxiety that she or he will be taken advantage of when obtaining transactional legal products for the first time by making the process of legal document creation more understandable to the lay legal consumer.

Second, post-recession consumers want corporate governance to

24. Id.
25. Id.
26. Id.
27. Sophisticated legal consumers are often lawyers themselves, as is the case with in-house counsel at a corporation. Here, the focus is on nonlawyer, unsophisticated legal consumers.
be ethical. The 2008 financial crisis caused general consumers to be increasingly suspicious of corporate misbehavior, particularly the individuals and companies responsible for the mortgage crisis. With respect to the legal profession, there was already a consumer culture of lawyer mistrust. The recession seemed to highlight the pain points in the lawyer-client relationship, information asymmetry, and inherent agency issues, arguably exacerbating the general consumers’ wariness of lawyers as being greedy, manipulative, and corrupt. A historic lack of transparency seems to drive this lack of trust in lawyers. We might expect post-recession consumers to seek more transparent legal knowledge, as in open-sourced legal products, that have the potential to eliminate their concern with a lawyer’s behavior being ethical by removing the lawyer’s blatant pecuniary interest from the document’s creation altogether.

Third, post-recession consumers want to economize. Since legal services are often expensive and infrequently needed for most consumers, post-recession legal consumers use existing, free (or low-cost), and readily accessible legal resources online to accomplish the legal task on a do-it-yourself basis, or “leverage” (read, not use) their lawyers’ time.

The post-recession consumer’s desire to economize coincides with another related shift—decline in consumer respect for and deference to authority, particularly government and business. Supporting this theory is the evidence that, as consumers become ever-savvier information gatherers (enabled by the internet) and

29. Id.
32. Ribstein, supra note 31, at 753.
33. The idea of open sourcing legal documents is discussed in detail in this note’s Section II.a. Open-Sourcing for Collaboration and Normalized Legal Knowledge, infra notes 70–75.
34. Flatters & Willmott, supra note 10.
35. Broderick & George, supra note 11.
decision-makers (improving reliability of that information), the outdated, “traditional” sources of purchased information will fall short of the consumers’ expectations in the longer term.\textsuperscript{37} With their increasing willingness to rely on user-generated and user-curated information, post-recession consumers defer less to authority, which may correlate to a softening in value of traditional legal advice by law firms, with consumers opting for legal forums and lawyer/legal/business blogs.\textsuperscript{38}

Fourth, post-recession consumers are more willing than ever to try new brands.\textsuperscript{39} A post-recession legal consumer’s tendency to move from one offering to another signals a consumer willingness to try-out an LTIC’s legal products that align with the new set of values discussed above.\textsuperscript{40}

These consumers, emboldened by user communities cataloguing their experiences with increased transparency, have the potential to create an emergent “wisdom of the crowd” so long as the group maintains its diversity, independence, decentralization and, thus, legitimacy.\textsuperscript{41} Voices joined and knowledge shared, post-recession consumers have been given increased leverage through their ability to “vote with their feet”\textsuperscript{42}— or more appropriately, “voting with their clicks”—rewarding quality legal products and ultimately drawing ever-more competent providers to the marketplace.

B. THE LONG TAIL

Where do post-recession consumers fit in today’s legal marketplace? Bill Henderson’s visualization and summary of today’s legal ecosystem is helpful in clarifying this reality.\textsuperscript{43} (See Figure 1 in

\textsuperscript{37} Flatters & Willmott, \textit{supra} note 10.


\textsuperscript{39} Flatters & Willmott, \textit{supra} note 10.

\textsuperscript{40} \textit{Id.}

\textsuperscript{41} JAMES SUROWIECKI, \textit{THE WISDOM OF CROWDS} XIX (First Anchor Books 2005).


\textsuperscript{43} Bill Henderson, \textit{A Counterpoint to “The most robust legal market that ever existed in this country”}, THE \textit{LEGAL WHITEBOARD} (Mar. 17, 2014), http://lawprofessors.typepad.com/legalwhiteboard/2014/03/a-counterpoint-to-the-most-robust-legal-market-the-ever-existed-in
appendix). The y-axis of Henderson’s chart follows the Heinz-Laumann “Two-Hemisphere” theory that lawyers serve two principal constituencies: individuals and organizations. The x-axis incorporates Susskind’s continuum of legal work, from bespoke to standardized to systematized to productized to commoditized. Occupying the left side of the graph, bespoke to standardized legal services for both individuals and organizations is the artisan guild (all sizes of law firms, public defenders and district attorneys). Transactional legal services fit within this left hand section of the chart. In the middle lies standardized to productized legal work. Henderson collectively defines this section as multidisciplinary teams. Multidisciplinary teams not only include traditional in-house legal departments, but also new trends in legal businesses like legal analytics, contract management vendors, non-pyramid structure law firms, and online dispute resolution platforms. On the far right of the chart is productized and commoditized legal work, which is produced by the low cost providers. Henderson places e-discovery vendors and legal publishers (what I will later refer to as automated document assembly) like LegalZoom and Business Integrity’s ContractExpress in this section.

The focus of this note, transactional legal products, falls into the far right range of Henderson’s chart occupied by the low-cost legal publishers. Because the chart does not provide revenue estimates or any other indicator of market potential, I will explore the market potential for these low-cost providers.

In statistics, a power law is a relationship between two quantities, where one quantity varies as a power of another and where the frequency decreases faster than the size increases. Power law has this-country.html.

44. Henderson, supra note 43.
45. Id.
46. Id.
47. Id.
48. Id.
49. Id.
50. Id.
been used to describe many scientific and social phenomena.\textsuperscript{52} Examples of power law distributions range from the frequency and magnitude of earthquakes to the “80-20 rule” of wealth accumulation (i.e., the Pareto Principle—eighty percent of wealth is controlled by twenty percent of the population).\textsuperscript{53} Power law probability distributions are inverted yield curves, in which the curve hugs the vertical and horizontal axes.\textsuperscript{54} The long tail is the narrowing portion of this distribution curve away from the “head” or central part of the distribution (See Figure 2).

In 2004, Chris Anderson, former editor-in-chief of \textit{Wired} magazine, first published an article on the long tail in \textit{Wired}, then later refined the theory in his blog, \textit{The Long Tail}, and in his book published in 2006, \textit{The Long Tail: Why the Future of Business is Selling Less for More}.\textsuperscript{55} His theory of the long tail is that our culture and economy are increasingly shifting away from a collective focus on a relatively small number of blockbuster hits (i.e., seeking success in mainstream products in mass markets) at the head of the demand curve and moving toward selling a huge number of smaller hits (i.e., niches in the tail).\textsuperscript{57} Technologies can break down bottlenecks and inefficiencies in traditional markets to make finding and buying niche products easier and cheaper for consumers.\textsuperscript{58} He describes one example of this theory’s prediction to be that the aggregate demand for products \textit{not} available in traditional brick and mortar stores is

\textsuperscript{52} Zipf’s law explains the power law behind word usage frequency. \textit{Power law, supra note 51}; \textit{Zipf’s Law, supra note 51} (the frequency of any word is inversely proportional to its rank in the frequency table).

\textsuperscript{53} \textit{Power law, supra note 51}; Hart, \textit{supra note 51}. \textit{Pareto Distribution}, WOLFRAM MATHEWORLD, http://mathworld.wolfram.com/ParetoDistribution.html (last modified Oct. 29, 2014) (the Pareto distribution is a power law probability distribution that is used to describe social, scientific, geophysical, and other observable phenomenon).

\textsuperscript{54} See Figure 1; Hart, \textit{supra note 51}.


\textsuperscript{58} \textit{Long Tail, supra note 55}. 
potentially as big as the aggregate demand for those products that are available. The classic manifestation of this example is Amazon’s ability to access a massive inventory of books in comparison to the brick and mortar bookstore that, however big, is still severely limited by physical retail shelf space. Amazon’s wild success in providing a means to make purchasing an obscure, niche book easier and cheaper helps prove the theory.

C. THE LONG TAIL OF TRANSACTIONAL LEGAL WORK

In transactional legal work, new technologies break down the bottleneck of individual lawyer-client representation because they allow access to transactional legal products for any legal consumer. This is important because many individuals and small businesses cannot afford a lawyer’s time. A cynic may claim this reality is due to the fact that lawyers have a monopoly on providing legal services, which creates suboptimal incentives when creating pricing structures, but it is important to remember that the price of hiring a lawyer, in addition to the legal service and attorney work product, must also include the costs of obtaining their legal degrees and bar licenses, and maintaining legal practices. These economics become a factor in the LTIC niche: the hourly rate model makes hiring a lawyer to provide transactional legal work cost prohibitive for most individuals and small businesses. While the indigent criminal defendant has the option to represent himself (pro se), the law’s

60. Id.
61. The motivations borne out of the billable hour business model incentivize inefficiencies that are, in turn, borne by the end consumer of the legal services. There is a powerful monetary incentive to spend as much time as the client will bear to complete any given task. It is “an institutionalized disincentive to efficiency. It rewards lawyers who take longer to complete tasks than their more organized colleagues, and it penalizes legal advisers who operate swiftly and efficiently.” SUSSKIND, supra note 3, at 16. This is because the longer an attorney takes to complete any given project, the more billable hours she can record to prove her productivity (to make bonus and stay on track to partnership) and her partner in turn may prove her value to the firm (by generating the most revenue possible). See also Steven Harper, The Tyranny of the Billable Hour, N.Y. TIMES, Mar. 29, 2013, at A25.
62. E.g., the requirement to go to an ABA accredited law school and the costs of malpractice exposure during practice.
default is that counsel will be provided for him. However, in nearly all legal transactions, there is no such right to counsel. Unless you can afford a lawyer, the default is self-representation.

This economic reality within the transactional legal marketplace generates an underserved (or unserved) market for transactional legal products. This note will refer to this market as the "Long Tail" legal market. This Long Tail legal market is accessible only after technologies break down inefficiencies in the traditional transactional legal market model to make finding and buying niche products easier and cheaper for legal consumers. In their existing business models, law firms have little incentive to offer products in the Long Tail; their consumer base is in the head—where one finds high-stakes, complex transactions that allow for larger profits.

The solo practitioner is the closest model for a lawyer’s practice that begins to correlate with the services needed to serve the Long Tail. The problem with an army of solo practitioners serving the Long Tail is it lacks the economy of scale. The economy of scale is essential to successful execution of Anderson’s tenets of the Long Tail: (1) make everything available to the consumer; (2) cut the price in half, then lower it; and (3) help the consumer find it.

In the Long Tail, transactional legal products are commoditized and therefore highly replicable. Ease of replicability lowers cost. Thus the Long Tail neatly meshes with the burgeoning values of the post-recession consumer, especially the desire to economize.

The LTICs profiled below couple the practical realities of shared legal knowledge with existing advancements in technology to create businesses that scale legal work for the Long Tail. LTICs offer legal products into these niche markets by eliminating historic barriers to entry for obtaining legal work by reducing cost, reducing fear and

63. It is well established through the Constitution and case law that criminal defendants have the right to be represented by counsel, regardless of their ability to afford counsel. U.S. Const. amend. VI (right to counsel in federal cases). See generally Gideon v. Wainwright, 372 U.S. 335 (1963) (applying right to counsel in state prosecutions for felony offenses); Faretta v. California, 422 U.S. 806 (1975).
64. Anderson, supra note 56.
65. Anderson, supra note 57.
anxiety, and providing more information and transparency for consumers who were previously “in the dark.” 66

III. STANDARDIZATION TO COMMODITIZATION

By utilizing open-source legal documents, normalized legal knowledge, and automated document assembly technology, LTICs transform some standardized transactional legal services into commoditized transactional legal products.

A. OPEN-SOURCING FOR COLLABORATION AND NORMALIZED LEGAL KNOWLEDGE

The term “open-source” describes a method of software development that harnesses the power of a distributed peer review, transparency of process, and far greater freedom to use. 67 Borrowing the term from its roots in software development, legal open-sourcing is the sustained mass online collaboration in the legal field. 68 Like software, the promise of legal open-sourcing is “better quality, higher reliability, more flexibility, lower cost, and an end to predatory vendor lock-in.” 69

There are also many social benefits to sharing resources through online collaboration. 70 Shared resources have been shown to increase good faith and fair dealing in transactions. 71 The growth of collaborative platforms between lawyers that are not connected by a firm, professional association, or otherwise, suggests a step towards developing a better quality, lower cost resource, while also having the added benefit of increasing professionalism and congeniality between


68. SUSSKIND, supra note 3, at 44.

69. About, supra note 67.

70. BREIT M. FRISCHMANN, INFRASTRUCTURE: THE SOCIAL VALUE OF SHARED RESOURCES 77 (2012).

lawyers. One example of a lawyer collaboration platform is Legal OnRamp. Legal OnRamp allows lawyers to “stop re-inventing the wheel” and share their expertise through access to thousands of questions and answers provided on the website each day. The website has the features of a social networking website that includes messaging, blogs, databases, and open forums for discussion and document sharing. In order to participate on Legal OnRamp, members must be lawyers or third party legal service providers. Membership is by invitation only. Legal OnRamp’s membership base is primarily in-house corporate counsel. Another lawyer collaboration platform is Docracy. It hopes to be the go-to for lawyers wanting to share contracting ideas and to collaborate on editing contracts. But the underlying theme motivating sites, like Legal OnRamp and Docracy, is not new to the transactional lawyer’s task of contract drafting. Among lawyers, there is a tradition of sharing contracting knowledge within a firm, with their clients, with other transaction professionals (like investment banks), and within professional or trade associations. Over time, this sharing of knowledge through private contracting negotiations creates generally accepted standards within distinct legal communities. This note calls these large bodies of developed norms in contract language—facilitated by decades of


74. See generally LEGAL ONRAMP, supra note 72.

75. Id.

76. Id.

77. Id.


80. Id.
lawyer creation, collaboration and adoption—normalized legal knowledge (“NLK”). With legal open-sourcing, the velocity at which normalized legal knowledge would be created arguably accelerates, as does the velocity (and thus volume) of code in the world of open source software.

Since lawyers typically reuse contract language from previous agreements and have little hope to copyright innovative language they develop, they are not incentivized to innovate on these terms.81 The opportunity for cost-cutting incentivizes lawyers to standardize agreements.82 By decreasing the amount of time spent on drafting of terms, lawyers can conclude transactions faster.83 Like many contract-based transactions, the venture financing process is largely standardized through the open-sourcing of funding documents and the generation of NLK attendant to the purpose and functionality of each document and its generally accepted term language.84 Standardizing increases the efficiency of these common business transactions, which in turn arguably increases access to capital in the relevant economy.

The collaborative open-source culture surrounding contract NLK produces standardization that reduces costs and yields learning and network benefits.85 However, NLK in contracting is a double-edged sword. Standardization tends to chill innovation.86 Novel contract

81. Triantis, supra note 79, at 186.
82. Id at 188-89.
83. Id.
85. In economics and business, a network effect is the effect that one user of goods or services has on the value of that product to other people. When present, the value of the product or services is dependent on the number of others using it. Network Effect, INVESTOPEDIA, http://www.investopedia.com/terms/n/network-effect.asp (last visited Oct. 25, 2014).
86. Triantis, supra note 79, at 194.
terms are likely to face resistance from counterparties who potentially bear the risk of unpredictable judicial interpretations or adverse market reaction to the new terms.\textsuperscript{87}

However, despite the chilling effects of standardization, contract innovation may still occur. As it has with software development, open-source collaboration has the potential to improve contract quality over time.\textsuperscript{88} There is a plausible down-market drift over time, as professional services become standard products.\textsuperscript{89} For law, lawyers at law firms create innovative provisions that eventually drift down-market to be integrated into transactional legal products.\textsuperscript{90} As the innovation and tailored contract design procedures become simple enough or as LTIC software becomes sophisticated enough, those provisions will eventually be made available to the Long Tail.\textsuperscript{91}

\section*{B. Document Automation: From Standardization to Commoditization}

Combining the large body of open-source collaboration and contract NLK, LTICs develop software that automates the contract drafting process by assembling the document for the user.\textsuperscript{92} Automation is possible because contracts are capable of being modularized, meaning portions can be drafted, edited, read and re-edited without necessarily requiring amendment or referencing to other parts of the contract.\textsuperscript{93} By exploiting the modularity of contract terms, code can be written that allows for a user to add, adjust, swap, and remove modules (i.e., whole contract provisions) based on the user’s responses to a series of questions about the transaction being drafted.\textsuperscript{94} Essentially, the technology enables a person to program
contract language depending upon various sets of answers gathered through interactive questionnaires with context-specific guidance that change as users respond to them.\textsuperscript{95} LTICs effectively remove the bottleneck of a lawyer’s time spent during client intake, questioning and analyzing the client’s issues prior to the application of contract NLK in drafting the contract. Instead of a lawyer, software (i.e., legally-informed, encoded expert systems) automates lawyer decision making for the consumer’s issue through coding via interactive decision trees coded into software that purports to replicate a lawyer’s analysis of that issue.

Popular documents for automation are highly standardized contractual agreements like wills, trusts, NDAs, articles of incorporation, and employment agreements. Notable companies in this space are Rocket Lawyer and Legal Zoom, which both offer free contract templates to draft and sign online.\textsuperscript{96} Rocket Lawyer has free and fixed-fee document creation online.\textsuperscript{97} Similarly, Legal Zoom has a similar model for base fees for common services, e.g., LLC formation for ninety-nine dollars plus the state filing fee.\textsuperscript{98} Cooley LLP’s Cooley GO suite of document generators utilizes Business Integrity’s ContractExpress software to draft all documents associated with incorporation of the business entity, terms of use, privacy policy, NDA, and various employment agreements for free.\textsuperscript{99}

Shake is a mobile phone application ("app") that allows the user to "create, sign and send legally binding agreements in seconds" for free.\textsuperscript{100} Shake claims to be the "Square for contracts."\textsuperscript{100} Square is an

\textsuperscript{95} Marc Lauritsen, \textit{Liberty, Justice, and Legal Automata}, 88 CHI. KENT L. REV. 945, 947 (2013).


\textsuperscript{98} \textit{LEGAL ZOOM, supra} note 72.


\textsuperscript{100} SHAKE, http://www.shakelaw.com/ (last visited Mar. 7, 2014). Rocket Lawyer also has a mobile app that allows the user to create an NDA. However, Rocket Lawyer’s app functions more as a client portal than a streamlined automated document assembly like Shake’s app, which has no such login gating function. See Rocket Lawyer app for iOS, \textit{available through} the Apple App Store.

app that lowered the barrier to entry for small businesses to process credit card payments by creating a mobile point of sale platform, allowing their clients to avoid the steep overhead of an expensive point of sale machine (both cash register and credit card reader).\textsuperscript{102} Square’s clients receive the iconic square credit card readers for free, then download the free app to their mobile devices, and can begin accepting credit card payments immediately.\textsuperscript{103} Similarly, Shake seeks to lower the barrier to entry for individuals and small businesses to draft simple contracts, like NDAs and freelance employment agreements, via its mobile app.\textsuperscript{104}

Shake allows users to create plain English legal documents that are signed digitally on the user’s mobile device with the expectation that the contract is both legally binding in court and sufficiently detailed to resolve uncertainties about the agreement in the future (thereby avoiding court). This model may prove useful for two unsophisticated parties seeking to enter into an agreement more formal than an oral agreement. Shake fits within the Long Tail by allowing consumers to form a simple, legally-binding agreement that is: (1) free, unlike the paid model of LegalZoom, and (2) formatted for mobile, unlike Docracy’s free web-based contracts. However, while Square has charged a small transaction fee, it is unclear if Shake plans to monetize its business model.\textsuperscript{105}

In his \emph{Wall Street Journal} critique of Harper’s book, \emph{The Lawyer Bubble}, Richard Epstein writes, “The most significant recent dislocation in the practice of law . . . is at the consumer end of the market: the rise of low-cost online law firms like LegalZoom and RocketLawyer that aid clients in drafting standard partnerships, wills, leases and the like.”\textsuperscript{106} But Shake’s FAQ makes clear that it seeks to help those with simple, low-stakes transactions.\textsuperscript{107} Shake is targeting people who would not likely seek legal counsel otherwise. It is finally addressing the Long Tail, which Shake’s founder calls “TinyLaw.”\textsuperscript{108}

\begin{thebibliography}{9}
\bibitem{Square2} \textit{Id.}
\bibitem{Shake app} Shake app for iOS, \textit{available through} the Apple App Store.
\bibitem{Epstein} Richard Epstein, \emph{The Rule of Lawyers}, WALL ST. J., May 6, 2013, at A13.
\bibitem{Geiger} Abe Geiger, \textit{What is TinyLaw?}, SHAKE (Feb. 18, 2014), http://www.shakelaw.com/tiny
\end{thebibliography}
With four million dollars raised so far, Shake’s legal product capitalizes on key post-recession consumer values: (1) addressing the consumer’s willingness to try new brands by increasing accessibility through offering the application on mobile, (2) simplification through “plain English” and offering six different form contracts from which the user may choose (including a “Create Your Own” option with almost infinite possibilities), and (3) the desire to economize by offering the app and contract creation service for free.

Shake has built automation on top of a simplified offering of standardized documents and their associated NLK to create a completely free alternative that aligns with the needs of consumers purchasing products in the Long Tail. The current types of contracts offered are: “Freelance/Hire” (freelancing or work for hire agreements), “Keep Confidential” (NDA), “Buy/Sell” (a sales receipt, not intended for auto or motorcycle sales), “Rent/Lend” (no real-estate property only), “Loan Money” (lending or borrowing), “Create Your Own” (letting the user write out the agreement after putting in party names).

In the pro bono space, LTICs like LawHelp Interactive use automated document assembly software to fill out and submit court filings such as child custody, dissolution of marriage, or a protective order. LawHelp is trying to connect users to legal documents for free after the user answers a series of questions on his legal issue. The software is available online and can be accessed through any web browser by the consumer himself or by legal aid organizations, courts, and clerk’s offices, who walk the client through the series of interview questions to help the consumer complete the form. Like automatic contract drafting programs, the LawHelp software relies on its

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111. Find Forms, supra note 110.

understanding of NLK to develop the interview questions to help the consumer fill out necessary legal forms for standard court proceedings like filing a protective order or dissolution of marriage. Automated document assembly for legal aid organizations provides a much needed increase in efficiency that may translate into increased access to justice.

IV. CREATING NEW LEGAL DEMAND: PROTECTING OR HARMING CONSUMERS?

Entering into a formal contractual agreement without consulting a lawyer is common in some transactions like purchasing a home or signing a lease agreement for an apartment. Undoubtedly, a lawyer’s review of any of these contracts would be ideal if money was no object and time was irrelevant. Thus, a natural outcome out of the post-recession consumer’s need for lower pricing and expeditious processing is creating a means for simple, consumer legal transactions to proceed effectively without the personalized counseling of a lawyer. While the existing legal guidance technology used by LTICs still pales in comparison to an adept lawyer’s advice, an LTIC is arguably superior to the alternative—a lay consumer trying to draft a contract out of whole cloth. LTIC quality should continue to increase through open-sourcing and online collaboration within professional and user communities.

Mobile contracting apps like Shake take this freedom to contract a step further by allowing legal consumers to formalize any number of common agreements without the assistance of a lawyer. Hypothetically, contract creation can occur on-the-fly. Moreover, with the user-friendly design of an app like Shake, consumers are encouraged to use the app to formalize agreements that were once never put into writing. By encouraging consumers to formalize previously informal agreements, LTICs create demand for automated contract assembly, a transactional legal product.

Economic theory supports that technical progress creates demand, thereby inducing capital accumulation, and ultimately sustains economic growth. LTICs are generating the technological

113. Aoki & Yoshikawa, supra note 16.
innovation and development that is creating demand in the legal marketplace.

Recalling Henderson’s chart of the current legal ecosystem, the Long Tail can be visualized as existing on a plane measuring complexity and cost of the legal deliverable along the y-axis and the measure of replicability of that legal deliverable along the x-axis (ranging from bespoke to standardized to commoditized, adopting Susskind’s legal work continuum) (See Figure 3). Various legal services and products, ranging from high to low cost and complexity and low to high replicability are depicted along a power law curve plotted in this graph. LTICs’ creation of demand for legal products exists in the Long Tail within the narrowing, right hand side of the power law curve. LTICs are among the low cost providers that Henderson identifies in his chart.114

It is understandable that the hypothesis that some LTICs are actually creating more legal demand immediately calls the question, as it should, whether this type of demand creation is a good thing for society. While demand creation may signal a market opportunity for entrepreneurs to develop contract drafting apps and litigators to bring more enforcement actions in the courts, how are consumers potentially benefitting or being harmed by embracing this new method to formalize their business agreements?

The idea of companies creating demand for formalizing legal contracts to transact business without the assistance of a lawyer necessarily brings to the foreground the heated debate over the quality of automated contracts. This is partially due to the information asymmetry in the lawyer-client relationship that creates a “lemons problem.”115 A lemons problem, as economist George Akerlof popularized in his 1970 paper, is created through the information asymmetry occurring when the seller knows more about a product than the buyer.116 The classic example Akerlof uses is a used car sale.117 The buyer of a used car does not know beforehand which cars are of good or bad quality, so the buyer’s best guess for a

114. Henderson, supra note 43.
116. Id.
117. Lemons Problem, supra note 115.
given car is that of average quality. Ultimately, the bad drives out
the good from the market because buyers are only willing to pay for
an average quality used car and sellers of good used cars will be
unable to get a high enough price to make it worthwhile. Consequently, markets may falter or fail to exist altogether where
quality uncertainty is coupled with asymmetric information. The
exception is a market that on the whole has reasonable guarantees of
quality and certainty where there will always be a distinct advantage
for some vendors to offer low-quality goods to the less-informed
segment.

Thus, LTICs providing low-quality legal products to the lay legal
consumer may succeed in a market with quality uncertainty and
asymmetric information. However, if even a low-quality contract can
encourage parties to act according to the perceived duties of the
contract by crystallizing and memorializing their intentions
effectively, then LTICs still provide value by protecting, to some less
formal degree, a party’s interest in future disputes.

If we assume de minimis concern over contract quality in this
respect, then the bottleneck of information asymmetry in the lawyer-
client relationship concerning contract drafting is alleviated
proportionately. This should spur the creation of a more efficient
consumer marketplace by formalizing these previously informal
agreements and expanding the legal marketplace to reach a high
percentage of niche consumers. This potential for expansion of the
legal marketplace presents an enormous business opportunity for
LTICs.

However, LTICs like Shake may not, in fact, create new demand.
Some of Shake’s users were already creating their own legal
documents from resources online. Prior to Shake, consumers

118. Id.
119. Id.
120. Id.
121. Id. However, the market for legal contracts may be an exception to the lemon problem
because consumers are guaranteed protection from the detrimental consequences of poorly
drafted contracts under multiple bodies of common law (agency, tort and contract), as well as
ehics laws (e.g., the unauthorized practice of law). MODEL RULES OF PROF'L CONDUCT R. 5.5
(2013). Also, common law (agency, tort, contract law) provides a degree of consumer protection
against poorly drafted contracts.
122. See, e.g., Meet Shake User Travis K. Mendoza. SHAKE (Apr. 11, 2014),
would cut and paste their own contracts from online legal resources.\textsuperscript{123} Shake increases their users’ productivity as small businesses by eliminating time they used to spend on creating their own ad hoc contracts for business dealings. Regardless, Shake does capture users—individual consumers, and not just small businesses—who would never have bothered creating their own ad hoc contracts. But, is it a social good that these unsophisticated legal consumers, who previously never engaged in the legal marketplace, are now easily making (and want to make) formal contracts for their everyday transactions?

A. IS MORE CONTRACTING NECESSARILY GOOD FOR CONSUMERS?

Optimizing the value of a particular contract for a particular client is the objective of a legal contract document.\textsuperscript{124} Contractual relationships often succeed without the threat of legal enforcement because parties are already implicitly motivated to maintain the relationship for repeat dealing or reputation preservation.\textsuperscript{125} "The value of a contract stems largely from the incremental incentive effect of legal enforcement, net of the expected cost of dispute resolution and enforcement."\textsuperscript{126} Because a contract memorializes and communicates terms and expectations more clearly than when parties merely orally agree to terms, a formal written contract is more valuable than no contract because it reduces expected costs of dispute resolution.\textsuperscript{127}

Long Tail consumers feel empowered by this new freedom to create formal contracts, which releases them from the historic anxiety produced by the uncertainty in creating and enforcing informal business agreements, much less having no agreement.\textsuperscript{128} Thus, beyond

http://www.shakelaw.com/meet-shake-user-travis-k-mendoza/#more-1236.
123. Meet Shake User Travis K. Mendoza, supra note 122.
124. Triantis, supra note 79, at 180.
125. Id.
126. Id.
127. Id.
128. See, e.g., Meet Shake User Christine Amorose, SHAKE (Apr. 4, 2014), http://www.shakelaw.com/meet-shake-user-christine-amorose/#more-1096 (Christine, a freelance writer, says Shake lets her focus on what she’s good at, being a writer, not a legal agreement negotiator and drafter); “Sweet” Ways For Your Business to Use Shake, SHAKE (Feb. 26, 2014), http://www.
the contract produced, consumers gain a psychological benefit from formalizing their agreements. For example, Shake believes its users achieve “peace of mind” and elimination of anxiety through using Shake’s automated contracts.\textsuperscript{129}

Furthering the consumer’s peace of mind, contracts drafted through automated document assembly can eliminate an obvious source of misinterpretation: differing languages spoken by the contracting parties. For example, Peppercorn is an Italian-based LTIC specializing in automated contract drafting in multiple languages that purport to be binding in all of the EU.\textsuperscript{130} Even if the contract is not perfect, a contract is still valuable because of the actual process of drafting the contract’s key terms that require each party to clarify its expectations prior to entering into a formal agreement.\textsuperscript{131}

B. CONTRACT QUALITY ISSUES

While today’s post-recession consumers want the anxiety-allaying aspect of formal contracting, they are too cost conscious to focus on speculative variance in contract quality.\textsuperscript{132} Long Tail consumers, and the potential lawyers who would represent them, are typically unable to determine the degree of quality that is needed for a given legal transaction. Law firms and clients have not developed universally agreed upon metrics “to calculate the incremental value of the \textit{premium} contract and therefore, cannot reasonably assess whether the clients are getting their money’s worth.”\textsuperscript{133}

Since nearly all consumers in the Long Tail are likewise unable to assess any such incremental value in “quality,” they cannot determine whether or not a lawyer’s assistance would be cost-
effective. Consequently, these consumers default away from having a lawyer draft the legal document. This reflects a common pitfall caused by the information asymmetry between lawyers and clients. Consumer rationalization of quality is made even easier because of the lack of consensus over what is a high quality contract versus a low quality contract even among lawyers and their sophisticated clients.

However, LTICs may change how some lawyers define the quality of legal work to prove their value to consumers. The old way of defining value was through the price of billable hours, the firm’s brand reputation, size, and value of deals, and the size and monetary value of court judgments. But correlation is not necessarily causation, and these relationships are nearly impossible to measure, and thus prove. Corporate clients’ incomplete toolkit for maximizing overall value of their legal services comprises: “managing” cost, measuring and benchmarking to identify outside counsel’s value, streamlining process, locating and improving other efficiencies, and finding better ways to structure fee arrangements and budgeting. The new ways of evaluating a firm’s overall value used by sophisticated corporate clients will continue to help define quality for less sophisticated legal consumers, namely the Long Tail legal consumer. With the potential to vastly increase data analysis and transparency, LTICs signal a movement away from the old value system towards ones of accessibility, ease-of-use, efficiency and overall value-add to a wider variety of potential clients.

Foregoing legal counsel can be extremely problematic because damage from defective or incomplete legal efficacy is far more likely when no lawyer is involved. In estate planning, the growing popularity of automated document assembly engenders common errors and lost opportunities to many unwitting Long Tail

134. Ribstein, supra note 31, at 753.
136. Triantis, supra note 79, at 180.
138. Lauritsen, supra note 95, at 953.
consumers. As Tim Hwang, a fellow at the Stanford Center for Legal Informatics, acknowledges, “even if not actively malicious, the proliferations of negligently designed systems might harm the public.” Therefore, “policy arguments in favor of disallowing automated legal assistance systems generally involve protection of the public and protection of the legal profession.” For automated contract drafting, the contract created through an app does, on its face, seem superior to the user’s prior contract drafting methods of cobb[...](142) However, a superior system would be generating an application programming interface (“API”), which is a set of structured rules for third-party applications to access and make requests to a service, that would allow the state judiciary to track companies and lawyers offering automated legal services. As Hwang, explains the legal API would be “open,” permitting third-parties or lawyers to provide preapproved whitelist “automated legal services to the public so long as the total number of transactions processed stayed within certain preset rate limits.”

In the absence of an open API system for LTICs, if the primary purpose of the contract is to create the proper incentives for upholding the expectations of the relationship, then the quality of the contract may never be measured by its effectiveness via judicial interpretation or coercive enforcement by the state. LTICs like Shake may succeed in providing an easily digestible, plain English exchange of promises that deliver only the optics of a legally binding agreement. Still, by formalizing these simple exchanges of promises, servicing the Long Tail consumers’ simple contract drafting needs

141. Lauritsen, supra note 95, at 953.
142. There are other large bodies of common law protecting—e.g., agency, tort, employment—that may provide a default protecting Shake contracts. “Sweet” Ways For Your Business to Use Shake, supra note 128.
143. Hwang, supra note 12, at 20–22.
144. Id. at 22.
145. Triantis, supra note 79, at 183.
may ultimately help temporarily reduce some strain on the overburdened civil court systems, by keeping some legal disputes over oral contracts out of courts, regardless of whether or not the LTIC-generated contract is enforceable for the disputed purpose. However, this remains only a possible (and yet unproven) temporary benefit that LTICs provide. LTICs must continue to increase contract quality and accuracy for Long Tail consumers to ensure compliance with the ABA’s policies of protecting the public that underlie the purpose of legal licensing.\textsuperscript{146}

C. THE UNAUTHORIZED PRACTICE OF LAW

While beyond the scope of this note, it must be noted that legal ethics doctrine, animated by interests in protecting the public against legal services provided by unqualified actors and preserving integrity in the legal profession, constrain LTICs significantly.\textsuperscript{147} The unauthorized practice of law ("UPL") is implicated in the core business model of all automated document assembly services that incorporate NLK and essentially mimic a lawyer’s interpretation and decision-making.\textsuperscript{148} The California State Bar Rules of Professional Conduct prohibit a member lawyer from aiding any person or entity in the unauthorized practice of law and from practicing in a jurisdiction in which they are not qualified (i.e., not a member of that state’s Bar).\textsuperscript{149} Each state’s bar has its own rule barring UPL. In many states, UPL is a crime.\textsuperscript{150}

This universal rule is why all LTICs have robust disclaimers on their websites notifying their customers that they are not law firms, are not providing legal advice, and are not creating attorney-client relationships that are protected by privilege or attorney work product doctrine.\textsuperscript{151} Ultimately, the enforcement entities (courts and state bar

\textsuperscript{146} Hwang, \textit{supra} note 12, at 24.
\textsuperscript{147} \textit{Model Rules of Prof’l Conduct} R. 5.5 cmt. 2 (2013); \textit{Model Rules of Prof’l Conduct Preamble} (2013). For a comprehensive survey of legal precedent regarding the unauthorized practice of law and early LTICs, see Hwang, \textit{supra} note 12, at 10–19.
\textsuperscript{148} \textit{Model Rules of Prof’l Conduct} R. 5.5 (2013).
\textsuperscript{149} \textit{Cal. Rules of Prof’l Conduct} R. 1-300 (2014).
\textsuperscript{150} \textit{See, e.g., id.}
associations) hold the power to regulate LTICs. Since the incumbents (lawyers) run the disciplinary and enforcement entities, it is unclear what the fate of the LTIC will be with respect to UPL liability given the potential incentives to eliminate these competing companies from the legal marketplace.\(^{152}\)

V. LTIC’S DISRUPTIVE POTENTIAL AND THE OPPORTUNITY FOR LAW FIRMS

While some critics go so far as to purport that the “Big Law” firm model is dying, at this stage, LTIC is simply not replacing bespoke legal services.\(^{153}\) Even though venture capitalists see enough to support investing in LTICs, these companies represent only a small (but growing) portion of the revenue in the total legal marketplace.\(^{154}\) AngelList, a platform for startups, lists about six hundred legal startups as of September 2014, up from 450 legal startups in April 2014.\(^{155}\) Far fewer, like the legal research platforms and online dispute resolution services, would qualify as LTICs. Regardless, LTICs are expanding the legal ecosystem by broadening what it means to be a profitable, growing legal business in today’s legal economy.

Additionally, academics and legal commentators acknowledge that the legal profession is ripe for disruption.\(^{156}\) According to

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2014); Terms and Conditions, LAWPAL, http://lawpal.com/legal/terms/ (last visited Mar. 11, 2014). The extensive use of these disclosures likely stems from the Texas rule that ensures a product will not be deemed UPL if the product contains a statement that it is not a substitute for the advice of an attorney. Tex. Gov’t Code § 8.101(c) (2007). Hwang analyzes the problems with this UPL framework “based on notice and disclaimer.” Hwang, supra note 12, at 17.

152. However, the California Supreme Court held in Frye v. Tenderloin Housing Clinic Inc. that “legal aid societies serve an important public interest” and was not in violation of California’s UPL regulations. Frye v. Tenderloin Hous. Clinic, Inc., 129 P.3d 408, 417 (Cal. 2006).


156. See generally HLS PLP, Disruptive Innovation Conference - The Effects on Clients, Technology, Education and the Profession, YOUTUBE (Mar. 6, 2014), http://www.youtube.com/watch?v=olbNRjzjIKw.
Harvard Business School professor Clayton Christensen, disruptive innovation transforms a historically expensive and complicated product (accessible to few) into a more affordable and simplified product (accessible to many).\textsuperscript{157} Traditional legal products and services are ripe for this type of disruption because of a paradoxical problem in the legal profession: there are too many lawyers and there are too few lawyers.\textsuperscript{158}

While the future of law may ultimately be transformed by truly disruptive technologies, many legal technology companies, in their current iterations, are not “disruptive” to the legal services industry as Christensen defines the term.\textsuperscript{159} Disruptive technologies are innovations that virtually fracture an existing market and value network by bringing to market a very different value proposition than was previously available.\textsuperscript{160} There are few legal technology companies that bring a truly different value proposition to the market because many of these companies simply unbundle traditional legal services from other legal work that does not require a lawyer, allowing nonlawyers to produce legal deliverables for consumers. In short, all the hype aside, most LTICs are using technology to lower prices; \textit{ceteris paribus}, the increased access for consumers and the creation of new demand, emanates from the lower price point.

An additional doctrinal constraint on innovation in the American legal profession is the strict rule prohibiting (1) nonlawyer ownership of any company deemed to be delivering legal services, and (2) the sharing of revenue derived from a lawyer’s work with any nonlawyer.\textsuperscript{161} The United Kingdom liberalized its legal profession with the passage of the Legal Services Act 2007 (“LSA”) to eliminate these prohibitions in the U.K.\textsuperscript{162} The LSA allows for ownership and

\begin{footnotesize}

\textsuperscript{158} HLS PLP, supra note 156.


\textsuperscript{160} CLAYTON CHRISTENSEN, \textit{THE INNOVATOR’S DILEMMA} xviii (2011).

\textsuperscript{161} MODEL RULES OF PROF'L CONDUCT R. 5.4 (2013).

\textsuperscript{162} Legal Services Act, 2007, c. 29, §§ 71–111 (U.K.).
\end{footnotesize}
profit sharing of legal services businesses with nonlawyer owners.\textsuperscript{163} Measuring the outcomes of legislation like the LSA is difficult because of a lack of unified quality measurements and concrete data.\textsuperscript{164} Despite this reality, in 2012, the Legal Services Board ("LSB"), the governing body in charge of executing the LSA, published a Final Baseline Report on the impact of the LSA and its objectives.\textsuperscript{165} Due to the constraints, the report deemed many of the legislative outcomes inconclusive, while noting a few of the desired changes in consumer confidence and public perception remain unchanged in a four-year period following the passage of the LSA.\textsuperscript{166} However, this study may not be indicative of the LSA’s actual success because “most of the new legislation [went] into effect in 2011 or 2012.”\textsuperscript{167}

Similar liberalization efforts arise regularly in the United States. Most recently, one such effort was defeated by the American Bar Association’s Ethics Commission in 2013.\textsuperscript{168} Instead, American law firms and lawyers continue, directly or indirectly, to capitalize on limitations imposed on LTICs, like nonlawyer ownership and UPL rules. Lawyers also have the opportunity to embrace their state’s possible adoption of revised Rule 1.2(c) under the Model Rules of Professional Conduct and ABA guidance expanding a lawyer’s ability to engage in limited scope representation (i.e., unbundled services).\textsuperscript{169}

Because of the ethics rules, common law, state and federal statutes, civil and criminal law that are in place to protect consumers from lawyer misbehavior, lawyers alone have the ability to form the attorney-client relationship, withhold privileged material in court, and provide legal advice.\textsuperscript{170} Law firms, ironically, are best positioned to

\textsuperscript{163} Id.
\textsuperscript{165} Id.
\textsuperscript{166} Id.
\textsuperscript{169} HOLLENBAUGH, supra note 21.
\textsuperscript{170} See, e.g., MODEL RULES OF PROF’L CONDUCT (2013).
provide services in the Long Tail because they already have the legal knowledge, both NLK and bespoke, necessary to begin an attorney-client relationship seamlessly with consumers seeking Long Tail products.\textsuperscript{171} By acknowledging the potential in providing legal work to this new client base, and developing the innovative applications to service them, law firms could alleviate, by expansion, the seemingly intractable problem of otherwise increasing profitability, gaining and holding clients, and growing their business.\textsuperscript{172} Put differently, growing a legal business could mean modularizing and delivering existing services, like contract drafting, specifically tailored for the needs of the Long Tail and the post-recession consumer who is in need of simple legal services that do not require a lawyer’s judgment and analysis beyond the generally accepted norms ("NLK"). Some law firms are capitalizing on this opportunity by providing free automated document assembly—for example, Cooley LLP’s Cooley GO Document Generators for incorporation of a business entity, employment agreements, terms of service, privacy policy, etc.\textsuperscript{173} Another example is Wilson Sonsini Goodrich & Rosati’s Term Sheet Generator that creates a venture financing term sheet based on a consumer’s responses to an online questionnaire.\textsuperscript{174} It remains to be seen if these firms will continue to develop automated document assembly for transactional legal products for the Long Tail.

The last decade saw a rise of many “mega-institutions,” companies of unprecedented size and scope that merged in order to

\textsuperscript{171} In business, White Space is more than uncharted territory or an underserved market, it is the range of potential activities not defined or addressed by the company’s current business model. White Space is unlike adjacencies, products or services that fit well within the current organization’s business model and serve new customers or existing customers in fundamentally different ways. White Space is the opportunities outside a company’s core competency and beyond its adjacencies that require a different business model to exploit it. When managing innovation, White Space provides absolute freedom from the previous business formulae and permission to do whatever it takes to keep growing. Mark Johnson, The White Space and Business Model Innovation: Finding Brilliant Opportunities Outside Your Core, SEIZING THE WHITE SPACE: BUSINESS MODEL INNOVATION FOR GROWN AND REVIVAL 5 (Harvard Bus. Press 2010).


\textsuperscript{173} Index of Cooley GO Document Generators, supra note 99.

differentiate from their smaller competitors.\textsuperscript{175} Other power law distributions were also exacerbated. The Pareto Principle seems less relevant today in describing wealth inequality, when the top 0.01 percent of the population outpaces wealth growth in the 99.99 percent by a factor of four.\textsuperscript{176} In law, there has been a rise of mega-firms, which actually opens the door for an even larger Long Tail.\textsuperscript{177} As Eric Schmidt, Google’s Executive Chairman, notes, “it’s also hard to make money if you don’t have a [Long] Tail (to satisfy minority taste, which improves the consumer experience), but the revenues are disproportionality in the Head.”\textsuperscript{178}

Firms will no doubt continue to focus their energy on the substantial revenues in bespoke legal services (the head). The current level of sophistication of LTICs means they cannot compete with law firms’ standardized legal work. Firms need not fear LTICs currently because they do not need to service consumers wanting Long Tail products to meet their financial objectives. Moreover, legal services are not one-hundred percent commoditizable, which means there will always be a need for bespoke legal services, the bread and butter of law firms.\textsuperscript{179} There would appear to be a correlation between the increased sophistication of an LTIC’s ability to fine-tune for a particular client’s needs, and the increased threat to law firms’ monopoly on bespoke legal services. However, absent a significant change in the law governing lawyers, the unauthorized practice of law remains a formidable barrier to the full realization of sophistication of non-lawyer automated document assembly software.\textsuperscript{180}

It is axiomatic that diversifying revenue streams reduces businesses risk. By focusing entirely on bespoke (or even standardized) legal services, law firms ignore the opportunity to also


\textsuperscript{177} Anderson, \textit{supra} note 175.

\textsuperscript{178} Id.

\textsuperscript{179} SUSSKIND, \textit{supra} note 3, at 24.

diversify by providing commoditized legal products. Law firms not spending some degree of resources on the development of commoditized transactional legal products in the Long Tail are ignoring a significant opportunity to diversify their consumer base, thereby losing ground to those firms that do so.
APPENDIX

Figure 1. Bill Henderson’s Chart on The Legal Whiteboard

In this chart, LTICs would occupy the space denoted as “Legal Publishers.”

181. Henderson, supra note 43.
Figure 2. The Long Tail

Figure 3. Long Tail of Legal Products
Inspired by Bill Henderson's Chart on The Legal Whiteboard

182. Anderson, supra note 57.
183. Id.