

SUSTAINABLE LIVING GUIDE: 50. COOPERATION LAW FOR A SHARING ECONOMY¹

Janelle Orsi[©]

A new sharing economy is emerging—but how does it fit within our legal system? Time for a whole new field of cooperation law.

What do you call a lawyer who helps people share, cooperate, barter, foster local economies, and build sustainable communities? That sounds like the beginning of a lawyer joke, but actually, it's the beginning of new field of law practice. Very soon, every community will need a specialist in this yet-to-be-named area: Community transactional law? Sustainable economies law? Cooperation law? Personally, I tend to call it sharing law. We need sharing lawyers to help people such as Lynne:

- Lynne lives in an urban co-housing community and shares ownership of a car with two neighbors. Every day, she fluidly shares, borrows, and lends (rather than owns) many household goods, tools, electronics, and other items.
- She is a member of a cooperative grocery, through which she receives significant discounts in exchange for putting in a few monthly work hours. She grows vegetables on an empty lot and sometimes sells the veggies to neighbors.
- She has a successful rooftop landscaping business, which she launched using 20 microloans and investments from friends and family. She often barter, doing odd jobs in exchange for goods and services.
- She also owns a 5 percent share of a hot springs retreat center outside of town, which she acquired through sweat equity.

With the help of sharing, cooperation, and collaboration, Lynne has managed to craft an affordable, comfortable lifestyle, put her skills to use, do varied and self-directed work, and live/work in a supportive community. She has “financed” property ownership and launched a thriving business off of the traditional financial and banking grid.

Lawyers Are Going to Have a Ball With This

Lynne has “financed” property ownership and launched a thriving business off of the traditional financial and banking grid. Now, if only she knew how to report it to the IRS. Now, if only Lynne knew how to report all this to the IRS, and how to explain it to her car insurance company, the Health Department, mortgage lenders, the Secretary of State, the Department of Real Estate, the city planning and building departments, the Department of Agriculture, the Department of Labor, the Securities and Exchange Commission, and all of the other regulatory and bureaucratic entities that have a say over what she can and can't do.

And if only Lynne could feel fully assured that her rights to partial ownership in the cohousing community, retreat center, car, shared goods, and consumer cooperative would be honored by her co-sharers, or, in the event of an unresolvable dispute, honored by a court of law. If only she could find affordable ways to manage the risk of her activities, since her activities don't fit into traditional insurance application check-boxes. If only there weren't so many legal headaches involved in living well and creating more localized, sustainable economies ...

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Trying to unravel the legal issues that arise from Lynne's lifestyle would be like trying to unravel a gigantic, messy, tangled ball of string. Fortunately, thousands of people go to law school every year because they enjoy solving tangled messes. The emerging generation of lawyers is going to have a ball with this.

The Evolving Nature of Our Transactions

Contrary to what we see on lawyer TV shows, around half of lawyers primarily work as transactional lawyers, not courtroom litigators. Transactional lawyers advise on, negotiate, and structure the contracts that govern business deals, real estate transfers, loans, mergers, securities, insurance, and so on. The evolving nature of our transactions has created the need for a new area of law practice. We are entering an age of innovative transactions, collaborative transactions, crowd transactions, micro-transactions, sharing transactions—transactions that the legal field hasn't caught up with, like: Bartering. Sharing. Cooperatives. Buying clubs. Community currencies. Time banks. Microlending. Crowdsourcing. Crowdfunding. Open source. Community supported agriculture. Fair trade. Consensus decision-making. Cohousing. Intentional Communities. Community Gardens. Copyleft.

At present, there is not much literature explaining the legal implications of these kinds of transactions. To those of us who have made this our area of practice, many of the legal questions in this new field sit unanswered on our giant to-do lists. One-by-one, client-by-client, we are making headway. As the ground swells with people adopting more sharing and cooperative work and lifestyles, we can look forward to a growing body of law and literature on the subject.

As the ground swells with people adopting more sharing and cooperative work and lifestyles, we can look forward to a growing body of law and literature on the subject. At the same time, the answers will never be clear cut, and lines we have grown accustomed to will be increasingly blurred. Until we evolve a new set of legal definitions, we'll dance uncertainly around the lines between "income" and "gifts," between "own" and "rent," between "employees" and "volunteers," between "work" and "hobby," between "nonprofit" and "for-profit," between "invest" and "donate," and so on. Our clients may have outside-the-box livelihoods and organizations, but it'll still be the job of lawyers to help them fit into boxes that are traditional enough to comply with the law.

A Collaborative World Calls for Collaborative Lawyers

The growth of "community transactional law" or "sharing law" has implications not just for what lawyers practice, but how they practice—how they interact with clients, deliver services, determine fees, work with conflicts of interest, and so on. Working in this field will require not only the skills of legal analysis, but also the skills of open-mindedness, clear communication, collaboration, and an understanding of the role that human needs and emotions play in collaborative transactions. Collaboration between lawyer, client, and community is key. A lawyer brings legal knowledge, while a client brings practical knowledge, and the community provides the forum for the transactions. To the extent information is shared in all directions, thoughtful and innovative transactions will emerge.

Lawyers typically don't freely share sample documents because charging for documents is a primary way that lawyers make money. Lawyers in this new field will need to develop new revenue models that encourage sharing of information. The free flow of information and open-sourcing of legal documents will ensure better informed clients, better quality and widely-available documents, and communities that are empowered with an understanding of what is

possible. Lawyers can also use sharing to make legal services more affordable, and therefore accessible, to clients. A lawyer sharing office space can keep overhead and fees far lower than a law firm built to look like the Emerald City. A lawyer open to receiving payment in time dollars will make legal services accessible to a broader range of clients.

Documents That Are Alive (And Even Make Sense)

A large component of lawyers' work is drafting documents, like contracts and agreements about how organizations will function. In a world where people form babysitting co-ops, community gardens, open source creative projects, and other decentralized, participatory, fluid, and adaptable group projects, documents clearly describing these arrangements will be indispensable. In a world where people form babysitting co-ops, community gardens, open source creative projects, and other decentralized, participatory, fluid, and adaptable group projects, documents clearly describing these arrangements will be indispensable. That is, if people can understand them. In a typical lawyer-client transaction, the lawyer might prepare a document that the client looks at, often reluctantly and quickly. The document is then put into a filing cabinet, never to be seen again (unless someone sues someone, in which case everyone hires more lawyers to interpret the appallingly long and confusing paragraphs).

Documents should be living tools for a sharing organization. A thoughtfully composed governing document will:

- help the group come to a well-thought-out plan;
- serve as a handy reference for participants and encourage consistency in operations;
- enable new people to join and get up to speed with the program;
- promote group harmony by ensuring that everyone is on the same page; and
- support other, similar programs, by making it easy for others to model a new program using the first one's governing document. In other words, a document should do as much to promote good relationships and thoughtful planning as it will to create a legally binding agreement.

Lawyers Become Facilitators

In a more sharing world, attorneys might more frequently represent groups of people, rather than just individuals and business entities. In these situations, an attorney might simultaneously play a role as a lawyer and a facilitator. This deviates, to some extent, from traditional models of practice. For example, if three unrelated people decide to purchase a house together, and approach an attorney to draft their shared ownership agreement, the attorney might insist that each party will need his or her own attorney. Simultaneously representing multiple parties to the same transaction can put an attorney at risk of violating ethical rules because the parties' interests could come into conflict with each other. Furthermore, joint representation means that each individual client will not have his or her own zealous advocate. (In case you wondered, "zealous," is a word right out of lawyers' rules of professional conduct.)

Zeal, however, may not be the most important thing clients are looking for in a sharing lawyer. Perhaps they want one attorney who can learn about everyone's needs, help explain the benefits and risks for each person, mediate any conflicts that do arise, explain the legal framework, and then guide the group in developing a plan that works for everyone. Often, facilitating the growth of an open and trusting relationship among parties will be far more important than lobbying for favorable contract terms for a single party. At the same time, when the stakes are high, giving attention to individual interests will be essential. To this end, sharing law has much to learn

from “Collaborative Law,” which has been applied primarily to divorce cases, and sometimes to the preparation of prenuptial agreements. In the collaborative model, each party is represented by an attorney, and thus has an advocate helping to assert that party’s interests.

Typically, however, the attorneys are also trained mediators, and the parties come to the negotiating table in an open and cooperative spirit. In the same way that the collaborative approach has been used in negotiating prenuptial agreements, it could be applied also to co-ownership agreements, partnership agreements, and other situations where parties must balance concern for their own interests with the desire to come together and collaborate.

Lawyers Can Also Create More Square Holes

Trying to legally categorize cutting edge transactions will sometimes be like trying to fit a square peg in a round hole. As such, lawyers working in this field will be in a good position to call for more square holes in our legal system. In other words, innovation and policy reform will also play a key role in the work of community transactional lawyers. In the course of their work, sharing lawyers will recognize how a state law or local zoning ordinance could be improved to encourage sharing, to incentivize urban agriculture, or to enable new forms of co-ownership. Lawyers can also be proactive architects of new kinds of organizations, new legal structures for sharing, and mechanisms for protecting the commons. In this same vein, for example, Creative Commons has already created a new licensing structure for the sharing of ideas and creative works.

Greasing the Wheels of a More Sharing World

What do you do when you want to start sharing resources, but your community’s not into it? In small pockets around the country, lawyers are beginning this work. Recently, Oakland-based attorney Jenny Kassan and I co-founded the Sustainable Economies Law Center, an organization that creates a space for this new field to develop, generates tools and resources for the public, and provides learning opportunities for law students. With any luck, law schools will start offering classes and clinics focused on these cutting-edge transactions. Soon, a new generation of “sharing lawyers” or “community transactional lawyers” will be able to enjoy rewarding work, interesting clients, and a field of practice that deviates, refreshingly, from the usual big-firm and government career paths.

Years ago, I read a cynical article complaining that lawyers do nothing more than “grease the wheels of big business.” It’s unfortunate to the extent that it has been true, but I liked the phrase and I think we should simply roll it in a new direction. Now, our work is to grease the wheels of a more sharing, cooperative, and sustainable society.