ARTICLES

TRUSTING STRANGERS: DISPUTE RESOLUTION IN THE CROWD

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ABSTRACT

Hoping to be the next Pebble, entrepreneurs and businesses have flocked to various crowdfunding platforms to contribute dollars to fund initial launches of products and other investments. As readers are undoubtedly aware, Kickstarter was the first and best-known crowdfunding website, having helped to launch more than 95,000 projects to date.¹ On March 3, 2014, Kickstarter reported that it passed $1 billion in pledges with over 5.7 million people donating to creative projects.² There are currently over 800 crowdfunding platforms, with the bulk of dollars contributed going to social campaigns.³ Of course, as donations grew and the number of backers surged, poorly constructed items, delayed launch dates and failed projects began to be reported.⁴ Donating money for a cause is a good thing, until the project or product never come to fruition and then some donors are left without protection in such occurrences.

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This Article asserts that online dispute resolution ("ODR") platforms, which are designed specifically to manage low value claims in an online environment, can and should be used by crowdfunding platforms to assist in the recovery of donor loss. If individuals who participate in crowdfunding have access to efficient, essentially cost-free procedures for dealing with their crowdfunding related disputes, they will have improved trust in and satisfaction with the crowdfunding platform, which will eventually lead to more financial support for entrepreneurs. The Article concludes by arguing that in the crowdfunding, community based environment, the community itself should determine acceptable behavior and as such, the community should resolve its internal disputes based on these newly created behavioral norms supported by an internal ODR platform.

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I. INTRODUCTION

From the funding of the Statue of Liberty’s pedestal to the funding of the world’s first remote control paper airplane, crowds have been used to raise capital for decades. Crowdfunding involves engaging a large number of people, mostly online, who contribute small amounts of money to a project. People contribute to these projects via websites such as Kickstarter and IndieGoGo. Through these sites, businesses or individuals who need financing for a project/venture publish an appeal for funds and typically offer an award (e.g., prototype, music CD, framed photo, etc.) to those who make contributions. Because small amounts of money from a large number of people add up quickly, these sites have experienced tremendous success. For example, since its inception, Kickstarter has raised over $1.18 billion from 143,714 projects. Indeed, one project, the Pebble, collected a remarkable $10 million from thousands of donors, which enabled the entrepreneur to produce a water-resistant watch that syncs with smartphones.

Crowdfunding has become incredibly popular as a means of raising capital in recent years. According to an eFunding report, crowdfunding on a global basis is doubling at nearly ten times the rate of Moore’s Law. With its exponential growth, crowdfunding has helped countless entrepreneurs, but it has also caused many headaches for supporters stemming from delayed launches and failed projects. Supporter frustration is compounded by the fact that when something goes wrong with a crowdfunding project, many supporters are left without any reasonable recourse. While

Kickstarter’s Terms of Use require creators to produce and ship all project awards or refund any backer whose award they do not or cannot fulfill, and Amazon Payments used to facilitate payment, neither have created a mechanism to initiate an action against failed project creators. Thus, backers are left with the need to pursue action in brick-and-mortar courthouses, sometimes in the creator’s home state.

This Article asserts that online dispute resolution (“ODR”) platforms, which are designed specifically to manage low value claims in an online environment, can and should be used by crowdfunding platforms to assist in the recovery of donor loss. If individuals who participate in crowdfunding have access to efficient, essentially cost-free procedures for dealing with their crowdfunding-related disputes, they will have improved trust in and satisfaction with the crowdfunding platform, which will eventually lead to more financial support for entrepreneurs.

Part II of this Article more fully describes award-based crowdfunding platforms. Part III describes the characteristics of backers using crowdfunding websites and the types of complaints and claims they have when something goes wrong with a project. Part IV asserts that ODR would improve backer trust and satisfaction with awards-based crowdfunding platforms. Part V proposes an ODR structure and then the paper concludes by considering other crowdsourcing applications of the proposed ODR structure.

Our study has interesting implications from both a consumer protection perspective (more accountability from entrepreneurs) and from a business standpoint (higher trust in and consumer satisfaction with crowdfunding will lead to more contributions).
II. THE PLATFORMS

Crowdfunding websites helped companies and individuals worldwide raise $2.7 billion from members of the public in 2012, an 81% increase from the previous year. North America accounts for the bulk of activity, with $1.6 billion raised in 2012, a 105% increase from 2011. Massolution, a crowdfunding research firm, estimates there are more than 800 crowdfunding platforms worldwide, either already active or planning to launch.

The most popular type of crowdfunding, known as awards-based crowdfunding, invites individuals, known as “backers,” to give money to entrepreneurs and pre-order products or receive some other token award for their contributions. For example, aforementioned Indiegogo, originally launched to help finance films, now includes funding for literally anything and is becoming known for financing personal and cause-related campaigns. It accepts all projects without review from around the world and allows creators to offer “perks”/awards to backers in exchange for their support. If the project reaches its funding goals, Indiegogo charges a four percent fee, and if the project does not reach its goal, Indiegogo charges a nine percent fee. In this Article, we focus solely on award-based crowdfunding. This contrasts with crowdfunding through profit sharing, known as equity crowdfunding, where individuals contribute cash for ownership in the company and debt crowdfunding, where individuals loan money to businesses and individuals in exchange for interest and repayment of principal.

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17 See id.
20 See id.
21 See id.
22 See id.
23 Equity crowdfunding has become more popular with the execution of the Jumpstart Our Business Startups Act—also known as the JOBS Act. Jumpstart Our Business Startups Act, Pub. L. No. 112–106, 126 Stat. 306 [hereinafter JOBS Act]. While still not fully in effect, the JOBS Act will enable entrepreneurs and small business owners to sell limited amounts of equity in their companies to a large number of investors via social networks and various Internet platforms. Paul Belleflamme, Thomas Lambert & Armin Schwienbacher, Crowdfunding: Tapping
The most well-known and widely used award-based crowdfunding platform is Kickstarter, and we will focus heavily on it in this Article. Kickstarter centers on creative endeavors including design, the arts, gaming, and technology. While it does not fund businesses per se, it does accept products and has had some remarkably successful campaigns, including roughly fifty campaigns that have generated over a million dollars in funding.

Kickstarter has a submission process for determining which projects will be eligible to go on the site. Each project is evaluated to determine if it satisfies Kickstarter’s Community Guidelines, which require projects: (1) fit within one of thirteen categories; (2) have tangible goals; and (3) not be to support a charity, advocate for a cause, or pay for a personal expense. If Kickstarter rejects a project, the creator can appeal the decision to Kickstarter, which will review the case but reserves the right of final decision.

Despite the approval process put in place by Kickstarter, it is still possible for relatively pointless or perhaps even fraudulent projects to get approval. For example, in July of 2014, a creator named Zack “Danger” Brown created a Kickstarter campaign called “Potato Salad” with the primary purpose of supporting Mr. the Right Crowd, 29 J. Bus. Venturing 585 (2011). In addition, debt crowdfunding also exists on sites like SoMoLend, a peer-to-peer platform that facilitates friends and family loans, accredited investor loans, and bank loans to business borrowers looking for funding. See SoMoLend, https://www.somolend.com/ (last visited July 17, 2014).

25 See id.
26 See id.
29 Id.
30 Id.
Brown’s desire to make potato salad.32 While one might think the campaign should have failed, the project was a huge success. The campaign received over $55,000 dollars from over 6000 backers.33

Once Kickstarter approves a project, the creator is free to launch her project, thereby starting the clock for the project’s deadline (up to sixty days from launch).34 During this time, creators promote their project and try to attract backers.35 To back a project, backers click the “Back This Project” button on the project’s page and sign up for a Kickstarter account or log in through Facebook or an existing Kickstarter account.36 For U.S.-based transactions, the backer then enters her payment information with Amazon,37 and Amazon places an authorization on his or her credit or debit card for the amount of the pledge.38 Backers are charged only if the project meets its funding goal by the deadline.39 Most projects, roughly 56%, fail to meet their funding goals by the deadline, which means that neither the creator nor Kickstarter receives any money.40 If however, by the deadline, backers have pledged enough money to meet the project’s funding goal, then the creator receives the funding through Amazon. Kickstarter takes five percent of the money raised, and Amazon Payments takes between three percent and five percent in processing fees.41

35 Id.
37 Id.
39 Backer Questions, supra note 36.
Once a project is funded, the creator works to create and distribute awards by the “Estimated Delivery Date.”\textsuperscript{42} Kickstarter’s Terms of Use,\textsuperscript{43} however, only require that a creator make a “good-faith effort”\textsuperscript{44} to fulfill each award by its Estimated Delivery Date.\textsuperscript{45} If a dispute arises between a backer and a creator, Kickstarter takes a hands-off approach and contractually absolves itself of most legal liability for disputes arising between backers and creators, leaving the backer with only a few options.\textsuperscript{46} First, the backer could place a charge-back on his or her credit card or work with Amazon Payments Buyer Dispute Programs to work out an issue with the creator.\textsuperscript{47} Second, the backer could file a suit in court, either as an individual or as a part of a class action. Third, the backer could message the creator or post a public comment on the project page requesting more information.\textsuperscript{48} Fourth, the backer could complain on social media or to other online forums.\textsuperscript{49} If Kickstarter wants to intervene it can suspend and cancel a project if it seems like a scam.\textsuperscript{49} However, once a project is ap-


\textsuperscript{43} Kickstarter Terms of Use, supra note 13.

\textsuperscript{44} Good faith effort is of course fraught with legal difficulty. See Kenneth A. Adams, Understand “Best Efforts” and Its Variants (Including Drafting Recommendations), 50 Prac. Law 11 (2004), available at http://www.adamsdrafting.com/downloads/Best-Efforts-Practical-Lawyer.pdf (last visited Aug. 21, 2014). The phrase takes on many meanings, depending on the specific setting. See, e.g., Jim Kuhnhenn, White House: IRS Made Good-Faith Effort to Produce Missing E-Mails in Congressional Probe, US News (June 14, 2014) (implying what occurred was not bad faith, so it was good faith). Frankly, it often means that the party makes an honest attempt to accomplish the intended goal or objective. \textsuperscript{45} See Projects: Fundraising and Commerce, Terms of Use, Kickstarter (Mar. 2012), http://www.kickstarter.com/terms-of-use.

\textsuperscript{46} Id. (“Kickstarter is under no obligation to become involved in disputes between any Users, or between Users and any third party arising in connection with the use of the Service.”).

\textsuperscript{47} Chen et al., supra note 42.

\textsuperscript{48} Id.


A project may be suspended if the Kickstarter Trust & Safety team uncovers evidence that it is in violation of one or more of Kickstarter’s rules, including:

\begin{itemize}
  \item Misrepresentation of support, through self-pledging
  \item Misrepresentation or failure to disclose relevant facts about the project or its creator
  \item The creator provides inaccurate or incomplete user information to Kickstarter or one of our partners
  \item The characteristics of the creator account overlap with the characteristics of backer accounts that pledged to their project
  \item A party related to the creator is posing as an independent, supportive party in project comments or elsewhere
  \item The creator is presenting someone else’s work as their own
\end{itemize}
proved, according to its Terms of Use, “Kickstarter is under no obligation to become involved in disputes between Backers and Project Creators . . . Kickstarter does not oversee the performance or punctuality of projects.”50 There are many possible reasons for this decision. First, Kickstarter is a small company51 and it does not want to unnecessarily spend resources on disputes. Second, Kickstarter claims that traditional funding systems are risk-averse and profit-focused, and as a result many great ideas never get a chance to become a reality.52 If every project were guaranteed, there would be less innovation and the cost of the Kickstarter platform would be much greater. While those points are very valid, many think, the authors of this Article included, that Kickstarter and similar sites would benefit from some form of dispute resolution for backers, such as ODR. These sites and the backers and entrepreneurs that participate in them would greatly benefit from ODR because it would improve consumer satisfaction and heighten trust, which would lead to more backers and more cash for the platforms and entrepreneurs.

III. THE CROWD AND ITS PROBLEMS

To understand the crowd and how the crowd might respond to an online platform for resolving disputes, it is important to understand the characteristics of the award-based crowdfunding crowd and the types of disputes that arise in the award-based crowdfunding world. This section will describe the basic demographics of a typical crowdfunding backer, explore backer motivations, and describe the nature of disputes that arise on award-based sites.

A. Demographics

Basic demographics reveal a great deal about the type of individuals that participate in crowdfunding platforms. The most recent analytics reveal that the Kickstarter platform is incredibly

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50 Kickstarter Terms of Use, supra note 13.
51 Kickstarter has only eighty-one employees. See Meet The Team, KICKSTARTER, https://www.kickstarter.com/team?ref=footer (last visited July 17, 2014).
52 Chen et al., supra note 42.
popular and has widespread international reach. For example, in 2013, three million people backed a project on Kickstarter, coming from over two hundred countries and territories and all seven continents. And while one could hypothesize that many contributors are friends and family, analytics revealed that “the average distance between artist-entrepreneurs and investors is about 3000 miles.” Almost unsurprisingly, the majority of backers are between the ages of twenty-five and thirty-four and tend to be relatively affluent.

The high level of diversity of backers coupled with the widespread geography makes crowdfunding platforms international in nature. While this may seem like a wonderful use of the Internet to connect people far and wide, it also means that in the event of a dispute the parties are unlikely to pursue claims at brick-and-mortar based courthouses, which will often involve expenses far exceeding the actual value of the claim. Fortunately, the nature of ODR is ideal for resolving cross-border disputes as an Internet-based platform can be used; thereby, eliminating the need to travel and pursue formal and complicated legal action. In fact, because the crowdfunding communities can incorporate ODR in existing

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54 See The Year in Kickstarter 2013, KICKSTARTER, https://www.kickstarter.com/year/2013/?ref=footer#countries (last visited July 17, 2014). One might suggest this number would be even greater if the website did not require contributors to have a credit card. See Backer Questions, supra note 36.

55 For example, “Indiegogo believes approximately 25% of a project’s goal should come from close friends, family, and fans.” Michael Ibberson, The Inner Crowdfunding Circle: Friends and Family, CROWDCLAN (Mar. 21, 2014), http://www.crowdclan.com/crowdfunding-through-friends-and-family/ (last visited Aug. 21, 2014). For every order of magnitude in Facebook friends—10, 100, 1000—the probability of success, defined as meeting the campaign’s goal, increases drastically from 9% to 20% to 40%, respectively. See Crowdfunding Statistics, FUNDABLE.COM, http://www.fundable.com/crowdfunding101/crowdfunding-statistics (last visited July 17, 2014) [hereinafter FUNDABLE.COM].


57 See FUNDABLE.COM, supra note 55 (compared to individuals who are forty-five and older).

58 Id. (earning over $100,000 per year).

“Terms of Service” or “Terms of Use” contracts, an ODR-provision can all but eliminate jurisdictional issues, choice of law dilemmas, and non-existent or outdated consumer-based regulatory schemes. An ODR platform for awards-based crowdfunding is both appropriate and feasible; however, we must also consider whether or not backers and creators will embrace it. For the purposes of accepting an online dispute resolution platform, one of the conclusions we can draw from the demographics is that the various stakeholders are familiar with the online world and are comfortable with technology. The importance of this conclusion cannot be minimized, as ODR platforms are best suited to individuals that demonstrate a basic level of comfortableness with the use of basic click boxes, pull-down selection menus, and direct-linked communication boxes. In addition, the Millennial generation (ages twenty-five to thirty-four) view their use of technology as one of their biggest sources of distinctiveness. Although it is the early days in terms of the crowdfunding community, one can use this information to hypothesize that many of the stakeholders involved with a crowdfunding website will: (1) communicate information about their experience; (2) interact and remain up-to-date on funding projects; and (3) will view themselves as members of the particular platforms online crowdfunding community.


62 See infra note 141 and accompanying text.


64 In fact, 75% of Millennials have created a profile on a social networking site, compared to half of the Generation Xers and 30% of the Baby Boomers further suggesting that they feel comfortable in the online world. Id.


66 See id.
characteristics suggest that backers will be platform loyal and will view themselves as members of the platform community. One can thus suggest that these individuals will be invested in: (1) ensuring the longevity of the community,\textsuperscript{67} and (2) will seek to be part of the community norm and culture establishment.\textsuperscript{68} In the case of the dispute resolution platform these two characteristics are highly important, as the ODR platform requires a moderate to high level of participation from the community on an ongoing basis.\textsuperscript{69}

\section*{B. Motivation of Backers}

In addition to demographics, it is important to understand, for the purposes of ODR adoption that backers care about the projects they support for various reasons. Backers are motivated to participate in order to seek rewards and become first-adopters of new products,\textsuperscript{70} support creators and causes, and strengthen connections with people in their social networks.\textsuperscript{71} They consistently follow-up on the projects they support and are upset when expectations are not met. It can therefore be inferred that if backers have positive experiences with projects, they will be more likely to contribute to future projects and make larger contributions.\textsuperscript{72} However, if there is a lack of effective redress mechanisms when

\textsuperscript{67} Also known as commitment to the group. \textit{Jarlah Benson, Working More Creatively with Groups} 6 (2000) (arguing without some commitment to the pursuit of common goals the group will not survive or be effective).

\textsuperscript{68} See Daniel B. Levin, \textit{Building Social Norms on the Internet}, 4 \textit{Yale Symp. L. & Tech.} 9 (2001); Richard H. McAdams, \textit{The Origin, Development, and Regulation of Norms}, 96 \textit{Mich. L. Rev.} 338, 340 (1997). Some argue that we need to customize law. See Almaguer, \textit{supra} note 61; Ann E. Carlson, \textit{Recycling Norms}, 89 \textit{Calif. L. Rev.} 1231, 1253 (2001). In many ways, however, the research into dispute resolution online is still in its infancy. Social science research into groups demonstrates the accuracy of these statements—but in the physical world. See \textit{Jarlah Benson, Working More Creatively with Groups} 5 (2000) (considering the group as sharing beliefs, values, and norms about areas of common interest). Moreover, research suggests that groups exist in relation to other groups. See \textit{Rupert Brown, Group Processes: Dynamics Within and Between Groups} (2d ed. 1989).

\textsuperscript{69} See infra Section IV(C).

\textsuperscript{70} See, e.g., Belleflamme et al., \textit{supra} note 65.


\textsuperscript{72} Almost a third of the backers on Kickstarter backed more than one project. \textit{See Meet The Team, Kickstarter}, https://www.kickstarter.com/year/2013/?ref=footer#4-multiple-projects (last visited July 17, 2014) (807,733 people backed more than one project, 81,090 backed ten or more projects, and 975 people backed more than 100).
projects begin to stall or ultimately fail, contributions to future projects will be impacted, as backer trust will reduce. One can certainly point to other similar online projects that have suffered at the hands of diminishing trust in the system as a result of effective redress mechanisms.

Motivations and commitment to the community are also important to the overall ODR design because individuals who view themselves as members of a community, especially those that view themselves as participants in the creations of the group norms, are less likely to misbehave and are more likely to react negatively to those who do misbehave. Thus, the creation of a community-based ODR platform could assist in the establishment and communication of community norms through the use of transparency of outcome and information dissemination. In addition, the platform could allow community members to participate in the admonishment of misbehaving members, further solidifying the creation of community norms and allowing for the community to monitor and self-regulate.

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75 Norms are rules of conduct that indicate what attitudes and behavior that might be expected or demanded in particular social situations and contexts. It is not referring to what might occur, it is referring to what should occur.

76 One way to reduce deviant behavior is to promote civil behavior online: to encourage people to want to “fit in” so they will be less inclined to misbehave. See generally Janet Sternberg, *Misbehavior in Cyber Places: The Regulation of Online Conduct in Virtual Communities on the Internet* (2012); Amy Bruckman, *Approaches to Managing Deviant Behavior in Virtual Communities*, in Proceedings of CHI 1994 (Boston, MA, Apr. 24–Apr. 27, 1994), available at http://www.cc.gatech.edu/~asb/papers/bruckman_deviance_panel_ch94.html.

77 See, e.g., Robert S. Baron & Norbert L. Kerr, *Group Process, Group Decision, Group Action* 6 (2d ed. 2003) (explaining group norms have powerful effects on the thoughts and actions of group members).

78 See generally Sternberg, supra note 76.
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C. Nature of Disputes

There are many opportunities for disputes to arise in the crowdfunding process. In crowdfunding, the money is raised up front, and without any clear legal obligation, other than those stemming from contract and sales laws, on the project creator to deliver the promised rewards. Setting aside people who may defraud backers, those who intend to deliver on their obligations may legitimately run into trouble. When creators decide to pursue crowdfunding they are typically at the very beginning of their development process, and are not well-organized enough to receive financial support from traditional funding sources, such as banks, angel investors, and venture capitalists.\(^79\) In addition, meeting crowd obligations requires the creator to have significant foreknowledge about the budget and schedule required to create the promised goods or service. That knowledge is nearly impossible to have since the creators have to make promises before any new learning takes place, using budgets that were established very early in the venture process. Furthermore, successful campaigns can easily exceed goals leaving the creators questioning how they are going to be able to ramp up capacity enough to produce goods in the promised time frames.

In an exploratory study of crowdfunding, Ethan Mollick found that out of the 381 projects he studied that promised to deliver products, as of the time of his analysis, three projects had issued refunds and eleven had apparently stopped responding to backers.\(^80\) The direct failure rate, therefore, was 14 out of 381 products, or 3.6\%.\(^81\) Further, the projects that were not responding totaled just $21,324 in pledges, compared to nearly $4.5 million for the remaining projects. Even though Kickstarter has no enforcement mechanism to prevent con artists from using the system to raise funds for fake projects, it is clear that with a direct failure rate well below 5\%, founders appear to make attempts to deliver their products. The concerns about the ability of projects to deliver, however, are supported as the majority of products were delayed and a few will never be delivered.\(^82\)

\(^79\) Gerber et al., supra note 71.
\(^81\) Id.
\(^82\) Of the 247 projects that delivered goods, the mean delay was 1.28 months. Only 24.9\% of projects delivered on time, and 33\% had yet to deliver. Id. at 12.
Unfortunately, projects are sometimes delayed to such a degree that the community begins to doubt the veracity of the entire project. For example, two notorious Kickstarter projects, the “ZionEyez HD Video-Recording Sunglasses for Facebook” and the “Asylum Playing Cards,” illustrate potential problems with awards-based crowdfunding. The ZionEyez were to be a pair of regular-looking sunglasses with built-in cameras to record video. The team raised $343,415 from 2106 backers and promised to deliver the glasses by winter 2011 but ran into engineering difficulties and have yet to deliver the glasses. In response, backers posted a stream of upset comments on the “Comments” page of the project website. Some of the backers have appealed directly to Zion-Eyze for refunds; others have filed complaints with their state’s attorney general office. Similarly, with the Asylum Playing Cards, the company behind it, Altius Management, was sued for violating consumer protection laws. The suit alleges that Altius collected over $25,000 backer dollars and delivered nothing. The suit seeks restitution of the cash, as well as fines up to $2000 per backer for violations of the Consumer Protection Act, meaning the total value of the case could top $1.6 million.

While these two projects are not the norm, the number of failed projects is hard to clearly estimate, because Kickstarter does not disclose the number of failed projects. Leaving the public to guess numbers, especially in light of growing media attention, is a poor choice when a platform/website is fully dependent upon the trust of its users. For example, in June 2013 with the news media...
frenzied over the various Snowden leaks, Internet users became aware of the real possibility that Internet and other Internet related providers were supplying a large amount of information to government entities without approval of the court and the knowledge of the public. For the first time, the general public was concerned about their use of the Internet. The absence of trust in a backbone communication facility, such as the Internet, is a large problem in multiple areas and across numerous stakeholders. Google and others, recognizing the potential of serious impact, quickly realized that the easiest way to quiet some of the frenzy was to release transparency reports that included information about the number of National Security Agency’s data requests. The response worked for many Internet users and people continued to use the Internet as a primary means of communication, with a better eye to the potential for misuse of information. Important for this Article is not a discussion of privacy, but instead to focus on the importance of a swift and complete response to an attack on the primary purpose of an online community. Google recognized one of its primary purposes is to provide communication over the Internet, thus an attack on such a purpose demanded a swift and direct response. It seems in terms of crowdfunding platforms, however, designers fail to recognize the importance of the failure to address concerns related to delayed or failed projects. Certainly, project complaints impact the primary purpose of the platform. The average Kickstarter contribution size is a mere seventy-five dollars, which probably would not even pay for an hour of an attor-


ney's time, thereby effectively leaving backers with no reasonable access to a dispute resolution mechanism should a project be delayed or fail. Instead, a group of individuals highly connected to social media are left with social media recourse—140 characters of Twitter blasts and Facebook posts. Crowdfunding platform developers have to begin to recognize the multifaceted issue that may soon destroy the communities trust in the overall crowdfunding movement or they will likely face the continued questions of trust as the social media frenzy grows over project delays and failures.

IV. ONLINE DISPUTE RESOLUTION

Fortunately, the solution to growing concern over crowdfunding delays and failures is relatively simple: allow the community to resolve disputes through the use of a specialized, crowd-behavior focused ODR platform. Although in many ways technology is still in its infancy within the justice system, the use of technology to assist, support, and facilitate the resolution of disputes has grown exponentially in the last few years, especially in online dispute resolution. Despite the recent growth, many individuals and especially consumers have little idea what ODR entails; in fact, the term itself remains difficult to precisely define. Unfortunately, as the use of technology within the justice system has increased, the definition of ODR has become more complicated, even causing arguments about the precise type of alternative dispute resolution that should be considered within the definition. For the purposes of this Article, ODR is the resolution of a dispute, through the use of technology, that involves no face-to-face contact, but does involve the possibility of using a neutral third party to resolve the dispute. For the purposes of this Article, ODR is not merely a storage, or pre-face-to-face communication device. Nor does the outcome necessarily need to be a binding arbitration award. How-

96 For example, with attorney's fees being a great expense in traditional litigation, parties may be able to save a lot of money in ODR, where hiring an attorney—even more then in alternative dispute resolution (“ADR”)—is often unnecessary. See Friedman, supra note 59, at 712; Hang, supra note 61, at 855; Louise Ellen Teitz, Providing Legal Services for the Middle Class in Cyberspace: The Promise and Challenge of Online Dispute Resolution, 70 FORDHAM L. REV. 985, 986–91 (2001) (discussing cost).

97 See Demographics supra Section III(A).

ever, the parties to the dispute must, at some point in the process, have the opportunity to engage a third party to either mediate or resolve the dispute. This narrower than usual definition will hopefully not limit the debate, but will narrow the explanations needed to further the discussion. This section will briefly describe ODR in general, will describe two successful ODR platforms that the majority of readers are already using, and will then use those success stories to suggest a list of essential attributes that must be present in the crowdfunding-based ODR platform.

A. ODR in General

The resolution of disputes online is nothing new to the majority of online shoppers.\(^99\) In fact, in 2010 the eBay dispute resolution platform designers claimed that the internal ODR platform resolves about 60 million disputes per year.\(^100\) eBay has 145 million active buyers globally\(^101\) and while one cannot argue that 145 million people know the parameters (or existence) of ODR, 145 million people are engaged in an activity that could potentially entail the use of ODR to resolve disputes. And, although eBay may draw a specific type of online audience, Amazon, with net sales of $19.74 billion in the first quarter of 2014,\(^102\) also uses an ODR type platform, called A-to-Z Guarantee\(^103\) that allows unsatisfied cus-


customers the opportunity to initiate a dispute with an Amazon-based merchant. In addition, other e-commerce sites such as China-based Alibaba Group have tested the use of panelists, drawn from website users, to resolve a narrow type of sale related dispute.\textsuperscript{104}

The benefits of ODR have been studied in several contexts including its effects on trust.\textsuperscript{105} Trust on e-commerce platforms usually is initially developed through reputation, and then through repeated experience with the websites.\textsuperscript{106} However, as Colin Rule and Larry Friedberg of the Trust and Safety Department at eBay write, “Trust is something of a baseline state. The expectation prior to engaging in a transaction is most likely positive, or the user would not make the decision to dive in and use the service.”\textsuperscript{107} They explain that when the transactions go smoothly and there are no problems, the “baseline” is simply preserved, but when a negative experience occurs, the effect on a user’s satisfaction level can be significant and lasting. If websites want to avoid negative feelings and maintain trust, among other things, ODR can be useful for resolving disputes quickly and effectively. Furthermore, if users of e-commerce websites are aware of successful dispute resolution processes, it can also help establish an overall atmosphere of trust and increase the number of participants in the market.

B. Success Stories in ODR

Some readers may be surprised that online dispute resolution has been a topic of discussion in some portions of the legal community for a considerable length of time. For example, noted author-


\textsuperscript{106} Rule & Friedberg, supra note 105.

\textsuperscript{107} Id.
ity on the topic Ethan Katsh dates ODR origins to the 1990s.\textsuperscript{108} Despite the longevity of the discussion, the actual implementation of ODR platforms has been relatively unsuccessful,\textsuperscript{109} minus a few exceptions. Probably the largest success to date involves the eBay platform, although other platforms certainly paved the way for its success. However, what the eBay platform developers did better than anyone else was to consider the complex needs of an ODR platform. Thus, eBay is a very good place to start the debate about the manner in which to design an ODR platform.

1. The World of eBay and PayPal

eBay is an online platform where individuals create accounts to enable buying and selling of items through an online auction process. Without going into unnecessary details, the key to eBay’s success is trust within the eBay community.\textsuperscript{110} eBay creator, Pierre Omidyar, recognized the vast potential of the Internet and the absence of a virtual secondhand market. While some of eBay’s success could certainly be attributed to luck,\textsuperscript{111} there is no doubt eBay tapped an unrealized market.\textsuperscript{112} It accomplished this by recognizing “two basic truths about the Internet. One is that people need a place where to buy and sell directly online, and the second is the principle of peer-review and community enforceability.”\textsuperscript{113} Mr. Omidyar and his eBay team quickly discovered the truth of these needs, when it quickly became apparent that community members might behave in a fraudulent, or simply lazy, manner. For example, a few short years after its launch, the United State National Fraud Information Center in 2002 reported 87\% of complaints involved auction transactions.\textsuperscript{114} In addition, in 2000 the Federal Trade Commission (“FTC”) received more than 25,000 complaints

\hspace{1cm} \textsuperscript{108} See Ethan Katsh, ODR: A Look at History – A Few Thoughts About the Present and Some Speculation About the Future, in ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE 9–22 (Mohamed S. Abdel Wahab, Ethan Katsh & Daniel Rainey eds., 2012).

\hspace{1cm} \textsuperscript{109} See id. at 15.

\hspace{1cm} \textsuperscript{110} See ADAM COHEN, THE PERFECT STORE: INSIDE EBAY 21–24 (2008).

\hspace{1cm} \textsuperscript{111} See id. at 19.

\hspace{1cm} \textsuperscript{112} See Jillian D’Onfro, eBay Beats On Earnings, Stock Down Slightly, BUSINESS INSIDER (Apr. 29, 2014) (eBay’s 2014 first quarter (April) revenue is reported as $4.26 billion, slightly higher than the expected $4.23).

\hspace{1cm} \textsuperscript{113} Andrés Guadamuz González, PayPal and eBay: The Legal Implications Of The C2C Electronic Commerce Model, 18th BILETA Conference: Controlling Information in the Online Environment (2003), available at http://www.mediate.com/Integrating/docs/PayPal%20and%20eBay%20%20The%20Legal%20Implications%20of%20the%20C2C%20Electronic%20Commerce%20Model.pdf.

\hspace{1cm} \textsuperscript{114} See González, supra note 113 (citing National Consumers League, supra note 11).
for web-based auction fraud, which increased from 100 in 1997.\footnote{See González, supra note 113 (citing FTC, supra note 12).} Mr. Omidyar and his team recognized trust had to be ingrained into the site and there had to be a mechanism for community members to avoid conflict via the communication of peer-reviews and there had to be a way to resolve conflict and means to enforce outcomes.

E-commerce developers have argued that e-commerce presents interesting challenges to the buyer-seller transactions.\footnote{For example, some areas/regions of the world continue to struggle with the recognition of an electronic equivalent in communications. See UNCTRAL Convention on the Use of Electronic Communications in International Commerce, United Nations E.07.V.2 (2007) (the Convention sets out criteria for establishing the functional equivalence between electronic communications and paper documents, as well as between electronic authentication methods and handwritten signatures). Of course, the UNCTRAL Model Law on Electronic Signatures (2001) assists in the creation of a law that recognizes electronic signatures and the UNCTRAL Model Law on Electronic Commerce (1996) overcomes limits in the use of the terms writing, paper, original and similar terms. These are widely regarded documents, used by many nations (including the United States) to guide domestic law creation. And while none of these issues seem important today, at the time the absence of these law caused great issues between buyers and sellers in the online world. Today, it is argued that online consumers have more protections than those shopping in a local shop, at least in the E.U. See Pablo Cortés, Online Dispute Resolution for Consumers, in ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE 141 (Mohamed S. Abdel Wahab, Ethan Katsh & Daniel Rainey eds., 2012).} Unlike any other sales environment, customers have no real mechanism to “meet” their seller, and vice versa.\footnote{Some websites overcome this issue by creating “trusted” sellers, verified sellers and similar systems. For a further discussion, see Colin Rule & Harpreet Singh, ODR and Online Reputation Systems: Maintaining Trust and Accuracy Through Effective Redress, in ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE 163–84 (Mohamed S. Abdel Wahab, Ethan Katsh & Daniel Rainey eds., 2012).} Even in the case of online retailers with a real world store front, people are still hesitant to shop online prior to purchasing items, especially for high-end goods.\footnote{See Anjanette H. Raymond, Yeah, But Did You See the Gorilla? Creating and Protecting an ‘Informed’ Consumer In Cross Border Online Dispute Resolution, 19 HARV. NEGOT. L. REV. 129, 145 (2014) (discussing online consumer behavior and the potential of technology to overcome lack of attention to detail).} Moreover, at the time of eBay’s founding the Internet and online auctions websites were relatively new which further amplified buyers concerns about their ability to receive items ordered from an unknown entity. And of course, sellers were equally concerned about their ability to receive payment for items sold.

Today, few online participants can imagine buying a product on Amazon without reading user reviews, or booking a hotel with-
out visiting TripAdvisor. In fact, there are several pay-for-the-recommendation websites devoted solely to recommended service companies, such as Angie’s List. The number of sites using on the ground actual user based recommendations has exploded. However, at the time of initiation, eBay feedback was relatively new and to foster trust, eBay recognized the potential for less than honest feedback rankings and instituted a policy for responding to feedback that allows for the possibility of removal of some feedback. All feedback, except that which has been removed, is posted for all to see and more importantly is used as part of a reputation indicator known as the “Feedback” score. Ultimately, eBay reserves the right to lower search placement and limit selling activity if performance falls significantly below the minimum requirements.

eBay’s Terms of Service, both then and now, do not require it to provide resources in the event some dispute arises over a transaction. However, as disputes became a real problem in the early days of eBay, eBay developers believed that a fair, efficient, and quick dispute resolution process would assist in establishing more trust. eBay selected SquareTrade.com to be its preferred dispute resolution provider.

eBay benefited from the Internet boom and the quick realization by designers and recognition by the U.S. justice system that individuals could legally be bound to agreements made online, including when clicking and agreeing to various contract terms. On-

122 What is Feedback and how does it affect my reputation?, eBay, http://pages.ebay.com/help/feedback/questions/feedback.html (last visited July 18, 2014); Feedback scores, stars, and your reputation, eBay, http://pages.ebay.com.au/help/feedback/scores-reputation.html (last visited July 18, 2014). The Feedback score is made up of the number of positive, negative and neutral Feedback ratings a member has received over time. In most cases, the Feedback score represents: +1 point for each positive rating; No points for each neutral rating; and, -1 point for each negative rating. Id.
124 Ethan Katsh, Online Dispute Resolution: Some Implications for the Emergency of Law in Cyberspace, 21 INT’L REV OF L. COMPUTERS & TECH. 97, 100 (2007).
line platforms were therefore allowed, with few restrictions, to include in their Terms of Use an entire litany of rules, limitations and prohibitions,\textsuperscript{126} including the prohibition of the use of brick-and-mortar courts and the insistence as a term of membership to use an internal justice system now known as ODR.\textsuperscript{127}

While smooth ODR processes can definitely help improve user experience, without enforcement of outcomes there is often no real justice.\textsuperscript{128} Fortunately, online shopping is primarily done through the use of credit cards or similar devices. The use of these types of payment devices demands that the bank, card issuer, or other institution implements a payment reversal known as a chargeback if there is a problem.\textsuperscript{129} Chargebacks are the process through which funds are returned to a cardholder by removing the funds from the merchant’s account.\textsuperscript{130} Although the process protects consumers, chargebacks and associated issuance, processing, terminal use, and maintenance are often costly, requiring the returning of funds and fees across banking institutions. There was, however, another option for eBay—develop a system of payment that was internal to and familiar in the eBay community: Paypal.

eBay and PayPal developers noticed that the PayPal logo was frequently posted on auctions.\textsuperscript{131} In 2000, at the behest of eBay users, PayPal began to integrate heavily into the eBay platform, ultimately resulting in eBay acquiring PayPal in 2002.\textsuperscript{132} PayPal is an online financial transaction broker, which, in essence, means

\begin{itemize}
  \item \textsuperscript{126} For example, some items are specifically precluded from being sold on eBay, such as tobacco. \textit{See Tobacco Policy}, eBay, http://pages.ebay.com/help/policies/tobacco.html (last visited July 18, 2014).
  \item \textsuperscript{128} \textit{See} Raymond, supra note 118, at 152.
  \item \textsuperscript{129} Credit card chargebacks were included in the 1968 United States federal law called the Truth in Lending Act (Regulation Z). Debit cardholders were awarded reversal rights courtesy of Jimmy Carter’s 1978 Electronic Fund Transfer Act (Regulation E).
  \item \textsuperscript{131} \textit{History}, PayPal, https://www.paypal-media.com/history (last visited July 18, 2014).
  \item \textsuperscript{132} \textit{See} Cohen, supra note 110, at 24.
\end{itemize}
that PayPal is the middleman, allowing people to send payment originally via email without ever having to disclose financial information with each other. In many ways, PayPal serves as an escrow service that facilitates payment between parties without sharing financial information. Moreover, PayPal as a quasi-escrow is able to hold onto money for a period of time in the seller’s PayPal account, prior to distribution, thereby eliminating or greatly reducing sellers’ fraud in the system.133

PayPal was a real dream for the eBay platform as it eliminated the need to use the Visa and MasterCard system of payment, thereby eliminating (or keeping in-house) the fees associated with the transaction. Although it may seem that enforcement would only occur in a tradition brick-and-mortar courthouse, it is easy to see that the combined use of PayPal and eBay led to a mechanism of enforcement that required no court intervention. Instead, the payment mechanism serves as a means of enforcement providing for chargebacks when necessary and releasing funds when appropriate. Outcomes of the dispute resolution process are easily and simply enforced via the payment mechanism.

2. Success Includes Learning Prior Lessons

The successes within the eBay and PayPal environment lead to some interesting observations that must be considered within the dispute resolution environment of crowdfunding. First, it is important to note that unlike many instances when dispute resolution is a possibility, the communities involved in eBay and PayPal are both comfortable in the online world. Some systems of ODR must be developed that overcome some individual’s difficulties with the use of technology or unfamiliarity with the online world.135 In the instance of the crowdfunding community, this is simply not the case. As previously discussed in Section III, the crowdfunding commu-

133 This is of course initiated via a chargeback process that is facilitated through the PayPal system. However, PayPal is able to place a hold on the distribution of seller funds, until the issue is resolved. See Chargeback Guide, PAYPAL, https://www.paypal.com/us/webapps/mpp/security/chargeback-guide (last visited July 19, 2014).

134 Credit cards originated in the early 1900s with the first modern credit card issued in 1946. At the time, all cards were closed loop. Today, many closed-loop cards exist, such as store specific cards, however, only American Express and Discover remain outside the Visa/MasterCard loop. Since its inception, PayPal has grown enormous in its popularity with the online world, reporting over 148 million active accounts. See Media Information, PAYPAL, https://www.paypal-media.com/about (last visited July 18, 2014).

135 See Raymond, supra note 118 at 162–63.
nity tends to be familiar with the online world and is comfortable with technology.

Second, the group of individuals that participate in eBay and PayPal also tend to understand, appreciate, and have a tolerance for the entrepreneurial attitude of a grassroots/startup environment, especially one that involves the online world.\footnote{See Rule & Singh, supra note 72, at 171–80 (discussing the newest reputation systems that were used to support entrepreneurial attitudes in the early e-commerce world).} As discussed in Section III, crowdfunding backers are entrepreneurial with a basic level of tech-savviness and, most importantly, they are comfortable being early adopters of new projects and technology-based ideas.

In addition, as highlighted above, eBay and PayPal designers knew early on that trust in the website, trust in the system, and trust within the community were essential aspects of trust in e-commerce.\footnote{See, e.g., Robert Bordone, Electronic Online Dispute Resolution: A Systems Approach – Potential, Problems, and a Proposal, 3 HARV. NEGOT. L. REV. 175, 187–89 (1998) (discussing the earliest platforms); Ethan Katsh, Online Dispute Resolution: Some Lessons from the E-Commerce Revolution, 28 N. KY. L. REV. 810, 817 (2001) (discussing lessons that should be learned); Julia Hörnle, Online Dispute Resolution, in 1 BERNSTEIN’S HANDBOOK OF ARBITRATION AND DISPUTE RESOLUTION PRACTICE 783 (John Tackaberry & Arthur Marriott eds., 2003) (discussing early successes).} The need for trust was emphasized early on within both platforms and was a focus throughout their original web days. These organizations and others built trust by using feedback and reputational systems, by ensuring real people opened accounts, by enforcing community rules, and by creating a resolution system that included an efficient and simple system with final resolution provided (if needed) by a third party neutral. Finally, and maybe most importantly of all, both systems guarded their environment through enforcement of community rules and through a system that allowed the financial system to be used as a means to re-enforce appropriate seller and buyer behavior. Instead of relying upon a court judgment, the systems used chargebacks as a mechanism to enforce final outcomes. Individuals that consistently misbehaved would lose account privileges, while buyers that failed to receive products would have their money returned in a quasi-simple process without the need to appear in small claims court.
C. Using Crowds to Resolve Disputes

It is important to note that crowd administered justice is also a growing phenomenon. While this particular topic is much too new and complex to handle fully within this Article, harnessing the wisdom of the crowd may be useful in the administration of justice via ODR platforms. As discussed above, the crowd mentality is already being widely used in community and non-community based websites as active providers of feedback based on experiences. eBay India and Alibaba have both used peer justice, but in different ways. eBay India attempted to use a “Community Court” based system of dispute resolution that sought to resolve issues in relation to unfair or unjustified feedback.138 In this instance, twenty-one randomly selected community “jury” members judge the unfair feedback claim. If a majority of jurors agree that the feedback is unjustified, it is removed, without any further right of appeal of the outcome. Although the eBay India “Community Court” no longer functions (due to non-related issues) the “eBay Community Court lives on in the Gebruikersjury, which is live in The Netherlands as part of the eBay site Marktplaats.”139

In the case of Chinese e-commerce website Alibaba, the group piloted the use of panelists, drawn from website users, to resolve a narrow type of sale related dispute.140 Unfortunately, there seems to be little information about the success or failure of the pilot project, and the website seems to be no longer using such a democratic community court.141

While both of these attempts may have ultimately been abandoned, the abandonment should not necessarily be viewed as a failure, just as a possible indication of a steep learning curve and the need to adjust the process. For example, one of the community courts, eBay India, was specifically established as eBay developers became aware of the real possibility that businesses were seeking to game the feedback system. Ultimately, the developers deter-


140 See Mobertz, supra note 104.

141 See How Do I Open a Dispute, supra note 104. See also Alibaba.com Sourcing Transactions Dispute Rules, supra note 104.
mined that others measures were necessary to prevent such occurrences, not because the challenge to the feedback system did not work, but because other measures were needed to ensure fairness in the process. Fairness in the system—without manipulation of the system—is one important aspect of the establishment and maintenance of trust in the overall community and system. eBay was right to insist upon a high level of response, as trust lost is rarely regained.

However, the use of the community court in both of these instances and the adjustments that have (or are being) made should not be viewed as a failure of the community court, instead adjustments need to be made to ensure the community court is also not susceptible to the same potential for manipulation. As will be discussed below, this could be accomplished by establishing a community court that provides feedback and information to the decision maker, but that is not allowed to produce a final outcome.142

D. ODR Within the Crowdfunding World

Because of the unique nature of crowdfunding with many different people coming together to achieve a common goal, an ODR platform for resolving crowdfunding disputes would be incredibly useful. ODR does in a way, already occur on sites like Kickstarter—exchanging messages with the project creator and posting comments on project updates is “the application of technology” to “[help] people resolve their disputes out of court.”143 However, as described above, the tools backers have to deal with disputes are very limited.

An ODR platform for crowdfunding disputes would have to be distinctly different than those seen on eBay or elsewhere, where there is one seller and a buyer. With crowdfunding, there is one creator and hundreds if not thousands of backers. Conducting online mediations with every backer would be terribly inefficient. In addition, the system must account for scalability, i.e., it must be able to continue to function effectively as caseloads, due to the predicted increase in crowdfunding projects, rise. Therefore, we propose the model described below.

142 See infra Section IV.D.
143 RULE, supra note 61, at 43.
V. How the System Should and Could Work

For crowdfunding disputes, backers likely want one of four things: an apology, a reward delivered by a certain date, a refund, or a creator banned or punished by the website. To help achieve a satisfactory result there could be a user-friendly platform that allows for asynchronous communication of information, which would allow emotions to cool and give individuals time to gather facts and even legal arguments. When a party is reading and responding to an online written message, the silent reflection of the wording on the screen tends to take the focus off the means by which the message is sent and places more emphasis on the content of the message. Moreover, when ODR is used through secure websites that require usernames and passwords, asynchronous communications can deliver a high level of privacy and security.

We have divided our ODR proposal into the following four stages and two separate tracks. Our proposal is influenced by successful commercial models such as SquareTrade developed for eBay and the largest ODR platform in the world, Modria, and by the work of Emilia Bellucci, Arno R. Lodder, and John Zeleznikow on integrating artificial intelligence, argumentation, and game theory in the ODR environment.

A. Stage 1: Communication

First, because apologies for delays and estimated item delivery dates could easily be provided by the project creator, the project creator should be compelled by the platform to keep that information reasonably updated on the creator’s page. This simple sharing of information should reduce backer anxiety greatly and reduce the

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145 Davis, supra note 12, at 50.
147 Ethan Katsh, supra note 99, at 271.
number of backers filing complaints through the formal process described below.

**B. Stage 2: The Formal Complaint**

If the problem is still unresolved, the backer’s first step would be to file a complaint to initiate the ODR process. Unlike traditional ODR, crowdfunding disputes can arise during one of two time periods in the crowdfunding cycle: 1) after an award is sent to a backer; or 2) before a backer is given his or her award. Therefore, the system should be broken into two separate tracks.

Track 1 would be used for issues arising after an award is sent to a backer, such as late delivery, wrong size/color/etc., and issues similar to a more traditional e-commerce ODR platform. Track 2 would be used in situations before a product is delivered, where projects are delayed, no product is forthcoming, or information is not being provided in a timely manner.

1. **TRACK 1: Traditional Individual Disputes**

Track 1 would operate very similar to the ODR platforms of traditional e-commerce sites, such as eBay. After the backer’s formal initiation of the claim, the creator would need to respond within seventy-two hours providing more information and/or re-
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sponding to the claim. Upon receiving the creator’s response, the backer would have forty-eight hours to respond, by providing more information and/or directly addressing issues presented.

The platform used in Track 1 would be more than a mere comment/text based platform. The platform could provide information, legal explanation, definition, and other information in a seamless interaction allowing the hyperlinks, hover box information, and further informational links to external sites. Thus, the platform could provide both backers and creators with pro-forma information about the issue at hand, depending on the type of issue, and explain basic legal rights available.

C. Stage 3: Mediation

If communication between the parties does not resolve the issue at hand, the parties would need to move into the mediation phase in which a neutral third party facilitates open dialogue\textsuperscript{150} between parties with the goal of the parties reaching an agreement. As a condition of posting a project, a creator would agree to the use of mediation and the selection of mediators. The backer, however, would be allowed to select from a list of five available mediators, one of which would be randomly selected to serve as the mediator. Mediation would be subject to specific timeframes, requiring the parties to participate or face triggering the initiation of the arbitration process. Mediation could occur over a total of five days and could include the use of written, oral, and face-to-face via the platform communications.

\textsuperscript{150} Today, modern and reasonably inexpensive technology allows communication via the Internet that includes face-to-face interaction. The ability to communicate in this manner was a prior limitation to widespread use of online mediation. See, e.g., Bruce Leonard Beal, \textit{Online Mediation: Has Its Time Come?}, 15 \textit{Ohio St. J. on Disp. Resol.}, 735, 745 (2000) (The online environment constrains the mediator’s ability to express “serious demeanour, professional presentation, occasional humour, and just plain charisma.”); Robert Bordone, \textit{Electronic Online Dispute Resolution: A Systems Approach – Potential, Problems, and a Proposal}, 3 \textit{Harv. Negot. L. Rev.}, 175, 180–81 (1998) (“Tone, affect, space, and time all add to the richness of an interpersonal communication and help us to calibrate our responses appropriately to that of our counterpart.”); Joel B. Eisen, \textit{Are We Ready for Mediation in Cyberspace?}, BYU L. Rev. 1305, 1308 (1998) (noting that “electronic communication is no substitute for the ability of face-to-face conversations to foster important process values of mediation”); William T. D’Zurilla, \textit{Alternative Dispute Resolution}, 45 La. B.J. 352 (1997) (“there is almost universal agreement that mediation is most effective if the parties to the dispute are physically present before the mediator”).
D. Stage 4: Arbitration

Should parties fail to resolve their dispute in the mediation phase, or should a party fail to participate, the arbitration phase of the process would begin. Similar to the mediation process, backers would select several acceptable arbitrators from a list of available arbitrators with the final selection from the list being random assignment. However, unlike mediation, the arbitration process would also allow for participation of a voluntary crowd vote. Arbitrators would be allowed to post on the crowdfunding platform questions to all backers on the platform, not just backers to the particular project. All backers would be able to vote on the question. For example, the arbitrators could post a question: Is a product delivery of three days past the promised delivery date too long to expect someone to wait without communication/explanation? Backers could then vote via a simple “yes” or “no.” Of course, arbitrators would post more elaborate questions as well, even asking for the crowd to review the majority—or even all—of the dispute, especially in situations that would be resolved based on community knowledge or expectations. Arbitrators would be under no obligation to follow the backer vote, but the information would serve as a litmus test for the general expectations of the larger community in this specific type of backer community.

After a period of ten days after the initiation of the arbitration phase, the arbitrator would be responsible for the production of the final award and for posting that award to the platform for the parties to review. Moreover, outcomes of the arbitration would be integrated into the website’s feedback/reputation system of the parties. This information could include participation, willingness to engage in the dispute process, successful conclusion, compliance with the award, and other similar measures.

1. TRACK 2: Technology-Based Class Action

Because issues arising in Track 2 have to do with the failure of the creator to provide a completed project in a timely manner, Track 2 would be fundamentally different from the traditional dispute route. Track 2 disputes would be filed and stored but not acted upon until a percentage of the total backers complained about the project in a similar manner. When the required percentage is reached, the claim would be initiated by the ODR platform and all backers would be notified of problems and the initiation of the claim. Track 2, in essence, is a class action against the creator for
failure to deliver the promised project. Each backer would have
the option to join the class or to forgo the class action process,
retaining the right to bring an individual claim later. Joining the
class would not end the individual’s right as an backer and should
the project begin to progress in a more timely manner, the class
would be dismissed.

In Track 2 once the claim is initiated, the timeframes would
essentially be the same for all parties involved in the dispute. The
creator would need to respond within seventy-two hours to the
claim and the backers that joined the class would need to respond
to the creator within forty-eight hours. Of course, as a class, the
backers would participate in a different platform interface, requir-
ing the backers to “vote” on the areas of concern. For example,
the backers could have forty-eight hours to log into the platform
and select from the following list: (1) failure to communicate; (2)
delay in delivering the product; and (3) information available caus-
ing a belief the product will never be delivered. After selection, a
further dropdown list could ask for more information, for example,
delay in delivering promised product, in excess of: sixty days; six
months; one year; and greater than one year.

The disputes that arise in the crowdfunding setting will be-
come—or already are—very predictable and therefore the creation
of a basic series of dropdown and “forced” selection will be easy to
design. There will be no reason to allow backers to explain the
dispute or type in elaborate text box explanations.

Most importantly, there is no need for extended communica-
tions between the parties in Track 2 disputes. Thus, the initiation
of a Track 2 claim will immediately move to the arbitration phase
of the dispute process, resulting in an arbitrator being assigned
again using a random assignment as described previously with no
peer committee involvement. The arbitrator will have thirty days
to review the information, gather any additional information, ask
questions, ask for the class to comment (if desired), and produce a
final award.

As is the case in Track 1, the outcomes of the arbitration in
Track 2 would be integrated into the website’s feedback/reputation
system of the parties. This information could include participation,
willingness to engage in the dispute process, successful conclusion,
compliance with the award, and other similar measures. In addi-
tion, the platform or website could take action against a creator in
these instances in limited circumstances, for example, when a large
majority of the backers have complained about the entire project.
VI. Next Steps

The practical applications and benefits of the two-track ODR system are many. The system, with the help of talented software designers or commercial services such as Modria, could handle large numbers of disputes swiftly, effectively, and securely. However, as discussed previously, crowdfunding sites such as Kickstarter do not currently offer ODR, so designing, implementing, and maintaining the platform would all be additional costs to the websites. Some of these costs could be recovered by charging a small fee, perhaps at Stage 2, to access the system. The fee would have the added benefit of discouraging frivolous claims.\footnote{Cortés, supra note 74, at 139–62.}

To help further defray costs, crowdfunding platforms as a community could come together to create a single crowdfunding dispute resolution platform. A single crowdfunding ODR platform would allow for an interesting overlap of crowdsourced opinions and decisions that would transcend a single platform. For example, if a Kickstarter creator and backer had a dispute, crowd jury participants could be drawn from various crowdfunding websites. While these individuals would likely need additional background and education on the terms of community membership on Kickstarter, they would also be able to interject their experiences from other platforms. The cross-pollination of the ODR system such as this would allow a norm to be created concerning expectations, monitoring, and enforcement of outcomes within the entire crowdfunding community, beyond a single campaign or website. Thus, those crowdfunding jurors that had also experienced delays in project delivery could share experiences across platforms, allowing both a more harmonious set of community expectations, but also allowing problems arising in the community to be shared more widely. Thus, a small number of failures of delivery on a single website will be considered in light of the total number of failures of delivery across websites thereby allowing expectations and social policy to be created more quickly in the community as a whole.

Of course, there is at least one drawback of such cross-pollination, individuals in the online world, especially in community-based structures, tend to be very brand/website loyal. Kickstarter backers tend to be active in and thus, are more likely to give on the Kickstarter website. While this loyalty is certainly a good thing for
the websites, it can also act as a means to prevent information dissemination, something that is likely necessary to monitor and reduce the number of poorly run, operated, and/or flat out fraudulent websites. Brand loyalty could inhibit information dissemination and/or the impact may also mean that individuals may view the users of other websites more harshly. Allowing the community as a whole to manage the community as it sees fit seems to be a reasonable trade-off in the fight against online inappropriate behavior in these types of websites.

In addition, some commentators argue that regulation and/or legislative action must occur as these websites grow more popular with little oversight. However, we believe that the use of regulation in this particular area is not needed if the website operators begin to recognize the benefits that can occur from operating (or linking to) an ODR platform. eBay and Amazon long ago recognized the importance of an individual’s trust in their online shopping environment, something that has been repeated consistently in the European Regulation/Directives covering cross-border e-commerce disputes. Once this trust is lost, it is incredibly difficult to restore, especially in light of the enormous trust placed in both the website and the creators. One can hypothesize that few backers have read the Terms of Service and Community Guidelines and even fewer recognize the absence of means to resolve simple disputes without needing to file a claim in a brick-and-mortar courthouse. Trust is fragile and will certainly be lost if the websites see an increase in delivery failures and/or fraud without means to file a claim online. Moreover, the absence of complaint and dispute options has already caused at least one state to file a consumer protection lawsuit; one can expect that this will not be the last. And of course, Kickstarter itself has also been sued; for example, several lawsuits have been filed against Kickstarter in re-
Trust can also be assisted by immediately implementing the critical mass crowd voting as explained in Track 2 of the ODR designed above. Mass voting allows backers to complain to the platform and when a large enough percentage of the backers complain the creator—and most likely the platform—needs to respond to the backers complaints. The implementation of this concept accomplishes three things. First, it allows for individuals directly involved with giving money in an entrepreneurial environment to complain about lengthy delays and to demand a response and the explanation of a plan for reduction of the delay. Second, it allows the creators to not be burdened by responding to small number of individual backers that believe that delivery dates should always be satisfied, but instead allows for the critical mass of the group to determine when response is needed. Third, it allows everyone within the community to know and understand the need for a critical mass to believe the delay is unacceptable. A percentage determined ahead of time allows the creators to appreciate the risk—and estimate when—a critical mass of disgruntled backers will be reached and to react to this knowledge. It also allows the backers to appreciate and face the reality of their perception as outside the normal response in the given time frame. Backers would be able to see that they are in a small minority—or a large majority—and can gauge behavior and adjust expectations. Finally, the percentage allows potential new backers to select wisely prior to new funds.

Additionally, some basic education on the various platforms might also impact the expectations of the various participants in the system. For example, many readers may be surprised to learn that one of the most frequent complaints on e-commerce sites relates to late deliveries. The number of complaints and the expectations of both timely and fast delivery began to rise when some large-scale e-commerce sites began to offer next day delivery service as the default setting within their standard delivery price structure. The practical effect, more people regularly received next day delivery.

156 See Charles Luzar, Kickstarter, Lawsuits And An F From The BBB, CROWDFUND INSIDER (Aug. 22, 2013), http://www.crowdfundinsider.com/2013/08/22/kickstarter-lawsuits-f-bbb-business-bureau/. Interestingly, even lawsuits against the platform must be brought in court. “You agree that any action at law or in equity arising out of or relating to these terms, or your use or non-use of the Services, shall be filed only in the state or federal courts located in New York County in the State of New York and you hereby consent and submit to the personal jurisdiction of such courts for the purposes of litigating any such action.” Terms of Use, KICKSTARTER, https://www.kickstarter.com/terms-of-use?ref=footer (last accessed July 18, 2014).
delivery, but paid standard delivery prices. The result, many other websites experienced an increase in complaints for late deliveries because shoppers’ expectations of next day delivery became more common. Crowdfunding websites suffer from several similar unrealistic expectations. For example, it is common in a shopping environment that your current purchase is funding the inventory of next week—so the product you are purchasing has already been paid for by those that shopped long ago. In the current crowdfunding world, your backing funds are paying for development and design, not the inventory of tomorrow. What this mean in real terms is that without a good estimate of delivery timeframes and many other important variables, creators are facing an uphill battle under the current model. The financial truth of this description—one can imagine there is simply no money to return to unhappy backers, especially if delivery is merely delayed. In fact, backers that demand a return of funds in product delay situations could potentially derail the entire project. In a similar manner as the disgruntled e-commerce shoppers, backers must be educated to adjust expectations and to understand the consequence of their activities.

Finally, unlike many of the Articles Professor Raymond has previously written relating to ODR in different contexts, crowdfunding dispute resolution probably needs little to no regulation. Unlike many ODR platforms being designed, the crowdfunding platforms are populated by a tech-savvy group of individuals that believe very strongly in the sense of community within these platforms. The sense of community can and should be used as a means to self-regulate, in a similar manner as the early e-commerce sites such as Amazon and the early peer-to-peer auction sites such as eBay. Unlike the move to regulate the equity-based crowdfunding movement, award-based crowdfunded projects are limited in time and event (the product) and thus, do not necessarily produce a lasting relationship between the creator and the backers. Instead, the lasting relationship is with the crowdfunding platform and the community of backers—a relationship based on trust of the

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158 See supra note 29 and accompanying text.
Thus, the platform can and should recognize the importance of trust in the platform and should seek to assist in maintaining that trust via the creation of an ODR portion of the platform (or a single platform for all crowdfunding websites). Moreover, the regulation of the newest entrepreneurial websites is, as often argued, stifling the best aspects of the website, a position that is clearly supportable in the basic crowdfunding websites. The need to regulate is not there—at this time—unless the websites themselves foolishly refuse to react to growing issues of fraud within the community.

VII. Conclusion

Crowdfunding is a growth industry with a surprising number of people willing to hand over hard earned cash to support strangers in developing items and projects that are often still in the early stages of development. While many of the crowdfunding projects result in successful launches, some of which would never been brought to market without individual backing, a few projects are destined to fail. One can expect the number of failures to increase as the total participation on these websites grow. Yet, few websites have internal complaint forums for the backers and none have online dispute resolution platforms within their design. In fact, some platforms explicitly contract away legal liability in their Terms of Service clauses that exclude the platform from any and all complaint resolution services involving backer and creator disputes. Crowdfunding platforms and the creators themselves must begin to understand that individuals, no matter how willing there are to place their trust in start-ups, are a group that will lose trust in the system if they begin to feel their initial trust was misplaced. Something must be done to demonstrate to backers that their trust was well placed. At the same time, expectations must match reality and basic education and dispute resolution platforms can help with both of these issues. The dispute resolution system described above begins to meet all parties’ needs within the crowdfunding world. Larger ODR platforms, with wider participating audiences allow for the creation of crowdfunding norms, while critical mass voting allows for expectations to be adjusted appropriately within

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the community. If crowdfunding platforms continue to fail to meet basic expectations of the community, trust will be lost, and the crowdfunding movement may lose many of the backers it critically needs to be successful. Moreover, if crowdfunding platforms do provide the means for resolving disputes within the crowdfunding community they will maintain and possibly increase the level of trust within the website, improve backer satisfaction, and eventually increase the amount of funding for creators and start-ups.