LAW FOR MEDIA STARTUPS

By Jan Schaffer and Jeff Kosseff

About the Authors

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Disclaimer

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Introduction

When Andy Hall founded the Wisconsin Center for Investigative Journalism in 2008, he, like most other media startup founders, assumed his primary legal needs would be simple. He'd need a lawyer to review stories before publication and write threatening letters to public officials who weren't coughing up public records.

"I was trying to line up lawyers for issues I had dealt with as an investigative reporter in a [commercial] newsroom," he said. "I soon learned that far more legal services are required."

For one, negotiating an agreement with the University of Wisconsin that ultimately gave the center office space in return for hiring journalism school student interns.

The legal advice he got in drafting that agreement served the center well when it came under attack in 2013 by the state legislature, which tried to bar the university from working with WCIJ. "That document became a very important pillar for explaining the relationship between WCIJ and the university," Hall said.

Hall is hardly alone among media entrepreneurs in running into unanticipated legal needs. From renting space, to hiring freelancers, to getting invoices paid, to making decisions on running sponsored content, the legal issues involved in operating a new media venture involve much more than classic First Amendment law.
"New media has not changed the law of libel at all," said Richard Tofel, ProPublica's president and its resident lawyer, "but it has changed the breadth of laws entrepreneurs need to know about."

And those legal needs are similar whether the media entrepreneurs are launching and running for-profit ventures that rely on earned income or nonprofit organizations that rely on donors or grants to pay the bills.

Jayed Rahman, for example, a co-owner of the for-profit Paterson News in New Jersey, had to find a lawyer after he got a subpoena seeking the Internet Service Provider (ISP) addresses for anonymous posters commenting on one of his stories. The article disclosed that a local police officer was sending thousands of text messages and making hundreds of phone calls to a girlfriend while on duty. When some commenters made defamatory comments about the girlfriend's former husband, who tipped off the Paterson News to the story, the husband moved to unmask their identities.

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The outcome was "pretty grim," Rahman said. He did have to turn over some of the addresses because of the nature of the comments.

This guide, produced for CUNY's Tow-Knight Center for Entrepreneurial Journalism, is intended to be a primer on the kinds of legal issues media entrepreneurs like Rahman, Tofel and Hall encounter in running their day-to-day business operations and in their newsgathering activities. We expect it to help identify legal minefields in personnel policies and ad operations, set out certain rights and responsibilities for obeying state and federal laws, protect the content publications create and navigate fair use of copyrighted material created by others. It includes best practices for dealing with readers, users and partners.

It also suggests when you might need to seek professional counsel.

To be sure, media startups, like all news organizations, sometimes need legal assistance with classic matters of press freedom: FOIA requests; SLAPP lawsuits demanding that stories be removed; pre-publication review of sensitive stories. But it's not hard for startup founders to list several issues that have nothing to do with the news and that they didn't anticipate. This guide will cover many of them, including:

- Filing articles of incorporation.
- Crafting Memoranda of Understanding with content or work-space partners.
- Drafting scope of work and compensation agreements for freelance writers and photographers.
- Complying with labor laws.
- Adhering to the promises you make in your privacy and terms-of-use policies.
- Reviewing insurance coverage to be sure you'll have the right to choose your own lawyer.
- Unpacking Creative Commons licenses.

Options for Legal Help

News startups are often dependent on lawyers who will do pro bono work or give them a discount on their standard fees. Others call the Reporters Committee for Freedom of the Press for telephone help, but RCFP primarily deals with media issues. Some site founders use a state referral service to find a lawyer who will take their case.

But it can get complicated. "We have reason to have two law firms available for pro bono work," Hall said. "One is never enough." All too often, he said, a lawyer or the firm will have a conflict because they have represented someone in the story, or be a source in the story, or is a friend with someone in the article."

Ken Martin, founder of The Austin Bulldog, is working with a volunteer attorney to defend a libel and retraction suit brought by a local political candidate who objected to Martin publishing information in court records from the candidate's divorce case. A judge recently dismissed the suit and the plaintiff was ordered to pay Martin's attorney fees.

"He adopted me," Martin said. "We've been working together hand in glove." Martin also knows he, like any news outlet in the state, can call the hotline at the Freedom of Information Foundations of Texas for legal help.
Despite the free legal help, he still had to pay the costs for filing fees and getting certified court records. In this case, the Investigative News Network reimbursed him for those out-of-pocket costs from its $25,000 legal defense fund available to members.

"Creative Commons was something I did not know anything about when I started," ProPublica's Tofel said. Now the New York City-based investigative news site, like many media startups, permits other publishers to use its stories – if they give ProPublica credit. Getting broader distribution is one strategy many startups use to generate visibility, but use of your stories still needs to be monitored.

Protecting Content

One area news startups struggle with is not only protecting the content they create but also ensuring that they are adhering to the doctrine of fair use, which permits limited use, in certain instances, of other people's copyrighted material, such as photos, music, books, without getting permission from the owner. (See Chapter 3 for more information on fair use.)

"Fair use is something that surfaces way more than I would have guessed," said Andy Hall. "Sometimes we didn't use material or used less of it than we were inclined because of fair use."

Dylan Thomas, founder of TucsonSentinel.com agrees. Thomas is also former president of LION Publishers, the membership group for Local Independent Online News publishers. About 60 percent of his members are for-profit operations. Several members, he said, have found whole stories lifted from their sites and republished elsewhere. After a while, issuing a DMCA notice invoking the Digital Millennium Copyright Act to ask ISP providers to remove materials from users' websites that appear to constitute copyright infringement happens almost on autopilot, he said.

As for using the content of others, what happens if you find a photo on the Internet of someone you are writing about, can you use it? Most sites try to track down the owners of the copyright and try to get permission to use it.
Hearn of inewssource agrees: "If we can't figure out who owns the copyright, we don't use it." However, she recently, consulted with her lawyer about taking the special steps to register the copyright for some 30 hours of exclusive video her team compiled as they investigated so-called "vent farms," special units in California where people live on ventilators and life support with little hope of recovery. The story aired on PBS NewsHour.
Other Issues

"The Number One question by far that we hear from our members is about freelancer contracts and rights," said Kevin Davis, executive director of the Investigative News Network. (See Chapter 2 for more information on Labor Laws.) Most startups want a standard set of agreements to pay what they can afford and monetize content through different distribution channels. Freelancers, on the other hand, want the right to make money on their work elsewhere. INN, for one, provides some sample scope of work agreements on its site.

"The more forward-thinking news sites want to re-purpose content," Davis said. That might include turning it into documentaries, books or podcasts, but that can only be done if the ownership rights are clear.

Hearn has needed to consult legal counsel on other employment matters. "Unfortunately, we needed to lay someone off and I needed to navigate that," she said. "If you find yourself in that unfortunate position, there are lots of legal documents that I didn't know about."

She now outsources her employment and human relations work to Mission Edge, which provides back-office support for San Diego nonprofits.

She, like other startups, is also feeling the need to craft written distribution agreements to cover inewsource partnerships with other news outlets, especially pertaining to how they credit her material on their websites. Some "want their own correspondents to come in and interview our people and make like this is a joint investigation," she said.

To be sure, more issues will surface as more startups launch. For now, we hope this guide jumpstarts some legal learning. Be mindful, however, that information in this guide is offered for educational purposes only. Do not rely on this module or any of its related content or communications as a substitute for the advice of a qualified attorney.

CHAPTER 1:
Forming your Business:
Sole Proprietorships, LLCs, Nonprofit Startups

So, you want to launch a news startup? Join the scores of independent journalists and ordinary individuals who have an idea for filling a news and information gap in their news landscape. Key to success, however, is recognizing you'll be doing more than engaging in a passion project – reporting wonderful stories. You'll need find the right business structure for your needs, file the necessary state and federal paperwork and run your startup like a business – be it a charitable enterprise or a commercial one.

Many of your legal risks and requirements will be determined by one of the earliest decisions you will make: Namely, what kind of business you will form.

This chapter outlines three of the most common business structures for new, small online publishers: Sole proprietorships, non-profit news startups, and limited liability companies (LLCs). They each have some pros and cons, and there are different routes to making them happen. If you elect to become a corporation, you will likely have a lawyer charting your course.

For starters, you must decide what kind of organization you want to be. Do you want to bootstrap a venture you will totally control? Do you want to operate as a tax-exempt charity with public education as your mission? Or do you want to operate as a business that can return a profit but with limited personal risk?

It helps, first, to craft your mission statement to zero in on your purpose. Here's one from IowaWatch.org, the Iowa Center for Public Affairs Journalism: *The Iowa Center's mission is to maintain an independent, non-partisan journalistic program dedicated to producing and encouraging explanatory and investigative journalism in Iowa, engaging in collaborative reporting efforts with Iowa news organizations and educating journalism students.*

Naming your Business

Regardless of which business structure you pursue, Step 2 entails finding a good name for your venture. You will likely use this name on any business-formation paperwork you file. Don't get stuck on a moniker until you are sure it's available to use.

The easiest place to start is to do a search in the U.S. Patent and Trademark Office TESS database (Trademark Electronic Search System.) to see if a mark has already been registered or applied for. Identical marks are permitted – IF they are used on goods or services that are not at all related. While you can register a trademark yourself, it is a complicated process with multiple steps and deadlines that can cost several hundred dollars in fees. You may want to hire a lawyer to help or pay one of the many services, such as legalzoom.com, that will register a trademark for you. (See Chapter 2 for more information about trademark law).

Next, search for an available web domain address. Many services, such as Domain.com, godaddy.com or register.com, let you search for the name you'd like and display related names that are available. It's getting harder to find good names that haven't been locked up but additional extensions have been added in the media arena – for instance .press, .today and .buzz – to expand the domain pool. You can also search on WHOIS, to see who already owns a name you wanted; you can contact that owner to see if you can buy it.

How can you find a good name that you can use? You'll need to do a bit of research:

- Conduct an Internet search to see if your Search the lists of "fictitious" or "assumed" business names at your county clerk's office and in your state's database of business names.
- Check whether someone else has trademarked the name you want.
- Search whether a URL, or web address, is available that fits your name.

Getting a Tax ID Number

Also called an Employer Identification Number (EIN), a tax identification number is a nine-digit number that identifies your organization and the person responsible for its operations. You'll need this to create a business or apply for tax-exempt status as well as to open a bank account, apply for a grant, or file required tax forms for your startup and your employees. You can apply online and immediately receive your number.

Regardless of the business structure you pursue, you will be required to meet the obligations of any small business, including filing appropriate tax returns, and administering payroll and tax withholding for your employees. (See more about Employment Law in Chapter 2.)

Now, you can begin the paperwork for forming your business. For a quick recap of the attributes of various business structures, check out this chart from the Digital Media Law Project at Harvard's Berkman Center for Internet and Society**.**

Creating a Sole Proprietorship

One of easiest ways to launch a news startup is simply to create a website or mobile app and begin uploading stores on your own. A sole proprietorship comes into being when you start operating as a business. As sole owner, you own all the assets and you also get all the profits, if there are any.

Among the pros:

- It's simple to start.
- Ownership is clear-cut and the owner has full control.
- There are no business tax forms to file; the owner reports profits or loss on his/her personal tax return.

Among the downsides:

- You will be personally liable for any debts, court judgments or unlawful conduct of your employees.
- As a small business owner, you'll need to file estimated taxes quarterly to cover your own Social Security and Medicare taxes via Form 1040 SE.
- You also might be required to file an information return.

If you lose a lawsuit or fail to pay a vendor, payment towards any judgments would come from your personal assets, such as a home or a car, or your bank accounts. Perhaps the biggest legal risk for a small online publisher is a defamation suit, but you could also face claims for invasion of privacy or copyright or trademark infringement. Assuming this kind of personal risk is not so bad if you have a small staff, but it would be a heavy burden if you had many employees. If you plan to borrow money to finance your startup, you would also be personally liable for paying back these loans.

You can read more in the IRS guidelines for small business owners.

Limited Liability Company

Although still somewhat rare in the news-startup landscape, for-profit limited liability companies have become one of the most prevalent types of business forms since they were introduced in the late 1970's.

So-called LLCs are a hybrid of a corporation and a sole proprietorship. Like a corporation, an LLC provides limited liability to its owners for any debts or judgments. And like a sole proprietorship, owners pay taxes on any profits via their individual tax returns instead of having to file a business tax return.

For example, if one of the members writes a defamatory article on your jointly run website, then your liability in most cases is limited to the amounts invested in the LLC. Your personal assets would be off limits.

It is not hard to form an LLC, but it can be expensive because of state filing fees. To form an LLC, you must file articles of organization usually with the Secretary of State's office in your state. Think of your Articles of Incorporation as your startup's birth certificate. Here is where you will specify the management structure you want.

You will outline the nature of your startup's work and identify your organization's registered agent, the person who will handle official correspondence. It might be you, or a lawyer or another party. The date you file this will become your company's date of birth. Nolo.com offers a good outline on the basics that should be covered. A Northwest LLC, a registered agent, even offers a free template.

You must also enter into a written operating agreement, which sets down ground rules for what monetary contributions are required from the members, how the business will be managed, how profits and losses will be allocated, among other things.

An LLC's management structure can be more informal and allow hands-on, day-to-day supervision by the owners. It is a good idea, however, to keep good financial records and record minutes of major decisions by the owners. Generally, LLCs exist for a specified time. You will need to check your state for specific LLC record-keeping and reporting requirements and any fee or tax requirements.

Some of the most valuable assets of any news startups are the articles, photos and videos on its site. An LLC will generally own the copyright to any content its employees produce or created under work-for-hire agreements with freelancers. It's a good idea to specify in the operating agreement whether the LLC or individuals own the copyright to work created by its owner/members.

The Digital Media Law Project offers more details here on forming an LLC.

How to be a Nonprofit News Startup

Nonprofit news startups are tax-exempt organizations created under Section 501(c)(3) of the Internal Revenue Code, which covers public charities such as churches and hospitals.

Despite the proliferation of nonprofit news outlets in recent years, you might be surprised to learn that journalism is not something the IRS recognizes as having a tax-exempt purpose. So, you will need to think strategically about your mission, your activities and your fundraising strategy to create an application that will win IRS approval.
Brant Houston, a founder of the Investigative News Network, and Andy Hall, founder of the Wisconsin Center for Investigative Reporting, outline steps to follow on J-Lab's Knight Community News Network in asking the IRS to approve non-profit status for your news startup.

To create a nonprofit news startup, you will need to file considerable paperwork with the federal government and, often with your state government, as well.

There are many plusses to being a nonprofit news entity:

- Your startup will be exempt from paying federal taxes.
- Donations to your venture will be tax deductible.
- Your project will be able to receive grants from foundations.
- It will enjoy limited liability for any debts or judgments.

But there are several minuses:

- You will report to a governing board, which can fire you and hire someone else to run your startup.
- Your startup must manage a lot of paperwork, including filing 990 tax returns every year that will make public your revenues and top salaries.
- It must establish formal systems for tracking spending and activities so you can report on grants you receive.
- It must refrain from any political activity, endorsing or opposing candidates for office, and from lobbying on behalf of legislation.
- It must show a track record of being publicly supported, meaning about 30 percent of your revenues must come from contributions, membership fees or revenue from activities related to your tax-exempt purpose.
- It must pay federal income tax on any revenues received that are not related to your tax-exempt purpose.

To receive tax-exempt recognition from the IRS, you must apply for it by completing IRS Form 1023. You can do it yourself, although the IRS estimates it will take about 10 hours to complete. Many news startups will seek some legal help with the process, although you can save money by filling out a lot of the forms, so you have something for your attorney to review.

As part of this application, you will need to draft articles of incorporation and bylaws. The Digital Media Law Project offers a peek at some successful applications from news startups here. Be sure to archive these and other important documents in a records book along with minutes from your board meetings, all federal and state tax returns, names, address of past and present directors and any other official documents you file.

For nonprofits, your articles of incorporation need to certify that your startup will be operated exclusively for your tax-exempt purpose and that no profits will go to individuals or to the founder's family or insiders. The articles must also certify that you won't try to influence legislation or participate in political campaigns.

The IRS publishes some sample Articles of Incorporation here.

Some media entrepreneurs, like Lorie Hearn, founder of inewssource.org in San Diego, started by getting a do-it-yourself book from Nolo.com. She consulted a lawyer, however, when she learned she first had to file as a corporation in California. "I didn't trust myself," she said. But doing some of the research herself and filling in some of the forms in-house are strategies new media ventures can use to keep legal costs affordable.

Bylaws

When you apply for nonprofit status, you will be asked to submit a copy of your startup's bylaws, which essentially are a roadmap for how your organization will operate. Bylaws should cover such things as how many directors will serve on your governing board, how often meetings will be held, whether they can be held via telephone, the tenure of board members and how they will be elected.

Some bylaw samples can be found here. Be prepared for the IRS to compare your articles of incorporation with your bylaws to check for consistency.

Applying for 501(c)(3)

Now you are ready to complete IRS Form 1023. There are, however, some minefields along the way.

The IRS only grants Section 501(c)(3) status to organizations engaged exclusively in one of eight activities. Because journalism is not among those eight activities, most news startups apply under the "educational" category, but you'll need to design an operating model that strictly fits that category. Most journalism startups have no problem making the case that the information they produce educates the public, and it involves trained experts. However, the IRS lists four criteria for determining whether a publishing organization is operated exclusively for charitable purposes. One is, “the manner of distribution must be distinguishable from ordinary commercial publishing practices." So, you may need to include other educational activities as public discussions, forums, lectures, panels and programs.

You will be required to estimate your organizations revenue and expenses for the first years. And, while it isn't formally required, you should consider including a conflict-of-interest policy. Here's an example of one from the Wisconsin Center for Investigative Reporting.

The IRS provides more advice on completing Form 1023 in IRS Publication 557.
You can expect to wait three to six months or more for the IRS to act on your application. Once approved, keep your original determination letter from the IRS with your important business records. You will need it for every grant application you fill out.

State Tax Exemption

Once you've received your nonprofit ruling from the IRS, you may be required to register for a state tax exemption or as a state charity. You can find more information for your state from the Federation of Tax Administrators. You can find a list of state offices that regulate charities from the National Association of State Charity Officials.

Piggybacking on Another Nonprofit

Some nonprofit-wannabes may want to test drive their ideas before applying for nonprofit status. Stil others may find the requirements of being an independent nonprofit too burdensome for a small project.
Here are two options that will give you a longer startup runway and allow you to pursue grant funding.

- **Find a fiscal agent.** This involves reaching out to another nonprofit, such as another news startup or a community group, to allow you to apply for grants under their sponsorship. This usually entails paying the fiscal agent a small fee, 5 to 10 percent of your incoming grants, to do the grant bookkeeping and be a steward for how responsibly you spend your grant money. This can be an interim arrangement until you get on solid-enough ground to seek independent nonprofit status, or it can be a longer-term relationship that helps both parties.

- **Affiliate with a university.** You might seek an affiliation with a university and negotiate free or inexpensive office space in return for teaching or providing student internships. You can affiliate either as an independent nonprofit or negotiate whether the university will serve as your fiscal agent. You can also agree on whether you will run your contracts and hire your employees through the university. If you do that, you will have to observe university rules, but it can be a way to give your employees university benefits, although you will likely need to raise the money to pay for them.

In either case, it's critical to draft a formal Memorandum of Understanding, specifically outlining the extent of your relationship with another nonprofit and any costs or in-kind services involved.

Read More

Knight Community News Network: Launching a Nonprofit News Site http://kcnn.org/learning-modules/launching-a-nonprofit-news-site/

Digital Media Law Project: Forming a Business and Getting Online http://www.dmlp.org/legal-guide/forming-business-and-getting-online

Digital Media Law Project: Tax-exempt journalism and the IRS http://www.dmlp.org/irs

IRS Charity Classification: Private Foundation or Public Charity? http://www.nolo.com/legal-encyclopedia/irs-charity-classification-private-foundation-public-charity.html

INN Planning a Nonprofit News Organization

CHAPTER 2
Labor Law: Hiring Employees, Freelancers, Interns

In February 2012 Xuedan Wang sued the Hearst Corp., saying she should have been paid when she worked as an intern at Harper's Bazaar from December 2010 to December 2011. By treating her and as many as 3,000 others as unpaid interns rather than regular employees, she said the magazine not only denied her wages, but also Social Security contributions and the right to receive unemployment insurance when a job ended, and worker's compensation for injuries on the job.

Wang's appeal was being heard in tandem with another intern wage complaint against Fox Entertainment Group. It has also attracted support from such heavy hitters as the U.S. Department of Labor and the U.S. Chamber of Commerce, which have filed supporting briefs.

Wang's case illustrates one of several employment-law hazards for media startups, especially those that can't immediately afford to hire a staff of journalists and opt instead to hire freelancers to report stories, shoot photographs or edit video and add interns into the mix.

In the world of employment law, freelancers are independent contractors, not employees. Driving the use of freelancers is cost and flexibility: It's cheaper for a startup to enter into freelance agreements because you don't have to withhold income taxes or pay the employer share of Social Security and Medicare taxes. These workers are not entitled to minimum wage or overtime requirements either. The same is true for unpaid interns.

Moreover, if your startup's expected funding or revenues fall short, it's easier not to renew a freelance agreement than it is to terminate an employee. For independent contractors, in particular, the deal may not be so sweet. They not only have to pay all their own taxes, they also don't get company benefits, such as health insurance, retirement plans or vacation time.

Beware, however, that the IRS has explicit criteria for who can be an unpaid intern. It also outlines specific rules on who can be considered an employee and who may be a contractor. Be mindful that the federal government is keenly interested in being sure you classify your people correctly. In part, it wants the income and payroll taxes it's supposed to get. Penalties for violations can be severe.

Another federal agency, the U.S. Department of Labor's Wage and Hour Division sets rules that govern who can be an unpaid intern. In recent years interns have started to speak up when they think the law has been violated. ProPublica.org has published a list of the lawsuits in which interns assert they should have been paid.

As 2014 ended, two media companies reached tentative agreements to settle lawsuits brought by former unpaid interns. In December, Condé Nast won preliminary approval to pay $5.85 million to a class of more than 7,000 former interns. In October, NBC Universal agreed to pay $6.4 million to settle a class action brought by unpaid interns who worked at "Saturday Night Live."

In Wang's case the Justice Department's amicus brief expressed particular concern that the sluggish economy has made "the promise of free labor...both tempting and available," allowing unpaid internships to proliferate. That case is pending.

Her case is being heard alongside another case: In June 2013, a Manhattan federal judge found that Fox Searchlight Pictures violated U.S. and New York minimum wage laws by not paying two production interns for work done on the set of the movie "Black Swan." The judge also opened the door to other Fox Entertainment Group interns in New York to join the case.

Employee vs. Independent Contractor

Seldom will a startup have its own human relations or legal departments, so many issues are dealt with on an ad hoc basis.

To help businesses figure who should be an employee and who can be an independent contractor, the Small Business Administration sets out these distinctions:

An Independent Contractor:

- Operates his/her own business
- Invoices for work completed
- Has more than one client
- Owns the equipment used for the work and sets own hours
- Keeps business records

An Employee:

- Performs duties dictated or controlled by others
- Is given training for work to be done
- Works for only one employer

The IRS also publishes specific guidelines to help determine whether a worker qualifies as an independent contractor. It all depends on who controls the worker's behavior, who has financial control, and the overall relationship. The employer must consider:

- **Hours and Office:** Who determines how the work is done? Contractors set their own hours and where they work. If you, as an employer, determine when and where the person works, he/she is an employee, not a contractor.

- **Financial Control:** If a worker is guaranteed a regular amount of pay, he/she is likely an employee. If a worker is paid by the job and can accept work from other employers, they qualify as a contractor. Contractors also generally use their own equipment and pay their own expenses.

- **Relationship:** If you can fire a worker, the person is an employee. You cannot fire a contractor if the terms of the contract are being fulfilled; you can elect not to renew a contract. If worker provides key services and the relationship is permanent, he/she should be an employee.

Classifying a person as an employee might give that worker protection under several federal laws, including gender and age discrimination statutes, disability accommodations, and family and medical leave rights. Independent contractors don't get these protections.

In addition, laws in individual states can affect other benefits, such as whether as individual is entitled to worker's compensation if they are injured on the job, and whether they can file for unemployment benefits, if they are terminated.

Some states, such as Massachusetts and California, have more stringent guidelines than the IRS for determining who qualifies as a contractor or an employee, so be sure to check your state's guidelines. To learn more, simply search online under the name of your state and "independent contractor."

If you deliberately misclassified a worker, you can be hit with heavy costs. You will have to pay your share of back payroll taxes that you should have withheld if he/she were an employee. You'll have to foot your half of FICA (Medicare and Social Security) taxes and unemployment insurance taxes – plus penalties and interest. You may also be liable for any claims for unpaid overtime and attorney's fees. In some cases, companies have had to compensate for back benefits as well.

Employer Responsibilities

As a news startup, you must be prepared from Day One to keep track of payments and any taxes withheld for those who work for you. Many startup founders have tried, at first, to do this on their own, only to find themselves overwhelmed by the requirements and turn these tasks over to a payroll processing company.

Employer obligations include:

- **For Employees:** Ask workers to fill out W-4s, allowing federal income taxes to be withheld. Give workers annual W-2 wage and tax statements, detailing wages received and taxes that were withheld from paychecks.

- **For Contractors:** Ask contractors to fill out fill W-9s, supplying their Social Security or Tax ID number. You are responsible for obtaining the contractor's full name, social security number and address before you pay them. Give all workers 1099-MISC (miscellaneous income) forms with amounts received for each tax year. You must give every person paid more than $600 a year a 1099 statement by Jan. 31 and file Form 1099 to the IRS by Feb. 28.

Self-employed contractors generally must pay their own estimated taxes every quarter, and they must pay the full share of FICA taxes although they can claim a business deduction for half of these taxes. Figuring estimated payments can be tricky; IRS Publication 505, "Tax Withholding and Estimated Tax," provides some guidance but it may be necessary to consult with a tax professional.

Freelancer Scope of Work Agreements

Contracts, consulting agreements and scope of work agreements all act to lower legal liability. They set out expectations, compensation, timelines and ownership of the work.

When hiring independent consultants, it's best to set out the details of your relationship in a written Scope of Work agreement or contract. The agreement should specify:

- Time period covered
- Work to be produced
- Amount of payment
- Invoicing procedures
- Early termination contingencies
- Clear indication of independent contractor status.
- Options for making changes to the contract; usually a statement that any changes must be agreed to in writing.

A key component of any freelance contract addresses the question of who owns the copyright to any articles or photographs produced. This has grown increasingly important as news startups seek to re-purpose content on many different platforms – print, online, video social media, e-books, anniversary issues, paid archives, promotional calendars – and even license it to others.

If you are an employee, your company owns the copyright to all the work you produce for them. If you are a freelancer, however, and agree to produce "works for hire," generally the news organization retains the copyright – unless the Scope of Work agreement specifies otherwise.

Among specific issues freelancers may want addressed in a Scope of Work agreement are such things as whether they may use research gathered for your article for other work products or on a personal blog or business website. If you plan to license a freelancer's work to others, the freelancer may ask you to pay them a cut of the licensing fee. The Investigative News Network offers sample freelancer writer and photography contracts on its website that specifically address some of these issues.

The National Writers Union, which represents freelance writers, not only offers contract advice, it has published a Guide to Work-for-Hire Contracts.

In 2001, a key decision by the U.S. Supreme Court ruled against the New York Times Co. on the issue of copyright and freelancers. It found that The Times could not license freelance work for use in such databases as LexisNexis because the articles were initially licensed to be published only in print form. The Times had to pay $18 million to compensate these writers.

Some media startups also may hire an ad salesperson to work on commission. Be sure to spell out how the commission is to be calculated and how it will be paid if your relationship ends.

Hiring Employees

In hiring employees, you must:

- Keep track of wages paid plus federal and state (if applicable) income taxes withheld.
- Pay your share of Medicare and Social Security Taxes,
- Meet federal and state laws for minimum wages, overtime, and eligibility for workers compensation and unemployment insurance.

The U.S. Labor Department administers the U.S. Fair Labor Standards Act, which sets out compensation and overtime rules. It requires employers to pay a minimum wage of at least $7.25 an hour (more if a state has set a higher minimum wage). And pay overtime of one and one-half times the regular rate of pay for all hours worked more than 40 hours a week. Young people, those who receive tips and some others can be paid less.
So-called "exempt" employees, however, are not paid overtime, but that doesn't mean you can just declare an employee to be exempt. This classification depends on how and how much an employee is paid, and the kind of work she/she does.

For the most part, to be exempt, an employee must be paid at least $455 a week ($23,660 a year), receive a salary vs. an hourly wage, and do high-level professional or administrative work.

If your startup relies on grants to arrive or invoices to be paid, you also might face cash-poor moments. Be mindful that in some states, you can run afoul of the law if you ask workers to defer their wages until revenues come in. Technically, federal labor laws apply to companies that do at least $500,000 a year in business in interstate commerce, however, they are widely followed by most employers.

When you offer someone a job, the offer should be accompanied by a Letter of Employment, which will serve as an employment contract. If the employee is to be an "at will" worker, the letter should say that. For instance, *you will be employed on an at-will basis, meaning that either party may terminate the employment relationship at any time for any reason, with or without notice.*

Key Takeaways:

- Don't treat contractors as employees,
- Don't classify employees as "exempt" to avoid paying overtime.
- Consider paying your interns.

Read more

TECHNOLOGY; Temp Workers at Microsoft Win Lawsuit http://www.nytimes.com/2000/12/13/business/technology-temp-workers-at-microsoft-win-lawsuit.html

UnpaidInternsLawsuit.com http://unpaidinternslawsuit.com/current-cases

Judge Rules that Movie Student Should Have Been Paying Interns
http://www.nytimes.com/2013/06/12/business/judge-rules-for-interns-who-sued-fox-searchlight.html

Hire a Contractor or an Employee? https://www.sba.gov/content/hire-contractor-or-employee

U.S. Department of Labor Wages and Hours Worked: Minimum Wage and Overtime Pay
http://www.dol.gov/compliance/guide/minwage.htm#BasicPro

Supreme Court to Revisit a Case on Breach of Copyright
https://www.nytimes.com/2009/03/03/business/03bizcourt.html

Chapter 3:
Copyright, Fair Use and Trademarks

For media startups, intellectual property law is a double-edged sword. It protects your most valuable asset: The content that you and your employees generate. But intellectual property law also could lead to significant liability if you use an article, image, or video without the permission of the copyright owner. Even if you accidentally post copyrighted content and promptly remove it, you still could face thousands of dollars in liability. Online news outlets frequently confront such problems as when their employees post photos and videos on deadline without first checking whether they have a license to republish the content.

In intellectual property law, copyrights and trademarks are the most relevant for online news startups.

Copyright

Copyright is among the most misunderstood concepts in media law, mostly because the law has become so convoluted due to a series of conflicting opinions by federal appellate courts. But it also is one of the most important legal concepts to understand to establish a viable business.

Copyright is a legal right, in the U.S. Constitution and the federal Copyright Act, that provides the right to control the copying, distribution, display and public performance of an original work of authorship, such as a book, article, song, or movie.

To receive a copyright, your work must be original and “fixed” in a tangible medium. For instance, an article that you write and post on your website is copyrightable because it is original (you wrote it) and it is fixed in a tangible medium (your website). Likewise, you cannot record an episode of "Survivor" and post it on your website unless you have CBS’s permission.

Ideas are not copyrightable. Let’s say that you and your co-workers discuss an idea for a new app to deliver news to consumers. You can’t claim a copyright on that idea, because it is not an original work that is fixed in a tangible medium. If you write an article about the idea, you can claim copyright in the article, and that would prevent other parties from redistributing that article. But copyright would not prevent others from discussing your idea. (To protect an “idea” for a new technology, you should explore filing an application for a patent. More information about patent applications is available at the U.S. Patent and Trademark Office’s website.)

Facts also are not copyrightable. In a 1991 opinion, the Supreme Court held that the publisher of a telephone book could not sue another publisher who copied the names, addresses and phone numbers. The Court wrote that only original, creative works are copyrightable, and that “[c]ommon sense tells us that 100 uncopyrightable facts do not magically change their status when gathered together in one place.” That said, the Supreme Court held that if the phone book publisher used even the slightest bit of editorial judgment – such as excluding certain listings – that work would be copyrightable because it required some originality and creativity.

Ownership of Copyright

Copyright automatically vests in the author who fixed the work in a medium (i.e., the author who wrote the article and posted it online). If one of your reporters wrote an article as an employee for you, you will own the copyright unless you have a separate agreement that allows the employee to retain ownership.The original author is free to sell the copyright to another person or company.

Copyright protection begins when a work is fixed in a tangible medium, regardless of whether you have registered the copyright with the U.S. Copyright Office. However, registration provides a copyright owner with certain advantages during litigation, including the ability to recover statutory damages, which often provide the most amount of money. For more information about copyright registration, visit the Copyright Office website.

Duration of Copyright

Copyright protection is not forever. Congress determines the duration of copyright. Currently, a copyright expires 70 years after the author's death. If a corporation is the author, or if the work is anonymously written, the copyright expires 95 years after publication or 120 years after creation, whichever is shorter.
After a copyright expires, the work is in the public domain and can be republished or redistributed without any threat of a copyright lawsuit. For example, Project Gutenberg maintains an online database of thousands of books that are now in the public domain.

Copyright and Breaking News

Merely linking to another site will not raise copyright issues. But copying portions of a story and pasting them to your site along with the link may expose a website to copyright liability.

You can copyright the article that reports the news, but you cannot copyright the news itself. Another site could summarize your article, in its own words, without violating your copyright. And the other site does not even have to credit you as the original source.

Some news outlets have attempted to claim ownership in their exclusive news stories under a separate cause of action, known as the "hot news doctrine," which provides news outlets with exclusive ownership of news for the first few days after they broke the story. In recent years, many courts have rejected "hot news" lawsuits, finding that copyright law preempts such claims. Thus, news aggregators that rewrite stories often avoid liability, even though they have not done any original reporting. But it is important to remember that at least some courts still recognize the hot news doctrine, so there might be some liability for copying another site's breaking news.

Copyright of Government-Created Works

Federal copyright law prevents the U.S. government from copyrighting its works. So, you are free to republish, in full or in part, the statutes that Congress passes, federal court opinions, the federal government's photos, and federal agency emails that you obtained via FOIA. Note that some state and local governments may retain the copyright in their publications, though this copyright is very limited and it is rare for a government agency to succeed in a copyright lawsuit.

Republication of Copyrighted Works Online

It is common to see websites post material that is clearly created and owned by another content provider. There are a few reasons why websites can do this:

- The website may have received a license to publish the content, either directly from the copyright owner or through a third party.
- Membership in a wire service, such as the Associated Press, allows a website to republish content received through the wire service.
- The website's republication of the content is "fair use."
- The website may permit republication under a Creative Commons license.

"Creative Commons was something I did not know anything about when I started," ProPublica's Tofel said. Now the New York City-based investigative news site, like many media startups, permits other publishers to use its stories – if they give ProPublica credit. Getting broader distribution is one strategy many startups use to generate visibility, but use of your stories still needs to be monitored.

For instance, other publishers may seek to trim ProPublica stories down to fit their space. Tofel says he tells them in no uncertain terms: "Free is a really good price. If it doesn't work for you for free, then you should pass."

Fair Use

Fair use is a defense to a copyright infringement claim. Unfortunately, it is difficult to predict with certainty whether the distribution or publication of copyrighted content will qualify for this exception. U.S. copyright law requires courts to balance four factors to determine whether you can use some copyrighted material under the fair use exception:

- **The purpose and character of the use:** A nonprofit's republication of copyrighted work is more likely to qualify for fair use than a for-profit company's republication. Similarly, a school's distribution of copyrighted material is more likely to qualify for the exception. If a court finds that the defendant's use of the work was "transformative," it is more likely to find that fair use applies. For instance, a parody of the copyrighted work might be considered transformative. But courts are deeply divided about whether they should even consider transformative use.

- **Nature of the copyrighted work:** Republication of entertainment works, such as fiction books, is less likely to qualify for fair use than informational works, such as news articles.

- **Amount and substantiality taken:** The republication of a small portion of a work is more likely to qualify for fair use than the republication of the entire work. But even the republication of a small portion of a work might not constitute fair use, depending on the content of the republished passage. For instance, the Supreme Court found that The Nation's republication of fewer than 400 words from Gerald Ford's 500-page autobiography was not fair use. The reason? That small passage was Ford's only discussion of his decision to pardon President Nixon. This passage was the "heart of the work" (i.e., the primary reason that many people would purchase Ford's autobiography).

- **Effect of using copyright work on the potential market for that work:** Courts will consider whether the republication has reduced the value of the copyrighted work. Some courts consider this to be the most important fair use factor.

Fair Use and Breaking News

Perhaps the largest – and most dangerous – misconception about fair use is that the republication of copyrighted material content during a breaking news event is always fair use. This simply is not true. Coverage of a breaking news story is more likely to cause a court to find that the purpose and character weighs in favor of fair use, but this is far from certain. For instance, if a newspaper photographer takes an exclusive photo of a plane crash, the market value of that photograph is quite high. Readers who want to see the photo will visit the newspaper's website, driving up advertising revenues and possibly online subscriptions. If another website copies that photograph without permission, that republication would divert traffic from the newspaper's website, and a court likely would find that the re-publication had a negative effect on potential markets for the copyrighted work.

YouTube, Social Media, and Copyright

You'll frequently find YouTube videos on news sites. Such use probably will not raise legal issues, provided that the video is embedded using the code provided with the YouTube clip. YouTube and similar sites allow the video uploader to decide whether to allow other sites to embed the video. If YouTube determines that the uploader did not own the copyright, YouTube will remove the video, and the embedded video will no longer work.

You should avoid copying video from YouTube and posting it directly on your servers. Such reposting could expose you to an infringement lawsuit from the copyright owner. Also, make sure to review the current Terms of Service for YouTube to determine whether your use of the video complies.

You may want to republish text, images, or videos that users have posted on social media. You must review the current terms of service for the specific site to determine whether the user has given permission for other people to republish the user's content. For instance, Facebook's current terms require users to allow third parties to republish photographs that are posted under the "Public" setting. But the users do not agree to third-party republication of photographs that are only available to friends.

Trademark Law

A trademark is a distinctive word, name, phrase, symbol or design that identifies and distinguishes a company's goods or services from the goods or services of another. For instance, "Huffington Post" and "The New York Times" are trademarks that identify and distinguish the news products that both companies offer.

A trademark can include a slogan (such as Nike's "Just Do It") or a logo (such as Nike's swoosh). A domain name can be a trademark, but only if it functions as a mark that identifies the company (such as amazon.com). But you still must register your domain name through a domain-name registrar.

Trademark registration is not legally required. However, registration is strongly recommended because it provides strong evidence if you are later involved in a trademark dispute with another company. Additionally, trademark registration is required before you bring a trademark infringement lawsuit against another company.
You can register a trademark with the U.S. Patent and Trademark Office online. Registration fees currently cost between $275 and $375.

Trademark approval is not automatic. The PTO first conducts a comprehensive search of trademarks that are already registered to determine whether your proposed trademark would create a likelihood of confusion. For instance, it is unlikely that the PTO would approve a trademark application for "The New York Times," because that likely would be confused with "The New York Times." You can search the PTO's trademark database for free at http://www.uspto.gov/trademarks/process/search/.

Additionally, you should consider whether your mark is "strong," i.e., whether you could prevent third parties from using the mark Trademark law provides more protection for "fanciful" or "arbitrary" marks. Fanciful marks consist entirely of made-up words, such as Kodak film or 409 Cleaner. Arbitrary marks consist of ordinary words that are used in an arbitrary way that is not related to the word's meaning (i.e., Apple computers).

You are not required to hire a lawyer to register your trademark, but you should consider doing so. An attorney with experience in trademark law can ensure that your registration protects your brand and increase the chances of PTO approval by conducting a thorough trademark search.

Key Takeaways

- Be very careful about posting content that you did not create. If you don't have adequate license or other permissions, you could face thousands of dollars in liability.
- Do not assume that covering breaking news allows you to republish content from other news outlets. Fair use is a limited defense that will not always apply.
- Protect your own copyrights. Your articles, photos, videos and other content are the products that generate revenues for your site. Monitor other sites for infringement and consider copyright registration to maximize your rights to this content.
- Your news site's brand is vital, so register the trademarks to all names, slogans, logos and other unique identifiers of your brand.

Read More

U.S. Copyright Office, Copyright Basics http://copyright.gov/circs/circ01.pdf

Copyright Tutorial, American Society of Media Photographers https://asmp.org/tutorials/copyright-overview.html#.VJDM0nsm9SA

U.S. Copyright Office, Fair Use http://www.copyright.gov/fls/fl102.html

University of Minnesota Libraries, Understanding Fair Use https://www.lib.umn.edu/copyright/fairuse

U.S. Patent and Trademark Office, Trademark Basics http://www.uspto.gov/trademarks/basics/

Chapter 4
Native Advertising, Testimonials, Endorsements

"Water Works!" declared the headline on a full-page article in the September 2013 issue of Shape health and fitness magazine. The content extolled the virtues of hydration and noted that about 20 percent of Americans didn't like the taste of water.

"If that sounds like you, check out the new Shape Water Boosters," read the article, which ran under the heading "News." Photos of four varieties of the product accompanied the article.

Shape, however, ran into trouble with that article. Water Boosters, an energy and weight-loss drink, is part of its own line of consumer offerings, and Shape was rebuked for promoting its own product in an article labeled "News." Shape “blurred the line between advertising and editorial content in a way which could confuse consumers,” the National Advertising Division (NAD) of the Better Business Bureau said in a January 2014 ruling. Going forward, the magazine needed to "clearly and conspicuously" tell readers that content that pitched Shape products is advertising, NAD said.

The Water Boosters content fell smack under the increasingly vigilant eyes of industry and federal watchdogs trying to police the rapid rise of so-called native advertising or branded content. These are ads or content that resembles stories designed to seamlessly lattice into a digital website with a few cues meant to unmask their origin. Regulators are concerned because native advertising is expected to soar in both startup and legacy news organizations in coming years. For some media outlets and advertisers, native advertising is seen as a win-win. It brings new revenue for cash-strapped news organizations and more effective messaging opportunities for the advertisers than intrusive pop-ups or banner ads.

But some regulators and watchdog groups believe that it is not so clear-cut for the consumers, especially when the differences between editorial content – the news stories – and adjacent marketing campaigns get fuzzy. The questions get trickier when the sponsored content is shared on social media and the cues don't travel with it, but the name of your publication does.

As a media startup, you need to know what federal law requires as well as how industry best practices are being wrestled to the ground. Federal law, as well, applies to bloggers or others who write reviews or endorsements on your site and receive free products or payments from the products' makers.

The Federal Trade Commission has said it will announce new guidelines for native advertising in 2015. These guidelines will only be advisory; they won't be binding law. That said, most companies treat FTC guidelines as law, because the FTC likely will bring a civil enforcement action against a company that it believes is violating the guidelines. And federal law gives the FTC broad authority to regulate "deceptive" or "unfair" trade practices.

For now, native advertising is the subject of a great deal of self-policing. Some best practices address consumer-protection concerns that have surfaced. And some have been a response to embarrassing mistakes.

One of the most publicized gaffes captured media attention in January 2013, when TheAtlantic.com posted content paid for by the Church of Scientology. The content, which looked like a story, heralded 2012 as a "milestone year" for the church and credited its "ecclesiastical leader" David Miscavige with leading a "renaissance" involving 12 new churches and an expansion of the religion to more than 10,000 churches, missions and groups.

The copy carried a bright yellow "Sponsor Content" label above the headline, with an adjacent "What's This?" label, disclosing that the church paid for the article. It was published just days before an investigative book about Scientology was to be released

Journalists quickly raised questions about whether the comments on the post, all so positive, were also sponsored – or planted. Then, it was discovered that a moderator was censoring negative comments.

Within a day, TheAtlantic.com took down the content and issued an apology. "We screwed up ... We now realize that as we explored new forms of digital advertising, we failed to update the policies that must govern the decisions we make along the way."

Within two weeks, The Atlantic, one of the media pioneers in branded content, published new advertising guidelines that called for:

- More intensive review to ensure that advertising content fits with the publication's brand.
- More pronounced labeling and disclaimers.
- No role for sponsors in moderating comments.

Native advertising guidelines have also been issued by the National Association of Magazine Editors and the Interactive Advertising Bureau and the American Press Institute.

In December 2013, the Federal Trade Commission held a workshop, "Blurred Lines: Advertising or Content?" It explored how advertisers and publishers were using native advertising and how to protect consumers. It was a prelude to its forthcoming guidelines.

It's the Law

As far back as 1912, Congress passed The Newspaper Publicity Act. It not only required newspapers wanting to use special mail rates to identify owners and investors, it also said they must label advertisements that resembled editorial content. As result, consumers got used to seeing the "advertorial" label in their newspapers. The U.S. Supreme Court upheld that law the following year.

The Federal Trade Commission came on the scene shortly afterwards. It mission is to ensure that consumers are not deceived. The FTC may be best known for its Truth-in-Lending Acts and Do-Not-Call rules. In the media advertising space, however, it derives much of its power from Section 5(a) of the Federal Trade Commission Act, which outlaws "unfair or deceptive acts or practices in or affecting commerce."

Simply put, the FTC has ruled that "material connections between advertisers and endorsers should be clearly and conspicuously disclosed." And it has published specific guidelines to help publishers obey the law.
It has repeatedly updated these guidelines. Among them:

- Dot.com Disclosures: How to Make Effective Disclosures in Digital Advertising

- How to disclose paid endorsements and testimonials in advertising: Guides Concerning the Use of Endorsements and Testimonials in Advertising

- How to avoid deceiving consumers. Statement on Deception

Native Advertising

Native advertising, or branded content, has become one of the fastest-growing revenue streams for news organizations. Advertisers love it because it usually doesn't look like advertising, the way old print advertorials with different fonts did. The ads are meant to be "native" to their host sites, blending in with the editorial content. Sometimes these ads are screened with a light yellow or blue background to offset them from news stories. They are supposed to carry a disclaimer, signaling to users that they are paid content.

Sometimes native advertising doesn't even overtly promote a product. It may be something like Qualcomm's 20-story "What's Inside?" series that appeared on Mashable, exploring new technologies powering new products, like cell phones. The articles looked like news stories, but they were paid for by Snapdragon, a brand of processor chip made by Qualcomm. While Mashable identified Qualcomm as the series' sponsor during the November 2012 through March 2013 campaign, the NAD ruled that Qualcomm didn't have to continue to identify itself after its sponsorship ended.

The FTC requires news outlets to be transparent about who has created their paid content because it wants to limit any risk that a consumer might think it's coming from a journalistic or unbiased source. In cases where there are health or medical claims, it also wants to be sure consumers are not harmed.

Transparency has gotten opaquer, however, as the media landscape has gotten increasingly complicated. One factor is the multiple labels news outlets use to designate native advertising. They include "sponsored by," "presented by," "featured by," "promoted by," or "in partnership with." Paid content can also appear in promoted listings in Facebook or on Gmail, in recommendation widgets and in paid search ads.

Less frequently is the content labeled "advertorial" or "paid for by." If the content is shared, say on Twitter, it might carry a "Promoted by" label or might just carry a #paid ad, #ad or #paid hashtag. In November 2014, the FTC settled an enforcement action with an ad agency whose employees tweeted positive statements about a Sony product without disclosing that Sony was a client of the ad agency.

Speakers at the FTC's 2013 hearing on native ads testified that early research suggested that consumers often didn't even notice these labels and frequently didn't understand them when they did. Moreover, when consumers came across something formatted to look like a news article, they thought it was a news article.

Among the issues that surfaced: How would a consumer know that a "sponsor" label on an article paid for by an advertiser means something different than a sponsor identified on NPR who is not paying for promotional copy but is underwriting NPR's journalism?

What's Different Now?

To be sure, advertorials and infomercials have been around for decides. Why the current fuss? A lot has changed including:

- The appearance of the advertising.
- The ease of sharing it via social media channels.
- The mindset of news startup founders.
- A news organization's role in creating native ads.

Critics say this type of paid content is designed to trick users into thinking they are bona fide news stories thereby hitchhiking on a publication's credibility and trust.

Advertisers can digitally track who's looking at their campaigns and they say their metrics show that users want to engage with brands they like and that user engagement is higher with native ads than with banner or display ads. When users like branded content enough to share on it their social media streams, it's a force multiplier: the users, in effect, become brand acolytes.

Branded content, however, doesn't just stay anchored on a publisher's site under the brand's logo. It can travel though social media and show up on other sites where its origin as a native ad gets lost. Adding to the branded-content fire hose is the fact that several digital publishing platforms, such as Facebook, Twitter, Tumblr or Pinterest, are open to all posts, and brands can post their promotional content on them without paying a thing,

As more media entrepreneurs launch news startups, new founders may be less anchored in old journalism norms, particularly the separation of church and state that kept the revenue side of news organizations strictly apart from the news side.

Moreover, many new startups are launching their own creative divisions to produce branded content, not just place it on their site. That adds more wrinkles: If publishers create content for advertisers does that imply endorsement of a product? Publishers also need to take care that they don't risk potential liability if any content they create leads to consumer confusion or is misleading or deceptive about a product. The FTC can hold ad agencies liable if they participate in creating an ad or disseminating an ad and knew, or should have known, it was deceptive.

What's at Stake?

If news outlets violate FTC guidelines, the agency can use its civil enforcement powers to sue them, fine them or issue a letter requiring compliance with its rules.

For instance, the FTC has sued several sites that are masquerading as news outlets but are really hawking weight-loss pills. They mislead consumers by running fake stories by fake journalists attesting to the pills' effectiveness.

In another case, the FTC in 2011 fined a Tennessee company $250,000 to settle charges that it advertised its how-to-play guitar DVDS by paying fake reviewers to post positive online reviews.

In using letters, the FTC in 2013 alerted major search engine companies, such as Google and Bing, that including paid rankings in search results was a form of advertising. To avoid deception, they needed to allow consumers to distinguish natural search results from paid advertising delivered by the search engine.

In 2009, the FTC updated its guidelines on how companies and bloggers should approach paying for blog coverage or online reviews. It stipulated that bloggers must disclose "any material connections they share with the seller of the product or service," such as cash or a free product, when writing about it. The FTC considers a post from a blogger who receives money or an in-kind payment to be an endorsement. Bloggers and brands can be fined up to $11,000 for failing to reveal sponsorships.

As far as the FTC is concerned, it doesn't have to prove that a company intended to deceive the public – just that an ad misleads consumers and causes harm.

Takeaways

Here are some best practices to consider:

- Prominently label paid content "as close as possible" to the ad.
- Tell users who created the content.
- Don't use bylines on sponsored articles; it suggests that a journalist wrote them.
- Be sure that labels and disclosures needed to prevent an ad from being deceptive also appear on social media platforms.
- Avoid making disclosures through pop-ups, which can be blocked.
- Steer clear of using hyperlinks, requiring consumers to click on disclosures that involve health and safety issues or product costs.

Read More

Promoting Its Own Products, a Magazine Labels ad Ad as News. http://www.nytimes.com/2014/01/17/business/media/promoting-its-own-products-a-magazine-labels-an-ad-as-news.html

Blurred Lines: Advertising or Content? An FTC Workshop on Native Advertising. http://www.ftc.gov/news-events/events-calendar/2013/12/blurred-lines-advertising-or-content-ftc-workshop-native

FTC Staff Revises Online Advertising Disclosure Guidelines. http://www.ftc.gov/news-events/press-releases/2013/03/ftc-staff-revises-online-advertising-disclosure-guidelines

Soon, Bloggers Must Give Full Disclosure http://www.nytimes.com/2009/10/06/business/media/06adco.html?scp=2&sq=bloggers& st=cse

Qualcomm Cleared in Self-Regulators' 1st Native Ad Probe. http://www.law360.com/articles/477916/qualcomm-cleared-in-self-regulator-s-1st-native-ad-prob

Chapter 5:
Selling Online Advertising

Selling advertising – and making sure you get paid for it – are major challenges for most online media startups. Especially when the advertisers are local merchants who don't have much of an advertising budget themselves and whose businesses have their own ups and downs.

For those startups smart enough to have their customers sign a contract or insertion order, there can be legal recourse if a customer doesn't pay. But often that legal path is not worth traveling.

Simply put: If you agree to design an advertisement or run an ad in a specified place for a period and you fulfill your side of the bargain, the advertiser must pay the agreed-upon price. But if your phone calls and invoices continue to be ignored, you can sue for breach of contract. Whether your lawsuit goes to small claims court or general civil court will depend on the amount due, and it also will vary significantly state to state.

Site founders have a couple of ways to circumvent getting stiffed on ad sales.

"Most of us are smart enough to get paid upfront," said Dylan Thomas, founder of TucsonSentinel.com and former president of LION Publishers, the membership group for Local Independent Online News publishers. "Really, what are you going to do if someone signs up to pay monthly and doesn't? The cost of pursuing that would probably outweigh the money you'd get."

Not to mention that many small startups consider themselves to be part of their community and don't cotton to the idea of kneecapping customers who are also local readers to get paid.

Strategies for Selling Ads

Strategies for selling ads – and getting the revenue from them – involve using ad networks, requiring up-front payments, insisting on credit-card payments, and listening to your gut.

By turning your available ad space over to an ad network, you can avoid a lot of headaches. The ad networks will screen the advertisers, target their ads to appropriate sites, handle the contracts and collections, and give the advertisers real-time analytics. Your site will get a share of the revenue.

Kenny Katzgrau, co-founder of Broad Street Ads, says his company tries to help independent publishers avoid the time and expense of collecting unpaid bills. Most advertisers will sign up for a six-month deal that requires them to pay a portion of the cost monthly via credit card. The second most-popular deal requires the advertiser to pay half up front and half at the end of the campaign. The third most-popular option requires full payment up front.

Publishers who make a sale on behalf of other publishers in Broad Street Ads' network have the responsibility to collect on their contracts. "We are going to bill you regardless of whether or not you got paid so we can pay other publishers," he said.

Broad Street, like other ad networks, works to expand the universe of advertisers by offering tools, like "Selfie" that opens the door to customers who don't have brick-and-mortar establishments but may work from home, for instance, as a web designer, and want the community to know about their business

Credit-card sales were the preferred option for Debbie Galant when she was publishing Baristanet. She said the best way to collect for ad sales was to sign up advertisers for month-to-month ads that were paid by credit card and automatically renewed until the advertiser asked to stop the ads. Often advertisers got a discount to sign a multi-month deal.

“We just found it was an easy way to collect even though you had to pay the credit-card company a percentage,” she said. Some small startups, however, don’t want to pay those fees and prefer to invoice advertisers or collect in person.

Galant recalls a particularly “loony” professional who kept writing to say she wanted to advertise on Baristanet. She, like many small publishers, learn to proceed in some cases with caution: “I said: Don’t say anything. Tell her Debbie will come to pick up the check.”

Jay Rahman, co-owner and reporter for the Paterson Times recalls an overture from a tax preparer who wanted to advertise but pay after tax season kicked off; Rahman demurred.

He says most local advertisers are not online, and many do not like using PayPal. They like to cut deals with you one on one, in person.

Finally, it is important to remember that selling ads can entail some other legal responsibilities. If you are a for-profit startup, you need to pay attention to whether you are based in a place where the city imposes a tax on advertising sales – something you will need to collect and turn over to the city. If you are a nonprofit startup and get money from advertising, it will not likely be part of your charitable mission and you will be required to pay unrelated business income taxes on that income.

Key Takeaways

- Be sure to use written contracts or insertion orders. The simpler the better.
- Offer discounts to customers using credit cards and signing up for several months.
- Ask to be paid upfront if a customer doesn’t sound like a good bet.

Chapter 6
SPAM: Email and Text Communications

Email and text messages have introduced a few legal requirements for journalism startups, especially if you use email newsletters or mobile alerts to promote your venture. The key is adhering to federal laws regulating these electronic communications.

For many news startups, e-newsletters are an important way to engage and grow their audiences and even to do fundraising. Some startups may attract corporate sponsors or advertisers to defray the cost of producing e-content or subscribing to an email marketing service. Others use them as another way to solicit donations to fund their nonprofit ventures.

As more people consume news on their cell phone, news startups are increasingly reaching people via text messages or news alerts.

Two federal laws address commercial messages that people don't want, so-called spam: the Telephone Consumer Protection Act (TCPA) and the Controlling the Assault of Non-Solicited Pornography and Marketing (CAN-SPAM) Act. The CAN-SPAM Act of 2003, signed into law by President George W. Bush, established the nation's first national standards for the sending of commercial e-mail. The Federal Trade Commission (FTC) is empowered to enforce its provisions.

CAN-SPAM sets rules for commercial messages and gives people the right to have you stop emailing them. It spells out tough penalties for violations; each separate email that violates the act could land a penalty of up to $16,000. CAN-SPAM covers all commercial email messages, not just bulk email traffic. So, what does that mean? The law defines that as "any electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service." That includes email that promotes content on a commercial website, so if your website makes any money at all and your email links back to it, you should play by the rules.

In most cases, news startups will subscribe to an email marketing company, such as Constant Contact or Mail Chimp, to handle their emails and help them follow the law. These companies charge a monthly fee that usually depends on the size of your contacts list. They provide design templates, handle requests to unsubscribe, and give you metrics on the number of people who opened your email or clicked on any of the internal links. They will, however, require you to affirm that you have permission from each recipient to send them an email.

Federal law says you must follow these basic requirements:

- **Create an accurate header.** The "From" "To" and "Reply-To" information must identify the originating email address and domain name and identify the person or business who is sending the email. It cannot be misleading.

- **Use accurate subject lines.** The subject line must accurately describe the content of the email; it cannot be deceptive.

- **Tell recipients where you are located.** The email must include a valid physical postal address, such as your current street address, a post office box you've registered with the U.S. Postal Service. It can also be a private mailbox you've registered with a mail-receiving agency under the auspices of the Postal Services.

- **Include "why" information.** You must tell recipients why they are receiving this email. For instance, *"You are receiving this email because you subscribed to our newsletter, or signed up at xx event, or donated to our website "*

- **Tell people how to unsubscribe**. You must provide a clear and conspicuous way to opt out of future emails. You may create a menu that allows people only to opt out of certain emails, but it must include an option to stop all commercial messages from you. If you don't subscribe to an e-newsletter service, you must make sure these requests don't get stuck in your spam filter.

- **Honor unsubscribes promptly.** You must honor a request to unsubscribe within 10 business days. You must be able to process opt-out requests within 30 days of sending your email. You cannot charge people a fee to do this, nor collect any additional information from them other than their email address. Once people have said they don't want to
- address. Once people have said they don't want to receive any more emails from you, you cannot sell or transfer their email addresses.

The Federal Trade Commission's Bureau of Consumer Protection offers more guidelines.
The originator of an email as well as the email marketing company or an advertiser whose product is promoted in an email could be held liable for violations. Harsher penalties, including criminal charges, can be applied to anyone involved in serious spam activities.

There are no restrictions against your emailing existing users or anyone who has inquired about your products or services, even if these individuals have not given specific permission. These messages are classified as "relationship" messages under CAN-SPAM.

The TCPA and the FCC's rules also ban many text messages sent to a mobile phone using an autodialer. These texts are banned unless:

- The recipient previously gave consent to receive the message
- The message is sent for emergency purposes.

This ban applies even if you have not placed your mobile phone number on the national Do-Not-Call list of numbers of telemarketers must not call. For more information on the TCPA and the national Do-Not-Call list, see the FCC's consumer guide.

E-mail Records as Public Records

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In addition to abiding by rules for sending out e-mails, increasingly media entrepreneurs can obtain government emails under open-government laws. As more citizens and journalists have sued to get access to public officials' emails, more states are declaring electronic correspondence involving public business to be public records.

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After Ken Austin, founder of The Austin Bulldog sued to get the emails of city officials, he not only received the records, but the law was also changed to require officials to use government emails for government business or forward to their government account emails sent or received via their personal email address.

Read more

CAN-SPAM Act: A Compliance Guide for Business http://www.business.ftc.gov/documents/bus61-can-spam-act-compliance-guide-business

Email Privacy and CAN-SPAM Laws to be Aware Of http://emailmarketing.comm100.com/email-marketing-ebook/can-spam-law.aspx

E-mail Records as Public Records
http://www.rcfp.org/access-electronic-communications/e-mail-records-public-records

Chapter 7
Privacy Policies and Terms of Use

In 2010, journalists at the Cleveland Plain Dealer noticed an odd trend in comments on their Cleveland.com website. A commenter pseudonymed “lawmiss” had posted more than 80 comments, many involving high-profile criminal cases that were before Ohio state court judge Shirley Strickland Saffold.

For instance, of a Cleveland firefighter who was convicted of capital murder in Saffold’s courtroom, lawmiss wrote “[i]f a black guy had massacred five people then he would’ve received the death penalty. A white guy does it and he gets a pat on the hand. The jury didn’t care about the victims.” Lawmiss also opined on the performance of local prosecutors and defense attorneys.

The comments prompted the journalists to dig deeper to discover lawmiss's identify. An editor looked up the email address lawmiss used to register with Cleveland.com and discovered that it was Saffold’s personal AOL account. Saffold denied posting the comments and said that others, including her 23-year-old daughter, had access to the account. She sued the Cleveland Plain Dealer and related companies for $50 million. But more than claiming the newspaper defamed her, Saffold also alleged that the newspaper violated its privacy policy by publishing her personal information. The lawsuit settled on undisclosed terms.

The Saffold case demonstrates the importance for all companies – including newsgathering enterprises – of ensuring that they adhere to all promises they make to the public about how they handle personal information. This includes their privacy policies and terms of use.

As a newsgathering business, you have an instinct to provide as much information as possible to the public. But as an Internet-based business, you have several legal obligations that require you to keep certain information private and secure.

Among the most common privacy-related legal troubles websites face is when a regulator or plaintiff discovers that the site has not adhered to the promises it made in its privacy policy or terms of use. Regulators and courts view privacy policies as promises to customers, and they view terms of use as contracts with the customers. Both contain obligations that both you and your customers must follow when the customers use your services. If you break the promises that you make in either document, you can face regulatory inquiries or, even more alarmingly, class-action lawsuits that could put you out of business.

The solution to this problem sounds simple: Don’t post a privacy policy or terms of use. And in fact, this *was* an effective solution in the early days of the Internet. You were not required to say anything about your privacy policy, but if you did say something, it had to be accurate.

Today, that is no longer true. Several laws worldwide, including in the United States, now require websites, apps and other online services to have privacy policies that clearly describe how the companies collect, process, store, and share customers’ personal information. Here's a review of the primary laws that websites should consider when developing their privacy policies.

California Online Privacy Protection Act (“CalOPPA”)

Most notably, the California Online Privacy Protection Act (“CalOPPA”) requires all website and online service operators that collect personally identifiable information about California residents to conspicuously post a privacy policy. Because it is quite difficult to operate a website in the United States that entirely avoids dealing with a single California resident, CalOPPA has become a de facto national requirement.

If you operate a basic, advertising-supported local news website, you might wonder whether CalOPPA even applies to you. CalOPPA applies if you collect *any* individually identifiable information, such as a consumer's name, address, email address, social security number, or "any other identifier that permits the physical or online contacting of a specific individual." The definition is quite broad. For example, if commenters must sign up with their email addresses, then the site is collecting personally identifiable information and CalOPPA applies.

You might argue that if you're operating a local news website in, say, Iowa, you won't be collecting any personally identifiable information from Californians. That may be true, but it is unlikely given the global nature of the Internet. If even one Californian provides personally identifiable information to you, then CalOPPA applies to you.

Assuming you fall under CalOPPA, you must post a privacy policy that identifies:

- The categories of personally identifiable information collected via the website or service (i.e., e-mail address, name, mailing address, etc.).
- The types of third parties who may receive this personally identifiable information (PII).
- If the website offers a consumer a process to review and request changes to the consumer's PII (the process is not required under CalOPPA, merely the disclosure if such a process exists).
- How the website notifies visitors about changes to the privacy policy.
- How the website responds to "do not track" signals or other mechanisms that enable a consumer to determine how the consumer's online behavioral information is tracked across websites.

California Shine the Light Law

If your website provides customers' personal information to third parties, and you know or reasonably should know that those third parties used the information for their direct marketing purposes, additional requirements apply under California's Shine the Light law.

The statute is fairly complex, and we need not get into the intricacies of the law here. What you need to know is that most websites fulfill their requirements under this law by notifying customers, in their privacy notices, of their policy of not disclosing information to third parties unless the customer opts in to or opts out of such disclosure and provides a cost-free way to exercise that right.

Websites subject to the Shine the Light law also must describe, in a notice linked from the site's home page, a customer's rights under the statute and provide a designated mailing address, email address, toll-free phone number and fax number. This applies unless the business either (1) instructs all agents and supervisors who regularly have contact with customers about how to comply with the statute or (2) makes the addresses or numbers readily available at all its places of business in California.

Children's Online Privacy Protection Act ("COPPA")

If your website collects, uses or discloses personal information from children under 13, another law applies. You must comply with numerous collection, use and disclosure requirements under the federal COPPA statute and the accompanying regulations issued by the FTC. (COPPA also contains several detailed restrictions on collection of information from minors under 13; this section only focuses on the notification requirement of the statute). COPPA most likely will not apply to general-interest news sites. But some news sites have sections or features targeted toward children (like the Kid's Pages of local newspapers). If those sites collect information from minors, COPPA may apply.

Additionally, if a site uses "age-gating" (i.e., asking registered users to enter their complete birth date), COPPA may apply if a user states that he or she is under 13. COPA requires covered websites and online services to state the following in a website privacy notice:

- Name, address, phone number and email address of all operators collecting or maintaining personal information through the site or service.

- Description of the information the operator collects from children, including whether children can make their personal information available to the public.

- How the operator uses the information.

- The operator's disclosure practices.

- A statement that the minor's parent can review or have deleted the child's personal information and refuse to permit its further collection and use, and a description of how they can do that.

Drafting a Privacy Policy

As you may have gathered, you almost always need to post a privacy policy. Even if you fall into the rare category of website that is exempted from this requirement, many customers have come to expect websites to clearly and accurately disclose how they handle personal information. As you develop your privacy policy, consider these points:

- **Avoid boilerplate.** You may be tempted to copy-and-paste from the policy of another website. Indeed, privacy policies often contain similar language. But your privacy policy must be drafted for *your* website, app or other online service. For instance, you might share registered users' email addresses with advertisers, while your competitor might only share the users' IP addresses. If you copy your competitor's privacy policy, which states that you only share IP addresses, then you can find yourself in serious legal trouble down the road. Plaintiff's lawyers and regulators are eager to pursue websites that do not accurately describe how they handle users' information.

- **What does your privacy policy cover?** At the beginning of your privacy policy, clearly state which services are covered by the policy. Does the privacy policy apply to all your company's websites?

- **Use clear language.** Privacy policies should be understandable and clearly explain how you collect, process, retain and share users' personal information. They should not look like the tiny-print contracts that you sign when you rent a car or purchase a cell phone. Consider a summary of the privacy policy at the beginning of the document, followed by the more detailed policy (also known as a "layered" privacy policy). FAQs also may help to clearly explain your site's privacy policy.

- **What is legally required?** We've outlined the primary statutes that require specific elements in your privacy policy. Work with a lawyer to determine whether these – or other legal requirements – necessitate other provisions in your privacy policy.

Common Elements of Privacy Policies

The following are some of the most common provisions in privacy policies:

What types of personal information are collected? Make sure ~~that~~ you comprehensively describe every category of information you are collecting or may collect in the future. If you collect particularly sensitive information, such as geolocation data, you should strongly consider getting your consumer's consent through a pop-up notice, checkbox or other mechanism.

- Does the site log IP addresses and other automated browsing information?
- Does the site use cookies, web beacons or other tracking technology?
- How does the site use this information? (i.e., to provide services, to allow advertising on the site, to analyze traffic).
- With whom does the site share this information, and for what purposes? (i.e., the site's service providers, third-party advertisers, ad networks, etc.)
- Describe situations in which site will provide customer information in response to subpoena, court order, law enforcement request or to protect the rights of the site or a third party.
- Generally, describe the site's "reasonable security protections" but do not make specific commitments.
- Reserve the right to share customer information in connection with a merger, asset sale or other corporate transaction.

Make the policy accessible on all platforms. Make sure your privacy policy is easily viewed on all computers, tablets, smartphones and other devices. In 2012, the California Attorney General sued Delta Airlines for failing to include a privacy policy with its mobile app.

Practice what you promise. After you have drafted and posted your privacy policy, make sure you adhere to it. For instance, if your policy states, "we do not share your personal information with third parties for marketing purposes," that means that if an advertising network asks you to provide the email addresses of all your registered users, you will decline. You could change your privacy policy to allow such sharing of information that you collect in the future, but that change is not retroactive (i.e., changing the policy would not enable you to share personal information that you collected when the old privacy policy was in effect). As you hire more employees, make sure that they understand what the privacy policy requires.

Terms of Use

Most websites have both privacy policies and terms of use. Unlike privacy policies, terms of use are not required by statute. But it always is in the best interests of a website to post terms of use.

A terms-of-use document is a contract between the website and its consumers. By using the website, a user agrees to the terms. Most importantly, terms of use restrict the distribution and republication of the website's content and allow websites to control the use of their sites.

Below are some common issues addressed in terms of use:

Scope of license for use of service: Can the user only access the site for non-commercial purposes?

Distribution of the website's content: Does the user have any rights to repost or distribute the website's content? Typically, websites reserve all intellectual property rights in their content.

Access controls: Websites often prohibit unauthorized access to the site and require registered users to provide accurate registration information.

User-generated content: Websites typically reserve a broad license to republish user-generated content, but the users continue to hold the copyright. Terms of use also can prohibit certain types of user-generated conduct (i.e., indecent images, profanity, defamatory material, etc.). Websites often reserve the right to monitor user content but disclaim any obligation to do so.

Warranties and disclaimers: The terms of use should broadly protect the website operator's interest by disclaiming warranties and legal duties, limiting the website's liability, and requiring the user to indemnify the website for the user's activities. Such language is standard and highly recommended for all websites.

Choice of law and forum: The terms of use could require that the laws of a particular state apply to any dispute arising from a consumer's use of the site. The terms also could require the dispute to be litigated in a particular court or before an arbitrator.

Key Takeaways

Your website should include a privacy policy. You likely are legally required to have a privacy policy, and even if you are not, posting a policy is a best practice the helps to build trust with consumers and reduce your liability.

Your privacy policy should be clear, in plain language, and accessible via all platforms.

Your website should contain terms of use that protects your intellectual property and limits your liability.

Read More

California Attorney General, Making Your Privacy Practices Public
https://oag.ca.gov/sites/all/files/agweb/pdfs/cybersecurity/making_your_privacy_practice s_public.pdf

Electronic Privacy Information Center, California's Shine the Light Law https://epic.org/privacy/profiling/sb27.html

Federal Trade Commission, Complying with COPPA, Frequently Asked Questions
http://www.business.ftc.gov/documents/0493-Complying-with-COPPA-Frequently-Asked-Questions

International Association of Privacy Professionals, Best Practices in Drafting Plain Language and Layered Privacy Policies https://privacyassociation.org/news/a/2012-09-13-best-practices-in-drafting-plain-language-and-layered-privacy/

Chapter 8
Defamation

For major media companies, defamation lawsuits are an annoyance and often lead to considerable expenses. But a single defamation lawsuit generally will not put a large media company out of business.

The same is not necessarily true for media startups. For a company that has a six-figure budget, few staff members, no libel insurance and no retained counsel, a libel lawsuit could break the bank. And the average defamation verdict exceeds a half-million dollars, and some verdicts have exceeded $10 million.

Anyone can *file* a defamation lawsuit, regardless of whether their claim has any merit. And defending even the most frivolous lawsuit can be time-consuming and costly (though many states have statutes that allow you to recover attorney's fees and costs for defending against truly meritless defamation lawsuits). You can reduce the chances of facing a *successful* defamation lawsuit by carefully evaluating all risks before publication and ensuring that your reporting is careful and rigorous.

You should understand the basic rules of defamation and ways you can minimize your legal risk. Here are some points to consider:

- Defamation only Applies to *False* Statements
- A statement cannot be defamatory if it is true. U.S. law places the burden on defamation *plaintiffs* to demonstrate that a statement was false. This is a significant difference from other countries, which require defamation *defendants* to prove that their article was true. In practice, this makes it much harder for plaintiffs to succeed in defamation lawsuits in the United States.

Did the False Statement cause harm? Even if the article undeniably contained an inaccurate statement, the plaintiff must demonstrate that this inaccuracy caused the plaintiff harm. A minor, harmless deviation from the facts may not lead to any liability. In other words, an article that is substantially true is not defamatory. For example, if an article states that a police chief was indicted for embezzling $2.2 million from the city, when he was indicted for embezzling $2.1 million, a court likely will find that this inaccuracy did not lead to any harm. If, however, he had not been indicted at all, he could have the basis for a defamation claim.

Fact vs. Opinion

Any restaurant critic who is any good has, at least once or twice, been threatened with a defamation lawsuit. Fortunately, nearly all these threats are completely empty. That's because courts have long held that statements of opinion cannot be the basis for a defamation claim. A statement can only give rise to a defamation claim if it is capable of being proven true or false.

So, when a restaurant critic says that the new Italian restaurant serves linguini that tastes like day-old leftovers, the restaurant cannot win a defamation lawsuit. No judge or jury could ever determine with certainty whether the linguini actually tastes like day-old leftovers.

However, the protection for opinions goes only so far. If the critic said, for example, that the Italian restaurant serves leftovers when, in fact, it does not, then the restaurant might have a defamation claim. In that case, the critic would be making a statement of fact rather than opinion.

Additionally, you cannot avoid defamation claims by couching factual statements as opinions. For instance, if you state, "It is my opinion that the police chief has embezzled $2.2 million," a court almost certainly will interpret this as a statement of fact. If that statement is substantially false, you could face a defamation lawsuit even though it begins with "it is my opinion."

Standard of Care

Perhaps the most important question in any defamation case is whether the plaintiff is a public figure or a private figure. That technical distinction often makes all the difference in determining the success of a defamation claim.

To understand why this matters so much, consider the cases of L.B. Sullivan and Elmer Gertz.
Sullivan was a city commissioner in Alabama who sued the New York Times for statements about him in an advertisement. In 1964, the Supreme Court ruled that because Sullivan was a public official, he was required to demonstrate that the Times published the ad with "actual malice," a legal term meaning knowledge that the statement was false or reckless disregard for the truth. This is a very high standard. In the half-century since, then, plaintiffs have rarely been able to prove that a media outlet acted with actual malice.

Gertz, a lawyer who was representing the family of a man killed by a Chicago police officer, filed a defamation lawsuit against the John Birch Society after its newsletter falsely accused Gertz of being affiliated with Communist groups and having a criminal record. The Supreme Court ruled that because Gertz was a private figure, he did not have to prove actual malice to succeed in a defamation lawsuit. Gertz, the Supreme Court reasoned, was a private figure who did not seek the attention that he received from the John Birch Society. Additionally, Gertz did not have the same access to "self-help" (i.e., correcting the record) that public officials and public figures have. Because Gertz was not a public figure, he only had to demonstrate that the newsletter was negligent, a much lower standard than actual malice.
Forty years later, the Supreme Court's ruling in Gertz's case continues to set the framework for defamation law: The actual malice requirement makes it nearly impossible for public figures and public officials to succeed in defamation lawsuits. But private figures need only demonstrate that the media outlet was negligent.

For this reason, legal arguments in defamation cases focus on whether the plaintiff is a public or private figure. In some cases, that is easy to discern: A member of Congress, for example, is a public official. So is the mayor of a small town. And the police chief. But there are closer calls: What about the second-in-command of a police department? Or the deputy administrator of the public sewage department? Courts have come to different conclusions about such individuals, which means courts must closely examine the facts.

Unless the subject of your reporting is clearly a public official or public figure, you should assume that the individual is a private figure who is not required to demonstrate actual malice.

Examining the Reporting

Even if a statement is false and damaged the plaintiff, a court will not automatically award damages. As described above, the defendant will only be liable if the judge or jury finds that the defendant's reporting fell below a standard of care. Private-figure plaintiffs must demonstrate that the journalism was negligent, and public-figure plaintiffs must demonstrate that the journalist or news organization acted with actual malice.

In either scenario, the court will focus on the steps that the journalist took to verify a statement's accuracy. To determine the level of care that the journalist exercised, the court will consider:

- Did the journalist provide the plaintiff with an opportunity to respond to the allegations before publication?
- If the journalist was unable to reach the plaintiff, what steps did the journalist take to attempt to make contact?
- How reliable are the sources that provided the information to the journalist?
- Are the sources anonymous or on-the-record?
- Did the reporter gather information via means that some might view as unethical, such as using false pretenses or hiding a recording device?
- Did the reporter make a statement that indicates that he will publish regardless of whether the information is true (i.e., "I am going to bring you down.")?
- Did the journalist obtain the information from a public document, such as a court filing, or from the statement of a public official?
- Did the journalist ignore publicly available information that contradicted the reporting?

Keep in mind that during discovery, plaintiffs often seek to obtain journalists' email messages with editors, notes, and other communications and records that could shed light on whether the journalist acted negligently or with actual malice. For this reason, it is wise to consider adopting a records and email retention policy that requires the destruction of internal documents and communications after a specified period (i.e., destroy notes two months after publication of a story, or automatically delete unarchived email messages after 45 days). If, however, you receive a notice of a potential lawsuit, you are obligated to preserve all records and communications related to that dispute.

State Law Protections

Many states have enacted laws that provide some protection to media outlets that are sued for defamation.
These states, either through statutes or court rulings, recognize a "fair report privilege." Under this rule, a media outlet cannot be sued for fairly and accurately reporting on public proceedings and documents. For example, if a news story names a suspected perpetrator of a sexual assault, the suspect cannot win a defamation lawsuit if the story is based on a police report. Keep in mind that only some states have fair report privileges, and the scope of these privileges vary significantly. Some of these privileges cover a wide range of government proceedings and documents (such as press releases by executive agencies) while others more narrowly cover judicial proceedings.

In states that have enacted "retraction statutes," a defamation plaintiff must first demand that the media outlet retract the allegedly false statement. If the media outlet publishes a retraction within the time period provided in the statute, the plaintiff is precluded from obtaining the most lucrative categories of damages. Most retraction statutes were enacted before the modern Internet, and therefore only explicitly apply to broadcasts and print publications. But some courts have begun to apply the statutes to online publications.

Privacy Torts

Close relatives of defamation are what are known as privacy torts. Privacy tort claims are less common than defamation claims, but you should be aware of them because they may provide plaintiffs with a claim even if the article at issue does not contain a false statement of fact. The four privacy torts are:

- **False light:** The plaintiff claims that the statement portrayed the defendant in a "false light" that harmed the plaintiff's dignity or emotional well-being. In other words, a plaintiff could sue even if the published statement was true and did not damage the plaintiff's reputation. Several states are limiting or eliminating false light claims.
- **Intrusion upon seclusion:** The plaintiff claims that the defendant intentionally invaded the plaintiff's private affairs in a manner that would be offensive to a reasonable person, causing suffering or mental anguish. This claim focuses on the act of *gathering* the information rather than the publication.
- **Publication of private facts:** The plaintiff claims that the defendant disclosed private facts that are not newsworthy, and the disclosure would be highly offensive to a reasonable person. Courts often dismiss such claims by public officials and figures, reasoning that the disclosure of these details about them generally are newsworthy.
- **Misappropriation/right of publicity:** The plaintiff claims that the defendant used the plaintiff's name or likeness for commercial purposes without the plaintiff's consent. For your purposes, the most important thing to note is that in most states, plaintiffs cannot bring such claims if their image was used in purely editorial content, such as news reporting. Misappropriation issues typically arise if an individual's name or likeness is used in advertising.

Key Takeaways

Rigorous, accurate reporting is the best way to minimize your risk of a defamation lawsuit.

Pay careful attention when you are reporting about private figures.

Whenever possible, you should base your reporting on public records such as court filings and police reports.

If you discover that you published an inaccurate statement, publish a retraction. It is not only the right thing to do, but it also might reduce your risk in a defamation lawsuit.

Read More

Electronic Frontier Foundation, Online Defamation Law https://www.eff.org/issues/bloggers/legal/liability/defamation

Digital Media Law Project, Fair Report Privilege http://www.dmlp.org/legal-guide/fair-report-privilege

Digital Media Law Project, State Law: Retractions http://www.dmlp.org/legal-guide/state-law-retractions

Reporters Committee for Freedom of the Press, Public Officials v. Private Figures http://www.rcfp.org/first-amendment-handbook/identification-harm-fault-public-officials-vs-private-figures

Chapter 9
User-Generated Content

Less than a week after the Oklahoma City bombing, an anonymous user advertised for “Naughty Oklahoma T-shirts” on an AOL bulletin board. The online post contained several highly offensive slogans and encouraged people to call “Ken” for more information.

The prankster posted a phone number that belonged to Seattle resident Kenneth Zeran. As expected, many who viewed the post did not see the humor in it. Zeran received several angry phone calls and death threats. He couldn't change his phone number because he used it for his home business. He called AOL to complain, and AOL removed the post.

The next day, an anonymous user posted yet another entry about the T-shirts, again encouraging people to call Zeran’s phone number. The number of posts increased, as did the phone calls. Within a week, Zeran was receiving an abusive phone call every two minutes. An Oklahoma City radio announcer soon obtained a copy of the first post and read it on the air (including Zeran’s phone number).

In 1996, Zeran sued AOL, arguing that the company had a duty to remove the defamatory posting, notify its subscribers that the message is false, and screen future postings. Under traditional theories of negligence and defamation, Zeran may have had a viable case. But the U.S. Court of Appeals for the Fourth Circuit held that a recently enacted federal law immunizes AOL for any liability arising from the pranksters’ post.

In 1996, Congress had passed the Communications Decency Act. Section 230 of that law states: “No 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.” That single sentence has done more to shape the Internet as we know it than any other law. Basically, it means that websites, mobile apps, ISPs and other online services are not liable for the content that their users post on the site either through direct comments or via social media commenting plug-ins such as Facebook.

Just think about it: What would the world look like if, say, a social media site was legally responsible for *every* word that *every* user posted? The site most likely would want to pre-approve all content before users post it to avoid any liability.

Absolution for Liability

As you develop your media company, Section 230 provides strong certainty that you will not be held liable for most content that users post on your site, app or other online service. The law provides immunity to all providers and users of “interactive computer services,” which it broadly defines as “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.” This covers websites, social media providers, mobile apps, ISPs, and just about any other online communications service.

The statute also provides immunity arising from any content provided by another “information content provider.” The law defines that 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.”

For online media enterprises, this means that you will not be held responsible for user comments. Users could write the most vile, defamatory comments – either anonymously or under their real names – and you will be free from liability for defamation

Myth Busting

One of the biggest misconceptions about Section 230 is that websites only have immunity if they take a hands-off approach, and don't edit or moderate any comments. Nothing could be further from the truth. In fact, Congress enacted Section 230 in response to a 1995 New York state court decision that held that Prodigy was responsible for user-generated content because it posted and enforced content guidelines. Congress was concerned that this decision would discourage online services from moderating user content.

To ensure that online service providers would feel free to moderate content, Section 230 states that providers will not lose their immunity due to “any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing or otherwise objectionable, whether or not such material is constitutionally protected.”

This means service providers have wide latitude to edit, delete, or even select user content without being held responsible for it. For instance, if your website requires a moderator to approve comments before they go public, your site still won't have to worry about claims arising from the comments that you do choose to publish. You could even edit a user comment and remain immune from any lawsuits arising from the content of the edited comment (though if your edits to the material *adds* defamatory content, then you could be liable).

Consider what happened to Ellen Batzel, a North Carolina attorney. She had hired Robert Smith to do some repair work at her home. Smith said he overheard Batzel claim to be related to Nazi Heinrich Himmler, and Smith noticed paintings in the house that appeared to be old and European. He sent an email to the Museum Security Network, a website dedicated to stolen artwork, identifying Batzel by name and claiming that “these paintings were looted during WWII and are the rightful legacy of the Jewish people.” Smith included Batzel's address in the email.

The email initially only went to Tom Cremers, the operator of the Museum Security Network. Cremers made minor wording changes and included it in an email digest sent to all the Network’s subscribers and posted on the Network’s website. He included a “moderator’s message” stating that “the FBI has been informed of the contents of [Smith’s] original message.” Smith said he had no idea that the email would be posted to the full listserv or posted on the Web. Batzel, who says she is not a descendant of a Nazi official, sued Smith and Cremers. The U.S. Court of Appeals for the Ninth Circuit held that Section 230 immunized Cremers, reasoning that he “did no more than select and make minor alterations to Smith’s e-mail.”

Batzel’s experience demonstrates just how broadly courts have interpreted Section 230 immunity. You can choose to post only some user-generated content that you receive – and edit that content – and you will not be liable if the user-generated content defames another person.

Exceptions to the Rule

As you may have surmised, there are very few cases in which a website or other online service will be found liable for user content. If you ask a lawyer to point to one of the rare exceptions to this rule, you most likely will be directed to the case of Roommates.com.

The website was designed to allow people to find roommates. Before a user could search or post roommates’ listings, they were required to create a profile to disclose information such as gender, sexual orientation, and whether the individual planned to bring children to the household. Other users were able to search profiles based on these criteria. The Fair Housing Councils of the San Fernando Valley and San Diego sued the site, alleging that it induces people to violate federal and state fair-housing laws, which prohibit discrimination based on race, religion, sex, familial status, sexual orientation and marital status. Roommates.com claimed that it was immune under Section 230.

The Ninth Circuit Court rejected the website's claim, reasoning that the questions about sex, family status and sexual orientation are asked of all people who want to use the website's services. By requiring these answers, the Court said, Roommate "becomes much more than a passive transmitter of information provided by others; it becomes the developer, at least in part, of that information." The Court noted that "[i]f you don't encourage illegal content or design your website to require users to input illegal content, you will be immune."

The Roommates.com case teaches us that if you induce your users to violate the law, you might lose Section 230 immunity. For instance, if you encourage users to post rumors about a local official, you might not be able to avoid a defamation lawsuit. The local official might be able to claim that you helped develop the defamatory content by encouraging readers to post rumors. But the Roommates.com decision is highly controversial, and other courts may not necessarily follow its holding.

It also is important to note that Section 230 has two explicit exceptions: It does not apply to user content that violates intellectual property laws or federal criminal laws.

So, if users upload video, audio, or other content that is copyrighted by a third party, that third party can sue you for copyright infringement. You cannot claim Section 230 immunity in a copyright lawsuit. To reduce the risk of being liable for a user's copyright infringement, consider registering with the U.S. Copyright Office. Under the Digital Millennium Copyright Act, if you register the name and address of an agent with the Copyright Office, a copyright owner first must serve your registered agent with a take-down demand notice. If you remove the material from your website, then you will not be liable for copyright infringement.

The federal criminal law exception often involves user-generated content that contains child pornography. If your website hosts child pornography, you will not be immune from criminal and civil penalties. If you become aware of user content that you believe may contain child pornography, you should promptly notify law enforcement and consult an attorney.

Key Takeaways

With some exceptions, you will not be liable for user comments and other user-generated content.

Editing, deleting or moderating user-generated content will not make you liable for that content, unless your changes add defamatory or illegal material to the content.

You might be liable for user-generated content if you actively induce illegal activities.

You may be liable for user-generated content that infringes the copyright of another party, but you can limit this liability by registering with the Copyright Office to receive notices of infringement.

Read More

Electronic Frontier Foundation, Section 230 Protections https://www.eff.org/issues/bloggers/legal/liability/230

Digital Media Law Project, Online Activities Covered by Section 230 http://www.dmlp.org/legal-guide/online-activities-covered-section-230

Reporters Committee for Freedom of the Press, DMCA Safe Harbor http://www.rcfp.org/browse-media-law-resources/digital-journalists-legal-guide/protection-infringing-material-posted-othe

Chapter 10
Access to Information and Places

If you're doing your job as a journalist, at least some public officials will want to prevent you from accessing information. They'll try to exclude you from city council meetings. They'll seek to close court hearings. They'll attempt to withhold public records. And they will make their best efforts to prevent you from ever accessing this information.

Fortunately, the United States and all 50 states have several statutes and court opinions that require the government to provide public access to meetings, government property and records. Of course, these rights of access are far from absolute; most access laws contain several exemptions that the government is eager to claim.
Here's an overview of the laws governing access to documents and meetings, and some best practices for getting the information you want.

Access to Government Meetings and Property

Unlike other countries, the United States opens most meetings of executive, legislative and judicial branches at the federal, state, and local levels.

There are, of course, limits to this right of open access. For example, city council meetings are presumptively open to the public. But in many states, city councils may go into executive session and exclude members of the public, including the press. (Some states allow members of the press, but not the general public, to attend executive sessions). The state laws on executive sessions vary significantly. The Reporters Committee for Freedom of the Press summarizes them by state.

Court proceedings also are presumptively open to the public, thanks to a series of rulings by the United States Supreme Court beginning in the 1980s. Under these rulings, both state and federal courts must allow members of the press and the public to attend hearings, trials, sentencings and other courtroom proceedings.
In rare cases, such as federal court hearings that require discussion of classified national security information, judges may close the courtroom. But such closures are very limited, and the entire trial must be open to the public.

Although the public has a right to access most court proceedings, many courts prohibit the use of cameras and other recording devices in courtrooms. Indeed, many courts also prohibit spectators from bringing computers or cell phones into a courtroom, making it difficult to provide real-time coverage of court proceedings. Some state courts have more media-friendly laws and allow computers, cameras, and other electronic devices.

Reporters also often want to access government property. Your access rights will depend on whether the property has traditionally been open to the public. Reporters may freely collect information, without restriction, on property that has been open to the public, such as sidewalks. If the property is open to the public for a limited purpose (such as schools), the media can gather information in the parts of the building that are open to the public but may be restricted in other areas (such as the classroom). And in property that is not open to the public (such as government agency offices), the media must obtain permission before entering.

Government agencies have wide discretion to issue press credentials for the media to receive special access to events, such as inaugurations and high school sports games. A survey of journalists found that 20 percent of respondents were denied press credentials at least once. Online news organizations face challenges in receiving credentials. For instance, SCOTUSBlog, which provides in-depth coverage of the Supreme Court, was denied credentials for the U.S. Senate.

Access to Government Records

The federal government and all 50 states have enacted statutes that provide a public right of access to government documents. These statutes all contain exemptions and other loopholes that government agencies often use to avoid disclosing their records, so it is important to be familiar with your legal rights, as well as strategies that help increase your chances of obtaining the records.

Obtaining records from the federal government is governed by the U.S. Freedom of Information Act. Your state's open records law will determine what state and local government records you can access. Check the Reporters Committee for Freedom of the Press overview of each state's specific provisions. Here are some FOIA guidelines:

FOIA covers *records*, not information. When you draft your FOIA request, keep in mind that FOIA only requires the government to provide records that already exist (i.e., documents, recordings, images, etc.). The government is not required to create a record. So, you can ask the government to provide its most recent employee roster. But you can't ask the government to create a roster. Therefore, it is very helpful if you know what records exist before you draft your request.

FOIA only applies to federal agencies and departments. Congress exempted itself from FOIA, so you cannot request that your local congressperson provide you with internal correspondence or other records. You can, however, obtain correspondence between members of Congress and federal agencies by sending FOIA requests to the agencies.

Keep your request general, but not *too* general. Drafting a FOIA request requires a careful balancing act. You want to make your request broad enough to encompass as many records as possible. But if your request lacks any specificity, the agency may stall for years, claiming that the search is time-consuming. FOIA requires a federal agency to state within 20 days after receipt of your request whether it will comply with the request, and if not, why not. But the statute does not set a specific deadline for producing the records. Some requests are open for years. Additionally, agencies may deny requests if they are not specific enough to identify particular categories of records.

Specify the format. If you are requesting large amounts of data (such as a database of public employee salaries), your request should state whether you would like that data in an electronic format (if so, specify the document type, such as .xls). If your request is not specific on this point, you might end up with thousands of pages of database printouts (that you may have to pay for an electronic file that is not easily accessible on a personal computer.

Understand the FOIA exemptions. If an agency denies your access to government records, it will claim one of nine exemptions provided in the statute:

- Classified documents.
- Internal personnel rules and practices.
- Information exempt under other laws.
- Confidential business information.
- Internal government communications, which are inter-agency or intra-agency memorandums or letters that would be exempt from discovery in litigation. Agencies frequently claim this exemption even if it is questionable whether the records would be exempt from discovery, so you should be particularly skeptical of these denials.
- Records whose disclosure would constitute a clearly unwarranted invasion of personal privacy (often medical or human resources files).
- Law enforcement information related to ongoing proceedings. personal privacy, confidential sources or techniques and procedures.
- Certain information about financial institutions.
- Geological information.

Technicalities matter. Every federal agency or department has its own FOIA regulations, which set certain procedures, such as the address where the request must be sent and the contents of the request. If you do not comply with these requirements, the agency may delay or deny fulfilling your request. Check the “Electronic Reading Room” on every agency's website for its FOIA procedures.

The agency’s response is not the final word. If you are denied access, you have several avenues to appeal. The agency must provide an administrative process for these appeals. At this point, you should consider retaining a lawyer, because the administrative appeal likely will require legal arguments and case citations. If you don’t succeed in your agency appeal, you can file a lawsuit in federal district court contesting the denial. Additionally, in 2007, Congress created the Office of Government Information Services, a division of the National Archives and Records Administration that mediates disputes between requestors and federal agencies.

Write a news story about the denial. Often, the most effective way to receive government records is by writing a story about the government’s refusal to comply with FOIA. A news story may bring the denial to the attention to a high-ranking official in the agency who is more concerned about negative publicity than the FOIA officer.

Legislators may be your friend. Members of Congress often have access to information that is not available to the public.

Key Takeaways

- Understanding the applicable laws, which are often complex is your most effective tool for obtaining access. Government agencies employ lawyers who specialize in open records and public access laws, so it is important to be able to challenge their arguments effectively.
- Comply with all procedural requirements in FOIA or the state open records law.
- Don’t take no for an answer. Many federal agencies will reflexively deny a records request. Understand your various appeal rights and exercise them.

Read More

Reporter’s Committee for Freedom of the Press, Open Government Guide, http://www.rcfp.org/ogg

National Freedom of Information Coalition, State Freedom of Information Laws http://www.nfoic.org/state-freedom-of-information-laws

Reporter’s Committee for Freedom of the Press, FOIA Letter Generator http://www.rcfp.org/foia

Justice Department FOIA Overview http://foia.gov

Chapter 11
Confidentiality and Government Surveillance

After Bethany McKee was indicted for the murder of two people, Joseph Hosey, a reporter for Patch.com in Joliet, Illinois, did what any journalist would do: He dug into the court records, spoke with sources and reported the facts. He soon found himself facing the prospect of jail time.

The reason? Hosey published police reports from the case and toxicology reports from the autopsies of the victims. The state trial court judge ordered Hosey to reveal the source of this information, reasoning that if an attorney or staffer involved with the case provided Hosey with the documents, that individual may have violated the court's discovery or grand jury secrecy rules.

Like most journalists, Hosey refused to reveal his confidential source. In September 2013, the judge found him in criminal and civil contempt and fined him $1,000 and $300 per day for 180 days, after which Hosey would be incarcerated. In December 2014, a state appellate court reversed this contempt ruling, finding that the Illinois reporter shield law prevents the court from forcing Hosey to testify about a leak that is not directly relevant to McKee's murder prosecution.

Hosey's case demonstrates the importance of state shield laws that protect reporters from being forced to reveal their confidential sources in court. Government prosecutors, defense attorneys, and civil litigants often seek court orders that would force journalists to disclose their sources. Forty-eight states and the District of Columbia provide some protection to journalists, though this coverage is not absolute. (Hawaii and Wyoming are the only states without shield laws). Most shield laws require the court to conduct a balancing test that weighs the litigants' need for the information against the harm to press freedom that would result from compelled disclosure.

Keep in mind that state shield laws only apply in state and municipal courts. They do not apply to federal courts. And unlike nearly every state legislature, Congress has not enacted a shield law. This means that you probably would have a much harder time fighting a subpoena in federal court than you would in state court.

The federal courts have recognized a limited reporter's privilege under the First Amendment and the common law, but this privilege varies by court and generally is not nearly as strong as the state shield laws.
If you receive a subpoena to reveal a confidential source, consult with a lawyer immediately. Unless you are willing to violate your confidentiality agreement (which could result in a breach of contract lawsuit against you by your source), you could face significant jail time and large fines. Prosecutors have become especially aggressive in their attempts to force journalists to testify, and shield laws generally are weaker in criminal trials than they are in civil litigation.

Government Surveillance

Even if you do not receive a subpoena, the government might obtain your confidential source information. Lucy Dalglish, the former director of the Reporters Committee for Freedom of the Press, said she had chills down her spine when a national security representative told her at a conference that "We're not going to subpoena reporters in the future. We don't need to. We know who you're talking to."

Electronic newsgathering concerns elevated after the FBI in 2009 secretly secured a search warrant for the personal emails of James Rosen, Fox News' chief Washington correspondent. To obtain the warrant, the U.S. Justice Department painted Rosen as criminal co-conspirator for persuading his source to leak secret documents. The warrant let investigators track Rosen's calls and personal emails.

Then in 2013, the Associated Press revealed that the Justice Department employed broad subpoena power to acquire phone records used by reporters and editors involved in a 2012 story describing a terrorist plot in Yemen that the CIA thwarted.

In the resulting furor, journalists asserted that these government tactics were chilling sources and whistleblowers. The DOJ revised its media guidelines in 2013 and said it will no longer label a journalist a criminal co-conspirator, and it would support a national shield law to protect a reporter's confidential sources.

The fact is that electronic devices and platforms have changed the world of journalism. Few reporters can do business without their laptops or cellphones, emails, texts, chats, and Twitter feeds. E-tools have made newsgathering easier, but they have also made confidentiality harder.

These devices and accounts store reams of data and some of it lives, not on your computer or in your phone, but in "the cloud" – in Dropbox or Google Documents or in Gmail accounts that are controlled not by your news organization, but by commercial enterprises.

If someone wants to monitor your information, they can go through many doors. They include your Internet provider, your phone company, your Facebook and Twitter accounts – even Uber, the car service. As well, every time you connect to the Internet via a hotel room or a cybercafe, you open another door.

"In fact, the standard email and social media account contains the kind of information that interrogators used to pull out fingernails to get – your friends; your colleagues; your associations; you private opinions; your political beliefs," wrote Joel Simon, head of the Committee to Protect Journalists, in a 2014 Columbia Journalism Review article.

Just carrying a cell phone or connecting your laptop to the Internet from a hotel room or an airport can telegraph your location and help someone track your movements. This is a keener concern for journalists working in danger zones. Nevertheless, the information can be enticing to law enforcement officials, every-day hackers, even political opposition researchers.

Internet companies may elect to turn over private data in response to government demands or government threats. Investigators in other countries may extract passwords by force to reconstruct activities of their targets. Hackers may access your passwords or logins.

Compounding the problem, the law that was intended to protect personal electronic privacy in the U.S. is outdated. The 1968 U.S. Electronic Communications Privacy Act, which became law before most people had computers or used email, allows government agencies like the IRS, FBI, and even local government agencies to access stored emails and documents in the cloud without first getting a warrant from a judge. Whereas a warrant is required to get your postal mail or documents in your desk. The Reporters Committee for Freedom of the Press offers more detail on how the law has been enacted. The Center for Democracy and Technology and others are working to enact updates.

Until your data is protected with better legal restrictions, there are some simple, and some more sophisticated, ways to avoid legal risks:

- Use strong passwords.
- Take care when using public Internet hot spots, in hotels, airports or Internet cafes.
- Think about how and where you are saving notes or archiving past notes.
- Consider putting sensitive documents on a thumb drive, instead of your computer.
- For sensitive stories, consider purchasing a pre-paid cell phone with cash.
- Use a notepad and pen for sensitive notes.
- You can also use the Watergate/Deep Throat technique and meet your source in person.

Encryption is also an important option. The Committee to Protect Journalists offers more specific security advice in its Journalist Security Guide.

Subpoenas for Anonymous Commenters

Law enforcement and civil litigants aren't just trying to get information about journalists' sources; they also have attempted to subpoena online news outlets to provide information about their anonymous commenters.
For instance, Zebulon Brodie sued anonymous commenters on Maryland-based Independent Newspapers' website who wrote, among other things, that Brodie maintained "dirty and unsanitary-looking food-service places" and allowed trash from those establishments to "waft" into a waterway. Because the defendants did not comment under their real names, Brodie subpoenaed Independent Newspapers for information that would help him identify the defendants.

Independent Newspapers fought the subpoena, arguing that it violates the First Amendment right to anonymous speech. The Maryland Court of Appeals in 2009 ultimately agreed with the newspaper and quashed the subpoena after balancing the strength of Brodie's defamation claim against the defendants' First Amendment rights. The court reasoned that this test "most appropriately balances a speaker's constitutional right to anonymous Internet speech with a plaintiff's right to seek judicial redress from defamatory remarks."

Most other courts that have confronted this issue have applied similar balancing tests, although the factors may vary somewhat. Note that courts are far more likely to quash subpoenas for commenters' identities in civil cases such as Brodie's than in criminal cases.

Because the right to anonymous speech is not absolute, you might be ordered by a court to turn over any information that you have about your users. Accordingly, you should carefully consider whether you want to require commenters to provide you with their e-mail addresses and other identifying information. And even if you don't require users to provide this information, most servers automatically collect users' IP addresses, which could help a litigant or law enforcement agency discover users' identities.

Key Takeaways

- Prosecutors are increasingly attempting to force journalists to disclose their sources. Before promising confidentiality to a source, carefully consider whether you'd be willing to go to jail and pay large fines to protect the source's identity.
- Know your rights under your state's shield law. And remember that your protections probably are far weaker in federal court.
- Be careful when communicating with confidential sources via email and telephone; in-person meetings and pen-and-paper notes may be the best way to protect your source's identity.

Read More

Reporter’s Committee for Freedom of the Press, Shield Laws http://www.rcfp.org/browse-media-law-resources/guides/reporters-privilege/shield-laws

Committee to Protect Journalists, Journalist Security Guide https://cpj.org/reports/2012/04/journalist-security-guide.php
Electronic Frontier Foundation, Anonymity

https://www.eff.org/issues/anonymity

Chapter 12
Finding Legal Help

It is rare for a media startup to have an in-house lawyer like ProPublica does. Richard Tofel was the fledgling news organization's first employee and now, as president, handles nearly all its issues from a handful to libel cases to copyright issues and more.

More often, media startups cobble up legal advice and intervention from friends, supporters and state networks of First Amendment attorneys. Some reach out to national organizations, like the Reporters Committee for Freedom of the Press, which has a round-the-clock legal hotline. However, RCFP's focus is largely on press issues, such as government access and confidential sources, and less on the business issues that many startups confront.

For many years, Harvard's Berkman Center for Internet & Society was home to a robust legal resource, the Digital Media Law Project, but it announced in mid-2014 that it would cease being a stand-alone project of the center while it worked to spin off some of its activities. Still online, although not recently updated, are its rich Legal Guides that contain useful information. The Digital Media Law Project also had developed the Online Media Legal Network of law firms, law school clinics and in-house counsel willing to provide free or reduced-fee legal assistance to online news outlets. However, DMLP has stopped accepting new applications for referral until it regroups sometime in 2015, according to the OMLN website.

So, what's a media startup to do? If you are lucky enough to be in New Jersey, you might reach out to Montclair State University's New Jersey News Commons. Its director, former Baristanet founder Debbie Galant, can try to match you up with some legal help. But no other state offers its independent news outlets the resources that NJNewsCommons.org does.

Galant, for instance, on several occasions has helped Jayed Rahman, co-owner of The Paterson Times, a for-profit he launched shortly after graduating with a degree in business administration said he's had to try fight off a domestic-dispute request for IP addresses associated with defamatory comments, sue to extract records from the City of Paterson, and try access a name in a police report.

"There are hundreds of smaller outlets around New Jersey that are filling in where bigger outlets have retreated," he said. "We're facing legal problems and we don't have resources to attack them."

"If you can't take a city to court for breaking the [open records] law, they don't take us seriously. Instead of taking three months to fill a request, they take six months," he said. "When you actually stand up for your rights with a lawyer, they are much quicker [to respond." Indeed, after he sued the City Paterson for taxi records, he said, the city has responded to information requests much faster.

The Investigative News Network has a small legal defense fund to help its members defray legal costs, said its director, Kevin Davis. Even if a startup connects with a pro bono lawyer, they may face out-of-pocket costs for filing fees and copying documents. The Reporters Committee soon plans to help with referrals for members of the Investigative News Network, said Katie Townsend, RCFP's Litigation Director.

The National Freedom of Information Coalition provides a state-by-state list of government laws involving access to public records and meetings. It also administers the Knight FOI fund to help cover the costs of litigation to pursue secret records. Online media outlets can join for $100. Media startups can also search for under their state Freedom of Information coalition to find more help.

Some techniques that many small media startups use to secure legal help include:

- Creating an Advisory Board comprised of various professional advisers, including a lawyer, to serve as a kitchen cabinet.
- Connecting with a lawyer who likes your mission and developing a lower-fee or pro bono arrangement.
- Connecting with your state Freedom of Information coalition – just search under those terms – for a referral to a lawyer.
- Writing a news story about your legal predicament, which can elicit offers to help.

After Rahman sued the City of Paterson to get taxi records he wanted, the city was ordered to pay his attorney $3,000 to cover her costs. Rahman waited until the city was presented with a resolution to approve that expenditure to write a story pointing out what the lack of transparency and failure to adhere to the state's Open Public Records Act had cost the city.

Finally, when looking for a lawyer well-versed in media law, consider asking whether he or she is a member of the Media Law Resource Center, which is a membership association for content providers and their lawyers. Membership can be quite expensive, but MLRC's publications and databases are the go-to place for keeping abreast of recent developments on media law and First Amendment issues. MLRC's Defense Counsel Section lists more than 200 law firms worldwide that specialize in defending media organizations.

Here is a list of additional online resources for media organizations:

Reporters Committee for Freedom of the Press has many resources online including:

A 24-hour Legal Hotline, 1-800-336-4243
The First Amendment Handbook covers confidential sources, libel, access to courts and other places.

The Federal Open Government Guide covers federal open meetings laws, the Privacy Act, and the Federal Freedom of Information (FOIA) Act. It also provides sample letters to request government records.
The Digital Journalist's Legal Guide covers content regulation as well as access and newsgathering issues.

Digital Media Law Project at Harvard's Berkman Center for Internet & Society offers a robust collection of online information, but it has ceased being a stand-alone project of the Berkman Center.
Its various Legal Guides provide in-depth information on Forming a Business and Dealing with Online Legal Risks.
Its Online Media Legal Network provided free or reduced fee assistance to online journalism ventures.
Investigative News Network, a membership organization of nonprofit new sites offers several training resources, including Legal Guide for Nonprofit News Organizations, which covers ethics and conflict-of-interest politics, advertising policies, freelancer agreements/Its CJET online course helps startups in developing business plans and staying current with technologies.

J-Lab's Knight Citizen News Network offers several learning modules for startups, including:
Launching a Non-Profit News Site, a step-by-step guide to applying for a 501(c)(3)
Top 10 Rules for Limiting Legal Risk

The Journalist's Guide to Open Government, which grades state web sites on how well they make open-government information available.

The Media Resource Law Center chronicles for its members the latest legal developments in media law in its publications and conferences. It maintains:

- It maintains a database of U.S. incidents that threaten online speech.
- It offers sample briefs, guides and jury instructions.
- Its annual 50-state surveys provide comprehensive coverage of media libel, media privacy, and employment libel and privacy law in the U.S.

Journalist's Resource is an initiative of Harvard's Shorenstein Center that provides newsgathering helps, case studies, syllabi and skills training.

The Student Press Law Center offers hotlines and resources for scholastic media, including:
Legal Guides on censorship, protecting sources and the American court system
You can request legal help via email.

J-School Legal is an initiative spearheaded by Geanne Rosenberg, a journalist and attorney at City University of New York's Baruch College and CUNY's Graduate School of Journalism, to provide legal assistance for journalism-school based publications and collaborations with professional news outlets.

Poynter offers a self-directed course in Newsgathering Law & Liability for $29.95.

Nolo.com offers many low-cost, do-it-yourself legal guides. Media startups might find useful, the guides for:
Business Formation
Employment Law
Nonprofits

The University of North Carolina Center for Media Law & Policy offers resources on drone journalism.
Center for Media and Social Impacts F