

# TRUST ME, I SHARE YOUR VALUES

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*“Trust is the foundation of society for without trust, we cannot cooperate.”<sup>1</sup>*

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## INTRODUCTION

During the Spring of 2018, my wife and I traveled to Washington D.C. to visit to the U.S. Patent and Trademark Office. While were planning our trip, I was finishing up my first sharing economy article, “For a New Economy, Puerto Rico needs a Sharing Mindset.” As a result of the writing process, I knew I wanted to experience in real life what a sharing economy would look like on a day-to-day scenario. Therefore, we booked an Airbnb; moved through the greater Washington D.C. area using Uber, and Capital Bikeshare; and ate in local restaurants, mainly counter-culture places. It was an amazing experience because

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<sup>1</sup> Beth Simone Noveck, *Trademark Law and the Social Construction of Trust: Creating the Legal Framework for Online Identity*, 83 WASH. U. L.Q. 1733 (2005).

we had the opportunity to see the U.S. capital, its many faces, and the stories of its people.

However, we were aware that not everything is ‘peaches and cream’. Some columns have pointed out that Airbnb’s reality dictates far from the sharing economy.<sup>2</sup> There is even a website called “Airbnb Hell” that is dedicated to helping hosts and guests share their stories about the risks and dangers of using Airbnb.<sup>3</sup> Other articles have pointed out that, among other problems Airbnb has, is the fact that “[h]omes bought for the sole purpose of generating income have restricted local inventory and inflated real estate markets in major cities such as New York and San Francisco.”<sup>4</sup> Similarly, “[l]ocals claim they are being squeezed out of their own neighborhoods by commercial landlords.”<sup>5</sup> Although it is difficult to determine whether these are isolated occurrences sensationalized by the media, confirmed reports point out that “Airbnb’s exponential growth has prompted cries of foul around issues of safety, trust, discrimination, and regulation.”<sup>6</sup>

This Airbnb pandemonium reached Puerto Rico, particularly in Old San Juan. The capital city mayor, Carmen Yulín-Cruz, recently argued that these short-term rentals are affecting the residential integrity of the community.<sup>7</sup> As a result, she presented a project to stop Airbnb-like platforms from operating for a whole year in the Old San Juan area.<sup>8</sup> Said project is based on the argument that these types of economic models foster displacement and gentrification of urban areas. Nonetheless, while this regulatory battle is being dealt with at the municipal level, at the state level, Governor Ricardo Rosselló announced an agreement with Airbnb

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<sup>2</sup> See generally, David Dodwell, *Uber and Airbnb are not the real sharing economy – think MTR, recycling and generosity instead*, SOUTH CHINA MORNING POST (May 11, 2018), <http://www.scmp.com/comment/insight-opinion/article/2145653/uber-and-airbnb-are-not-real-sharing-economy-think-mtr>; Niall Fraser, *A real ‘sharing economy’ – not Airbnb and Uber – is the remedy for a city that has lost its way*, SOUTH CHINA MORNING POST (Sept 19, 2017), <https://www.scmp.com/news/hong-kong/article/2111841/real-sharing-economy-not-airbnb-and-uber-remedy-city-has-lost-its-way>; Giorgos Kallis, *Airbnb is a rental economy, not a sharing economy*, THE PRESS PROJECT (Oct 18, 2014), <https://www.thepressproject.gr/article/68073/AirBnb-is-a-rental-economy-not-a-sharing-economy>.

<sup>3</sup> See generally, AIRBNB HELL, <https://www.airbnhell.com/> (last visited Feb. 27, 2019).

<sup>4</sup> Jim Pickell, *Airbnb: The Good, the Bad and the Ugly*, HUFFINGTON POST (Jan 25, 2016), [https://www.huffingtonpost.com/jim-pickell/airbnb-the-good-the-bad-t\\_b\\_9052176.html](https://www.huffingtonpost.com/jim-pickell/airbnb-the-good-the-bad-t_b_9052176.html).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> See generally, José Orlando Delgado Rivera, *Buscan limitar servicios como Airbnb en el Viejo San Juan*, EL NUEVO DÍA (May 22, 2018), <https://www.elnuevodia.com/noticias/locales/nota/buscanlimitarservicioscomoairbnbenelviejosanjuan-2423814/>; José Orlando Delgado Rivera, *Los residentes del Viejo San Juan defenderán su comunidad frente a Airbnb*, EL NUEVO DÍA (May 23, 2018), <https://www.elnuevodia.com/noticias/locales/nota/losresidentesdelviejosanjuandefenderansucomunidadfrenteaaairbnb-2423974/>.

<sup>8</sup> Adriana De Jesús Salamán, *San Juan quiere reglamentar arrendamientos tipo Airbnb*, NOTICEL (May 22, 2018), <http://www.noticel.com/economia/san-juan-quiere-prohibir-arrendamientos-tipo-airbnb/744935850>.

to establish initiatives in the Island in order to increase tourism. This is being done based on what the current administration is calling the “visitor’s economy”.<sup>9</sup>

Likewise, Manuel Laboy-Rivera, Secretary of the Department of Economic Development and Commerce, and President of the Board of Directors of the Tourism Company, reacted to the mayor’s ordinance by defending what he believes to be a sharing economy model in Airbnb.<sup>10</sup> As part of his reaction, he pointed out that the recently passed Senate Bill No. 840, by Senator Zoé Laboy-Alvarado, will regulate the sharing economy to prevent municipalities from decreeing prohibitions on these types of businesses. Among other structural issues, this bill seeks to establish, as a public policy, the advancement of the sharing economy in Puerto Rico. Therefore, it is possible to see that we have a fragmented economic policy.

Although I do not have a specific opinion regarding said bill, I argued, in my first article, that there are at least three reasons why the sharing economy is the solution for Puerto Rico. These are: (1) the sharing economy presents itself as an integral local sustainable economic development paradigm; (2) the sharing economy is an empowering movement for the people today; and (3) the sharing economy has already started and has a promising future. However, in the article, I recognize that if we want to further the sharing economy, we need both new legal premises and a collective conscientious movement. The purpose of this article is to complement my first article, providing more research regarding the current rule of law and its relation either advancing or regressing the sharing economy movement.

As I stated in the first article, I believe that the sharing economy values and principles are vital for Puerto Rico. I am not advocating for more Airbnb or Uber business models, I am advocating for something much greater; fostering community and collective values and principles. But, how can we foster these principles from the ground up? How can we move from a mostly unknown theory where people put the sharing economy labels to any e-business they see, to a defined, rational and intelligible narrative? Is it possible to use the marketplace and private activity to do so? That is precisely what this article proposes.

This written work aspires to explore whether the current rule of law regarding trademarks, particularly certification or classification marks, can be used to further the sharing economy values in Puerto Rico. In order to do so, this article will study: (1) how certification marks deliver information; (2) how information generates trust, — the currency of the sharing economy —; and (3) how certification marks create the necessary trust to foster the sharing economy. To do so, I will unveil my premises and lay out the methodological and technical background of this investigation.

Accordingly, Part I of the article, will reveal the theoretical premises used here — the functional law and economics — and why it is used. Likewise, the article will briefly address the sharing economy movement and the definition we will use. Also, this written work will lay out the current rule of law regarding

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<sup>9</sup> *Airbnb y Rosselló anuncian iniciativa para atraer turismo*, EL NUEVO DÍA (May 9, 2018), <https://www.elnuevodia.com/negocios/empresas/nota/airbnbbyrosselloanuncianiniciativaparaatraerturismo-2421214/>.

<sup>10</sup> De Jesús, *supra* note 8.

trademarks, collective, and certification marks, its underlying theory, and justification. Part II will evaluate the role of certification marks in providing information to consumers, how information creates trust, and, how trust can ultimately advance the sharing economy. Finally, the conclusion will address the way we can develop a certification mark in order to foster the sharing economy values and principles through the marketplace and private activity in Puerto Rico.

## I. BACKGROUND

### A. LAW & ECONOMICS IN A NUTSHELL

#### i. THE MAIN GOAL: EFFICIENCY

Law and economics has emerged as a leading methodology across the legal system.<sup>11</sup> Namely, there are three distinct schools of thought; the positive;<sup>12</sup> the normative;<sup>13</sup> and the functional.<sup>14</sup> Beyond each school's particularities, there are methodological divides among them.<sup>15</sup> In general, the distinctions address the question of how to define efficiency on both the individual and aggregate level; specifically, how preference should be evaluated and what exactly should be maximized to achieve an optimal legal system.<sup>16</sup> The more traditional law and economics maxima is efficiency, a comprehensive measure of public benefits.<sup>17</sup> In *Law and Economics*, it is said that "economics conceives . . . laws as incentives for changing behavior (implicit prices) and as instruments for policy objectives (efficiency and distribution)."<sup>18</sup>

At large, on defining efficiency, there are three possible models that have been subject of both acceptance and criticism: (1) the Pareto Criterion; (2) the Bentham and Kaldor-Hicks Utilitarian Test; and (3) the Nash and Rawls Non-Linear Social Preferences.<sup>19</sup> However, there is another question that must be considered; what should the legal system try to maximize: aggregate wealth or aggregate utility?<sup>20</sup> Because utility cannot be objectively measured, the increasing

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<sup>11</sup> RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 29 (8th ed. 2011).

<sup>12</sup> *Id.* at 31 (focusing on facts and cause-and-effect relationships) (The Chicago school — or *positive school* — attempts to explain legal rules and outcomes as they *are* rather than as they *ought to be*).

<sup>13</sup> Jonathan Klick & Francesco Parisi, *Wealth, Utility, and the Human Dimension*, 1 N.Y.U. J.L. & LIBERTY 590, 591 (2005) (citation omitted) (The Yale school of thought, — or *normative school* —, "sees the law as a tool for remedying 'failures' that arise in the market.").

<sup>14</sup> *Id.* at 591-94 (The Virginia school of thought, —or *functional school*—, "draws from public choice theory and the constitutional perspective of the Virginia school of economics to offer a third perspective that is neither fully positive nor fully normative.").

<sup>15</sup> *Id.* at 591.

<sup>16</sup> *Id.*

<sup>17</sup> ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 4 (6th ed. 2012); *see, Id.* at 2 ("Prof. Bruce Ackerman of the Yale Law School described the economic approach to law as 'the most important development in legal scholarship of the twentieth century'").

<sup>18</sup> COOTER & ULEN, *supra* note 17, at 9.

<sup>19</sup> *See* Klick & Parisi, *supra* note 13, at 596-99, for more information regarding these concepts (This article will not delve into any of these models because they are not necessary in order to examine our study subject).

<sup>20</sup> *Id.* at 599-600.

consensus among the three schools of thought is to abide by the wealth maximization paradigm in order to comprehensively measure social welfare.<sup>21</sup> Richard Posner, former judge for the U.S. Appellate Court for the 7<sup>th</sup> Circuit, is the most notable champion of this standard where “a transaction is desirable [or considered efficient] if it increases the sum of wealth for the relevant parties.”<sup>22</sup>

ii. **COOPERATION IN ITSELF CAN BE EFFICIENT**

In order to define efficiency under the functional law and economics methodology (hereinafter, “F.L.E.”), we can bypass the above mentioned wealth/utility divide and focus our analysis on the choice or revealed preference of individuals.<sup>23</sup> Most importantly, because the F.L.E. formulates value-neutral principles of collective choice, it does not weigh one preference above the others.<sup>24</sup> In order to do so, the F.L.E. “relies on institutions that provide individuals with the opportunity to express their own values truthfully. These revealed preferences are then granted complete validity in normative terms, with law and policy makers taking them as a given.”<sup>25</sup> Under this functional analysis, courts and policy makers will “first inquire into the incentives underlying the legal or social structure that generated [a] legal rule, rather than directly attempting to weigh the costs and benefits of individual rules.”<sup>26</sup>

Moreover, “by designing mechanisms through which parties are induced to reveal their subjective preferences, the [F.L.E.] obviates the need for third parties, such as judges or legislators, to decide between wealth and utility as the appropriate maximand.”<sup>27</sup> For example, if people decide that collaborative principles are the appropriate benchmark for a certain legal rule, no further considerations are needed. The fostering of this favored standard would be in itself efficient. As a result, this “approach tends to align individual and social optimality.”<sup>28</sup> However, given its normative individualism premises, the F.L.E. “suggests that institutions should provide incentives, such that individuals will naturally act in a desired way without any external monitoring or coercion.”<sup>29</sup> “This necessarily requires that individuals have the ability and incentive to reveal their own subjective values and preferences, and that all costs and benefits generated by an individual’s actions accrue to that individual.”<sup>30</sup>

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<sup>21</sup> *Id.* at 600. (“[W]here wealth is meant to include all tangible and intangible goods and services.”); *see also, id.* at 604 (“Posner . . . never suggested that wealth maximization should be the only social value or principle of justice.”).

<sup>22</sup> *Id.*

<sup>23</sup> Francesco Parisi & Jonathan Klick, *Functional Law and Economics: The Search for Value-Neutral Principles of Lawmaking*, 79 CHI.-KENT L. REV. 431, 448 (2004).

<sup>24</sup> *Id.* at 449.

<sup>25</sup> *Id.*

<sup>26</sup> Klick & Parisi, *supra* note 13, at 595 (Namely because courts and policymakers lack the expertise and methods for evaluating the efficiency of alternative legal rules).

<sup>27</sup> *Id.* at 604.

<sup>28</sup> *Id.*

<sup>29</sup> Parisi & Klick, *supra* note 23, at 448.

<sup>30</sup> *Id.* at 448-49.

The above implies “that individuals will only achieve socially optimal outcomes when they act for their own gain . . . .”<sup>31</sup> While this notion is similar to what traditional economic knowledge proposes,<sup>32</sup> it is important to note that, as David C. Korten explains: “[Adam] Smith did not advocate a market system based on unrestrained greed. He was talking about farmers and artisans trying to get the best price for their products [in order] to provide for themselves and their families. That is self-interest, but it is not greed.”<sup>33</sup> Professors Parisi and Klick point out that “[e]xamples of research in this area include the [F.L.E.] explanations for the cooperation that underlies much of human interaction. Cooperative behavior is an empirical regularity that proves puzzling from both the positive and normative perspectives.”<sup>34</sup> That is precisely the reason why this article is based on the F.L.E. methodology.

On one hand, the positive school’s efficiency maxima is based on the natural outcome of unbridled competition. On the other hand, the normative school of thought prescribes external limits or alterations on the natural competition that arises among individuals. Therefore, cooperation does not easily fit within either of these two school’s perspectives.<sup>35</sup> Nevertheless, empirical studies show “how social norms evolve to solve various prisoner’s dilemma games by internalizing reciprocity constraints on individual action, improving the welfare of participants relative to the purely competitive outcome.”<sup>36</sup> Now, using the F.L.E.’s framework, we will proceed to the next phase of our analysis.

## B. THE SHARING ECONOMY

### i. A POOL OF CORE VALUES AND PRINCIPLES

My favorite definition of the sharing economy is: “what happens when you love your neighbor as yourself.”<sup>37</sup> Accordingly, for the purpose of this article, we will define the sharing economy movement as a pool of values and principles based mainly on the works of: Rachel Botsman, founder of the Collaborative Lab, and attorney Janelle Orsi, co-founder and Executive Director of the Sustainable Economies Law Center. On the one hand, by focusing on the fruits of this grassroots economy, Orsi points out that “[a]lthough it is hard to encapsulate the qualities of this new economy, [the sharing economy] generally facilitates

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<sup>31</sup> *Id.* at 449.

<sup>32</sup> Klick & Parisi, *supra* note 13, at 607.

<sup>33</sup> David C. Korten, *The Betrayal of Adam Smith*, in *WHEN CORPORATIONS RULE THE WORLD* (1995), [https://jacobsn.com/deoxy/deoxy.org/korten\\_betrayal.htm](https://jacobsn.com/deoxy/deoxy.org/korten_betrayal.htm).

<sup>34</sup> Parisi & Klick, *supra* note 23, at 449.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* See also, Avinash Dixit & Barry Nalebuff, *Prisoners’ Dilemma*, *THE CONCISE ENCYCLOPEDIA OF ECONOMICS*, <http://www.econlib.org/library/Enc/PrisonersDilemma.html> (last visited on June 7, 2018) (“The prisoners’ dilemma is the best-known game of strategy in social science. It helps us understand what governs the balance between cooperation and competition in business, in politics, and in social settings.”).

<sup>37</sup> M Andre Primus, *What is the sharing economy and why does it matter?*, TEDx TALKS (September 29, 2014), [https://www.youtube.com/watch?v=wgLPZ\\_0tAfc](https://www.youtube.com/watch?v=wgLPZ_0tAfc) (discussing the sentence’s proposition at 1m 20s).

community ownership, localized production, sharing, cooperation, small-scale enterprise, and the regeneration of economic and natural abundance.”<sup>38</sup> She further distinguishes that a key aspect of the sharing economy is that it aspires to regenerate the economic and ecological abundance necessary for everyone to thrive.<sup>39</sup> On the other hand, Botsman identifies that said movement revolves around three core values: (1) simplicity, (2) traceability and transparency — the notion that “local is good”, and (3) participation.<sup>40</sup> She says that this new “economic system . . . unlocks the value of underused assets through platforms that connect haves and wants in ways that enable greater efficiency, empowerment, and access.”<sup>41</sup>

Likewise, the promise of an “economic and social mechanism that starts to balance individual needs with those of [the] communities and [the] planet [is] what [Botsman calls] Collaborative Consumption.”<sup>42</sup> Botsman further points out that consumers’ trust has gone from institutionally-based (opaque, closed, centralized, vertical, licensed, and top-down) — such as big corporations and governments — to distributed-based (transparent, inclusive, decentralized, horizontal, accountable and bottom-up) — like peers and even strangers;<sup>43</sup> from institutional power to distributed power, from centralized to democratized.<sup>44</sup> This lack of institutional trust phenomenon is partly a consequence of individual’s growing skepticism regarding the current centralized-ownership-hierarchical-buying economic model that has both widened the gap between the rich and the poor, and is the main reason for the current environmental problems.<sup>45</sup>

## ii. SHARING ECONOMY BUSINESS MODELS

With regards to sharing economy business models, Orsi identifies some of the phenomena and practices that are beginning to comprise the new economy. These include: cohousing communities, community gardens, social enterprises, community-owned enterprises, shared commercial kitchens, car-sharing groups, ecovillages, local currencies, barter networks, time banks, gift economies,

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<sup>38</sup> JANELLE ORSI, PRACTICING LAW IN THE SHARING ECONOMY: HELPING PEOPLE BUILD COOPERATIVES, SOCIAL ENTERPRISE, AND LOCAL SUSTAINABLE ECONOMIES 2 (2012).

<sup>39</sup> *Id.* at 4.

<sup>40</sup> RACHEL BOTSMAN & ROO ROGERS, WHAT’S MINE IS YOURS: THE RISE OF COLLABORATIVE CONSUMPTION 51 (2010).

<sup>41</sup> Mike Sturm, *Rachel Botsman: An Economy of Trust*, NORDIC BUSINESS FORUM (Feb 4, 2018), <https://www.nbforum.com/nbreport/rachel-botsman-economy-trust/>.

<sup>42</sup> BOTSMAN & ROGERS, *supra* note 40, at 63.

<sup>43</sup> Rachel Botsman, *We’ve stopped trusting institutions and started trusting strangers*, TED (June, 2016), [https://www.ted.com/talks/rachel\\_botsman\\_we\\_ve\\_stopped\\_trusting\\_institutions\\_and\\_started\\_trusting\\_strangers](https://www.ted.com/talks/rachel_botsman_we_ve_stopped_trusting_institutions_and_started_trusting_strangers).

<sup>44</sup> *See generally*, Rachel Botsman, *Connected Communities: The Institution of the 21<sup>st</sup> Century?*, OUISHARETV (May 28, 2014), <https://www.youtube.com/watch?v=K6FXZJU2-w8> (explaining that some areas ripe for disruption are: (1) complex experiences (insurances); (2) broken trust (banking); (3) redundant intermediates (layer of middleman or processes, like publishing and advertising); and (4) limited access (health and education)) (discussing the sentence’s proposition at 6m 55s).

<sup>45</sup> Shane Hughes, *The unstoppable rise of a collaborative economy*, TEDX TALKS (February 6, 2013), <https://www.youtube.com/watch?v=ya6zndBOBH> (the sharing economy looks for access, networks, and sharing) (discussing the sentence’s proposition at 1m 20s and 2m 30s).

community land trusts, grocery cooperatives; worker cooperatives; community-supported agricultures; community-supported kitchens; credit unions, creative commons licensing, housing cooperatives, childcare cooperatives, renewable energy cooperatives, tool lending libraries, and coworking spaces.<sup>46</sup> Moreover, she explains that some enterprises that may emerge in the sharing economy ecosystem are: (1) sharing enterprise,<sup>47</sup> (2) nano-enterprise,<sup>48</sup> (3) producer cooperative enterprise,<sup>49</sup> (4) worker cooperative enterprise,<sup>50</sup> (5) consumer cooperative enterprise,<sup>51</sup> (6) social enterprise,<sup>52</sup> (7) community-supported enterprise,<sup>53</sup> and (8) community owned enterprise.<sup>54</sup>

### C. HOW DO THE METHODOLOGY AND THE VALUES COME TOGETHER?

Up until this point we have discussed what the F.L.E. is, how it works, and why we use it. Also, we have defined the sharing economy movement based on a pool of core values and principles that comprise the likes of: (1) blurring of personal and professional life, (2) peer-to-peer activities, (3) shifting from an ownership to an access mindset, (4) localized production and investment, (5) cooperative and collaborative lifestyles, (6) small-scale enterprises, (7) environmental sustainability, (8) sense of community, (9) online platforms, (10) transparency, (11) simplicity, (12) participation and democracy, (13) decentralized power and trust, (14) reciprocity, and (15) accountability. But, how do these two topics come together?

As mentioned earlier, the F.L.E. enables preferences to be revealed by relying on institutions that provide individuals with the opportunity to express their own values truthfully. This will result in preferences being granted complete validity in normative terms while also becoming the new standard for efficiency. In practical terms, once the new economy core values and principles have been laid out, the new framework for judges and legislators will be one in which efficiency is a variable analyzed in function of the furtherance of sharing economy core values, such as: cooperation, sustainability, transparency, decentralization, reciprocity

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<sup>46</sup> ORSI, *supra* note 38, at 2-3.

<sup>47</sup> *Id.* at 7 (“[A]imed at sharing and offsetting the cost of ownership and maintenance of an item; it is not aimed at making a profit.”).

<sup>48</sup> *Id.* (“[I]t’s anything we do for others . . . if the result is that the activity ends up providing for us in some way.”) (For example, a person allows his neighbor to use his guitar in exchange for washing his or her car, or any other exchange).

<sup>49</sup> *Id.* (“Producer cooperatives can harness the nano-entrepreneur in all of us by aggregating and marketing the products of multiple small producers.”).

<sup>50</sup> *Id.* at 8 (It is focused on “businesses owned and governed by their workers.”).

<sup>51</sup> *Id.* (An example could be when a “group of friends pools money to buy pet food in bulk.”).

<sup>52</sup> *Id.* (“[A]ctivity aimed at creating a social or environmental good and, in doing so, also generates income or sustenance for those engaged in the activity.”).

<sup>53</sup> *Id.* (“[W]ell established in the realm of agriculture [, this system enables] a farmer and a group of customers [to] form a relationship and agree to share a handful of things . . . in exchange [of] a share of the harvest [which depends on the harvest year].”).

<sup>54</sup> *Id.* at 9 (explaining that a community-owned entrepreneur would have a “diversified investment portfolio” if he or she would own shares in various local businesses).



and accountability. Consequently, pursuant to this new efficiency paradigm, institutions based on collaborative principles will also be favored.

#### D. TRADEMARK LAW

##### i. THEORY

Trademark law has its roots in unfair competition laws that prohibited competitors from “passing off” other producers’ goods as their own — the so called free-riders.<sup>55</sup> Its underlying theory is mainly based on a set of utilitarian justifications, focused on preventing consumer confusion and encouraging consumer information flow, and on encouraging producer investment in stable brands.<sup>56</sup> Namely, the essence of the first justification is that once consumers turn information into trust, they will *demand* certain goods or services under a specific mark. On the other hand, by providing the originator of a mark the right to police counterfeits, the following three types of investment will be protected: “(1) investment in the creation of the mark; (2) investment in advertising and promoting the product in association with the mark; and (3) product-related investment such as high-quality raw materials, production equipment, and quality assurance techniques.”<sup>57</sup> However, there is a third approach: the information theory.

In general, this third theory contrasts with the previous two conceptions in that it poses that trademarks foster, instead of hinder, the flow of information in markets.<sup>58</sup> Particularly, Professor Deven R. Desai argues that “[i]nstead of promoting information exchange across and within markets, ‘[trademark] law’s core mission, as it is understood today, is to facilitate the transmission of accurate information to the market.’”<sup>59</sup> Prof. Desai argues that the current rule of law assumption that trademarks are stable, and have a single and consistent meaning, is flawed. Hence, he maintains that trademarks are better understood as symbols and channels through which information is diffused. Prof. Desai’s vision aligns with Professor Beth Simone Noveck’s concept of trademarks.<sup>60</sup> She sees trademarks as “the product of a collective, namely the source of the mark and the buying public which associates the mark with that source. Trademarks recognize the interests of the collective in the authorship and use of identity in specific social contexts.”<sup>61</sup>

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<sup>55</sup> JAMES BOYLE & JENNIFER JENKINS, *INTELLECTUAL PROPERTY: LAW & THE INFORMATION SOCIETY* 112 (3rd ed. 2016).

<sup>56</sup> *Id.* at 108.

<sup>57</sup> ROBERT P. MERGES, ET AL., *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE* 736 (5th ed. 2010).

<sup>58</sup> Deven R. Desai, *Response: An Information Approach to Trademarks*, 100 *GEO. L.J.* 2119, 2119-20 (2012) (citing Stacey L. Dogan & Mark A. Lemley, *Trademarks and Consumer Search Costs on the Internet*, 41 *HOUS. L. REV.* 777, 778 (2004)).

<sup>59</sup> *Id.* at 2120 (citing Robert G. Bone, *Hunting Goodwill: A History of the Concept of Goodwill in Trademark Law*, 86 *B.U. L. REV.* 547, 548 (2006)).

<sup>60</sup> Noveck, *supra* note 1, at 1740.

<sup>61</sup> *Id.*

ii. **RULE OF LAW**

Before we go any further, it is important to note the following legal reality. At the federal level, based on the U.S. Congress Commerce Clause power, trademarks are protected by the Lanham Act, 15 U.S.C. §§ 1051. Broadly, the federal law applies when a product or service is sold in the interstate commerce (transactions in more than one state; Puerto Rico is a state for this purpose). However, because Congress did not preempt this field completely, when a product or service is sold only at a local level, trademarks are usually regulated by a local statute. In the case of Puerto Rico, we have the “Puerto Rico Trademark Law”, Act No. 169-2009. For the purposes of this article, both statutes are virtually the same; therefore, we will refer to standard principles that apply in both instances.

Now, what exactly is a trademark, and how does it work? On broad strokes, this particular Intellectual Property (hereinafter, “IP”) “can include any word, name, symbol, device used to identify and distinguish goods or services from those manufactured or sold by others.”<sup>62</sup> “This broad definition can [further] include . . . personal [and] trade names, symbols, abbreviations, fragrances, colors, sounds, or any combination of these things.”<sup>63</sup> The key aspect of trademarks is that they *identify* and *distinguish* goods or services from others, and *reveal the source* of goods or services. Trademarks work as symbols open to interpretations influenced by either: (1) the mark holder’s advertising efforts; (2) customers’ experience with the brand or with a competitor’s brand; and/or (3) third parties’ communications, such as ratings, reviews, news, etc.<sup>64</sup>

iii. **COLLECTIVE AND CERTIFICATION MARKS**

Because the inherent purpose of trademarks is to distinguish the source of a good or service, sharing is not as developed in this IP realm as it is in others.<sup>65</sup> “However, trademark law does provide mechanisms whereby parties working in common can use a trademark for a common or shared purpose through either a collective mark or a certification or classification mark.”<sup>66</sup> On the one hand, “[c]ollective marks indicate that [a] person or party providing a good or service is a member of a certain group and meets the standard of admission of [an]

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<sup>62</sup> 15 U.S.C. § 1127 (2012).

<sup>63</sup> D. Inder Comar, *New Approaches to Intellectual Property*, in ORSI, *supra* note 38 535, 550.

<sup>64</sup> Desai, *supra* note 58.

<sup>65</sup> COMAR, *supra* note 64, at 550 (some examples include Open Source and Creative Commons in Copyrights, and Humanitarian Licenses in Patents); *see generally*, Yana Welinder & Stephen LaPorte, *Hacking Trademark Law for Collaborative Communities*, 25 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 407 (2015) (where the authors look to clarify the problem of applying trademark law to the work of collaborative communities and offer a taxonomy of solutions (or hacks) that collaborative communities have developed to address this problem. The authors conclude that trademark law imposes centralized control requirements that are inherently inconsistent with the decentralized structure of collaborative communities. Interestingly, the authors point out that one of their proposed hacks is trademark holding entities on behalf of the community as “stewards.” In my first article, I proposed that other works could examine this stewardship paradigm and its potential applicability to different areas of the sharing economy.).

<sup>66</sup> COMAR, *supra* note 64, at 550.

organization.”<sup>67</sup> For example, a collective mark could be “the name of an umbrella group for a professional or religious society, or the name of a volunteer organization with chapters in several parts of the country”.<sup>68</sup> Additionally, “if a group of people wanted to come together under one organization for a common purpose, they could obtain a collective mark and thus differentiate themselves from other people who may be involved in similar activities.”<sup>69</sup> Other examples include: cooperatives, associations, and other collective groups.<sup>70</sup>

Furthermore, and “[i]n contrast to a regular trademark, ‘a certification mark is a special creature created for a purpose uniquely different from that of an ordinary service mark or trademark.’”<sup>71</sup> Rather than identifying the source of goods or services, “[a] certification mark is used to indicate that a particular good or service meets an independent standard.”<sup>72</sup> A certification mark can *endorse* or *certify* certain goods or services that either: (1) originate in a particular geographic area; (2) meet certain quality standards; or (3) whose work was performed by certain qualified workers (such as a specialist or a union member).<sup>73</sup> “The essential message conveyed by a certification mark is that the goods or services ‘have been examined, tested, inspected, or in some way checked by a person who is not their producer, using methods determined by the certifier/owner.’”<sup>74</sup> These labels are meant to bear the “seal of approval” of an organization with regards to quality, accuracy, and other characteristics that are important for said entity.<sup>75</sup> Note that “certification marks do not convey detailed or technical information directly; consumers must trust the certifying parties.”<sup>76</sup>

The main example I will be working with in this article is the *NON-GMO Project Verified* (hereinafter “non-GMO”) label. The purpose of this type of label is to tell the world that certain goods have met some standard. In this example, the owner of the non-GMO mark is the one responsible for determining the requirements for the certification. In the context of certification marks, this can be useful in instances where certifying a standard may be of interest to the public. Some examples are: USDA Organic, Gluten-Free, Certified Vegan, Fair Trade Certified, UL logos, Parental Advisory emblems, EnergyStar, Woolmark, etc.<sup>77</sup>

On broad strokes, when a person—the owner—wants to establish a certification mark, he or she must keep in mind the following four rules: (I) the

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<sup>67</sup> *Id.* (citing the Trademark Manual of Examination Procedures (TMEP) § 1303).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 550-51.

<sup>70</sup> 15 U.S.C. §1127 (2012).

<sup>71</sup> Wynn Heh, *Who Certifies the Certifiers?*, 16 VT. J. ENVTL. L. 688, 696 (2015).

<sup>72</sup> COMAR, *supra* note 64, at 551.

<sup>73</sup> *Id.* (making reference to 15 U.S.C. § 1127).

<sup>74</sup> *Id.* (making reference to the Trademark Manual of Examination Procedures (TMEP) § 1306.01(b)).

<sup>75</sup> MERGES, ET AL., *supra* note 57, at 773; *See also*, Jeanne C. Fromer, *The Unregulated Certification Mark(et)*, 69 STAN. L. REV. 121 (2017) where the author “advocate[s]advocates for robust procedural regulation of certification standard making and decision making that would detect and punish poor certification behavior.”

<sup>76</sup> Heh, *supra* note at 71, at 696.

<sup>77</sup> *See generally*, Certification Mark: Everything You Need to Know, UPCOUNSEL, <https://www.upcounsel.com/certification-mark> (last visited on Jun 15, 2018).)

certification mark cannot discriminate against other companies that meet the standards of certification; (2) the owner cannot use the mark for any other purpose other than certification; (3) the owner must draft agreements to certified parties and hold them accountable against the standards; and (4) owners cannot sell any product on their own that bears the mark.<sup>78</sup> Moreover, pursuant to *Freecycle Sunnyvale v. Freecycle Network*, when groups are “interested in licensing their trademarks to other entities or forming collective or certification marks [they] must be careful to follow trademark formalities.<sup>79</sup> Sharing the mark, but failing to police how it is used, can lead to a finding of ‘naked licensing’ and abandonment of the trademark”.<sup>80</sup> This is something mark owners have to be on the lookout for.<sup>81</sup>

In conclusion, regardless of the theory we prefer to use in order to justify trademarks, collective or certification marks, the reality is that these types of IP are intimately connected with information. In this case, we will apply the F.L.E. methodology and define the concept of “*sharing information*” as the appropriate efficiency maxima for the current rule of law. Basically, the dissemination of information will enable customers to make informed decisions.<sup>82</sup> Informed decisions are better for society as a whole to the extent that consumers will be able to allocate their scarce resources in products or services that will satisfy their wants or needs. With this background laid out, we will proceed to examine how certification marks, through the marketplace forces of supply and demand, are able to foster the sharing economy.

## II. ANALYSIS

### A. CERTIFICATION MARKS DELIVER INFORMATION

#### i. THE NON-GMO LABEL AND ITS IMPACT ON THE MARKET

As mentioned before, we will use as an example the non-GMO label—as a case study—to analyze the impact certification marks can have in a certain market by providing information. First, let us examine some data. In 2016, a survey was conducted in the United States where consumers were asked if they agreed that all products containing genetically modified organisms (“GMOs”) should be labeled as such. During the survey, 89% of the respondents agreed that products

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<sup>78</sup> *Id.* See also 15 U.S.C. § 1064.

<sup>79</sup> *Freecycle Sunnyvale v. Freecycle Network*, 626 F. 3d 509 (9<sup>th</sup> Cir. 2010).

<sup>80</sup> ORSI, *supra* note 38, at 552 (Also, “[i]n seeking to avoid a naked license, trademark owners should also be wary of giving themselves *too much* control over the licensee and inadvertently creating a franchise or parent/subsidiary relationship.”).

<sup>81</sup> See generally, Rochelle B. Spandorf, et al., *Certification Programs: Franchises or Not?*, 33 SPG FRANCHISE L.J. 505 (2014).

<sup>82</sup> See Yana Welinder & Stephen LaPorte, *Hacking Trademark law for Collaborative Communities*, 25 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 407 (2015) (arguing that it is possible to reform trademark law itself to accommodate the non-traditional forms of quality control that are effective in the peer-produced commons-based production model); see also Roya Ghafele & Benjamin Gibert, *A New Institutional Economics Perspective on Trademarks: Rebuilding Post Conflict Zones in Sierra Leone and Croatia*, 11 J. MARSHALL REV. INTELL. PROP. L. 745, 775-76 (2012).

containing GMOs should be labeled accordingly.<sup>83</sup> Similarly, in 2017, a survey was conducted and found that 46% of retailers and wholesalers increased their store brand focus on more natural and organic products.<sup>84</sup> Also, in that same year, research showed that 52% of retailers and wholesalers in the U.S. actively pursued private label specialty foods like gluten-free foods.<sup>85</sup>

Furthermore, in 2014, the National Research Center conducted a survey where adult consumers in the U.S. were asked if they looked for any product claims on food labels while they were shopping for groceries. Over half of respondents stated that they looked for the claim 'natural' on food labels during their shopping trips.<sup>86</sup> Currently, as a consequence of a market demand of this information, the federal government is working on a bill that will require mandatory labeling on foods that have been genetically engineered ("GE") or that contain GE ingredients. Numerous studies confirm the overwhelming demand for a printed label.<sup>87</sup> Therefore, it is possible to see that labeling has an impact on consumer behavior; so much so that what started as a private practice is about to become a public one. But how much of an impact?

A recent study made by Brandon McFadden, assistant professor of food and resource economics from the University of Florida, and Jayson Lusk, head of the agricultural economics department of Purdue University, came to the conclusion that consumers are willing to pay more for a product with a label disclosing certain information such as non-GMO or organic.<sup>88</sup> Data shows that there has been a

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<sup>83</sup> U.S. Consumer Perception regarding GMO label 2016, STATISTA, <https://www.statista.com/statistics/604013/us-consumer-perceptions-regarding-gmo-labels/>.

<sup>84</sup> *Share of retailers and wholesalers increasing store brand focus on specialty foods in the United States in 2017, by product claim*, STATISTA, <https://www.statista.com/statistics/743857/private-label-product-claim-focus/>.

<sup>85</sup> *Share of retailers and wholesalers actively pursuing private label specialty foods in the United States in 2017, by product claim*, STATISTA, <https://www.statista.com/statistics/743870/private-label-specialty-food-product-claim/>.

<sup>86</sup> *Id. Share of retailers and wholesalers actively pursuing private label specialty foods in the United States in 2017, by product claim*, STATISTA, <https://www.statista.com/statistics/743870/private-label-specialty-food-product-claim/>.

<sup>87</sup> *Product claims U.S. consumers look for on food labels while grocery shopping in 2014*, STATISTA, <https://www.statista.com/statistics/380899/food-labeling-important-product-claims-to-us/>.

<sup>87</sup> *Product claims U.S. consumers look for on food labels while grocery shopping in 2014*, STATISTA, <https://www.statista.com/statistics/380899/food-labeling-important-product-claims-to-us/>. See Caitlin Dewey, *Mandatory GMO labels are coming to your food*, THE WASHINGTON POST (May 4, 2018), [https://www.washingtonpost.com/news/wonk/wp/2018/05/04/mandatory-gmo-labels-are-coming-for-your-food/?noredirect=on&utm\\_term=.548e0ad37449](https://www.washingtonpost.com/news/wonk/wp/2018/05/04/mandatory-gmo-labels-are-coming-for-your-food/?noredirect=on&utm_term=.548e0ad37449); *U.S. Polls on GE food labeling*, CENTER FOR FOOD SAFETY, <https://www.centerforfoodsafety.org/issues/976/ge-food-labeling/us-polls-on-ge-food-labeling>.

<sup>88</sup> See Ashley Nickle, *Study: Consumers do not distinguish between non-GMO, organic label*, THE PACKER (October 30, 2017), <https://www.thepacker.com/article/study-consumers-do-not-distinguish-between-non-gmo-organic-labels>; See also Caitlin Dewey, *Mandatory GMO labels are coming to your food*, THE WASHINGTON POST (May 4, 2018), [https://www.washingtonpost.com/news/wonk/wp/2018/05/04/mandatory-gmo-labels-are-coming-for-your-food/?noredirect=on&utm\\_term=.548e0ad37449](https://www.washingtonpost.com/news/wonk/wp/2018/05/04/mandatory-gmo-labels-are-coming-for-your-food/?noredirect=on&utm_term=.548e0ad37449); *U.S. Polls on GE food labeling*, CENTER FOR FOOD SAFETY, <https://www.centerforfoodsafety.org/issues/976/ge-food-labeling/us-polls-on-ge-food-labeling>.

steady increase in demand for foods labeled as non-GMO.<sup>89</sup> Likewise, Jane Kolodinsky, professor of community development and applied economics at the University of Vermont, has found that GMO labels improve people's confidence and have a positive effect in the marketplace. Regarding the opposition of certain suppliers to label their products, Dr. Kolodinsky says:

My hypothesis is that what labeling is going to do is to stop this whole debate because people who want the information and are going to use it will have choice in the marketplace and people who don't care are going to go on their happy business. We will have a competitive marketplace where consumers will decide, and their desires will be met by a variety of offerings.<sup>90</sup>

## ii. THE GREEN MARKET CASE

The previously examined subsection coincides with certain legal articles that argue that certification marks "facilitate price increases due to service/product differentiation that in turn creates further incentives to invest in quality and reputation."<sup>91</sup> Likewise, "certification marks can . . . encourage purveyors of goods and services to provide quality goods or services that conform to those marks' standards" and "facilitate consumer trust in buying compliant goods or services from sources they do not otherwise know (or those that are distantly located)."<sup>92</sup> This rationale applies to different industries. Attorney Wynn Heh applies it to the "green" or environmentally friendly market.<sup>93</sup>

In her article *Who Certifies the Certifiers?*, Wynn points out that, in the face of an on-going consumption paradigm change, society is increasingly turning to what she calls an "ethical consumerism."<sup>94</sup> Her argument is based on studies that indicate that consumers "have indicated a willingness to pay a premium for goods

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<sup>89</sup> See Hadley Malcolm, *Non-GMO demand growing despite report that says GMOs are safe*, USA TODAY (May 18, 2016), <https://www.usatoday.com/story/money/2016/05/18/gmo-report-not-likely-to-change-minds-over-gmo-concern/84501686/>.

<sup>90</sup> See Ken Roseboro, *Food companies say GMO labels having no impact on product sale*, THE ORGANIC & NON-GMO REPORT (September 28, 2017), <http://non-gmoreport.com/articles/food-companies-say-gmo-labels-no-impact-product-sales/> (One of the biggest arguments against labeling foods containing genetically modified ingredients is that consumers would view the labels as a warning and not buy GMO labeled products. Real world experience by major food companies and published research shows that claim to be false, that the labels have had no impact on product sales. In fact, research has even indicated that GMO labels improve people's confidence in GM foods).

<sup>91</sup> See Roya Ghafele & Benjamin Gibert, *A New Institutional Economics Perspective on Trademarks: Rebuilding Post Conflict Zones in Sierra Leone and Croatia*, 11 J. MARSHALL REV. INTELL. PROP. L. 745, 775-76 (2012); see also Patrick Sörqvist, et al., *Effects of labeling a product eco-friendly and genetically modified: A cross-cultural comparison for estimates of taste, willingness to pay and health consequences*, 50 in FOOD QUALITY AND PREFERENCE 65-70 (2016), <https://www.sciencedirect.com/science/article/pii/S0950329316300076>.

<sup>92</sup> See Jeanne C. Fromer, *The Unregulated Certification Mark(et)*, 69 STAN. L. REV. 121, 128 (2017).

<sup>93</sup> Heh, *supra* note at 71, at 688.

<sup>94</sup> See generally, Daphne Zografos Johnsson, *Using Intellectual Property Rights to Create Value in the Coffee Industry*, 16 MARQ. INTELL. PROP. L. REV. 283, 309-10 (2012) for a discussion on the ethical consumerism topic.

and services that are less harmful to the environment.”<sup>95</sup> Because of this new and increasing demand for green goods, she identifies that there is a problem in the marketplace: “an increase in deceptive environmental marketing, dubbed ‘greenwashing.’”<sup>96</sup> Namely, she is worried about the instances where fraudulent marketing tactics are falsely suggesting a third party has certified goods. This is definitely a problem.

These types of fraudulent tactics affect the market as a whole inasmuch as the consumers’ money is not going to the people who are actually fostering environmental and sustainability principles. That is, demand and supply are not truly meeting. Consequently, Wynn argues for stronger certification marks, particularly in markets “where informational imbalance is pervasive,” and distinguishes the preferred qualities of a product that are not readily observable, such as environmental claims.<sup>97</sup> Specifically, Wynn’s argument logic is as follows:

Certification marks can help consumers identify sustainable goods and help marketers attract more consumer attention towards goods that may be priced higher but are more sustainable. Certification marks play an important role in greening the market by aiding consumers in finding green goods. Consumers that purchase goods bearing certification marks are promoting more environmentally friendly goods, and the purchases can more strongly incentivize producers to certify their goods without rewarding fraudulent marketers. So long as the goods comply with the purported certification standards, this shifts the market towards more sustainable goods.<sup>98</sup>

In general, it is possible to see that certification marks provide information in the marketplace. Furthermore, we can perceive how consumers react to certain information, and how their decisions affect the supply of goods. Moreover, it is possible to see how consumers send information to producers by choosing some products over others because of a preference in quality, characteristics, and any other differentiators. When companies adapt to what consumers prefer, the marketplace changes and becomes dynamic. Therefore, the dissemination of information is important for both the consumers and the producers in order to shape the marketplace.

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<sup>95</sup> Heh, *supra* note at 71, at 689 (Wynn points out that the market has increase deceptive environmental marketing, dubbed “greenwashing.” That is why she calls for a way to target this unfair and fraudulent practice).

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

**B. INFORMATION GENERATES TRUST; THE CURRENCY OF THE SHARING ECONOMY**

**i. FROM INSTITUTIONAL TO DISTRIBUTED TRUST**

The global ambassador and expert on the topic of trust is Rachel Botsman.<sup>99</sup> Botsman has repeatedly written articles and held conferences where she lays out the cornerstone or context of the sharing economy movement, that is, a transformation in trust.<sup>100</sup> Her main argument is that “[t]rust, the glue that holds society together, has shifted from institutional trust to a new form of distributed trust. Instead of flowing upwards to institutions, experts, authorities and regulators, it now flows horizontally to peers, friends, colleagues and fellow users.”<sup>101</sup>

Empirical research suggests that trust in institutions such as banks, governments, charities and the media, has hit an all-time low, thanks in part to scandals and corruption.<sup>102</sup> Botsman argues that, as a result, “[a] new trust framework is emerging, fueled by social, economic and technological forces that will profoundly change not just how we are trusted in the world, but how we view trust in the world.”<sup>103</sup> She claims that:

[D]igital tools are raising our levels of trust in others in ways that are speeding up the disruption of an old norm and accelerating the adoption of new ideas. This is a threat to big organizational systems—universities, corporations, banks, healthcare, even licensed taxi associations—that have depended on people placing value in the belief that traditional safeguards and centralized

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<sup>99</sup> See generally, RACHEL BOTSMAN, <https://rachelbotsman.com/>.

<sup>100</sup> Mike Sturm, *Rachel Botsman: An Economy of Trust*, NORDIC BUSINESS FORUM, (Feb 4, 2018), <https://www.nbforum.com/nbreport/rachel-botsman-economy-trust/> (“Initially, humans had local trust – which existed in small villages and communities. It was reputation based and non-transferrable. Once people started moving to cities and engaging in trade, the need for intermediaries arose, and institutional trust was created. The primary vehicles of these were governments and corporate brands, which carried reputations across borders. Now with advanced technology essentially shrinking the world, distributed trust has entered the game. Interactions between people are once again taking center stage. But this trust happens, Botsman explains, in ‘stacks’ or ‘layers.’”); see also, Rachel Botsman, *The changing rules of trust in the Digital Age*, HARVARD BUSINESS REVIEW (Oct 20, 2015), where the author explains how this type of trust can grease the wheels of businesses and facilitate person to person relationships in the age of distributed networks and collaborative marketplaces. Yet, she recognizes that this trust shift is going to be messy. Furthermore, she says that “[n]ew complexities will emerge around risk, discrimination and accountability that will require not just new regulatory and legal frameworks but a different organizational mindset to find a way through. And we’ll have to find a way through because to be human, to have relationships with other people, is to trust. Perhaps the disruption happening now is not about technology; it is how it enables a shift in trust, from institutions to individuals.”

<sup>101</sup> Rachel Botsman, *Trust in 2030 – from institutions to individuals*, World Economic Forum, (Nov 10, 2017), <https://www.weforum.org/agenda/2017/11/trust-score-2030-airbnb-facebook/>.

<sup>102</sup> *Id.*; see also Matthew Harrington, *Survey: People’s Trust Has Declined in Business, Media, Government, and NGOs*, HARVARD BUSINESS REVIEW, (Jan 16, 2017), <https://hbr.org/2017/01/survey-peoples-trust-has-declined-in-business-media-government-and-ngos>.

<sup>103</sup> Rachel Botsman, *Technology is making it easier to trust strangers*, WIRED (Jan 29, 2016), <http://www.wired.co.uk/article/trust-networks>.



guarantees will keep them safe and render goods and services reliable.<sup>104</sup>

Thus, Botsman points out that, as this traditional institutional trust framework continues to crumble, it creates fertile ground for technology-engineered decentralized trust directly between people. She says that “institutional trust, taken on faith, kept in the hands of a privileged minority and operating behind closed doors, simply wasn’t designed for the digital age.”<sup>105</sup> Nowadays, she explains:

[T]he signs of distributed trust are everywhere: from the rise of tech platforms such as Airbnb, Tinder and Uber that depend on strangers trusting one another; to the emergence of cryptocurrencies such as Bitcoin and Ethereum that bypass traditional banks; to rating and review systems on Amazon and Tripadvisor; to the feverish consumption of news on Facebook and other social media platforms.<sup>106</sup>

Note though, that the “real disruption taking place is not technology; it’s a trust shift that will open the doors to new—and sometimes counter-intuitive—ways of designing systems that will change human behavior on a large scale.”<sup>107</sup>

## ii. HOW DOES TRUST WORK?

With regards to the concept of trust, Botsman points out that “what you are always trying to do with trust is to reduce the unknown, to make the unfamiliar feel more familiar; and then the other things you are trying to do is to build the confidence for people to feel like they can take the risk on something that is new.”<sup>108</sup> Botsman articulates that in studying the trust topic, many years now, she has observed a common behavioral pattern that people follow in forming trust; she calls it “climbing the trust stack.” In simple terms, Botsman argues that this three-step process consists of: first, people trusting that a new idea will work and is safe; then, trusting the platform or third party that is facilitating the exchange; and finally, trusting the other user, sometimes a person, machine or even robot.<sup>109</sup> The analysis is richer than what it looks like.

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<sup>104</sup> *Id.*

<sup>105</sup> Botsman, *supra* note 101.

<sup>106</sup> *Id.*

<sup>107</sup> Botsman, *supra* note 101.

<sup>108</sup> See, *The new rules of trust | Global trust expert Rachel Botsman*, IBM Z (Jul 17, 2017), <https://www.youtube.com/watch?v=k02-q6wgdQE>; Rachel Botsman, *Apple needs to be more upfront about the iPhone’s black box*, WIRED (April 12, 2018), <https://www.wired.co.uk/article/iphone-battery-replacement-throttling-ios> (signaling “the four traits of trustworthiness: competence, reliability, benevolence, [and] integrity”).

<sup>109</sup> Rachel Botsman, *The three steps of building trust in new ideas and businesses*, IDEAS.TED.COM (Dec 8, 2017), <https://ideas.ted.com/the-three-steps-of-building-trust-in-new-ideas-and-businesses/>; see also Rachel Botsman, *Technology is making it easier to trust strangers*, WIRED (Jan 29, 2016), <http://www.wired.co.uk/article/trust-networks>.

She argues that in order to overcome the universal trust hurdles—that is, to even consider “climbing the stack”—, the following three key notions summed up the conditions that enable that to happen: (1) the California Roll principle; (2) the WIIFM factor (“what’s in it for me”), and (3) trust influencers. These three can also be seen as questions: “What is it?”, “What do I gain?”, “Who else is doing it?”. Let us examine each one separately.

“The California Roll principle depends on making the unfamiliar more familiar.”<sup>110</sup> Botsman uses the 1960’s phenomenon when U.S. restaurateurs attempted to popularize sushi and failed as an example. She points out that, “the thought of consuming raw fish wrapped in seaweed was bewildering, even dangerous-sounding.” However, the introduction of the California roll—with very familiar ingredients such as cucumber, avocado, and crab— exploded; and now \$2.25 billion worth of sushi annually is consumed in the U.S. Therefore, “[o]ne of the ways people get [a new] concept is by relating to something they understand.” “Once we are over the ‘I get this’ hump, the next barrier to be crossed is the WIIFM factor.”

Botsman makes reference to American sociologist James Samuel Coleman’s study regarding the ways people decide whether or not to trust a new idea. “Essentially, his research showed we decide whether to trust based on assessment of the upsides and downsides. We make a calculation about whether trusting an idea will make our lives better or not.” Hence, the critical point that this raise is that people need to grasp what new ideas or business models can do and what it can give them. Benita Matofska, founder of The People Who Share, adds that some of the things people can do to safely trust strangers is research and verify the identity of the people on the platforms with whom we will exchange or share. Finally, Botsman points out that the third element needed to achieve trust is human.

Back when I was in college, I remember my marketing professor going through the diffusion of innovations theory, popularized by Everett Rogers.<sup>111</sup> On broad strokes, this theory explores and attempts to explain how, why, and at what rate new ideas and technologies spread. By utilizing the diffusion of innovations curve, Rogers describes five types of adopters for products—innovators, early adopters, early majority, late majority and laggards—and provides insight into each of those types.<sup>112</sup> Botsman describes early adopters as individuals who use a new product or technology before others do.<sup>113</sup>

However, while she recognizes that early adopters are critical in order for innovations to take off, she argues that, as a group, they are not necessarily the most needed to get the laggards to climb the first layer of the trust stack. The third element she points out that is needed to achieve trust is what she calls “trust influencers.” Botsman describes them as groups of people who can

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<sup>110</sup> *Id.*

<sup>111</sup> See EVERETT M. ROGERS, *DIFFUSION OF INNOVATIONS* (Simon & Schuster, 5<sup>th</sup> ed. 2003).

<sup>112</sup> *Understanding Early Adopters and Customer Adoption Patterns*, INTERACTION DESIGN FOUNDATION, <https://www.interaction-design.org/literature/article/understanding-early-adopters-and-customer-adoption-patterns>.

<sup>113</sup> Botsman, *supra* note 109.

disproportionately influence a significant change in the way we do something; they set new social norms. Botsman states that these three ideas—the California Roll principle, the WIIFM factor and trust influencers—offer a way to see how an idea once dismissed as preposterous can turn into something strangely familiar. These viewpoints explain how trust in new ideas spreads.

**C. CERTIFICATION MARKS CREATE THE NECESSARY TRUST TO FOSTER THE SHARING ECONOMY**

**i. THE SYMBIOTIC RELATIONSHIP BETWEEN TRUST AND SHARING**

Benita Matofska utters that the secret to building a solid sharing economy is trust; first you trust, and then you share.<sup>114</sup> This idea is extremely interconnected with everything we discussed before. Briefly reiterating, climbing the trust stack consists of a three-step process: trust the idea, trust the platform, and trust the other user. Botsman explains that over time, people open up to changing their behavior the more they live in these new horizontal trust structures; in which case sharing a ride with someone you don't know can become as normal as driving alone. As people go through the trust stack in different areas of their lives, the process and comfort of using online/offline trust to make decisions accelerates. She concludes that:

[A]nyone who has ever built trust in a venture, a new product or an idea has had to go through that process, and it is powerful. It can turn an idea once dismissed as risky and even frightening—sharing a long ride with a stranger, staying in the home of someone you don't know, or getting into a self-driving car—into something normal, rewarding and disruptive.<sup>115</sup>

So, up to here, we have discussed the role certification marks play on delivering information to the marketplace; how that information generates trust; and finally, how trust fosters the sharing economy in itself. This last part is almost a circular argument inasmuch as trust advances sharing and sharing fosters trust. However, now we want to examine how trademarks and certification marks can serve as a sharing delivering mechanism in the marketplace. That is, when consumers identify through a label that a certain product or service is certified as a promoter of the sharing economy values and principles they endorse, consumers will support it over other similar products or services that are not certified.

Columnist and IP attorney Jess Collen, in a Forbes article, expressed that:

[I]t seems pretty clear that trademarks may become more important than ever in a sharing economy. People rely on the trademarked name as an assurance of quality. Trademarks will signify quality, authenticity and predictability. They may function in different

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<sup>114</sup> Benita Matofska, *The Secret of the Sharing Economy*, TEDX TALKS (January 11, 2017), <https://www.youtube.com/watch?v=-uv3JwpHjrw>.

<sup>115</sup> *Id.*

ways, but the value of a trademark—an indication of origin—is still front and center.<sup>116</sup>

Collen further argues that by proactively joining the sharing economy and using their intellectual property to build trust in products, services and commercial speech, brands have an opportunity to shape the legal landscape and how people function and trade within the sharing mindset. In order to achieve this, Collen poses that companies should consider the possible benefits of leveraging the power and trust of their brand to join the sharing community. Regardless of whether the goods or services offered are new or shared, brand names and trademarks must still deliver the message to consumers that they can reliably expect a trusted level of quality.<sup>117</sup> Particularly, he suggests that companies that want in should partner with collaborative companies to offer certification programs. He says: “[o]ffer goods/services for sharing rather than purchase and publicize that they come from a trusted, branded source.”<sup>118</sup>

Nevertheless, just like we discussed earlier, Collen points out that:

[T]rademark owners will have to develop strategies to maintain the value and strength of their brands against a more expansive field of usage. To do so, they must continue to police their marks in the sharing economy, with a focus on two guiding principles. First, they must protect against their trademarks becoming generic. Second, they need to be sure the brands are not used in a way that would suggest endorsement or affiliation with the brand owner where no such relationship exists.<sup>119</sup>

## ii. LOOKING FOR A MODEL

The concept of using a certification mark in Puerto Rico to foster the core sharing economy value and principles is not an original one. Sharing Economy UK (hereinafter, “SEUK”), the trade body championing the United Kingdom’s sharing economy industry, developed a “TrustSeal” kitemark.<sup>120</sup> Debbie Woskow, SEUK’s

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<sup>116</sup> Jess Collen, *Does Airbnb.com Need a Trademark? Branding in the Collaborative Economy: Are Intellectual Property Rights at Risk?*, FORBES (Feb 6, 2014), <https://www.forbes.com/sites/jesscollen/2014/02/06/branding-in-the-collaborative-economy-are-intellectual-property-rights-at-risk/#5b2a32bc5668> .)

<sup>117</sup> COLLEN IP: THE SHARING ECONOMY: RADICAL REPRODUCTION OF “OWNING” OR REBRANDING OF RENTING?, [HTTPS://COLLENIP.COM/WP-CONTENT/UPLOADS/2018/03/COLLEN-IP-THE-SHARING-ECONOMY-PART-1-INTRODUCTION.PDF](https://collenip.com/wp-content/uploads/2018/03/COLLEN-IP-THE-SHARING-ECONOMY-PART-1-INTRODUCTION.PDF) .

<sup>118</sup> COLLEN IP, *BRANDING IN THE SHARING ECONOMY: LEGAL IMPLICATIONS FOR INTELLECTUAL PROPERTY & CONSUMER OUTREACH* (2014), [https://collenip.com/wp-content/uploads/2016/04/Sharing\\_Economy\\_White\\_Paper.pdf](https://collenip.com/wp-content/uploads/2016/04/Sharing_Economy_White_Paper.pdf) .)

<sup>119</sup> *Id.*; see also *Intellectual Property Rights and the Sharing Economy*, BALDWINS (Sep 7, 2017), <https://www.baldwins.com/news/intellectual-property-rights-and-the-sharing-economy>, (“seeing as the shared economy is based on notions of trust, it appears trademarks will continue to have significant value in this new economy, provided companies remain in control of their brands”).

<sup>120</sup> Sam Shead, *A Sharing Economy kitemark has been developed to take the danger out of platforms like Airbnb and Uber*, BUSINESS INSIDER UK (Jul 7, 2016), <https://www.businessinsider.com.au/sharing->

chair and CEO of the home sharing startup Love Home Swap, expressed that they “want to do with the TrustSeal in the sharing economy sector what the Fairtrade mark did for international fair trade standards.”<sup>121</sup> The aim of this certification mark-like label is “for companies of all shapes and sizes from all kinds of sectors to embrace this kitemark as a symbol of high standards and best practice.”<sup>122</sup> Woskko says that they’d love for this to be something businesses are proud of and a sign consumers trust in.<sup>123</sup> The whole purpose underlying this initiative is to increase trust for the sharing economy amongst businesses and consumers.

According to SEUK’s website, their aims are to: champion the sector, making the UK the global home of the sharing economy; ensure best practices through the SEUK code of conduct and an independently awarded kitemark called TrustSeal which gives customers the confidence that awarded platforms are upholding the highest consumer standards; and act as a single voice, recognizing the shared challenges facing member businesses and developing innovative responses.<sup>124</sup> By working closely with policymakers, including the Government, SEUK represents the sharing economy community and calls for policy changes which better protect both consumers and sharing economy businesses.<sup>125</sup>

Furthermore, according to their website, the TrustSeal is based on “a set of good practice principles [that look] to set out minimum standards for sharing economy businesses in order to ensure that they act with integrity and maintain professional standards.”<sup>126</sup> Just like we propose in this article and complying with the certification marks under the current rule of law, when businesses meet performance criteria based on laid out principles, they will receive authorization to display the TrustSeal on their own digital properties. Thus, the TrustSeal “underpins the principles in order to convey a sense of trust and good standing in the market, and with both providers and consumers of services.”<sup>127</sup> SEUK developed the TrustSeal in partnership with Oxford University SAID business school—who developed the research into what consumers and companies thought would be valuable from a trust seal. They arrived at the following six broad principles of good practice: “(1) Identity and Credential Verification; (2) Transparent Communications and Pricing; (3) Participant Help and Support; (4) Security and Data Protection; (5) Insurance and Guarantees; (6) Peer Reviews.”<sup>128</sup>

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economy-uk-has-developed-a-kitemark-called-trustseal-2016-7.

<sup>121</sup> See generally, Daphne Zografos Johnsson, *Using Intellectual Property Rights to Create Value in the Coffee Industry*, 16 MARQ. INTELL. PROP. L. REV. 283, 316-23 (2012) for a discussion on the fair trade topic.

<sup>122</sup> Shead, *supra* note 122.

<sup>123</sup> *Id.*

<sup>124</sup> See generally, SHARING ECONOMY UK, <http://www.sharingeconomyuk.com/about-us>.

<sup>125</sup> *Id.*

<sup>126</sup> See generally, SHARING ECONOMY UK, <http://www.sharingeconomyuk.com/trustseal>.

<sup>127</sup> *Id.*

<sup>128</sup> See generally, SHARING ECONOMY UK, <http://www.sharingeconomyuk.com/trustseal>.

## CONCLUSION

In the first paragraphs of this article, we mentioned that several authors have argued that Airbnb's reality dictates far from the sharing economy. This statement begs the question, what is the sharing economy? In this article we defined the sharing economy as a pool of core values and principles that generally consists of transparent, inclusive, decentralized, horizontal, accountable and bottom-up institutions. Whether business models such as Airbnb and Uber advance these core values is a subject for another article. What this article does is explore whether the current rule of law regarding certification marks can be used to further the sharing economy values in Puerto Rico. The answer is yes.

How can we foster these principles from the ground up? How can we move from a mostly unknown theory where people put the sharing economy labels to any e-business they see, to a defined, rational and intelligible narrative? This article champions for the creation of a certification mark—a Puerto Rican TrustSeal—that works as a symbol of clearly defined high standards and best practices. As discussed earlier, this certification mark will inspire and increase trust among businesses and consumers in the local economy. In order for this certification mark to be as collaborative as possible, I propose that the owner of the mark should be a collectively designed type entity—maybe a cooperative—that serves as a steward. This topic can be a subject for another article.

The reality of our community is that we hardly trust what our current bankrupt government says or promises.<sup>129</sup> Just as Botsman argues, Puerto Rican trust has shifted from institutional trust to a distributed trust; from governments and big corporations, to peers, friends, colleagues and fellow users. That is precisely why this written work claims for more private-collaborative intervention; for a grassroots oriented movement. Furthermore, this article's main argument is that, by delivering information to the marketplace, the certification mark will create the necessary trust to foster the previously laid out sharing economy core values and principles.<sup>130</sup> Accordingly, from a F.L.E. stand point, these revealed preferences will be granted complete validity in normative terms while also becoming the new standard for efficiency in our society.

Finally, other articles can study: (1) the relationship between the reputation systems in the sharing economy and trademarks;<sup>131</sup> (2) the Senate Bill No. 840 by Senator Zoé Laboy-Alvarado in the face of the herein defined sharing

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<sup>129</sup> Redacción El Vocero, *El pueblo confía más en la familia y en sus amigos*, EL VOCERO (April 26, 2017), [https://www.elvocero.com/gobierno/politica/el-pueblo-conf-a-m-s-en-la-familia-y/article\\_d5fde12f-dce8-58f4-a324-d8ee6e135d5c.html](https://www.elvocero.com/gobierno/politica/el-pueblo-conf-a-m-s-en-la-familia-y/article_d5fde12f-dce8-58f4-a324-d8ee6e135d5c.html).

<sup>130</sup> By information we could also mean educational material, conferences, etc.

<sup>131</sup> See generally, Vanessa Katz, *Regulating the Sharing Economy*, 30 BERKELEY TECH. L.J. 1067, 1117 (2015), where she points out that “[i]n [a] sense, reputation systems serve a function similar to a brand or trademark for providers. The provider profile serves as an indication of source, and the reputation system allows the provider to build goodwill within the platform's community of users.”; see also, Beth Simone Noveck, *Trademark Law and the Social Construction of Trust: Creating the Legal Framework for Online Identity*, 83 WASH. U. L.Q. 1733, 1740 (2005) where the author argues that “the area of [legal] doctrine most closely analogous to how identity is construed in cyberspace is, in fact, trademark . . . [Therefore] [i]t is a good place to locate a new doctrine of online reputation.”

economy core values and principles; (3) whether different local businesses are fostering the sharing economy; (4) how much people know in Puerto Rico about the sharing economy; (5) the best way to create an entity to police the proposed certification mark; (6) the minimum standards the certification mark should ensure; and (7) the role of the stewardship concept in the sharing economy, among others.