Brave New World? Legal Issues Raised by Citizen Journalism

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Citizen journalism, though still in its infancy, is beginning to move into the mainstream. Traditional news organizations increasingly are publishing and broadcasting content generated in part, in whole, or in collaboration with what one observer called "the people formerly known as the audience."[1] The widely shown video of police responding to the Virginia Tech shootings, for example, was taken by a student on his mobile phone and submitted to CNN through its I-Report citizen journalism website portal.[2] News reports of almost exclusively local interest are being posted on hyperlocal news sites,[3] including those of traditional media organizations.[4] And some news organizations are experimenting with having professional journalists collaborate with readers and others outside the newsroom to gather and analyze information that is incorporated into news reports.[5]

This phenomenon is not entirely new. The Zapruder film of the assassination of President Kennedy foreshadowed the practice of news organizations regularly using photographs and videos taken by nonprofessionals, and letters to the editor have been precursors to the reader comments sections of news websites. What has changed is technology and the increased involvement of the "audience" earlier in the process of gathering and producing news. Cell phone cameras and ubiquitous high-speed Internet access make it possible for people physically near a newsworthy event to record images and quickly transmit them anywhere. The Web also makes collaboration in creating news reports substantially easier. Interwoven with these technological advances are changes in the public's attitude toward the news. Now that the Internet allows greater participation in the process of creating the news, it appears that at least some citizens want to partake in nonprofessional journalism.

The growing use of citizen journalism to gather news and create content inevitably raises legal questions. Conventional media law and intellectual property concepts are applicable or adaptable to this new realm, but courts have yet to address these doctrines in the context of citizen journalism. This article will explore some of these issues, acknowledging that many of them are at this point theoretical and that it is difficult to predict how the legal framework overlaying the rapidly changing citizen journalism movement will evolve. We focus primarily on questions related to how citizen journalism presently is being utilized by traditional media organizations, but many of the issues addressed also apply to all forms of citizen journalism.

We first explore the variety of citizen journalism efforts under way. We then examine legal issues these efforts may raise with respect to the familiar categories of publication liability, newsgathering liability, copyright, and subpoenas.

Citizen Journalism by Traditional News Organizations

It is difficult to catalog all of the ways in which traditional news organizations currently are engaged in citizen journalism. Indeed, there is no single definition of citizen journalism, or even a single name for it.[6] Rather, citizen journalism encompasses a broad range of vehicles and techniques for publishing and broadcasting content created, in part or in whole, by nonprofessionals.[7] These presently include reader comments, forums, reader blogs, hyperlocal reader-generated news, user-generated photographs and videos, reverse publishing, and "crowdsourcing."

Reader Comments

In a broad sense, citizen journalism includes the increasingly familiar opportunity for readers to comment on stories, editorials, blogs, and other content published on a news website. Reader comments often are reactions to the published content, but they also can contain information that advances the story, including breaking news and new leads and sources.[8] Some news organizations provide reader comment sections on nearly all electronic content.[9] Others only allow comments to a limited number of items, commonly opinion-related pieces such as editorials, op-eds, and blogs.[10] Larger websites receive thousands of comments per day, making it difficult, if not impossible, to screen the comments before they are posted.[11] Many news organizations, however, try to review comments in advance or monitor them promptly after posting.

Forums

Some news organizations also host forums (sometimes called discussion groups or message boards) on their websites that provide citizens with the opportunity to post views on a wide range of subjects. Comments on forums normally are not reviewed or edited before they are posted. In addition to commenting on a particular news story, users have the opportunity to start discussions about any topic. The *Fort Myers News-Press* website, for instance, hosts forums on topics ranging from immigration issues to local traffic problems to high school softball.[12] The forums also are the place where much of the *News-Press*'s crowdsourcing efforts, discussed below, take place.

Reader Blogs

A number of newspapers and other news organizations now host weblogs written by members of the community. The *Houston Chronicle,* for example,

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hosts dozens of blogs, some written by reporters and others by members of the public.[13] News organizations that host blogs commonly solicit these contributions.[14] Frequently they are not edited by the news organizations before publication.[15]

Hyperlocal Reader-Generated News

An increasing number of news organizations are turning to readers to report news that is of such singularly local interest that the news organization might not otherwise cover it. For example, the *Rocky Mountain News* launched YourHub.com in April 2005 with websites for thirty-nine Denver-area communities.[16] Co-owned by E.W. Scripps and MediaNews Group, YourHub.com now has more than 100 sites in eight states, most of which are associated with local newspapers.[17] Readers contribute stories on everything from local government to Little League. In July 2007, the Oxnard, California, YourHub.com site, which is associated with the *Ventura County Star,* included stories written by readers on the National Night Out program in a small town, a club of local owners of classic Chevys, and an accident on a local road in which a car ended up on top of a wall, among many others.[18] "It's a new approach to news, a participatory approach that puts you—our readers—at the center of the equation," *Rocky Mountain News* editor John Temple wrote in launching YourHub.com.[19] The degree to which reader-generated hyperlocal stories are edited varies, but many are not reviewed at all by news organizations before they are posted.[20]

User-Generated Photographs and Videos

Some of the most memorable examples of citizen journalism are photographs and videos of breaking news events taken by ordinary citizens, such as seen recently with the London subway bombing, the Indian Ocean tsunami, Hurricane Katrina, and the Virginia Tech shootings. Many of these vivid images were recorded by members of the public on cell phone cameras and camcorders before professional journalists arrived on the scene.

Although members of the public have long gathered newsworthy images, technology now allows these photos and videos to be instantly uploaded to the Internet. The photos and videos generated during the 2005 London terrorist attacks were considered by many a watershed event in citizen journalism. BBC, for instance, received more than 1,000 photographs and twenty pieces of amateur video in the first six hours after the bombings, many of which it used in its coverage.[21] Based on these experiences, many television news organizations have set up portals on their websites that invite members of the public to submit newsworthy videos. CNN solicits user-generated videos through I-Report, as does ABC News on i-Caught, Fox News Channel on uReport, and MSNBC on First Person. As a result, CNN's earliest on-scene video of the Virginia Tech shootings was the mobile phone video shot by graduate student Jamal Albarghouti, which he submitted through I-Report.[22]

Reverse Publishing

Several news organizations that use citizen journalism on their websites also reverse publish some of the content by using it in print sections of newspapers. In Denver, for example, some content that is originally published on various local YourHub.com websites is republished in weekly zoned print sections sent to *Denver Post* and *Rocky Mountain News* subscribers.[23] The *Chicago Tribune* recently began the same practice with Triblocal.com.[24] Similarly, ABC News began broadcasting user-generated video in August 2007 in a new television news magazine based on i-Caught video.[25]

Crowdsourcing

Crowdsourcing is the term increasingly used to describe efforts, both in and out of journalism, to harness the combined knowledge and talent of many individuals to perform jobs traditionally assigned to a single person.[26] Familiar examples outside of journalism include Wikipedia and "open-source" software development.

In citizen journalism, crowdsourcing, also called pro-am journalism (as in professional-amateur), is beginning to be used by news organizations in several ways. One of the most frequently cited examples is the *Fort Myers News-Press*'s investigation into exorbitant prices charged to connect new homes to water and sewer lines.[27] Instead of having reporters conduct a traditional investigation, the newspaper asked its readers to use their knowledge and expertise to help find out why the cost was so high.[28] The response was surprising and overwhelming. A government insider leaked documents that contained evidence of bid-rigging, retired engineers and accountants analyzed blueprints and balance sheets posted online, and discussions in forums generated leads.[29] The newspaper published several reader-assisted articles based on the information, after which the water line fees were lowered by 30 percent and an official resigned.[30] An even more ambitious experiment, Assignment Zero, engaged hundreds of amateur volunteers to report and write a series of stories for *Wired* magazine, with professional journalists volunteering as editors.[31] And the Associated Press this year began collaborating with the citizen journalism network NowPublic, which claims to have 100,000 contributors in 140 countries, to gather breaking news.[32]

Publication Liability

The use of citizen journalism by traditional news organizations is likely to lead to some new and untested legal issues in defamation, invasion of privacy, and other publication claims. Many traditional media law concepts and principles are certain to be relevant in this new realm, but it is far from clear how courts will apply them or if they will establish new doctrines. Among the issues that could be relevant to practitioners are Section 230 and liability, terms of service, and scienter issues.

Section 230 and Liability

One of the most common concerns that reader comments sections, forums, reader blogs, and user-generated hyperlocal news raise for news organizations is potential liability for defamatory and other potentially actionable statements posted by readers. Such content is posted with exceeding frequency, especially in reader com-

ments sections and forums. The concern is sometimes strongest when the content is not reviewed before it is published, but, conversely, there is often concern when the news organization has some involvement in soliciting or editing the material.

As publishers, news organizations face potential exposure for defamatory statements contained in letters to the editor in print versions of newspapers. However, as a result of Section 230 of the Communications Decency Act, the same statements typically do not give rise to liability by a news organization when published in a reader comments section or forum of its website.[33] Section 230(c)(1) provides that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." In other words, an interactive computer service is immune from being treated as a publisher of information provided by another party.[34] Although the phrase *interactive computer service* might seem to address only Internet Service Providers (ISPs), courts consistently have construed it broadly.[35] Operators of websites, including those that provide news and those that give readers an opportunity to comment on various topics, qualify for immunity under the statute.[36] As a result, news organizations should be immune from liability for most statements made by readers in comments sections and forums.

No court yet has addressed directly the application of Section 230 to reader blogs, and it is possible they will be treated differently from statements in reader comments sections and forums. Because reader blogs often are actively solicited by news organizations, a court might not consider them to have been "provided by another information content provider."[37]

A key federal district court decision, *Blumenthal v. Drudge*,[38] concerned a close factual analogue to a reader blog. In *Blumenthal*, America Online (AOL) contracted with Matt Drudge to provide his report (not unlike a blog) to AOL subscribers, and under the agreement AOL maintained some editorial control over the content. Nevertheless, the district court interpreted Section 230 as giving AOL immunity. The court noted that Congress's stated intention for Section 230 to be "an incentive . . . to self-police the Internet for obscenity and other offensive material"[39] suggested that immunity was contemplated even where the interactive computer service has the right and ability to make editorial changes. No higher court has yet addressed the issue of reader blogs, and whether other courts will follow *Blumenthal* is unclear.

However, a number of courts have left open the possibility that active solicitation of content could eliminate Section 230 immunity, albeit in different circumstances. In *Hy Cite Corp. v. badbusinessbureau.com, L.L.C.,* defendants operated a website called the Rip-off Report, which published consumer complaints about businesses and individuals.[40] Plaintiff alleged that various defamatory complaints about it were posted on the website and contended that the website "'solicit[ed] individuals to submit reports with the promise that [they] may ultimately be compensated.'"[41] Defendants moved to dismiss several claims, arguing that Section 230 provided immunity for posted complaints. The court denied the motion, holding that the allegations could support a finding that defendants were "'responsible . . . for the creation or development of information provided'" by others in response to the solicitation.[42]

Is publishing hyperlocal news stories written by readers protected by Section 230? News organizations can argue that they are simply providers of interactive computer services posting information provided by another information content provider, and therefore they are protected. But this would create an anomaly such that a news organization would be liable for posting on its website a defamatory story about a local event written by a professional journalist on its staff, but immune for an identical one written by an amateur. On the other hand, not extending Section 230 immunity to hyperlocal news would be equally inconsistent because a news organization would be liable for a reader-generated "story" published in the news section of its website, but immune if the identical content appeared as a "posting" in a reader comments section or forum.

Two difficult issues arise in this context. One is the status of the citizen journalist. Courts may consider a reader who provides a hyperlocal news story to be comparable to a reporter or freelancer for the news organization and thus not an outside information content provider. The role of the news organization also may be significant. Depending on whether and to what extent the story was edited before it was published, courts may find that there was sufficient involvement by the news organization such that the content can no longer be considered to be provided by another information content provider.

Three aspects of citizen journalism by traditional news organizations are not likely to be protected by Section 230. First, reporters and editors sometimes post their own comments in reader comments sections and forums in response to questions or comments. Such comments are not likely to be treated any differently from any other information created and published by the news organization.[43] Similarly, some news organizations, such as the *Fort Myers News-Press,* are using forums to communicate with readers as part of collaborative pro-am citizen journalism efforts. If a reporter, for example, asked readers in a forum if they had any information about a particular public official taking bribes, Section 230 immunity appears unlikely. In contrast, a news organization could expect to have immunity for publishing replies to such a question. Finally, reverse publishing is likely to be held to destroy any Section 230 protections. In these circumstances, the news organization is no longer acting as a provider or user of an interactive computer service, but as a traditional publisher (or republisher).[44]

Terms of Service

News organizations commonly require anyone who wants to post content on their websites to agree to certain terms of service. Such terms often forbid posting a wide range of material that could create liability or be offensive. For example, the *Washington Post*'s Discussion Guidelines advise readers that they may not post content that is "libelous, defamatory, obscene, abusive, that vi-

olates a third party's right to privacy, that otherwise violates applicable local, state, national or international law, or that is otherwise inappropriate."[45] The *Post*'s guidelines, like those of most other news organizations, also prohibit knowingly posting any content that violates the copyright or intellectual property rights of others.[46] Terms of service also typically include clauses that indemnify the news organization for any claim that arises out of a violation of the terms.[47] On many news organization websites, the terms of service are presented to the user in connection with a required registration process.[48] Although the registration forms commonly purport to bind the user to the terms of service, the terms themselves are frequently on another page.[49]

Terms of service are useful in that they provide explicit rules of the road for users of websites. But the extent to which they have legal significance is not fully clear. For example, if a user posts defamatory material on a news organization's website and the news organization is sued, would a court enforce an indemnity clause in the terms of service against the user?

Several aspects of contract law are implicated by this scenario. First, are the terms of service unenforceable due to a lack of assent? Assent, in the context of an online contract, often depends on whether the contract is a "clickwrap" or "browsewrap" agreement. Courts tend to enforce clickwrap agreements, which require a user to affirmatively click on an "I accept" or similar button.[50] In browsewrap agreements, by contrast, the terms simply are published on the website and purport to bind users without requiring express assent. Courts have reached varying conclusions about the enforceability of browsewrap agreements. These decisions often turn on the prominence of the placement of the terms of service and the sophistication of the user.[51] Assenting to terms of service as part of the registration process is more comparable to a clickwrap agreement than to a browsewrap one, and thus courts are likely to conclude that a user agreed to them. In a handful of cases, though, courts have taken notice when the actual terms of service are not on the page on which the user registers, but they have not found a lack of assent on those grounds.[52]

Second, are specific provisions of a website's terms of service unconscionable? In certain circumstances, for example, courts have found arbitration clauses in online agreements unconscionable.[53] Similarly, for news organization terms of service, a court may find unconscionable a clause requiring an individual reader blogger or the contributor of a local news story to indemnify a large news organization.

Scienter Issues

Courts have yet to address scienter issues in the context of citizen journalism. In any defamation claim, a news organization can only be liable if it publishes the challenged statements with the required degree of fault. The use of citizen journalism presents unique issues in this regard, but decisions in broadly comparable circumstances are likely to provide some guidance.

Consider, for example, the *Fort Myers News-Press*'s crowdsourcing of the investigation into exorbitant prices being charged to connect new homes to water and sewer lines. What if the readers who helped analyze the balance sheets had ulterior motives to damage the reputation of a government official and falsely made it appear that the high prices were the result of the official taking kickbacks? The newspaper's professional journalists, unaware of the ulterior motive, could unknowingly publish false and defamatory statements. Similarly, imagine that an amateur reporter for Assignment Zero negligently misquoted a source, producing defamatory quotes that *Wired* published, or that a citizen journalist writing for a YourHub.com site posted a false story about a teacher using corporal punishment. It is difficult to know how these scenarios would fit into a court's fault analysis if the news organization were sued.

One critical issue is whether the state of mind of citizen journalists will be imputed to news organizations. If a court analogizes citizen journalists to news sources, their state of mind, even if strongly biased, should not form the basis of a finding of actual malice by the newspaper. As the Fourth Circuit held in *Reuber v. Food Chemical News, Inc.*, "[s]elf-interest . . . motivates many news sources; if dealing with such persons were to constitute evidence of actual malice on the part of a reporter, much newsgathering would be severely chilled."[54]

Perhaps a better analogy for citizen journalists is freelancers. Because they directly collaborate with the professional journalists, these amateurs are not sources in the traditional sense. Thus, courts may look to decisions considering whether the state of mind of freelancers can be attributed to the news organizations that published their stories. These cases generally hold that although the state of mind of an employee journalist can be imputed to his or her employer under respondeat superior principles, an independent contractor's state of mind cannot.[55]

However, a few decisions appear to leave open the possibility that a freelancer's state of mind can be imputed to a news organization. In *McFarlane v. Esquire Magazine*, the D.C. Circuit observed that although two earlier appellate decisions "seem to require an employment relationship, they might also be understood as supposing that some kinds of intense editorial involvement by a publisher's employees might entangle them in the independent writer's thought process enough to serve as a basis for holding the publisher vicariously liable."[56] Nevertheless, the *McFarlane* court concluded that "we doubt that actual malice can be imputed except under *respondeat superior,*" and it affirmed summary judgment for the publisher.[57]

When considering scienter, another issue raised by citizen journalism is the difficulty of ascertaining the reliability of information and documents received over the Internet, or even verifying the identity of a source or collaborator. News organizations have experienced problems with doctored photographs and documents in recent years, including the fabricated National Guard documents that embroiled CBS News in controversy in 2004. Although doctored photographs and documents can be transmitted in many ways, the Internet allows sources and citizen journalists to do

so easily and with limited or no traces. Will a court take note of the problem of establishing reliability in the Internet context, find that the newspaper should be aware of these difficulties, and impose a heightened obligation to verify?

Relying on sources or collaborators obtained in crowdsourcing could raise similar issues to those raised by receiving documents via the Internet. Because of the well-known difficulty of ascertaining a person's true identity over the Internet, a court might conclude that it is negligent to rely on a source or collaborator located this way. This problem also could impact an analysis of actual malice. Reckless disregard for the truth can be established where a story "is based wholly on an unverified anonymous telephone call."[58] A court could determine that crowdsourcing a source or collaborator is as untrustworthy as using an anonymous one and conclude that using a news organization had an obligation to investigate information received from that source before publishing.

Liability for Unlawfully Acquired Information

Crowdsourcing or otherwise soliciting source material from readers or viewers also may raise potential liability for newsgathering torts, such as violation of wiretapping laws or conversion. Journalists who receive unsolicited "purloined" documents or a tape of an illegally intercepted phone call from a third party can be reasonably sure that using information from such material will not trigger liability based on the underlying act as long as it involves a matter of public concern and they have not participated in that act.[59] Under *Bartnicki v. Vopper* and the cases following that decision, the news media cannot be held liable for publishing lawfully obtained information on matters of public concern, even if they knew or had reason to know that the material itself had been obtained unlawfully by a third party.[60]

On the other hand, the Supreme Court consistently has avoided addressing the question of whether the media may be punished for publishing information acquired unlawfully.[61] The Court has held that "generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news."[62] *Bartnicki* suggests further that a majority of the Court might sanction publishing liability in cases where the media participated, directly or indirectly, in the unlawful conduct through which the information was obtained. In his concurring opinion, Justice Breyer specifically noted that the media had "'neither encouraged nor participated directly or indirectly in the interception.' No one claim[ed] that they ordered, counseled, encouraged, or otherwise aided or abetted the interception, the later delivery of the tape by the interceptor to an intermediary, or the tape's still later delivery by the intermediary to the media."[63]

The exact nature of the conduct necessary to trigger such liability has not been defined by the Supreme Court, and only a few lower courts have considered the issue. Actively counseling a source regarding the unlawful conduct would likely be sufficient, and even a journalist's contemporaneous knowledge of his source's conduct may trigger liability. In *Peavy v. WFAA-TV, Inc.*, for example, the Fifth Circuit found that a reporter's interactions with his source could be sufficient to hold the reporter and the television station liable under federal and state wiretap laws for disseminating information from the recordings.[64] Specifically, the reporter had counseled his source to continue making recordings of a neighbor's telephone calls and "instructed [him] *not* to turn the recorder on and off while listening to the intercepted conversations, and *not* to edit the tapes."[65] Such conduct is likely the direct participation alluded to in *Bartnicki.*[66] The Fifth Circuit also found that "[a] reasonable jury . . . could conclude that defendants' willingness to pursue the investigation . . . encouraged [the source] to continue intercepting, and recording, the [plaintiff's] conversations."[67] Although this seems less likely to rise to the level of participation referenced in *Bartnicki,* the Supreme Court's denial of certiorari in *Peavy* leaves that unclear.

As when working with any source, journalists and news organizations engaging in crowdsourcing should proceed with caution with respect to these issues. General ethical standards clearly will continue to apply. Journalists soliciting input or source material from readers should be specifically aware of any conduct that could be deemed to encourage illegal behavior and should keep in mind that a source actually collaborating on the journalist's story may become quite invested and, consequently, be more apt to cross certain lines.

Liability for Inciting Risky Behaviors

Soliciting reader and viewer participation in newsgathering also has the potential to trigger traditional negligence liability for any physical injuries incurred by the citizens to themselves or others resulting from their attempts to gather news. Such solicitations may result in litigation against the journalist or news organization if they are deemed to have encouraged, promoted, or incited risky behavior.[68]

With increasing frequency, news organizations now commonly suggest that readers or viewers submit stories, photographs, and video.[69] Although at first blush it may appear unlikely that these requests could result in physical injury, care should be taken to limit any such risks. The incentives for an amateur photographer to see his photograph prominently displayed are great. Those incentives become greater still if attached to some type of financial reward and, when combined with the need to get the first or best shot, make the potential for physical injury more foreseeable.[70] An organization alleged to have set such conduct in motion may face liability.

A general request for submissions is obviously unlikely to support this type of negligence claim. On the other hand, soliciting specific stories related to unfolding events or, moreover, placing a "bounty" on a particular photograph may involve some risk of litigation.[71] Consider, for example, a feature offered on the website SpyMedia. SpyMedia is one of a number of websites that offer a forum for amateur photographers to sell their photographs online. It also allows users to "place bounties on photos you want the Spy Media community to get

for you."[72] Although the bounties placed thus far have been relatively tame, the potential risks bear consideration. Tying a prize to a specific photograph in this manner could conceivably create a crowd of amateur paparazzi. If pursuit of a photographic bounty results in an injury, it would not be surprising if litigation follows.

Weirum v. RKO General, Inc., a case frequently cited by plaintiffs in such lawsuits, is one of the few cases of this type in which judgment for plaintiff was allowed to stand. In *Weirum*, the California Supreme Court held that a broadcaster could be held liable for injuries to third parties caused by its listeners.[73] The radio station, which had a significant teenage audience, conducted a promotional contest in which the first person to physically locate the disc jockey in the city received a cash prize.[74] Two listeners, competing to follow the disc jockey, raced down a freeway, subsequently forcing a car off the road and killing the driver.[75]

The court found the defendants owed the decedent a duty because it was foreseeable that their listeners, in an effort to obtain the offered prize, would drive recklessly.[76] Noting that "[l]iability is imposed only if the risk of harm resulting from the act is deemed unreasonable," the court focused on the radio station's attempt to "devise[] an 'exciting' promotion" and "generate a competitive pursuit on public streets," thereby creating a risk of a "high speed automobile chase."[77] The court disagreed with the defendants' contention that the First Amendment provided a defense, holding that "[t]he First Amendment does not sanction the infliction of physical injury merely because achieved by word."[78] Although subsequent to *Weirum* courts generally have found that the First Amendment bars such claims, actions seeking damages based on this type of "incitement" or "clear and present danger" theory routinely have been permitted to proceed at least to summary judgment and in some cases through trial.[79]

Liability for Copyright Infringement

Even seasoned professionals do not always fully understand the intricacies of copyright law; ordinary readers are unlikely to be educated in such doctrines. For example, many people erroneously believe that anything published on the Internet is in the public domain or that anything can be reprinted as a fair use if the individual is not a professional making money from the publication. Even relatively sophisticated bloggers have found themselves subject to copyright claims.[80] As one author has noted, "[a] culture of cut-and-paste is made to order for the Net, where an almost-anything-goes attitude prevails."[81]

As traditional media organizations increasingly incorporate user-generated content, copyright infringement liability is not an insignificant risk. Even unedited, user-directed content may expose news organizations to a certain degree of potential liability if appropriate procedures are not followed. Unlike tort claims, Section 230 "does not clothe service providers in immunity from 'law[s] pertaining to intellectual property.'"[82] Although courts have interpreted the exemption provided by Section 230 as barring certain state law intellectual property causes of action such as unfair competition, federal intellectual property claims do not fall within the statute's provisions.[83]

With respect to user-directed content, news organizations may find a safe harbor in Title II of the Digital Millennium Copyright Act (DMCA).[84] For purposes of the § 512(c) safe harbor, a service provider is defined as "a provider of online services or network access, or the operator of facilities therefor."[85] As is the case with Section 230, the term *service provider* has been interpreted broadly under the DMCA.[86] To be eligible for the statutory limitation on liability, the organization must not have "actual knowledge" of an infringement or awareness "of facts or circumstances from which infringing activity is apparent" and must comply with specific notice, takedown, and put-back procedures.[87] This safe harbor does "not affect the question of ultimate liability under the various doctrines of direct, vicarious, and contributory liability," but it limits remedies to injunctive relief.[88]

Although an in-depth review of the requirements of the DMCA is outside the scope of this discussion, at a minimum news organizations should review their posting and submission policies and ensure the information is up-to-date.[89] If reader submissions are not vetted, the DMCA should protect the organization as long as it adheres to the notice and takedown provisions of the statute. If reader submissions are reviewed or edited and a potential infringement is detected, the safest course is to remove that content regardless of whether a notice has been received unless it is clear that a defense such as fair use applies.[90]

Who Owns the Copyright?

Another intellectual property issue raised by crowdsourcing, or pro-am journalism,[91] is the ownership of the copyright in the resulting article. Determining ownership of a work produced through collaboration presents a thorny legal issue.[92]

Under the federal Copyright Act, *joint work* is defined as "a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole."[93] Authors in a joint work hold undivided interests in that work, even if their contributions are relatively minor.[94] However, who is an author is not statutorily defined, resulting in "competing interpretations" of the criteria necessary to establish authorship.[95]

"Courts have applied two tests to evaluate the contributions of authors claiming joint authorship status: Professor Nimmer's de minimis test and Professor Goldstein's copyrightable subject matter ('copyrightability') test."[96] The majority of courts presently appear to have adopted the copyrightability test, which requires that the claimant demonstrate that his contribution to the joint work was independently copyrightable.[97] Under this standard, "[a] creative contribution does not suffice to establish authorship,"[98] and, thus, a person who "contribute[s] merely nonexpressive elements to a work" will not be granted a copyright.[99] Professor Nimmer's test, which requires only that the claimant made more than a de minimis contribution to joint efforts resulting in a copyrightable work, has found limited support, especially in circumstances in which there is demonstrable intent to create a joint

work.[100] Courts following this view have held, inter alia, that "the word 'author' refers to a person 'who is the source of some form of intellectual or creative work'"[101] and that, where there is an intent to create a joint work, a person who has contributed noncopyrightable ideas to that work should be accorded joint author status.[102]

Thus, if a member of the "crowd" can demonstrate that he contributed something independently copyrightable, he will have a strong claim that he is a joint author in the work. Moreover, even if his contribution was limited to ideas, he may still have a colorable claim in certain jurisdictions if there was significant collaboration on the article. Although joint authors may unilaterally use or license (nonexclusively) the joint work, coauthors may also be accountable for any "profits realized from [their] sole use of the jointly owned work."[103] Thus, organizations should avoid opening themselves up to such claims.

In practical terms, this issue only will arise if an amateur contributor actually participates in the writing process. Journalists need to be aware of this risk and know what measures need to be in place if such a collaboration is undertaken. Amateur contributors should be treated according to the organization's practices for freelance writers, with all rights clearly outlined. Terms of use, although sufficient to establish a nonexclusive license of limited reader-generated content, will not be sufficient to transfer copyright ownership.[104]

Subpoenas

In addition to liability issues, citizen journalism raises questions regarding the protection of confidential sources. Indeed, one of the issues at the forefront of the legal debate concerning nontraditional journalists is determining whether they should be afforded the protection of the reporter's privilege.[105] For instance, there has been deep controversy over whether nontraditional journalists such as Josh Wolf, the video blogger who spent 226 days in jail for refusing to turn over to a grand jury outtakes of a clash between police and protesters, should be protected and over how encompassing the language defining *journalism* and *journalist* in the proposed federal shield law should be written.[106]

A full examination of these important issues is beyond the scope of this article. However, these issues may have practical significance for news organizations engaged in citizen journalism, primarily in instances of close collaboration between professional and amateur journalists. For example, the extent to which nontraditional journalists are afforded the reporter's privilege may become critical if an amateur learns the identity of a professional's confidential source in the course of collaborating on a story. The protections that the reporter's privilege provides to traditional news organizations and professional reporters would be undermined if an amateur journalist in these circumstances were ordered to disclose the identity of the confidential source.

In addition, news organizations with reader comments sections and forums frequently receive requests, and sometimes subpoenas, for disclosure of the identity of anonymous posters. Most often, these requests are from companies or individuals seeking to identify a person they believe defamed or disparaged them. News organizations also receive requests from law enforcement officials for the identity of posters. A body of law has developed in this area, primarily in response to subpoenas by civil plaintiffs on ISPs for the identities of anonymous individuals who have posted allegedly defamatory statements on the Internet (for example, in Yahoo! chat rooms).

This developing law would appear to be applicable to news organizations as well. Indeed, one of the leading cases, *Doe v. Cahill*, involved an anonymous blogger who posted allegedly defamatory statements about a city councilman in a blog sponsored by the *Delaware State News.*[107] In these cases, the courts generally have protected the identity of posters based on their right to speak anonymously. In *Cahill*, the Delaware Supreme Court held that plaintiffs would be entitled to learn the identity of the anonymous blogger from his ISP only if they could make a prima facie showing that their claim against the blogger could survive summary judgment.[108] Other courts, however, have been less protective.[109] Although there is not yet a similar body of law relating to law enforcement subpoenas, as with the reporter's privilege, courts may be more likely to enforce subpoenas in the criminal context.

One new issue that recently has emerged is the threat of litigation from an anonymous poster when a news organization reveals the poster's identity in response to a subpoena. Earlier this year, a plaintiff in New Jersey filed a complaint alleging that NJ.com, the online affiliate of the *Newark Star-Ledger* and other newspapers, wrongfully failed to protect his anonymity when it revealed his e-mail address in response to a civil subpoena without first notifying him.[110] Plaintiff, then a Teaneck councilman, anonymously posted on an NJ.com forum statements critical of a former fireman who had repeatedly brought civil rights claims against the town. The councilman alleged that in response to a subpoena by the fireman for the e-mail addresses of all anonymous posters who had been critical of him, the website provided several, including his. The councilman resigned after his identity became public and then sued NJ.com.

In his complaint, the former councilman alleged that NJ.com breached its privacy policy,[111] which he contended bars the website from releasing identifying information pursuant to a subpoena unless legally required to do so. He also alleged that the website violated procedures established in *Dendrite International, Inc. v. Doe* for notifying anonymous posters of a subpoena.[112] In *Dendrite*, a New Jersey appeals court held that when a party seeks the name of an anonymous poster from its ISP, the ISP must first attempt to notify the poster of the subpoena so that the poster has the opportunity to contest it.[113] In the NJ.com case, plaintiff contended that the website had an obligation to notify him of the subpoena before it disclosed his e-mail address. This case may be the first time that a plaintiff has sought to hold a news organization, or even an ISP, liable for disclosing identifying information without informing the anonymous poster of the subpoena.[114]

At this point, the ramifications of *Dendrite* are not clear. Certainly,

news organizations should review their privacy policies, keeping the potential for such claims in mind. Whether courts will find that the notification obligations imposed on parties in cases such as *Dendrite* also apply to forum hosts, regardless of the content of their privacy policies, is yet to be determined.

Conclusion

Citizen journalism, in its many different varieties, has started to take root within the traditional news media. This new frontier of journalism offers citizens the opportunity to become involved in the process of gathering and reporting the news in ways never before possible, expanding the conversation beyond the newsroom. Although it is not yet clear to what degree this trend will revolutionize the news industry, it appears that citizen journalism, in one form or another, is here to stay.

This emerging phenomenon is likely to raise fresh legal challenges. Although not all of these issues will be novel, they will arise in comparatively uncharted legal waters. This article is not intended to be a comprehensive guide to these questions, but, hopefully, it will provide practitioners a starting point for navigating this new path.

Endnotes

1. Jay Rosen, *The People Formerly Known as the Audience*, PressThink, June 27, 2006, *available at* http://journalism.nyu.edu/pubzone/weblogs/pressthink/2006/06/27/ppl_frmr_p.html.

2. *See* Scott Leith, *News Networks Solicit Viewers' Contributions*, Atlanta J.-Const., June 7, 2007.

3. *See* Donna Shaw, *Really Local*, Am. J. Rev. Apr./May 2007, *available at* http://www.ajr.org/Article.asp?id = 4308 ("There's no official definition, but generally a hyperlocal news site (also known as local-local or microsite) is devoted to the stories and minutiae of a particular neighborhood, ZIP code or interest group within a certain geographic area.").

4. For example, in April 2007, the *Chicago Tribune* launched Triblocal.com, which invites citizens of eight Chicago suburbs to submit stories and photos. *See* Michael O'Neal, *Tribune Rolling Out "Hyperlocal" Web Site*, Chi. Trib., Apr. 17, 2007.

5. *See* Frank Ahrens, *A Newspaper Chain Sees Its Future, and It's Online and Hyperlocal*, Wash. Post, Dec. 4, 2006, at A1.

6. Other terms include *we media*, *participatory journalism*, *citizen media*, *grassroots journalism*, *open source journalism*, *networked journalism*, and *pro-am journalism. See* Scott Gant, We're All Journalists Now 34 (Free Press 2007); Mary-Rose Papandrea, *Citizen Journalism and the Reporter's Privilege*, 91 Minn. L. Rev. 515, 526 n.61 (2007).

7. One author identified eleven types of citizen journalism in 2005. *See* Steve Outing, *The 11 Layers of Citizen Journalism*, Poynter Online, June 13, 2005, *available at* www.poynter.org/content/content_view.asp?id = 83126.

8. *See id.; see also A First at 'NYT'? Blog Comments Lead Coverage of Bridge Collapse on the Web*, Editor & Publisher, Aug. 2, 2007.

9. For example, *USATODAY* announced in February 2007 that it would allow readers to comment on every article on its website. *See New USATODAY.com Ready to Launch*, *available at* http://blogs.usatoday.com/ondeadline/2007/02/new_usatodayco m.html. Websites of newspapers like the *Washington Post* similarly allow reader comments on nearly all content.

10. The *New York Times* and the *Wall Street Journal*, for example, presently limit comments. *See* Pat Walters, *Dialogue or Diatribe? Dealing with Comments: A Few Interesting Approaches*, Poynter Online, May 31, 2007, *available at* www.poynter.org/column.asp?id = 103&aid = 123155.

11. *See* Howard Kurtz, *Online, Curls Gone Vile*, Wash. Post, Mar. 26, 2007, at C1 (the *Washington Post* receives around 2,000 comments per day, too many to screen).

12. *See* www.news-press.net/phpBB2/index.php.

13. *See* www.chron.com/news/blogs/; www.chron.com/commons/commons.html ; *see also, e.g.*, *Seattle Post-Intelligencer* reader blog page, http://blog.seattlepi.nwsource.com/reader.asp; *Albany Times-Union* blog page, http://timesunion.com/blogs/index.asp; *Detroit News* blog page, http://forums.detnews.com/weblog/index.cfm.

14. The Politics Weblog and other pages on the *Detroit News* website have the headline "Wanted: Fresh bloggers" with a link on how to sign up. *See* http://info.detnews.com/weblog/index.cfm.

15. *See, e.g.*, www.chron.com/commons/commons.html ("Our members are responsible for this content, which is not edited by the Chronicle."); http://info.detnews.com/weblog/bloggerapply2.cfm.

16. *See* John Temple, *YourHub.com Will Be All About You*, Rocky Mountain News, Apr. 9, 2005.

17. *See* www.yourhub.com.

18. *See* http://vc.yourhub.com/Oxnard.

19. Temple, *supra* note 16.

20. *See, e.g.*, YourHub.com Terms and Conditions § 4.3, *available at* http://denver.yourhub.com/Administrative/Register.aspx (stating that YourHub.com does not pre-screen or edit content).

21. *See* Richard Sambrook, *Citizen Journalism and the BBC*, Nieman Rep., Winter 2005.

22. *See* Leith, *supra* note 2. Even more recently, CNN said it received 450 I-Reports in the first twenty-four hours after the Minnesota bridge collapse. *See* Larry Atkins, *Outlets That Utilize Citizen Journalists Must Be Careful*, Phila. Inquirer, Aug. 16, 2007.

23. *See* Tom Grubisch, *The Sweet (and Sour) Smell of Success at YourHub*, Online Journalism Rev., Mar. 12, 2006.

24. *See* www.triblocal.com; *see also* Lorene Yue, *Triblocal Launches Print Edition*, Crain's Chi. Bus., Aug. 16, 2007.

25. *See* http://ugv.abcnews.go.com/about.aspx.

26. The term was coined by Jeff Howe in a June 2006 *Wired* magazine article, "The Rise of Crowdsourcing."

27. *See* Jeff Howe, *Gannett to Crowdsource News*, Wired.com, Nov. 3, 2006.

28. *See Help Investigate Controversial Project*, Ft. Myers News-Press, July 14, 2006; *see also* Steve Fox, *Looking to Crowdsource? Better Have a Dog in the Race*, NewAssignment.Net, Nov. 9, 2006, *available at* www.newassignment.net/blog/steve_fox/nov2006/09/a_gannett_silo_i.

29. *See* Howe, *supra* note 27; *see also* Ahrens, *supra* note 5; *Gannett's New Lease on News*, Bus. Wk., Feb. 26, 2007.

30. *See* Howe, *supra* note 27; *see also Gannett Enlists Citizen Journalists*, Associated Press, Nov. 6, 2006, *available at* www.topix.net/forum/gci/TRVV3M4TKBCFOL9H0; Ahrens, *supra* note 5.

31. *See Wired Meets Assignment Zero*, Wired, Mar. 14, 2007; David Carr, *All the World's a Story*, N.Y. Times, Mar. 19,

2007; Jeff Howe, *Did Assignment Zero Fail? A Look Back, and Lessons Learned*, WIRED, July 16, 2007. In all, Assignment Zero produced more than eighty stories, essays, and interview transcripts that are available on its website at http://zero.newassignment.net/.

32. *See* Press Release, AP and NowPublic.com Announce a Collaboration, Feb. 9, 2007, *available at* www.nowpublic.com/ap_and_nowpublic_com_announce_a_collaboration; *NowPublic Raises $10.6 Million in Venture Capital*, ASSOCIATED PRESS, July 30, 2007, *available at* http://archive.newsmax.com/archives/articles/2007/7/30/93536.shtml; *see also* GANT, *supra* note 6, 37–38.

33. 47 U.S.C. § 230 (1996).

34. Section 230 further provides that no state or local cause of action can be brought, or liability otherwise imposed, inconsistent with its provisions. *See* 47 U.S.C. § 230(e)(3).

35. *See* 47 U.S.C. § 230(f)(2) (defining *interactive computer service*); *see also, e.g.*, Barrett v. Rosenthal, 146 P.3d 510, 513 (Cal. 2006) ("These provisions have been widely and consistently interpreted to confer broad immunity against defamation liability for those who use the Internet to publish information that originated from another source.").

36. *See, e.g.,* Donato v. Moldow, 865 A.2d 711, 718–19 (N.J. Super. Ct. 2005) (immunity for website that provides local news and a discussion forum where users could post messages); Schneider v. Amazon.com, Inc., 31 P.3d 37, 40–41 (Wash. Ct. App. 2001) (immunity for website that allows users to post comments about books and their authors).

37. See 47 U.S.C. 230(f)(3) (defining *information content provider* as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service").

38. 992 F. Supp. 44 (D.D.C. 1998).

39. *Id.* at 52.

40. 418 F. Supp. 2d 1142, 1145 (D. Ariz. 2005).

41. *Id.* at 1146, 1149.

42. *Id.* at 1149 (quoting 47 U.S.C. § 230(f)(3)); *see also* MCW, Inc. v. badbusinessbureau.com, L.L.C., No. Civ.A.3:02-CV-2727-G, 2004 WL 833595, at *10 (N.D. Tex. Apr. 19, 2004) ("The defendants cannot disclaim responsibility for disparaging material that they actively solicit.").

43. Although the likelihood of any claims arising from these postings may seem remote, the risks are comparable to when print journalists discuss their stories on television. One recent example of this danger occurred in *Murphy v. Boston Herald, Inc.*, 865 N.E.2d 746 (Mass. 2007), in which the newspaper reported in a print story that a state judge told a teenage rape victim she should "get over it." The reporter later appeared on a talk show and said he was 100 percent certain the judge had made the comment. The statements on the talk show provided an additional basis for liability and contributed to the Massachusetts Supreme Judicial Court's affirmation of the finding that the reporter made the statement with actual malice.

44. By contrast, the "wire service" defense generally protects news organizations from being held liable for republishing reports provided by another reputable news organization. *See, e.g.*, Winn v. Associated Press, 903 F. Supp 575, 579 (S.D.N.Y. 1995) ("[T]he mere reiteration of a news article published by a recognizable reliable source of daily news cannot constitute defamation by endorsement, unless the story was reproduced in a negligent manner."); O'Brien v. Williamson Daily News, 735 F. Supp. 218, 225 (E.D. Ky. 1990) ("The usual meaning of the term 'ordinary care' in the context of a local media organization's handling of a wire service release would not require that organization to independently verify the accuracy of the wire release of a reputable news agency."), *aff'd*, 931 F.2d 893 (6th Cir.1991).

45. *See* www.washingtonpost.com/wp-srv/liveonline/delphi/delphirules.htm. The Discussion Guidelines are incorporated by reference into the *Post*'s User Agreement. *See* www.washingtonpost.com/ac2/wp-dyn?node = admin/registration/register& destination = membersAgreement. Similar terms are included, for example, in the *New York Times*'s Member Agreement, *available at* www.nytimes.com/ref/membercenter/help/agree.html, and USATODAY.com's Terms of Service, *available at* www.usatoday.com/marketing/tos.htm. *See also Survey Results: User Agreements*, POYNTER ONLINE, May 17, 2007, *available at* www.poynter.org/column.asp?id = 103&aid = 123296 (listing terms in various user agreements). The *Post*'s guidelines further bar posting content that degrades others on the basis of gender, race, class, ethnicity, national origin, sexual preference, or other classification.

46. *See* www.washingtonpost.com/wp-srv/liveonline/delphi/delphirules.htm.

47. *See, e.g.*, *Washington Post* User Agreement § 6; *New York Times* Member Agreement § 5.1.

48. *See Washington Post* User Agreement.

49. *See id.*

50. *See* Robert Lee Dickens, *Finding Common Ground in the World of Electronic Contracts: The Consistency of Legal Reasoning in Clickwrap Cases*, 11 MARQ. INTELL. PROP. L. REV. 379 (2007).

51. *Compare, e.g.*, Sprecht v. Netscape Communications Corp., 306 F.3d 17 (2d Cir. 2002), *with* Pollstar v. Gigmania, Ltd., 170 F. Supp. 2d 974 (E.D. Cal. 2000); *see also* Ian Rambarran & Robert Hunt, *Are Browse-Wrap Agreements All They Are Wrapped Up to Be?*, 9 TUL. J. TECH. & INTELL. PROP. 173, 174–79 (2007).

52. *See Sprecht*, 306 F.3d at 23–24, 32; Comb v. PayPal, Inc., 218 F. Supp. 2d 1165, 1169 (N.D. Cal. 2002).

53. *See Comb*, 218 F. Supp. 2d at 1177; *see also* Allyson W. Haynes, *Online Privacy Policies: Contracting Away Control over Personal Information*, 111 PENN. ST. L. REV. 587, 618–20 (2007).

54. 925 F.2d 703, 715 (4th Cir. 1991); *see also, e.g.*, Woods v. Evansville Press Co., 791 F.2d 480 (7th Cir. 1986) (reliance on a disgruntled employee, who was the single source of a column, not actual malice).

55. *See, e.g.*, Cantrell v. Forest City Publ'g Co., 419 U.S. 245 (1974); McFarlane v. Esquire Magazine, 74 F.3d 1296, 1302–03 (D.C. Cir. 1996); D.A.R.E. Am. v. Rolling Stone Magazine, 101 F. Supp. 2d 1270, 1278–80 (C.D. Cal. 2000), *aff'd*, 270 F.3d 793 (9th Cir. 2001); Masson v. New Yorker Magazine, Inc., 832 F. Supp. 1350, 1373–74 (N.D. Cal. 1993), *aff'd*, 85 F.3d 1394 (9th Cir. 1996).

56. *See McFarlane*, 74 F.3d at 1303 (discussing Hunt v. Liberty Lobby, 720 F.2d 631 (11th Cir. 1983), and Price v. Viking Penguin, 881 F.2d 1426 (8th Cir. 1989)).

57. *Id.*

58. St. Amant v. Thompson, 390 U.S. 727, 732 (1968).

59. *See* N.Y. Times Co. v. United States, 403 U.S. 713 (1971); Bartnicki v. Vopper, 532 U.S. 514 (2001).

60. *Id.; see also* Jean v. Mass. State Police, 492 F.3d 24 (1st Cir. 2007) (website operator not liable for publishing video illegally recorded by known third party via "nanny-cam" even though she was aware

of the circumstances under which it was recorded); Boehner v. McDermott, 484 F.3d 573 (D.C. Cir. 2007). Although the *Boehner* court found defendant Representative McDermott liable, "a majority of the members of the Court . . . would have found [McDermott's] actions protected by the First Amendment" if he were not subject to a special duty as a member of the Ethics Committee. *Id.* at 581 (Griffith, J., concurring).

61. *See, e.g.*, *Bartnicki*, 532 U.S. at 528 (noting that is a "still-open question").

62. Cohen v. Cowles Media Co., 501 U.S. 663, 669 (1991).

63. *Bartnicki*, 532 U.S. at 538 (citations omitted).

64. 221 F.3d 158 (5th Cir. 2000) (reversing summary judgment), *cert. denied*, 532 U.S. 1051 (2001).

65. *Id.* at 171 (emphasis in original).

66. *Bartnicki*, 532 U.S. at 522 n.5 (noting that in *Peavy*, "the media defendant in fact participated in the interceptions at issue").

67. *Peavy*, 221 F.3d at 172. In *Quigley v. Rosenthal*, 327 F.3d 1044, 1067 (10th Cir. 2003), the Tenth Circuit similarly found that defendant's contemporaneous knowledge of the unlawful interception supported a finding of liability. The court contrasted this knowledge to that of media defendants in *Bartnicki*, "who found out about the interception only after it occurred." *Id.* In further distinguishing the case from *Bartnicki*, the court also noted that the "intercepted telephone conversations were not matters of public concern" and "defendants . . . did not accurately portray the contents" of those conversations. *Id.; cf.* Netherland v. Whiteman, 2003 WL 21958616, at *1 (Mass. Super. Ct. July 22, 2003) (defendant could not simultaneously raise First Amendment defense and "refuse[] to answer any questions about his knowledge of or role in planning or participating in [illegal] taping").

68. *See, e.g.*, Weirum v. RKO Gen., Inc., 539 P.2d 36, 41 (Cal. 1975) (affirming jury verdict based on speech deemed to have "generat[ed] a competitive pursuit on public streets"); Byers v. Edmonson, 712 So. 2d 681 (La. Ct. App. 1998) (reversing dismissal of claim based on shooting allegedly incited by the movie *Natural Born Killers*).

69. *See, e.g.*, ABC News, i-Caught, http://ugv.abcnews.go.com/; CNN, I-Report, www.cnn.com/exchange/; Fox News Channel, uReport, www.foxnews.com/studiob/ureport/index.html; MSNBC, First Person, www.msnbc.msn.com/id/16712587/; BBC, Your news, your pictures, http://news.bbc.co.uk/2/hi/talking_point/2780295.stm.

70. Consider the circumstances surrounding the death of Princess Diana. *See* Richard Lacayo, *Who Shares the Blame?*, TIME, June 24, 2001, *available at* www.time.com/time/magazine/article/0,9171,1101970915–138280,00.html.

71. *See* www.nowpublic.com/ (featuring "News Wanted" section); www.spymedia.com/ (offering to place "bounty" for wanted photographs).

72. *Id.*

73. *Weirum*, 539 P.2d at 40–41.

74. *Id.* at 37–38.

75. *Id.* at 38–39.

76. *Id.* at 39–40.

77. *Id.* at 40–41 ("The risk of a high speed automobile chase is the risk of death or serious injury. Obviously, neither the entertainment afforded by the contest nor its commercial rewards can justify the creation of such a grave risk.").

78. *Id.* at 40.

79. *See, e.g.*, Byers v. Edmonson, 712 So. 2d 681, 688 (La. Ct. App. 1998) (citing cases); Herceg v. Hustler Magazine, Inc., 814 F.2d 1017 (5th Cir. 1987) (reversing jury verdict); Olivia N. v. Nat'l Broad. Co., 178 Cal. Rptr. 888 (Cal. Ct. App. 1982) (affirming grant of nonsuit entered at start of trial); Walt Disney Prods., Inc. v. Shannon, 276 S.E.2d 580 (Ga. 1981) (summary judgment); Yakubowicz v. Paramount Pictures Corp., 536 N.E.2d 1067 (Mass. 1989) (same). Although courts have distinguished *Weirum* on varying bases, many make a distinction between the specific speech in that case, in which defendants actively urged or encouraged the reckless behavior at issue, and speech that merely stimulates conduct. *See, e.g., Olivia N.*, 178 Cal. Rptr. at 496; *Yakubowicz*, 536 N.E.2d at 630–31; Delgado v. Am. Multi-Cinema, Inc., 85 Cal. Rtpr. 2d 838, 840–41 (Cal. Ct. App. 1999).

80. *See, e.g.*, Peter Gilstrap, *Perez Hilton Blog Having Problems*, VARIETY, June 20, 2007, *available at* www.variety.com/article/VR1117967331.html.

81. DAN GILLMOR, WE THE MEDIA:GRASSROOTS JOURNALISM BY THE PEOPLE, FOR THE PEOPLE 273 (O'Reilly Media 2006), *available at* www.authorama.com/we-the-media-11.html.

82. Perfect 10, Inc. v. CCBILL LLC, 488 F.3d 1102, 1118 (9th Cir. 2007) (citation omitted); *see also* Gucci Am., Inc. v. Hall & Assocs., 135 F. Supp. 2d 409 (S.D.N.Y. 2001).

83. 47 U.S.C. § 230(e)(2) (1996) (providing that "[n]othing in this section shall be construed to limit or expand any law pertaining to intellectual property"); *Perfect 10, Inc.*, 488 F.3d at 1118–19; *Gucci Am.*, 135 F. Supp. 2d at 412–14; *see also* Almeida v. Amazon.com, Inc., 456 F.3d 1316, 1322–24 (11th Cir. 2006) (recognizing that Section 230 clearly does not immunize ISPs from federal intellectual property claims).

84. *See* 17 U.S.C. § 512(c) (limitation on liability for "[i]nformation residing on systems or networks at direction of users").

85. 17 U.S.C. § 512(k)(1)(B).

86. *See, e.g.*, Corbis Corp. v. Amazon.com, Inc., 351 F. Supp. 2d 1090, 1100 (W.D. Wash. 2004) ("definition encompasses a broad variety of Internet activities"); Hendrickson v. Amazon.com, Inc., 298 F. Supp. 2d 914, 915 (C.D. Cal. 2003) ("Amazon meets the DMCA's definition of an ISP" where alleged third-party infringer sold pirated DVDs via the website); Hendrickson v. eBay, Inc., 165 F. Supp. 2d 1082, 1088 (C.D. Cal. 2001) (eBay, as an operator of an Internet website for purchase and sale of consumer goods, qualifies as a service provider); *accord* Batzel v. Smith, 333 F.3d 1018, 1031 n.19 (9th Cir. 2003) ("The [DMCA] includes immunity provisions, similar to those of the Communications Decency Act, that protect service providers from liability for content provided by third parties."). *But cf.* Tur v. YouTube, Inc., 2007 WL 1893635, at *3 (C.D. Cal. June 20, 2007) (denying motion for summary judgment under § 512(c) based on finding of "insufficient evidence regarding YouTube's knowledge and ability to exercise control over the infringing activity on its site").

87. *See* 17 U.S.C. §§ 512(c), (g).

88. *Perfect 10, Inc.*, 488 F.3d at 1109; *see also, e.g.*, 17 U.S.C. § 512(c)(1).

89. "To be eligible for any of the four safe harbors at §§ 512(a)-(d), a service provider must first meet the threshold conditions set out in § 512(i), including the requirement that the service provider: '[H]as adopted and reasonably implemented, and informs subscribers and account holders of the service provider's system or network of, a policy that provides for the termination in appropriate circumstances of sub-

scribers and account holders of the service provider's system or network who are repeat infringers.'" *Perfect 10, Inc.*, 488 F.3d at 1109 (quoting 17 U.S.C. § 512(i)(1)(A)).

Organizations should be certain to keep up-to-date with the U.S. Copyright Office the contact information for their designated agent for "notifications of claimed infringement." *See* 17 U.S.C. § 512(c)(2); Ellison v. Robertson, 357 F.3d 1072, 1080 (9th Cir. 2004) (finding there was "at least a triable issue of material fact regarding AOL's eligibility for the safe harbor limitations" because it had failed to properly update its contact information).

90. 17 U.S.C. § 512(g)(1) states that:

> [A] service provided shall not be liable to any person for any claim based on the service provider's good faith disabling of access to, or removal of material . . . based on facts or circumstances from which infringing activity is apparent, regardless of whether the material or activity is ultimately determined to be infringing.

91. Substantive content written solely by readers would most safely be treated under provisions for freelance journalists.

92. Perhaps (at least in part) in recognition of this, strictly open-sourced articles generally incorporate what has been termed *copyleft. See* http://en.wikipedia.org/wiki/Copyleft. Under a copyleft licensing agreement, authors give others permission to reproduce, adapt, or distribute the work, either with or without restrictions, as long as any resulting copies or adaptations are also bound by the same licensing scheme. *Id.* Originally written by Richard Stallman for the GNU software project, the GNU General Public License is an example of such an agreement. *Id.* Other examples of such licenses are available at http://creativecommons.org/.

93. 17 U.S.C. § 101.

94. 17 U.S.C. § 201; Erickson v. Trinity Theatre, Inc., 13 F.3d 1061, 1067–68 (7th Cir. 1994).

95. 17 U.S.C. § 101; Brown v. Flowers, 2006 WL 2092548 (4th Cir. 2006).

96. *Erickson*, 13 F.3d at 1069.

97. *Id.; see also* Childress v. Taylor, 945 F.2d 500, 507 (2d Cir. 1991) ("It seems more consistent with the spirit of copyright law to oblige all joint authors to make copyrightable contributions, leaving those with non-copyrightable contributions to protect their rights through contract.").

98. Aalmuhammed v. Lee, 202 F.3d 1227, 1233 (9th Cir. 2000).

99. Gaiman v. McFarlane, 360 F.3d 644, 658 (7th Cir. 2004).

100. *Brown*, 2006 WL 2092548 at *9; *Gaiman*, 360 F.3d at 659.

101. *Brown*, 2006 WL 2092548 at *8 (quoting WEBSTER'S THIRD INTERNATIONAL DICTIONARY 146 (2002)).

102. *Gaiman*, 360 F.3d at 659.

103. DeBitetto v. Alpha Books, 7 F. Supp. 2d 330, 335 n.6 (S.D.N.Y. 1998) (citing 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 6.12[A] (1997)); *see also* A. E. Korpela, Annotation, *Rights and Remedies of Co-Owners of Copyright*, 3 A.L.R.3d 1301 (1965).

104. Although a nonexclusive license may be granted with little formality, a transfer of copyright ownership must be in writing and signed. 17 U.S.C. § 204(a); Walthal v. Rusk, 172 F.3d 481, 484 (7th Cir. 1999); Effects Assocs., Inc. v. Cohen, 908 F.2d 555, 558–59 (9th Cir. 1990). With respect to the enforceability of these terms of use agreements, *see* discussion on terms of service, *supra* notes 44–52.

105. *See generally*, GANT, *supra* note 6; Papandrea, *supra* note 6.

106. *See* GANT, *supra* note 6; *see also* Papandrea, *supra* note 6; Anne Broache, *House Panel Approves Legal Shield for Bloggers*, CNET NEWS.COM, Aug. 1, 2007.

107. 884 A.2d 451, 454 (Del. 2005).

108. *See id.* at 460; *see also* Dendrite Int'l, Inc. v. Doe, 775 A.2d 756, 760 (N.J. Super. Ct. App. Div. 2001).

109. *See, e.g.*, *In re* Subpoena Duces Tecum to America Online, Inc., 52 Va. Cir. 26 (Va. Cir. Ct. 2000) (plaintiff need only show a good faith basis that it has been defamed and that the information requested is central to the claim to obtain the identity of an anonymous poster), *rev'd on other grounds*, 542 S.E.2d 377 (Va. 2001).

110. *See* Gallucci v. N.J. On-Line, LLC, No. L-001107–07 (N.J. Super. Ct. Feb. 5, 2007) (complaint available at www.citizen.org/documents/galluccicomplaint.pdf); *see also* Mary Pat Gallagher, *N.J. Suit Could Be Test Case for Anonymous Web Posts*, N.J. L.J., Feb. 26, 2007.

111. In addition to (or as part of) their terms of service, most websites have privacy policies that purport to govern how the news organization will use personal information provided by the user.

112. 775 A.2d 756 (N.J. Super. Ct. 2001).

113. *See id.* at 760.

114. *See* Art Charity, *Anonymous Sources: Suit May Expand Web News Burden*, N.J. LAW., Feb. 26, 2007, at 1.