

# Fiduciary Duty of Loyalty among Digital Platformers in Sharing Economy

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## 1 Introduction

### 1 Digital Platform Business Model

A digital platform provides a multi-faceted market on the Internet via telecommunications and accumulated data.

Amazon, Google, and Meta (hereafter referred to as “Facebook”) are global business operators that provide digital platform services (hereafter referred to as “digital platformers”).

Users can access most of the digital platforms for free by creating an account. To maintain their business, digital platformers have their service users view advertisements and earn advertising revenue from advertisers. There arises a competition among business operators because of the “network effect,” where an increase in the number of users on digital platform benefits the users and advertisers, thereby increasing the revenue of digital platformers.

Services are provided to an unspecified number of users. The service users do not receive compensation for viewing advertisements, and the company operates by earning advertising revenue from advertisers. This business model of digital platforms imitates that of the TV broadcasting industry.

## 2 Contract and Fiduciary Duty of Loyalty between Digital Platformers and Users

### 1 Establishment of Usage Contract with Users

In the case of television, even if viewers receive free broadcasting services from the broadcaster, the programming is merely passively displayed on the screen. In contrast, in the digital platform business model, the digital platformer is contractually bound to the user.

The use of the digital platform signifies a contractual relationship for each digital platformer, is clearly outlined in the terms of service.

Using the Amazon terms of service as an example, it is stated, “When a customer uses Amazon website features or the mobile app, Amazon will provide the customer with services, products or features based on these terms of service. When using Amazon services, the customer agrees to these terms of service<sup>1</sup>.”

The features of Amazon’s website and mobile app, as well as the terms of service, are displayed on one's computer or smartphone. When a user views them, Amazon requests that they agree to the service usage contract. The use of the Amazon website's features or the Amazon mobile app is recorded as readable data on the Amazon website, which is registered to Amazon as the user's acceptance of the service usage contract, thereby establishing the service usage contract.

## 2 Content of Usage Contract with Users

When the user uses the digital platform to achieve their own goals and the digital platform's website features and mobile app work, it can be stated that the digital platform is helping the user achieve their goals.

Assisting the user in achieving their goals entails processing the user's administrative tasks using the quasidelegation contract serving, in which the digital platformer accepts the processing of the user's administrative tasks.

Using Amazon as an example, let us examine the provision of services in a quasidelegation contract.

The servicing digital platform performs the role of the market, enabling purchases between those on the digital platform, rather than being a part of a sales contract.

Contracts in which the consumer buys unspecified items are established when the buyer decides to purchase a product; therefore, to play the role of a market where purchases are completed, Amazon must set up conditions in which its users can decide to purchase products.

To that end, Amazon works on the display order of products supported by consumers and appealing new products on the website and mobile app so that users can easily discover them, as a means of assisting users. When the user decides to purchase a product, Amazon makes effort to deliver it to the user in the shortest possible time.

To accomplish this, Amazon creates an algorithm based on a product's novelty rating as well as statistics on the product's sales and purchase rate, allowing users to discover products that consumers are likely to want. The accuracy of the mathematical processing of the algorithm set by Amazon is used to establish the user's trust in Amazon. Then, Amazon constructs warehouses to deliver the products purchased by users in the shortest amount of time possible.

According to the above, the services to Amazon users involve providing information necessary for the user to decide to make a purchase, creating the conditions that resolve concerns that accompany purchases, and assisting in achieving the purpose of the user in purchasing the product, to process the user's administrative tasks.

## 3 Fiduciary Duty of Loyalty to Users of Digital Platforms

Because achieving their goals without the assistance of a digital platform is difficult for a user, the digital platformer is entrusted with assisting the user and must bear the fiduciary duty of loyalty as a moral administrator according to the quasidelegation contract with the user.

To establish the fiduciary duty of loyalty in a delegation contract, one stance involves requesting administrative task processing via delegation, a relationship entrusted by users, and independent discretion<sup>ii</sup>.

Through site features and the mobile app, digital platformers assist users in achieving their goals, and users process the tasks that achieve those goals.

Furthermore, the digital platform has “independent discretion” in setting algorithms that assist users in achieving their goals. Then, the user has a “relationship of trust toward the digital platformer,” where users have faith in the accuracy of the mathematical processing of the set algorithms.

The digital platform needs to protect the user’s trust by assisting them to achieve their goals, and the digital platformer bears the fiduciary duty of loyalty in taking care of the user’s administrative tasks for the user’s benefit, having been entrusted with processing the same.

#### 4 Multi-faceted Digital Platformers bearing the Fiduciary Duty of Loyalty

The case of bearing the fiduciary duty of loyalty toward participants on both sides off the market in digital platform management is limited to managing consumer to consumer (C2C) businesses, such as Airbnb private lodging.

Other market participants include those who list their products on Amazon. Moreover, the contractual format with advertisers listing ads on Facebook is a contractual agreement in which compensation is paid based on work results, with no fiduciary duty of loyalty involved. In this case, the digital platformer’s duty is included in the debt of completing the work; hence, no fiduciary duty of loyalty is borne.

#### 5 Details on Digital Platformers’ Fiduciary Duty of Loyalty

Based on the digital platformers’ fiduciary duty of loyalty toward users, they bear the responsibility of confidentiality in not disclosing to third parties personal information obtained in the service provision process, which the user does not want to be disclosed.

Furthermore, any conflict of interest that would benefit oneself or a third party at the expense of users is prohibited. As an example of a conflict of interest, Recruit Co., Ltd., which manages Rikunabi, a Japanese job-searching website, sold to recruiters the predicted scores of job offer decline rates for individual students who were hunting for jobs.

The job-hunting site is a digital platform joined by both students who are job-hunting and agencies who want to newly hire students. It follows a similar business model, allowing users to use the social networking feature for free while earning ad revenue from those who post ads on the site to support their business. Recruit Co., Ltd., such as advertisers on the social media, has no fiduciary duty of loyalty to recruiters who are compensated with a network of students via the website.

Although Recruit Co., Ltd. does bears the fiduciary duty of loyalty to students who are advised on how to advance their job search and take surveys to check for job suitability, they

sold predicted scores of the students' job offer decline rate to the companies that the students were applying to, invited preconceptions by the companies who may refuse job offers to the students, and created the risk of the students being at a disadvantage with those companies, which is conflict of interest that betrays trust.

### 3 Digital Platforms in the Sharing Economy

#### 1 New Sharing Economy

The sharing economy is a new economy where purchases, loans and provision of things, places, and skills, take place on a digital platform, which people share, distribute, and co-use).

It is now possible to use and share GPS coordinates and financial settlement systems on the internet. As a result, rather than purchasing desired items, it has become more common to share skills and assets, such as homes, furniture, clothes, the Uber car dispatch service, and Airbnb private lodging service, to achieve a lifestyle where “necessary portions are shared as needed,” based on the desires of those who believe it is better to borrow needed items and share them with others.

#### 2 Arrival of Digital Service Economy

Digital platforms and the sharing economy have the same direction regarding the economy, i.e., transitioning to an economy where services are supplied, from one where goods are supplied.

This entails shifting from a model in which consumers buy goods and gain benefits from owning and using them to one in which they only receive the core value of using something as a service. Customers may then enjoy the essence of the benefit of using something by being relieved of the responsibility of owning, managing, and disposing it.

Uber ridesharing, which is part of the sharing economy, is taken as a service for transportation in a vehicle, and Airbnb is taken as a service for using houses.

Other digital platforms also involve receiving the essence of the benefits of using items as a service, as follows.

- (i) The transactional digital platform of Amazon provides information about appealing products so that users can discover and select them, and delivers the products they have purchased in the shortest amount of time. As a result, users can start using the items right away and discard them as needed, allowing them to enjoy the essence of the benefit of using the items.
- (ii) Google's search engine allows one to enjoy the essence of acquiring information in which the user can immediately gain what they want to know without having to go to the library and search through a vast amount of material.
- (iii) Facebook provides a social networking platform where users can share their own experiences or acquired information with others, thus enjoying communication via self-expression.

### 3 Breaking away from Digital Platform Dependence

With digital platforms, the format where one receives revenue from item use as a service will spread in the future, increasing the likelihood of a global economy. However, as a negative, society may become dependent on digital platforms, thereby be controlled by them.

In a traditional economy, citizens control things via one's possessions; through desiring things, they were able to gain value from usage and dispose of items as they pleased. In owning things, the will of others does not interfere.

However, in transitioning to an economy in which using things are viewed as a service, the content of the services provided will be determined by the service providers. In terms of information and products displayed at the top of Amazon or Google, an algorithm selects items that it predicts users will want.

Receiving the supply of services that others determine means that one is at the mercy of the discretion of others determining the service content. If you dislike being at the mercy of others' discretion, you can stop receiving services; however, because digital platform services are just-in-time, they are far more robust than current service supply formats, creating a high barrier to users discontinuing services (lock-in effect).

The users should be able to determine what they want as a service, and digital platforms should be able to say they influence the users' selections and guide them via systems that unidirectionally set algorithms of projected user wants.

It would be ideal for users to be able to express their opinions without being biased by digital platforms regarding their opinions and interests.

For digital platform businesses to fulfill their fiduciary duty of loyalty toward users by working solely for the benefit of users, users must instruct digital platformers on how to implement the fiduciary duty of loyalty and hold them accountable for the same.

### 4 Pre-Existing Sharing Economies in the form of Cooperatives

#### (1) Cooperatives as sharing systems

Sharing items or services in a sharing economy is not new, but was diligently enacted as a joint venture of co-ops where necessary items were allocated to and used by those who required them.

Cooperatives determine rules for people to share the usage of items that they own and allow everyone to use them. They also buy necessary items in bulk and distribute them to participants. Furthermore, they purchase and manufacture the items that must be used, establish rules, and enforce them among union members. To that end, people pay fees, share items, establish usage rules, and union members are educated on how to use the items efficiently.

## (2) Character of cooperatives as sharing systems

Cooperatives are organizations formed to conduct business, on par with companies. As an example of that business, we can discuss electric power cooperatives that supply 3.7 million people with electricity in 75% of the national territory of the US.

Because of the lack of profits in providing services to remote areas, companies that provided electricity to cities only provided electricity to 10% of rural areas during the Great Depression. Electric power cooperatives were formed as electric companies owned and governed by electricity users, and they drew their own electric lines, purchased electricity from dams, and supplied electricity to previously unconnected areas.

Cooperatives were formed for the electric supply industry because the union members of US rural areas benefit as investors with electricity supply ventures.

Cooperatives differ from corporations in that corporations are business organizations that strive for the benefit of their investment, known as return on investment, whereas cooperatives are business organizations that conduct activities on behalf of their users.

## (3) Cooperatives as Organizations That Carry Out Activities on Behalf of the Users

To describe cooperatives per the definition of the International Co-Operative Alliance in 1995, “Cooperatives are autonomous organizations of people, where people who have voluntarily joined hands aim to fulfill shared economic, social, and cultural needs through a business organization that they jointly own and democratically manage.”

Nathan Schneider interprets this definition as, “Cooperatives are businesses that are owned by the members of cooperatives and run for the members of cooperatives, by the members of cooperatives”<sup>iii</sup>

Alternatively, the business purposes of cooperatives are: 1) members of cooperatives owning the business, 2) the members of cooperatives governing the business, and 3) the members of cooperatives making benefit.

“The members of cooperative making profits” in 3) signifies that the cooperative upholds the fiduciary duty of loyalty to the business users—the members of cooperatives. As such, the cooperative is an organization where users own and govern a business body that upholds the fiduciary duty of loyalty to the business users.

When the business body has a fiduciary duty of loyalty to the business users, the business users should have the right to govern the business body. Users should express their opinions on matters of interest regarding services, and those opinions should be reflected in the digital platform's services.

In a system that guarantees the users' right of the final call on the digital platform's services, the digital platformer changes their structure to a cooperative, and the users become union members who are owners (investors) in the cooperative, who govern the digital platformer. To that end, establishing legal means to allow changing the structure of a company into a cooperative would be ideal. For this reason, a law that can convert the organization of a stock company into a cooperative should be realized.

#### 4 Protection of Personal Interests such as User Privacy Rights

##### 1 Significance of the Right to Privacy

In acquiring and using personal information, digital platformers must take care to avoid infringing upon an individual's privacy rights.

It is valid to see privacy rights as "rights of controlling information about oneself," and that premise can be described roughly as follows.

When others acquire information about you, they may hold a different viewpoint than you, which may serve as a prejudice. If this other person expresses an opinion about the information they obtained on you or attacks you based on their opinion, they may cause you personal pain or put your safety at risk. As a result, to avoid personal pain or damage, you must be able to determine the extent to which your information is disclosed and ensure that undisclosed information is not acquired as a privacy right.

People should not be discriminated against based on their race or having venereal diseases. However, regarding information that may involve labels that cause risks to bodily safety or personal distress for some, one has the right to determine the extent to which information is disclosed and not disclose information that they have decided to not disclose. We believe that anyone has at least some personal information that they desire not to be disclosed without good reason.

##### (2) Protection against Profiling

Profiling is used on digital platforms to collect personal information in unexpected ways (evaluating specific personal traits, to automate the processing of personal data to analyze and predict personal work ethic, financial circumstances, positional information, health, preferences, reliability and actions).

Regarding determinations based on profiling, a person's profile is created according to a pre-established algorithm based on personal information data that they are not aware of, which allows for the risk of determinations based on evaluation and judgment of personal character, which is why protecting the right to oppose such profiling is necessary.

### 3 Risks occurring in Personal Autonomy of Users

With digital platforms running profiling based on individual information they obtain, they can grab personal, private information that the user wants to keep confidential.

Using Facebook as an example, Facebook profiles users in terms of “school history,” “thoughts,” “relationship status,” and “purchasing behaviors” based on their activity on the platform and data like the place of employment and school history that they record. It is said that they have classified users into 50,000 categories<sup>iv</sup>. With processing from algorithms per category, Facebook assists individual users to connect with those they are interested in, displays targeted ads (online ads that are distributed per individual based on internet browsing history) and enables users to discover content, products, and services.

As a result, they may gain private information, recommend connections with individuals or groups related to individual affiliations that the user may wish to keep confidential, and display targeted ads.

Digital platforms have the potential to use users' personal information, violate user privacy, and, if information security is inadequate, have information leaked through hacking, putting user privacy at risk.

### 4 Risks of Personal Information being used for Politics

Additionally, political use of personal information gained by digital platformers would be an issue.

Digital platformers can influence politics by distorting election results by displaying targeted ads using the personal information they have obtained.

The personal information gathered by Facebook was used for analytical surveys of personal character by a political consulting firm, as well as for targeting political ads to voters in the US presidential election and the national referendum on the UK's exit from the EU.

In these incidents, whether Facebook intended to use personal information to influence politics is not clear, but CEO Zuckerberg posted on Facebook in October 2019 that they would continue to show political ads.

Using targeted ads that vary the content of its political ads per group based on the personalized tendencies of their viewpoints gained via profiling of personal information of users, is reminiscent of Aesop's fable, “A Cowardly Bat.”

When running political targeted ads that vary based on the individual, making assertions that cater to the prejudices of groups with certain tendencies in viewpoint can be seen as a violation of justice.

### 5 Regulating Digital Platforms from the Perspective of Competition Law



The German Supreme Court annulled the high court order mandating the effective cancellation of the “decision to prohibit personal information collection from third parties” in August 2020. With the following statement, Facebook admitted to abusing their monopolistic position by using their digital platform business to collect user information generated on Instagram and WhatsApp<sup>v</sup>.

Facebook’s use of user data robs the user’s freedom of choice regarding whether to use a network in a way that is suited to the individual, based on their preferred level of personal information.

The user’s lack of choice in switching to another social networking site from Facebook is a violation of their rights to make determinations on their information. According to survey results, a sizable proportion of Facebook users want less disclosure of personal information. Users who believe that the extent of data disclosure should be a criterion for selecting a business if competition in the social network market existed can choose another social networking service, but this is impossible given Facebook's market dominance.

In addition, Facebook’s ability to use user information from Instagram strengthens the lock-in effect of advertisers, adversely affecting competition in the online ad market.

Therefore, whether it is in the social networking market or ad market, the action of obtaining user information generated by Instagram and WhatsApp and conducting network businesses by Facebook is an abuse of their dominant position.

## 6 Difficulty in the revival of competition against “network effect”

Although Facebook’s access to the user information of Instagram and WhatsApp is illegal in Germany and may be illegal in the United States, where a similar lawsuit was filed, the momentum of the monopoly over the ad market via the network effect and vastly growing database of users through methods other than purchasing will most likely not change.

The monopolization of giant digital platformers will continue, whereas competition diminishes, and users will have less capacity to select a digital platform.

The Antimonopoly Act prohibits acts such as corporate acquisitions that would diminish competition, but do not directly prohibit the state of monopoly. For this reason, a company split on the grounds that it monopolizes the market is beyond the scope of competition law disciplines. It is difficult to revive competition through competition laws against huge digital platformers because they have already monopolized the market of products and services.

## 6 Governing Right of Users toward Digital Platforms

In this situation, we need a method of restoring the freedom of user choice, regarding the extent of obtaining personal information or actions geared toward purchasing behaviors of services and products of users from digital platformers.

The user's decision on how much personal information to disclose should be respected. Furthermore, profiling based on a user's registered information and actions on the platform differs from their actual characteristics and affiliations. As a result, users should be able to make appropriate adjustments.

Furthermore, the users should be able to refuse suggestions by the platform and be able to accept or deny targeted political ads.

For users to be able to determine the extent of acquisition of personal information by the digital platformers and actions toward the users, the digital platform should change to a cooperative structure and allow the users to govern it.

#### 7 Entity conversion of a digital platformer into a cooperative

Entity conversion of a digital platformer into a cooperative is desirable for a digital platformer to fulfill their fiduciary duty of loyalty to users to the full extent.

The organizational structure of a digital platformer is generally a stock company. It is legally impossible to convert the organizational structure from a stock company to a cooperative. This would be because there has not been general necessity of converting the organizational structure from a stock company to a cooperative. However, fiduciary duty of loyalty of a digital platformer to users has created the need of conversion of the organizational structure to cooperatives to fulfill their fiduciary duty of loyalty to users to the full extent. Therefore, legislative measures should be taken to enable the conversion of a digital platformer's organizational structure to a cooperative.

The legislation of the conversion of a digital platform's organizational structure from a stock company to a cooperative could be modeled on the legislation of mutualization of a stock insurer. It is believed that insurance business should be run for policyholders, so legislative measure has been taken to enable the conversion of the organizational structure of an insurance stock company to mutual company. Mutual company is substantially a cooperative because it is owned by insurance policyholders who govern the company by exercising their voting rights at general meetings; mutual company operates for the benefit of policyholders.

In the case of a digital platform that has fiduciary duty of loyalty to users, since the digital platform business should be operated for the user, it is necessary to make it possible for a digital platformer to become a cooperative from a stock company in reference to the Insurance Business Act.

Under the Insurance Business Act, in which the organizational structure of a stock insurer can be converted to mutual company, the entity conversion plan (which stipulates the total amount of funds after the conversion, compensation for shareholders, content of the rights of policyholders, etc.) must be approved by a special resolution of the shareholders meeting. A resolution of the shareholders meeting should be adopted by two-thirds of the votes (in Japan) and three-quarters of the votes (in Montana and Hawaii). Then, the payment procedure of debts to creditors who state objection to the conversion is conducted. Next, in the resolution of the policyholders meeting, the policy holders adopt the articles of incorporation of the converted mutual company and other matters required for the organization of the converted mutual company and elect the directors of the converted mutual company. A resolution of the policyholders meeting shall be adopted by a three quarter majority of the votes (in Japan) and a two-thirds majority of the votes (in Montana and Hawaii)

To convert the organizational structure of digital platformers from a stock company to a cooperative without harming the interests of the parties concerned, entity conversion provisions of an insurance stock company to a mutual company should be a model for entity conversion provisions of digital platformers from a stock company to a cooperative.

#### 8. Aptitude of cooperatives as business entities for digital platformers

When a digital platformer is converted to a cooperative, the purpose of business activities of the digital platformer is to realize the interests of the digital platform users as the members of the cooperative. The profits earned by the digital platformer are not the center of interest of the members of the cooperative; however, the main concern of the members of the cooperative centers is the range of services provided by the digital platformer.

If the organizational structure of digital platformers is converted to a cooperative in which users are members of the cooperative, the question of whether a large number of users need to have their opinions reflected will arise.

However, even if each person represents a small percentage of the entire organization, the desire for the users' will to be reflected would be an eternal blade that could be pointed to digital platform management, where business management would be governed by the users for the users, and management would always be held accountable to users. This would highlight the importance of transforming a digital platformer into a cooperative.

**Keywords:** digital platform, network effect, usage contract with users, quasidelegation contract, fiduciary duty of loyalty to users, C2C business, sharing economy, dependence to digital platform, cooperatives, right of privacy, protection against profiling, personal information being used for politics, competition law, governing right toward digital platformer,

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