

Free Agents: Should Crowdsourcing Lead to Agency Liability for Firms?

ABSTRACT

Crowdsourcing has emerged as a new production paradigm through which firms outsource traditional employee tasks to an undefined and generally large network of people, the “crowd,” in the form of an open call. The relationships between the crowd and the firm vary across different crowdsourcing models and do not represent, either in fact or in theory, the employment or contractor relationships with which the law is familiar. Therefore, the law and the courts are ill-equipped to answer the questions of whether and how liability should attach to firms for the crowd’s harmful conduct toward third parties.

Agency law is the best lens through which to consider potential firm liability for the crowd’s misconduct. Although various characteristics of crowdsourcing make this an imperfect fit, agency theories of liability offer a workable foundation for determining whether and how liability should exist in a crowdsourcing context. A crowdsourcing liability regime should encourage the twin goals of promoting innovation and responsible business practices, and courts can best achieve these goals by adapting the apparent-authority and estoppel theories of agency liability to fit different crowdsourcing models.

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Crowdsourcing¹ is a powerful business trend that is changing the face of employment and production in today's global economy.² Over time, the meanings of the term have converged to represent "the act of a company or institution taking a function once performed by employees and outsourcing it to an undefined (and generally large) network of people in the form of an open call."³ A common example is Wikipedia, where an amorphous group of Internet users anonymously and voluntarily contribute definitions and explanations for millions of topics.⁴ Jeff Howe and his editor, Mark Robinson, coined the term in 2006 while Howe was writing his seminal *Wired* article, *The Rise of Crowdsourcing*.⁵ Howe explained the dynamics of crowdsourcing, revealing a new paradigm in employment, collaboration, and innovation.⁶

New paradigms bring new challenges, and crowdsourcing is no exception.⁷ Crowdsourcing's unconventional employment relationship

1. In some circles, this phenomenon is also known as "unsourcing." See *Outsourcing Is So Passé*, *ECONOMIST* (June 2, 2012), <http://www.economist.com/node/21556094>.

2. See, e.g., *id.*; John Winsor, *Crowdsourcing: What It Means for Innovation*, *BLOOMBERG BUSINESSWEEK* (June 15, 2009), http://www.businessweek.com/innovate/content/jun2009/id20090615_946326.htm.

3. Jeff Howe, *Crowdsourcing: A Definition*, *CROWDSOURCING* (June 2, 2006, 10:30 AM), http://www.crowdsourcing.com/cs/2006/06/crowdsourcing_a.html; accord Alek Felstiner, *Working the Crowd: Employment and Labor Law in the Crowdsourcing Industry*, 32 *BERKELEY J. EMP. & LAB. L.* 143, 145 (2011).

4. See *Welcome to Wikipedia*, *WIKIPEDIA*, http://en.wikipedia.org/wiki/Main_Page (last visited Oct. 23, 2012).

5. Howe, *supra* note 3.

6. See Jeff Howe, *The Rise of Crowdsourcing*, *WIRED* (June 2006), <http://www.wired.com/wired/archive/14.06/crowds.html>; see also Felstiner, *supra* note 3, at 145 (quoting Wendy Kaufman, *Crowdsourcing Turns Business on Its Head*, *NPR* (Aug. 20, 2008, 10:50 AM), <http://www.npr.org/templates/story/story.php?storyId=93495217>).

7. *Outsourcing Is So Passé*, *supra* note 1 (observing that legal and regulatory hurdles will limit the scope of crowdsourcing).

engenders formidable legal uncertainty.⁸ For example, when is a firm that uses crowdsourcing liable for consumer harms caused by information supplied by the public? Specifically, some crowdsourcing models involve firm-sponsored direct communication between the crowd and third parties without any quality control, and bad information⁹ sourced from the crowd through such active firm involvement can cause third-party harm.¹⁰ But it is unclear what recourse, if any, third parties may have against firms that rely on crowdsourcing technology when it is the amorphous crowd that generates the harmful information. It is similarly unclear whether, as a moral and practical matter, the law should impose liability on firms that rely on crowdsourcing to realize improved economic efficiencies and considerable cost-saving benefits.¹¹ Furthermore, though some researchers have given attention to the crowd's legal status in the context of employment law, there is a dearth of legal literature and jurisprudence on the subject of firm liability.¹² The resulting legal uncertainty of the crowdsourcing business model may chill potential growth and innovation.

This Note explores the potential liability to third parties that for-profit companies face when they incorporate crowdsourcing into their business models. An increasing number of businesses are utilizing crowdsourcing models without appreciating the risks.¹³ Because the Internet disseminates crowdsourced information rapidly and broadly,¹⁴ potential third-party harm and increased liability for firms is great. Part I discusses the various types of crowdsourcing models. It also outlines the incentives and risks that for-profit companies and crowd workers face when participating in these

8. Felstiner, *supra* note 3, at 145, 168.

9. "Bad information" is a term of art that can include inaccurate information, misleading information, and otherwise-harmful information. For a description of various types of bad information, see generally Joel Achenbach, *Archive: The Age of Bad Information*, WASH. POST (Sept. 6, 2012, 8:56 AM), http://www.washingtonpost.com/blogs/achenblog/post/archive-the-age-of-bad-information/2012/08/06/fb8bf1fe-dfc4-11e1-8fc5-a7dc1fc161d_blog.html.

10. See *infra* text accompanying notes 30–34.

11. See Press Release, Gartner, Gartner Says Organizations that Integrate Communities into Customer Support Can Realize Cost Reductions of up to 50 Percent (Feb. 21, 2012), available at <http://www.gartner.com/it/page.jsp?id=1929014>; see also *Outsourcing Is So Passé*, *supra* note 1.

12. See generally Felstiner, *supra* note 3, at 168.

13. See, e.g., Angus Loten, *Small Firms, Start-Ups Drive Crowdsourcing Growth*, WALL ST. J. (Feb. 28, 2012), <http://online.wsj.com/article/SB10001424052970204653604577251293100111420.html>; Rachel Emma Silverman, *Big Firms Try Crowdsourcing*, WALL ST. J. (Jan. 17, 2012), <http://online.wsj.com/article/SB10001424052970204409004577157493201863200.html>.

14. See, e.g., *User-Generated Content: Wikipledia*, ECONOMIST (Jan. 13, 2011), <http://www.economist.com/node/17911276> (explaining how Wikipedia attracts approximately 400 million visitors a month and undergoes thousands of edits daily).

business models. Part II analyzes the extent to which traditional aspects of agency law apply to the crowdsourcing relationship among for-profit firms, crowd workers, and third parties, and explores analogous case law regarding third-party harm. Part III outlines normative public policy goals regarding crowdsourcing and suggests a policy for assigning liability to for-profit companies. This Note ultimately recommends that courts should adapt apparent-authority and estoppel theories of agency liability to foster a crowdsourcing liability regime that simultaneously promotes innovation and responsible business practices.

I. CROWDSOURCING: CHARACTERISTICS, INCENTIVES, AND RISKS

Despite its novelty, crowdsourcing has already developed distinctive characteristics that separate it from traditional employment and production models.¹⁵ These characteristics, as well as the incentives and risks associated with dominant crowdsourcing models, are discussed below.

A. Characteristics of Crowdsourcing Models

Companies and institutions have harnessed the essential features of crowdsourcing—an open call to a network of nonemployees—in myriad models that vary in complexity and in the demands they place on the parties involved.¹⁶ Generally, the crowdsourcing exchange follows a five-step process: (1) the crowdsourcer¹⁷ recognizes that it has a task that is most efficiently completed by the crowd, an amorphous and usually anonymous section of the general public; (2) the crowdsourcer broadcasts a call,¹⁸

15. See generally Carliss Baldwin & Eric von Hippel, *Modeling a Paradigm Shift: From Producer Innovation to User and Open Collaborative Innovation*, 22 *ORG. SCI.* 1399 (2010) (discussing how crowdsourced innovation may displace producer innovation in different parts of the economy); Felstiner, *supra* note 3.

16. See generally *Outsourcing Is So Passé*, *supra* note 1 (explaining the trend of establishing online peer-to-peer support groups); Silverman, *supra* note 13 (explaining how various crowdsourcing platforms divide and distribute tasks); Winsor, *supra* note 2 (explaining contest and mass-collaboration models of crowdsourcing); Press Release, PR Newswire, Freelancer.com Launches World's Largest and Most Profitable Logo Crowdsourcing Site for Designers (June 6, 2011), available at <http://www.prnewswire.com/news-releases/freelancercom-launches-worlds-largest-and-most-profitable-logo-crowdsourcing-site-for-designers-123214288.html> (describing the contest model of crowdsourcing).

17. A diverse array of entities, from local governments to individuals and nonprofits, can perform this role in the crowdsourcing scheme.

18. Importantly, this call is not an employment contract, which would have various implications for intellectual property rights that are beyond the scope of this paper. See Mark N. Wexler, *Reconfiguring the Sociology of the Crowd: Exploring Crowdsourcing*, 31 *INT'L J. SOCIOLOGY & SOC. POLICY* 6, 13, 17 (2011).

usually over the Internet, describing the problem to be solved and any applicable rules; (3) the crowdsourcer collects input from the crowd, which subsequent users can edit and evaluate; (4) the crowdsourcer collects the best solutions for expert evaluation; and (5) the crowdsourcer decides whether and how to implement the crowd's solution.¹⁹

Key differences may emerge across crowdsourcing models based on the following characteristics, among others: the exchange of payment (if any), the complexity of the task, the expertise of the crowd contributors, the size of the firm, and the level of monitoring and filtering.²⁰ These features define relationships between firms and the crowd that make the application of traditional employment and agency law problematic. Combinations of these different features create three dominant crowdsourcing models: (1) the unpaid-volunteer model, (2) the contest model, and (3) the cognitive-piecework employment model.²¹

1. The Unpaid-Volunteer Model

As an introductory example, consider Wikipedia. Although Wikipedia is not a for-profit company,²² this “free encyclopedia that anyone can edit” is a paragon of unpaid-volunteer crowdsourcing.²³ Wikipedia relies on the crowd's volunteer labor to create and update encyclopedia pages for over seventeen million topics.²⁴ The website stresses that “*anyone*” can edit information and therefore immediately contribute to the collaborative discourse.²⁵ Overwhelmingly, the crowd incurs the monitoring cost of the accuracy of information, as volunteers make thousands of changes per hour.²⁶ Because of the crowd's vast ability to edit, Wikipedia is a prime example of the difficulties that plague crowdsourcing with respect to maintaining

19. *See id.*

20. *See generally* Loten, *supra* note 13 (explaining how small firms implement crowdsourcing); *Outsourcing Is So Passé*, *supra* note 1; Silverman, *supra* note 13; Winsor, *supra* note 2; Press Release, PR Newswire, *supra* note 16.

21. For a discussion of the cognitive-piecework employment model, see Felstiner, *supra* note 3, at 148–49.

22. *See* Jimmy Wales, *From Wikipedia Founder Jimmy Wales*, WIKIMEDIA FOUND., https://donate.wikimedia.org/w/index.php?title=Special:FundraiserLandingPage&country=US&uselang=en&utm_medium=sidebar&utm_source=donate&utm_campaign=C12_en.wikipedia.org (last visited Dec. 19, 2012).

23. *Welcome to Wikipedia*, *supra* note 4.

24. *User-Generated Content: Wikipleadia*, *supra* note 14.

25. *Wikipedia: Introduction*, WIKIPEDIA, <http://en.wikipedia.org/wiki/Wikipedia:Introduction> (last visited Dec. 19, 2012).

26. *Id.*

accuracy.²⁷ As this Note discusses in Part I.C, the varying abilities of crowdsourcing operations to generate accurate results and prevent the diffusion of bad information are critical to determining when liability should attach to firms.²⁸

The unpaid-volunteer crowdsourcing model that underlies Wikipedia is prevalent in the technology-support sphere.²⁹ An article in *The Economist* observed that industry leaders in software, consumer electronics, and telecoms are establishing online support groups, either on the companies' websites or through other social networks, through which users help each other solve and troubleshoot problems with their products.³⁰ Like Wikipedia, this structure relies on unpaid volunteers for information and allows volunteers to directly communicate with third-party users without relying on the firm to quality check the contents of the discussion.³¹ Compare this general technology-support trend with the model that Best Buy adopted: Best Buy hosts similar volunteer-based discussion forums where employee moderators supervise discussions.³² It is unclear, however, if the monitors' role in this forum is to answer user questions directly or to correct erroneous advice from volunteers.³³ The nature and extent of the firms' direct involvement in providing the forum or monitors is another important aspect of the liability inquiry.

Consider the following hypothetical to understand how Best Buy's crowdsourcing model could cause third-party harm. Suppose third-party user *A* and crowd member *B* engage in a forum discussion about how to fix *A*'s electronic device. *A* applies *B*'s precise instructions, resulting in an electrical fire hazard, and *A*'s house burns down. Should *A* have a colorable claim against Best Buy? Would it matter if Best Buy's moderator *C* was also logged into the discussion forum when *B* advised *A*?

A final example of the unpaid-volunteer crowdsourcing model involves communal-mapping updates in which volunteers may not even be aware of their participation in the system.³⁴ TomTom allows

27. *User-Generated Content: Wikipleadia*, *supra* note 14.

28. *See infra* Part I.C.

29. *See Felstiner*, *supra* note 3, at 149; *Outsourcing Is So Passé*, *supra* note 1.

30. *Outsourcing Is So Passé*, *supra* note 1.

31. *See id.*

32. *See Meet the Moderator Pages*, BEST BUY, http://forums.bestbuy.com/t5/Meet-the-Moderator-Pages/bd-p/Meet_Mods (last visited Oct. 11, 2012).

33. *See id.*

34. *Compare TomTom Map Share*, TOMTOM, http://www.tomtom.com/en_gb/maps/map-share (last visited Dec. 20, 2011) (allowing users to report map changes online), *with* Alexis D. Madrigal, *The Forgotten Mapmaker: Nokia Has Better Maps than Apple and Maybe Even Google*, ATLANTIC (Oct. 3, 2012, 12:03 PM), <http://www.theatlantic.com/technology/archive/2012/10/the->

customers to update the company's satellite-navigation systems on their personal navigation device or report changes online through TomTom's Map Share technology.³⁵ Nokia collects global position system (GPS) data that volunteers passively send from navigation appliances to the firm.³⁶ This relatively constant and passive data intake is particularly useful for creating traffic maps where velocity data indicate traffic conditions.³⁷ One can readily imagine third-party harm that can result from inaccurate mapping information. Suppose that an update from the crowd routes third-party user *A*, who is unfamiliar with the area, through a dangerous neighborhood where he is assaulted at a stop light and suffers car damage. Can *A* recover from the mapping firm?

2. The Contest Model

The contest model, or prize model, of crowdsourcing has more historic roots than the unpaid-volunteer model.³⁸ In the days of empire building, the British government, stumped by its naval fleet's inability to measure longitude while at sea, established the Longitude Prize.³⁹ Bypassing costly experts, the government saved time and money by turning the problem over to the crowd, with a reward for the best solution.⁴⁰

Today, many private companies have adopted a crowdsourcing contest model that has generated solutions to specific industry challenges.⁴¹ For example, Colgate-Palmolive awarded \$25,000 to a lone "solver" on the InnoCentive network⁴² who determined how to inject fluoride powder into a tube of toothpaste without the powder

forgotten-mapmaker-nokia-has-better-maps-than-apple-and-maybe-even-google/263150 (explaining how volunteers may not realize they are sharing GPS data with the mapmaker).

35. *TomTom Map Share*, *supra* note 34.

36. Madrigal, *supra* note 34.

37. Nokia clarifies that its consumer privacy protections include blocking every other thirty-second interval of tracking information so the company is unable to track a particular user on a particular route. *Id.*

38. *See, e.g.*, Wexler, *supra* note 18, at 11.

39. *Id.*; *see generally* DAVID SOBEL, *LONGITUDE: THE TRUE STORY OF A LONE GENIUS WHO SOLVED THE GREATEST SCIENTIFIC PROBLEM OF HIS TIME* (1995).

40. Wexler, *supra* note 18, at 11.

41. Howe, *supra* note 6, at 3; *see generally* *Crowd Control: Crowdsourcing Puts Brands in Consumers' Hands*, PR NEWS (Aug. 10, 2009), http://www.prnewsonline.com/features/Crowd-Control-Crowdsourcing-Puts-Brands-in-Consumers-Hands_13168.html.

42. InnoCentive is a prize-driven crowdsourcing platform with a network of millions of problem solvers who address critical challenges in economic innovation and research and development. *What We Do*, INNOCENTIVE, <http://www.innocentive.com/about-innocentive> (last visited Oct. 12, 2012). Partner firms include Booz Allen Hamilton, Eli Lilly & Company, and NASA, among others. *Id.*

dispersing into surrounding air.⁴³ It would have cost Colgate-Palmolive significantly more time and money to discover this process if it had instructed its research and development team to address the problem, compared to paying the contest winner who “had a solution by the time he’d finished reading the challenge.”⁴⁴

Similarly, Proctor & Gamble, another partner with InnoCentive, established the internal program “Connect & Develop” with the goal of obtaining, by 2010, 50 percent of their new product ideas through crowdsourcing rather than through their seven-thousand-person internal development staff.⁴⁵ In addition to the money-saving benefits, crowdsourcing allows companies like Proctor & Gamble to keep up with the rapid pace of consumer demand for new developments.⁴⁶

The contest model is not limited to large firms, large prizes, or complex problems. Through Freelancer.com⁴⁷ and crowdSPRING,⁴⁸ two of the largest logo-crowdsourcing websites in the world, small businesses and individuals can offer prize-based design contests that attract submissions from among thousands of designers across the globe.⁴⁹ Small businesses and entrepreneurs can also take advantage of the expertise of over 2.5 million freelancers who solve problems in areas ranging from software development to legal services.⁵⁰ On both websites, the contest winner is paid only when the crowdsourcer selects his work,⁵¹ allowing smaller operations to spend limited funds more efficiently.

3. The Cognitive-Piecework Employment Model

The third popular variant of crowdsourcing is the cognitive-piecework employment model.⁵² Despite the legal employment relationship that the name suggests, this model remains distinct from traditional employment or independent-contractor

43. Howe, *supra* note 6.

44. *Id.*

45. Proctor and Gamble, MICROENGAGEMENT, http://www.microengagement.com/index.php?option=com_content&view=article&id=55:procter-and-gamble&catid=25:industry-examples&Itemid=34 (last visited Oct. 13, 2012).

46. *Id.*

47. See Press Release, PR Newswire, *supra* note 16.

48. See *How CrowdSPRING Works*, CROWDSPRING, <http://www.crowdspring.com/how-it-works> (last visited Oct. 12, 2012).

49. See *id.*; Press Release, PR Newswire, *supra* note 16.

50. Press Release, PR Newswire, *supra* note 16.

51. FREELANCER, <http://www.freelancer.com> (last visited Oct. 12, 2012); *How CrowdSPRING Works*, *supra* note 48.

52. See generally Felstiner, *supra* note 3, at 146–47.

paradigms.⁵³ Unlike the unpaid-volunteer and contest models, participants in this model select discrete tasks to complete for pay.⁵⁴ A popular example of this approach is Amazon’s Mechanical Turk (AMT).⁵⁵ The AMT⁵⁶ platform anonymously connects crowdsourcers (“Requesters”) with the crowd (“Providers”) through “Human Intelligence Tasks” (HITs) for which compensation is specified.⁵⁷ HITs often consist of menial tasks that humans nevertheless execute better than computers.⁵⁸ Examples include characterizing products and tagging photos.⁵⁹ The brevity of the tasks, as well as the low skill level required to complete them, results in low compensation that may not exceed a few dollars or cents.⁶⁰ In addition to the accuracy and monitoring issues discussed above, the anonymity of this model poses a particular hurdle to the application of traditional employment and agency law.⁶¹

B. Growth and Incentives

The crowdsourcing industry has grown tremendously despite the recent economic recession. Remarkably, the number of business-focused crowdsourcing firms—firms that facilitate crowdsourcing between the business requesting the task and the

53. *See id.* at 149.

54. *Id.* at 147.

55. *E.g., id.* at 148–49; Howe, *supra* note 6; J. Aislinn Bohren, Information and Incentives in Stochastic Games, Social Learning and Crowdsourcing 140 (2012) (unpublished Ph.D. dissertation, University of California, San Diego) (on file with the Author).

56. An interesting history underlies the name “Mechanical Turk”:

In the late 1760s, a Hungarian nobleman named Wolfgang von Kempelen built the first machine capable of beating a human at chess. Called the Turk, von Kempelen’s automaton consisted of a small wooden cabinet, a chessboard, and the torso of a turbaned mannequin. The Turk toured Europe to great acclaim, even besting such luminaries as Benjamin Franklin and Napoleon. It was, of course, a hoax. The cabinet hid a flesh-and-blood chess master. The Turk was a fancy-looking piece of technology that was really powered by human intelligence. Which explains why Amazon.com has named its new crowdsourcing engine after von Kempelen’s contraption.

Howe, *supra* note 6.

57. Felstiner, *supra* note 3, at 150, 161; *see also* Bohren, *supra* note 55. Although AMT refers to this compensation as a “reward,” this is not the same payment structure as the prize in the contest model. Here, multiple parties are not simultaneously competing for the same compensation on the same task. Once a provider accepts the HIT, it becomes her task to complete by a certain deadline. Felstiner, *supra* note 3, at 161. Payment is conditional on the requester’s satisfaction, but this satisfaction is not conditioned by solutions from other providers as with the contest model. *See id.*

58. Felstiner, *supra* note 3, at 150; Howe, *supra* note 6.

59. Felstiner, *supra* note 3, at 150.

60. Howe, *supra* note 6; *see also* Bohren, *supra* note 55 (“Wage payments typically range from one cent to \$10 per task.”); Felstiner, *supra* note 3, at 148 (describing how AMT “cornered the market on the most brief and ‘unskilled’ tasks”).

61. *See infra* Part II.A.

crowd—grew 53 percent from 2009 to 2010 and 74 percent from 2010 to 2011, with total industry revenue in the hundreds of millions of dollars.⁶² Between 2009 and 2011, the number of crowdsourcing workers reached 6.3 million, with annual growth rates exceeding 100 percent.⁶³ By some estimates, crowd workers have earned between \$1 billion and \$2 billion in the past decade.⁶⁴ What has catalyzed this phenomenal growth? The incentives and motivations differ among crowd workers, large businesses, and small business, as well as among the three models described above.

1. Crowd Incentives

A number of incentives motivate crowd workers. First, some members of the crowd, particularly unpaid volunteers, are often motivated by a sense of altruism or passionate belief in the cause to which they contribute.⁶⁵ Second, peer recognition serves as a powerful motivator. Some crowdsourcing platforms turn volunteering into a game of prestige, offering nonpecuniary rewards for helpful answers or a high level of participation on the platform.⁶⁶ On Wikipedia, for instance, an elite editor clique has emerged consisting of the most active editors whose work merits a low revision rate.⁶⁷

Even in the contest model where monetary rewards are the objective, peer recognition remains a prominent incentive.⁶⁸ Particularly in the development and design fields, responses to open calls can foster career advancement by generating attention, developing the participant's skills, and facilitating the development of the participant's professional portfolio and network,⁶⁹ which fuels participation.⁷⁰

Third, there are monetary incentives.⁷¹ For example, the brief, menial, and anonymous tasks typical in the cognitive-piecework employment model do not offer peer recognition or professional development benefits that the other crowdsourcing models offer. But the crowd nevertheless remains engaged with this model because, for

62. Loten, *supra* note 13; Silverman, *supra* note 13.

63. Loten, *supra* note 13.

64. Felstiner, *supra* note 3, at 149.

65. Wexler, *supra* note 18, at 13.

66. *Outsourcing Is So Passé*, *supra* note 1.

67. *User-Generated Content: Wikipeadia*, *supra* note 14.

68. Wexler, *supra* note 18, at 13; Daren Carroll Brabham, *Crowdsourcing as a Model for Problem Solving: Leveraging the Collective Intelligence of Online Communities for Public Good* 48–49 (Dec. 2010), available at content.lib.utah.edu/cdm/ref/collection/etd/id/1190.

69. See Brabham, *supra* note 68, at 48–49; Wexler, *supra* note 18, at 13.

70. See Brabham, *supra* note 68, at 48–49.

71. See Felstiner, *supra* note 3, at 161.

contributors who have an opportunity to tackle many HITs per day, the payments can add up.⁷² One crowd worker who relied on AMT for extra income sometimes responded to over one thousand HITs per day and earned almost \$10,000 in one year for his contributions.⁷³ He also remarked that this sort of work can be addictive.⁷⁴ This experience is not uncommon, and many respondents find online participation fulfilling, as it is “an opportunity to contribute to a collaborative activity.”⁷⁵ As a final consideration, the present economic downturn has influenced individuals’ participation in crowdsourcing, as crowd workers seek to remain active participants in their field when traditional employment is less available.⁷⁶

2. Firm Incentives

The incentives for companies to engage in crowdsourcing are more economically focused.⁷⁷ As mentioned above, the cost savings can be enormous.⁷⁸ The market-research firm Gartner estimates that, “[b]y 2014, organizations integrating communities into customer support will realize cost reductions ranging from 10 percent to 50 percent.”⁷⁹

The following economic incentives, though not an exclusive list, motivate firms to use crowdsourcing. First, crowdsourcing makes it possible for firms to pay less for tasks traditionally completed by full-time employees or outsourced to other companies.⁸⁰ The ability to complete specific odd jobs without employees, such as creating a corporate logo without hiring a graphic designer, is especially appealing to firms facing tight resource constraints, such as small firms and start-ups.⁸¹ In fact, data from 2011 show that demand from start-ups is a principle driving force behind the rapid growth in crowdsourcing sectors.⁸² Second, crowdsourcing allows firms to lower personnel costs by not providing benefits, job security, or other forms of workforce support.⁸³

72. See Silverman, *supra* note 13.

73. *Id.*

74. *Id.*

75. Brabham, *supra* note 68, at 120.

76. Winsor, *supra* note 2; see also Felstiner, *supra* note 3, at 157.

77. See, e.g., Howe, *supra* note 6; Loten, *supra* note 13; Silverman, *supra* note 13.

78. See, e.g., Howe, *supra* note 6; Press Release, Gartner, *supra* note 11.

79. Press Release, Gartner, *supra* note 11.

80. See Felstiner, *supra* note 3, at 152.

81. Loten, *supra* note 13.

82. *Id.*

83. Felstiner, *supra* note 3, at 152.

Third, crowdsourcing further reduces production and development costs because firms can enter and exit the crowdsourcing platforms at will, avoiding substantial transaction costs.⁸⁴ Indeed, crowdsourcing allows a firm to see the end product, which it can accept or reject, before incurring any significant costs.⁸⁵ Finally, the crowd's instantaneous responses can generate efficiency gains for firms.⁸⁶ Through the Internet, firms can immediately receive work product and solutions to their time-sensitive problems without having anyone on call.⁸⁷ These market characteristics incentivize firms to adopt a crowdsourcing paradigm by offering costs savings and efficiency gains without otherwise cutting into profits.

Furthermore, the crowd's broad information, knowledge, and experience base generates other innovations for firms.⁸⁸ The gains realized from the crowd's diverse pool of ideas and skills can exceed those accrued through independent contracting or through consulting.⁸⁹ Further, firms can avoid search costs because crowd members who believe they can solve the problem present themselves to the firm.⁹⁰ For example, studies of InnoCentive showed the counterintuitive result that "the odds of a solver's success increased in fields in which they [sic] had no formal expertise."⁹¹

C. Risky Business

Lest crowdsourcing appear to be a panacea for industrial inefficiencies, the crowd's divergent background, knowledge, expertise, and standards⁹² can lead to various liabilities, such as inaccurate or low-quality work-product. Much has been written about the economic risks associated with crowdsourcing.⁹³ There are also legal risks, however, attendant to this innovation. As with the incentives, the risks differ based on the actors—the crowd and the firms.

84. *Id.*

85. *Id.*

86. *See, e.g., id.*; Howe, *supra* note 6.

87. Felstiner, *supra* note 3, at 152; *see* Press Release, PR Newswire, *supra* note 16.

88. *Id.* at 152–53.

89. *Id.* at 153.

90. *Id.*

91. Howe, *supra* note 6 (internal quotation marks omitted).

92. *Cf.* Felstiner, *supra* note 3, at 153; Howe, *supra* note 6; Silverman, *supra* note 13 (“‘You have no idea who is doing the work,’ says Gordon Anderson, [the vice president of InsideView, discussing his company’s experience with crowdsourcing]. ‘It could be a housewife in Iowa or someone in a refugee camp in India.’”).

93. For an in-depth discussion of the inherent risks and disincentives of the cognitive-piecework employment model, *see* Felstiner, *supra* note 3, at 153–58.

1. Risks to the Crowd

Crowd members are subject to exploitation through low wages (if any), have no job security and no legal protection as employees, suffer from information asymmetries, and are disadvantaged by the general lack of regulation of crowdsourcing platforms.⁹⁴ In particular, the crowd may not know how its labor is being used,⁹⁵ which could result in ethical dilemmas. Crowd members may also lose intellectual property rights from their creative products to firms that adopt or exploit these ideas.⁹⁶ Additionally, the cognitive-piecework model may result in “digital sweatshops” where workers may be underage or working for negligible (or no) wages.⁹⁷ It is also plausible that crowdsourcing will depress wages in creative industries such as advertising and design by increasing the number of service providers, decreasing barriers to entry, and permitting negligible search costs for the best price. Crowdsourcing may also decrease the work quality or technical ability of advertisers and designers and possibly damage the industries overall.⁹⁸ The desirability or undesirability of this outcome is beyond the scope of this Note. But it is a critical market concern to consider moving forward.

2. Risks to Firms

The largest potential risk of third-party liability that firms face arises from the potential decrease in the quality and accuracy of their

94. *Id.* at 155–56; *see also* Aaron Peters, “Un sourcing”—Does Free Labour Ultimately Require Free Goods Too?, *OPENECONOMY* (July 5, 2012), <http://www.opendemocracy.net/openeconomy/aaron-peters/unsourcing-does-free-labour-ultimately-require-free-goods-too> (“[Crowdsourcing] can also intensify existing negative trends such as labour [precariousness] and unemployment.”).

95. Silverman, *supra* note 13 (observing that many microtasks involve creating spam, unbeknownst to crowd workers).

96. *See* Baldwin & von Hippel, *supra* note 15, at 1409–10, 1413–14; *see also* Felstiner, *supra* note 3, at 154 (“[F]irms may also encounter serious intellectual property risks by distributing tasks to a large pool of anonymous workers.”).

97. Silverman, *supra* note 13. *But see* Anand Giridharadas, *Reality Crashes Technocrats’ Party*, *ANAND GIRIDHARADAS* (Mar. 25, 2011), <http://anand.ly/articles/reality-crashes-the-technocrats-party> (“[Lukas Biewald, founder and CEO of crowdsourcing firm CrowdFlower] suggested that, while coercion was possible in a physical sweatshop, it could not happen online. The transparency of the Internet, he said, makes it near impossible for firms like his to do harm.”).

98. *See* Winsor, *supra* note 2. The ability of employment law to adapt in order to protect the crowd workers from firm exploitation in this context is undoubtedly of legal import, but this Note explores the liability of firms to third-party consumers rather than contributing crowd workers. For a discussion of the adaptability of federal labor and employment laws to crowdsourcing, *see* Felstiner, *supra* note 3.

products.⁹⁹ In fact, “low quality work product and unexpected results [are] ‘the single biggest factor[s] in companies choosing to abandon paid crowdsourcing.’”¹⁰⁰ Quality and accuracy suffer because the crowd does not share the same stake in the firm as an employee¹⁰¹ and crowd members are likely to feel disengaged from the business, which can have adverse effects on quality.¹⁰² Even if a crowd worker feels sufficiently connected to the firm, it is an investment and burden on the firm to communicate expected quality standards, as meaningful communication is difficult to achieve in a crowdsourcing model.¹⁰³

The contest model is best equipped to avoid this uncertainty pitfall because the contest allows the firm to select and reward only the best work.¹⁰⁴ In contrast, both the volunteer and cognitive-piecework employment models are less adept at maintaining quality controls, increasing firms’ exposure to third-party liability risks.¹⁰⁵ As previously described, the volunteer model allows for direct communication between the crowd and third parties, and consequently there is no mechanism to prevent bad information from reaching third parties.¹⁰⁶ The cognitive-piecework model involves a staggeringly high number of discrete tasks such that monitoring all responses would diminish the efficiency gains that make crowdsourcing so attractive.¹⁰⁷

Volunteer crowdsourcing models targeted at consumer participation present a unique risk to firms.¹⁰⁸ Consider MyStarbucksIdea, a platform that Starbucks operates to encourage customers to post, discuss, and vote on ideas to improve their

99. See, e.g., Felstiner, *supra* note 3, at 153; Silverman, *supra* note 13; *User-Generated Content: Wikipleadia*, *supra* note 14.

100. Felstiner, *supra* note 3, at 153 (quoting Brent Frei, *Paid Crowdsourcing: Current State and Progress Toward Mainstream Business Use*, SMARTSHEET.COM, 8 (Sept. 15, 2009), <http://www.smartsheet.com/files/haymaker/Paid%20Crowdsourcing%20Sept%202009%20-%20Release%20Version%20-%20Smartsheet.pdf>).

101. *Id.*

102. Loten, *supra* note 13.

103. See *id.* (quoting Michael Alter, the president of a small business that engages in crowdsourcing: “It takes time to get someone up to speed on your business needs and what you want from them”).

104. See, e.g., Press Release, PR Newswire, *supra* note 16.

105. See *supra* Part I.A.1, 3.

106. See *supra* notes 32–34 and accompanying text.

107. See Felstiner, *supra* note 3, at 148, 154 (“Anywhere from 20,000 to 100,000 HITs are available at one time, and Requesters post 20,000 to 40,000 new HITs every day.”).

108. See *Crowd Control: Crowdsourcing Puts Brands in Consumers’ Hands*, *supra* note 41 (observing that this type of crowdsourcing engenders “a considerable risk from a customer engagement standpoint”).

Starbucks experiences,¹⁰⁹ all based on the premise that Starbucks will implement the best innovations.¹¹⁰ This type of platform thrives on firms cultivating a sustainable relationship with customer participants, which requires legal guidance about how firms should develop policies for interacting with customers through this social medium.¹¹¹ As the customer-involvement paradigm shifts from reactive to proactive,¹¹² a firm's integration of the crowd's ideas may generate pushback and litigation from third-party stakeholders. Therefore, while there are palpable risks associated with crowdsourcing, the rapid proliferation of the crowdsourcing model indicates that the economic incentives dominate these risks.¹¹³

II. ANALYSIS

The stark differences between crowdsourcing and traditional employment models render employment and labor law insufficient to tackle litigation that arises in a crowdsourcing context.¹¹⁴ When crowdsourcing leads to third-party harm, agency law seems like a natural lens for analysis, but it, too, is ill-equipped to address the distinctive elements of crowdsourcing models.¹¹⁵ Finally, case law involving Wikipedia and eBay as parties can offer guidance to firms adopting a crowdsourcing model. These large crowdsourcing websites have been involved in litigation that could inform the practices of other firms.¹¹⁶

A. Secret Agents: How Agency Law Applies to the Crowd

Even during the short time that a crowd worker and firm are engaged in an exchange of labor, ideas, and sometimes money, it may be appropriate to attach a principal-agent relationship to this exchange. This type of relationship is based on the mutual consent of

109. *MyStarbucksIdea.com*, STARBUCKS, <http://www.starbucks.com/coffeehouse/learn-more/my-starbucks-idea> (last visited Nov. 2, 2012).

110. *Crowd Control: Crowdsourcing Puts Brands in Consumers' Hands*, *supra* note 41.

111. *Id.*

112. Winsor, *supra* note 2.

113. *See supra* text accompanying notes 62–64.

114. *See generally* Felstiner, *supra* note 3.

115. *See infra* Part II.A. For a discussion of the agency dynamics of crowdfunding, a cousin of crowdsourcing that relies on the crowd to find research and entrepreneurship, see Andy Ley & Scott Weaven, *Exploring Agency Dynamics of Crowdfunding in Start-Up Capital Funding*, 17 ACAD. ENTREPRENEURSHIP J. 85 (2011), and Jack Wroldsen, *The Social Network and the Crowdfund Act: Zuckerberg, Saverin, and Venture Capitalists' Dilution of the Crowd*, 15 VAND. J. ENT. & TECH. L. 583, 592, 621–33 (2013).

116. *See infra* Part II.C.

the parties to work together, and no express agreement of the same is necessary.¹¹⁷ Thus, the firm's act of posting a task or problem, and the crowd worker's act of addressing that task or problem, may be enough to create an agency relationship.¹¹⁸

The agency relationship does not apply straightforwardly, however, because firms do not embody the typical controlling characteristics of principals, and it is ambiguous what authorization the crowd can reasonably infer from the firm's actions. The principal's control of the agent is the *sine qua non* of agency relationships,¹¹⁹ but the extent of a firm's control over the crowd worker is unclear and varies across models.¹²⁰ A level of control exists in the cognitive-piecework employment model because firms post specific, discrete tasks that they want the crowd to perform.¹²¹ These firms are not soliciting intellectual or creative work product from the crowd; rather, they solicit specifically applied labor.¹²² As a result, crowd workers address tasks on the firms' terms.¹²³ In contrast, control probably does not exist in the contest model, where innovation and independent creativity are separate from the firm's own operations.¹²⁴

The questionable middle ground of the control inquiry involves the volunteer model, especially when volunteered information is immediately visible to third parties. When firms like Best Buy, for example, host volunteer-based discussion forums,¹²⁵ third parties may reasonably infer an agency relationship based on the circumstances.¹²⁶ Hosting the discussion on an official company website indicates a level of authenticity, reliability, and ownership, despite any disclaimers as to the content of forum discussions. When the firm provides moderators for forum discussions,¹²⁷ as with Best Buy, this lends

117. 1 JAMES D. COX & THOMAS LEE HAZEN, TREATISE ON THE LAW OF CORPORATIONS § 1:24 (3d ed. 2012).

118. *See id.* (describing the creation of an agency relationship). In the crowdsourcing context, the firm is the potential principal and the crowd worker is the potential agent.

119. *Id.*

120. *See supra* Part I.A.

121. *See supra* Part I.A.3.

122. *See supra* Part I.A.3.

123. *See supra* Part I.A.3.

124. *See Howe, supra* note 6 (explaining that the contest model is valuable because of diverse, outside ideas); *supra* Part I.A.2.

125. *See Meet the Moderator Pages, supra* note 32.

126. Agency relationships may be inferred from surrounding facts. COX & HAZEN, *supra* note 117.

127. *See supra* text accompanying notes 33–34.

further support to the inference that the firm has a degree of control over the crowd's responses.¹²⁸

Reconsider the example previously described in Part I.A.1: third-party user *A* and crowd member *B* engage in a forum discussion about how to fix *A*'s electronic device. *A* applies *B*'s precise instructions, resulting in an electrical fire hazard, and *A*'s house burns down. Should *A* have a colorable claim against Best Buy? Would it matter if Best Buy's moderator *C* was also logged into the discussion forum when *B* advised *A*? On one hand, crowd member *B*'s anonymity to Best Buy and his direct communication with *A* without any guidance from Best Buy support the conclusion that control is lacking. On the other hand, the facts that Best Buy hosted the discussion forum and contributed moderators weigh in favor of finding that Best Buy exerted control over the advice given therein. Inferences regarding control are highly fact specific, which makes it difficult to ascertain what combination of factors should dominate the liability inquiry.

The theories for legal liability associated with agency law similarly fall short.¹²⁹ The law will find agency relationships when the firm (as the potential principal) makes manifestations to the crowd (as the potential agent) or the third-party user (as the potential injured party) that suggest a controlling relationship between the firm and the crowd.¹³⁰ Since no specific manifestation or express agreements are necessary to create an agency relationship, the reasonable beliefs of all parties are critical to determining whether agency exists and liability is appropriate.¹³¹ Actual authority depends on the crowd member's reasonable belief, based on the firm's manifestations to him, that the firm wants him to act in a certain way.¹³² It is difficult to reasonably evaluate the firm's manifestations to any one crowd member because the firm engages in an open call.¹³³ While the firm clearly wants the crowd to address the issue, it is not the case that the firm wants any *particular* crowd member to address the issue, nor is it reasonable to believe the firm wants every individual who receives the call to share his ideas.

128. The counterargument to this proposition is that the existence of moderators as a quality check should indicate that the firm does not support all of the volunteered information in the forum. It is then reasonable, however, for third parties to assume that any information not yet removed from the forum discussion was, in fact, approved by the moderators.

129. These theories are (1) actual authority, (2) apparent authority, (3) respondeat superior, (4) estoppel, and (5) ratification. COX & HAZEN, *supra* note 117.

130. *See id.*

131. *Id.*

132. *Id.*

133. *See supra* text accompanying note 3.

Apparent authority is similarly murky as applied to crowdsourcing but is the best framework for a court to analyze liability. Apparent authority stems from a third-party user's reasonable belief, based on a firm's manifestations to him, that the firm authorized a crowd member to act in a certain way.¹³⁴ A reasonable understanding of a firm's manifestations to third-party users is highly variable across crowdsourcing models.¹³⁵ In the Best Buy hypothetical above, the firm's actions of hosting the discussion forum on its official website and providing moderators support the user's reasonable belief in an agency relationship that may not be supported absent either circumstance. The pervasive reach of the open call and the crowd members' anonymity, however, still affect the inquiry regarding the level of control that third-party users may reasonably believe exists between the firm and the crowd.

Beyond actual and apparent authority, the theories of respondeat superior, estoppel, and ratification also impose principal liability for agents' actions.¹³⁶ Respondeat superior, the theory that imposes liability on employers for employees' torts,¹³⁷ does not enlighten the crowdsourcing liability question because there is no well-defined employment relationship.¹³⁸ Under the estoppel theory of liability, third-party claims may have some merit, but the broad implications of this theory threaten its practical application. Estoppel protects third-party users who justifiably rely on a belief that the crowd member is the firm's agent and then act on that belief to their detriment.¹³⁹ The firm's responsibility for engendering the third-party user's belief is critical, although no manifestation to the user that the crowd has authority is necessary.¹⁴⁰ Similar to apparent authority as applied to the Best Buy hypothetical, the firm's direct hosting of the forum and providing a moderator support the user's reliance on the crowd members' assertions as firm agents.

Yet whether a third party's reliance on crowd members as firm agents is justified ultimately determines the applicability of estoppel,¹⁴¹ and this issue is far from settled. On one hand, it seems inequitable that a firm can offer a service and reap sizeable economic gains both when that service provides a good product—here, accurate

134. COX & HAZEN, *supra* note 117.

135. Compare, e.g., *supra* text accompanying notes 32–33 (discussing Best Buy's volunteer model), with *supra* Part I.A.2 (discussing the contest model).

136. See *supra* note 129.

137. COX & HAZEN, *supra* note 117.

138. See generally Felstiner, *supra* note 3.

139. RESTATEMENT (THIRD) OF AGENCY § 2.05 cmt. c (2006).

140. *Id.*

141. See *id.* § 2.05.

information—and when the service provides a bad product—here, detrimental information. On the other hand, it may be desirable to make the user bear his own costs if knowingly relying on crowdsourcing information is an irresponsible action for a consumer. For instance, it is irresponsible for a user to believe that everything he reads on the Internet is accurate, and maintaining accuracy is a particular hurdle for crowdsourcing models.¹⁴² There is a difference in kind between for-profit firms' crowdsourcing and other firms providing crowd-generated information on the Internet¹⁴³ because the former accrues economic benefit to firms.¹⁴⁴ Therefore, the justice system must determine where to draw the line between justifiable and unjustifiable reliance on crowd-generated content when applying the estoppel doctrine.¹⁴⁵ Because a massive number of users could rely on the same bad information through broad and rapid Internet dissemination,¹⁴⁶ allowing estoppel claims could induce a flood of litigation and cripple or eliminate certain crowdsourcing applications.

Additionally, the ratification theory of liability makes little sense here. Ratification theory holds a firm liable for the crowd members' actions when the firm approves those actions *ex post*.¹⁴⁷ It is often impractical, if not impossible, for firms to review and vet all the information that the crowd provides.¹⁴⁸ This becomes an issue when the crowd communicates information to third parties directly for their use. The firm has no incentive to ratify this information, rendering ratification inapposite for imposing liability.¹⁴⁹ Further, arguments that a firm *per se* acquiesces¹⁵⁰ to crowd members' dissemination of bad information are tenuous because it is unreasonable to assume that firms can keep abreast of crowd members' myriad actions so as to tacitly approve them.¹⁵¹

142. *See supra* Part I.A.

143. Consider, for example, an unaffiliated discussion forum for technology troubleshooting.

144. *See supra* Part I.B.

145. *See* RESTATEMENT (THIRD) OF AGENCY § 2.05.

146. *See supra* text accompanying note 14.

147. COX & HAZEN, *supra* note 117.

148. *See* Felstiner, *supra* note 3, at 153.

149. There are cases where the firm does verify or otherwise filter the crowd's information, as with contest models or mapping scenarios. *See supra* notes 38, 99 and accompanying text. There, ratification of good information is the firm's goal because it wants to use that information for its own consumption. *See supra* note 38. When the information is intended for third parties, the firm's incentives are aligned to not ratify the information in case it causes later harm; that is, the firm has nothing to gain and everything to lose from ratification.

150. In some cases, the principal's acquiescence to the agent's unauthorized actions can operate as ratification. COX & HAZEN, *supra* note 117.

151. *See supra* text accompanying notes 105–107.

*B. The Cutting Edge: (Lack of) Current Case Law on For-Profit
Crowdsourcing*

Courts have had little opportunity to adjudicate crowdsourcing issues.¹⁵² As of April 2013, only one Supreme Court decision discusses crowdsourcing: *United States v. Jones*.¹⁵³ Justice Alito, writing separately but concurring in the judgment, explained the phenomenon of passive crowdsourcing through GPS data on cell phones and other personal devices:

For example, when a user activates the GPS on such a phone, a provider is able to monitor the phone's location and speed of movement and can then report back real-time traffic conditions after combining ("crowdsourcing") the speed of all such phones on any particular road. Similarly, phone-location-tracking services are offered as "social" tools, allowing consumers to find (or to avoid) others who enroll in these services. The availability and use of these and other new devices will continue to shape the average person's expectations about the privacy of his or her daily movements.¹⁵⁴

The issue in *Jones* was whether the attachment and use of a GPS device to monitor a vehicle's movements on public streets constituted search or seizure under the Fourth Amendment.¹⁵⁵ Although that case did not directly involve a crowdsourcing issue, Justice Alito's remarks above underscore crowdsourcing as an important technological trend that is reshaping social norms and privacy expectations.¹⁵⁶

Jones puts crowdsourcing firmly in the national legal consciousness, inviting the opportunity for greater discourse regarding crowdsourcing's legal treatment, particularly since the issue is woefully absent from appellate-court decisions and did not garner express mention by the *Jones* majority.¹⁵⁷ Despite for-profit crowdsourcing models' many unique characteristics,¹⁵⁸ the courts can draw analogies from the legal treatment of other Internet-based services to begin their crowdsourcing analysis, as discussed below.

C. Wikipedia and eBay

An overview of cases involving Wikipedia and eBay illuminates two pertinent issues for crowdsourcing jurisprudence: (1) the reliability and accuracy of crowdsourcing endeavors, and (2) the

152. See *infra* text accompanying note 157.

153. *United States v. Jones*, 132 S. Ct. 945 (2012).

154. *Id.* at 963 (Alito, J., concurring in judgment) (footnote omitted).

155. *Id.* at 948 (majority opinion).

156. *Id.* at 963 (Alito, J., concurring in judgment).

157. *Id.*

158. See *supra* Part I.

possible principal-agency dynamic between a firm and crowd members.¹⁵⁹

1. Reliability and Accuracy

Maintaining accuracy is the hallmark struggle of crowdsourcing models,¹⁶⁰ and various courts have explored the reasonableness of relying on crowd-generated information.¹⁶¹ Analyzing Wikipedia's model, it is not surprising that some courts have generally found entries on that website to be unreliable.¹⁶² Not all courts have found Wikipedia content unreliable, however, and the cases where courts concluded that Wikipedia *is* reliable have strong implications for the relationship between crowdsourcing and agency law.¹⁶³ For example, these decisions affect whether an injured party can be found to have reasonably relied on crowdsourced information.

In *United States v. Lawson*, the US Court of Appeals for the Fourth Circuit expounded upon Wikipedia's unreliability based on basic intuition.¹⁶⁴ Lawson, who was convicted of illegal cockfighting, argued on appeal that he was deprived of his right to a fair trial because a juror performed an unauthorized search on Wikipedia regarding an element of his offense.¹⁶⁵ In an effort to assess the extent to which this misconduct prejudiced Lawson, the court engaged in a five-factor analysis that directly considered Wikipedia's reliability.¹⁶⁶ Concluding that "the danger in relying on a Wikipedia entry is obvious and real," the court held that the juror's conduct violated Lawson's right to a fair trial and vacated his conviction.¹⁶⁷

159. See, e.g., *United States v. Lawson*, 677 F.3d 629, 650–51 (4th Cir. 2012) (discussing the dangers of relying on information on Wikipedia); *Block v. eBay, Inc.*, No. 11-C-06718-CRB, 2012 WL 1601471, at *3 (N.D. Cal. May 7, 2012).

160. See *supra* text accompanying notes 99–102.

161. See, e.g., *Lawson*, 677 F.3d at 650–51; *Pitale v. Holestine*, No. 11-C-00921, 2012 WL 638755, at *5 (N.D. Ill. Feb. 27, 2012).

162. See, e.g., *Lawson*, 677 F.3d at 650–51; *Campbell ex rel. Campbell v. Sec'y of Health & Human Servs.*, 69 Fed. Cl. 775, 781 (2006); *Rainey v. Grand Casinos, Inc.*, 47 So. 3d 1199, 1204 (Miss. Ct. App. 2010).

163. See, e.g., *Pitale*, 2012 WL 638755, at *5; *Bates v. State*, 258 P.3d 851, 861–62 (Alaska Ct. App. 2011); *Fire Ins. Exch. v. Oltmanns*, 285 P.3d 802, 807–09 (Utah Ct. App. 2012) (Voros, J., concurring).

164. *Lawson*, 677 F.3d at 650–51.

165. *Id.* at 633–34.

166. *Id.* at 646–51.

167. *Id.* at 634, 650–51.

State courts across the country have confronted the issue of Wikipedia's reliability, with somewhat divergent results.¹⁶⁸ The Mississippi Court of Appeals in *Rainey v. Grand Casinos, Inc.*, unsurprisingly cautioned Internet users, advising them to be skeptical of information on Wikipedia.¹⁶⁹ The plaintiff in *Rainey* named the wrong defendants in her personal injury suit because she relied on a Wikipedia entry as proof of the corporate ownership of Grand Casino Tunica.¹⁷⁰

In sharp contrast, state courts in Alaska and Utah have themselves relied on Wikipedia entries to formulate their opinions.¹⁷¹ The Alaska Court of Appeals consulted Wikipedia in *Bates v. State* to clarify the definition of "dating" regarding a crime involving domestic violence.¹⁷² Acknowledging this unconventional approach, the *Bates* court reasoned that given the shifting connotation of "dating" in recent years, "one could plausibly argue that Wikipedia offers one of the most accurate gauges of what the word 'dating' now means in contemporary culture."¹⁷³ Similarly, the Utah Court of Appeals cited Wikipedia in *Fire Insurance Exchange v. Oltmanns* to assess the meaning of "jet ski" in an insurance contract.¹⁷⁴ A concurring opinion raised a vehement defense to the majority's reliance on Wikipedia, noting that citing Wikipedia in judicial opinions "is as controversial as it is common."¹⁷⁵ The concurrence relied in large part on an article in the *Yale Journal of Law and Technology* that addressed the appropriateness of judicial reliance on Wikipedia.¹⁷⁶ That article explained:

Courts should not take judicial notice of Wikipedia content. They should not rely upon a Wikipedia entry as the sole basis for their holding or reasoning or to demonstrate the existence or absence of a material fact in the context of a motion for summary judgment.

168. Compare *Rainey v. Grand Casinos, Inc.*, 47 So. 3d 1199, 1204 (Miss. Ct. App. 2010) (concluding that reliance on Wikipedia's reliability is improper), with *Bates*, 258 P.3d at 861–62 (citing Wikipedia within the judicial opinion as support for a disputed issue).

169. *Rainey*, 47 So. 3d at 1204.

170. *Id.* at 1200–01.

171. *Bates*, 258 P.3d at 861–62; *Fire Ins. Exch. v. Oltmanns*, 285 P.3d 802, 805–06 (Utah Ct. App. 2012).

172. *Bates*, 258 P.3d at 861.

173. *Id.*

174. *Fire Ins. Exch.*, 285 P.3d at 805–06.

175. *Id.* at 807 (Voros, J., concurring). Ironically and notwithstanding the footnotes herein, it is this Journal's convention not to cite to Wikipedia. *JETLaw Editing Conventions*, VANDERBILT JOURNAL OF ENTMT & TECH. LAW, http://www.jetlaw.org/?page_id=11269 (last visited Feb. 18, 2013).

176. *Fire Ins. Exch.*, 285 P.3d at 808–09 (citing Lee F. Peoples, *The Citation of Wikipedia in Judicial Opinions*, 12 YALE J. L. & TECH. 1 (2010)).

Wikipedia entries can be useful in some limited situations for defining slang terms and for getting a sense of a term's common usage.¹⁷⁷

There is well-founded skepticism regarding the reliability of unchecked information on the Internet, but arguments that reliance upon crowd-generated information is sometimes reasonable and justifiable are persuasive.¹⁷⁸ The distinction seems to lie in the precision of information the user hopes to glean and the intended use of that information. For instance, when the user seeks a bright-line, verifiable fact—such as in *Rainey v. Grand Casinos, Inc.*, where the plaintiff wanted to name the proper defendants—reliance of crowd-generated information is unreasonable.¹⁷⁹ In contrast, when the user seeks to ascertain the zeitgeist regarding a particular issue—such as the meaning of “dating”—crowd-generated information is a reasonable tool.¹⁸⁰

Extending these generalizations to the Best Buy hypothetical above,¹⁸¹ it may not have been reasonable for *B* to rely on *A*'s specific instructions to fix his electronic device. But it may have been reasonable for *B* to rely on *A*'s general advice about which brands or models of electronics are superior to others. Thus, the reasonableness inquiry for liability in the crowdsourcing context may depend significantly on the specificity of the crowd-generated information.

2. Online Agency

In May 2012, the decision in *Block v. eBay, Inc.* discussed at length the agency relationship between eBay and the potential buyers on eBay's auction platform.¹⁸² Plaintiff Block sued eBay in a class action suit alleging that eBay's automatic bidding system limits his earning potential as a seller on that website.¹⁸³ Block further claimed that the automatic bidding system transformed eBay into the bidder's agent “because the buyer tells eBay how much he is willing to pay, and then allows eBay to bid on his behalf.”¹⁸⁴ The User Agreement

177. Peoples, *supra* note 176, at 50.

178. See *Bates*, 258 P.3d at 861–62; *Fire Ins. Exchange*, 285 P.3d at 807–08 (Voros, J., concurring); Peoples, *supra* note 176, at 50.

179. *Rainey v. Grand Casinos, Inc.*, 47 So. 3d 1199, 1200 (Miss. Ct. App. 2010).

180. See, e.g., *Bates*, 258 P.3d, at 861–62.

181. See *supra* Part I.A.1.

182. *Block v. eBay, Inc.*, No. 11-C-06718-CRB, 2012 WL 1601471, at *2–3 (N.D. Cal. May 7, 2012). Operating the platform for exchange does not mean that eBay is crowdsourcing. eBay is taking a cut of the transaction surplus as a fee for operating the website, but eBay is not outsourcing its own work to the crowd. See *Who We Are*, EBAY INC., <http://www.ebayinc.com/who> (last visited Jan. 8, 2013).

183. *Block*, 2012 WL 1601471, at *1.

184. *Id.*

contained explicit statements that the Agreement does not create agency relationships.¹⁸⁵ The court considered these provisions in the context of the entire Agreement and concluded that eBay is not prohibited from establishing agency relationships with users, even though there was not an agency relationship between the bidder and eBay in *Block*.¹⁸⁶

The relationship that the court analyzed in *Block* differs from crowdsourcing in two respects: (1) the firm is the potential principal in crowdsourcing, not the anonymous crowd member, and (2) there was a User Agreement in effect.¹⁸⁷ Regarding the former, the court presupposed that a principal-agent relationship can be formed between a party operating an online platform, for example eBay, and the anonymous crowd members who interact on that platform.¹⁸⁸ Importantly in the crowdsourcing context, the court did not suggest that this relationship is unidirectional; either party could be the principal.¹⁸⁹ To understand this, think of the bidders on eBay as analogous to the diffuse crowd and eBay as analogous to a firm. The *Block* court held that there could be a principal-agent relationship where eBay is the bidders' agent; the court did not foreclose the possibility that the principal-agent relationship could run the other way: that is, the bidders (like the crowd) could potentially be eBay's (like the firm's) agents.¹⁹⁰ The facts of that case were insufficient to establish the principal-agent relationship of which *Block* complained.¹⁹¹ But the decision reaffirms the premises that agency law is the proper starting point for assessing liability in a crowdsourcing context and that potential liability for crowd members' actions is a bona fide threat to firms engaged in crowdsourcing.

The importance and enforceability of user agreements and disclaimers remain unclear in the crowdsourcing context. Unlike eBay or other computer service providers,¹⁹² crowdsourcing models

185. *Id.*

186. *Id.* at *2–3.

187. Compare *id.* (analyzing eBay's User Agreement), with *supra* Part II.A (explaining the possible principal-agent relationship in a crowdsourcing context). Some crowdsourcing endeavors may in fact have disclaimers or other agreements, but this feature is not a defining characteristic of crowdsourcing models. See *supra* Part I.A.

188. See *Block*, 2012 WL 1601471, at *3.

189. See *id.* (“Likewise, the non-agency provision lacks any indication that it is meant to be an enforceable promise. Had the provision read, for example, ‘eBay shall not act as any user’s agent,’ *Block* might have an argument.”).

190. See *id.*

191. See *supra* notes 184–187 and accompanying text.

192. For a discussion of Internet service providers' liability for crowd-generated information, see *Zeran v. American Online, Inc.*, 129 F.3d 327, 328 (4th Cir. 1997). Such service

involve the firm's direct reliance on crowd members to complete a productive task for the firm's benefit.¹⁹³ Therefore, the justice system may frown on such agreements or disclaimers given the possible inequity of allowing firms to realize huge economic gains as the primary beneficiary while contracting out of potential liability.

As case law develops in this area, courts will have to consider whether to threaten companies with higher potential liability to counterbalance higher potential economic gains through crowdsourcing. Currently, firms can exploit the employment market system by acquiring labor and ideas from individuals who fall outside the scope of an employment or agency relationship.¹⁹⁴ But there is nothing inherently socially undesirable about crowdsourcing or the potential changes to the employment market that may follow. Therefore, judicial attempts to craft a workable liability regime for crowdsourcing firms must be ever vigilant of stifling productivity growth and market development.

III. SOLUTION

In early crowdsourcing jurisprudence, the critical questions are: (1) what interests should the law value, and (2) what is the proper legal framework for promoting those interests. With respect to the former inquiry, courts need to define their preferences over the matrix of socioeconomic values and various crowdsourcing characteristics because these preferences will dictate crowdsourcing's legal treatment. Once courts determine a value system, agency law will readily provide a proper, if yet imperfect, analytical framework for addressing crowdsourcing liability.

A. Values

Crowdsourcing implicates myriad economic and social values. Promoting innovation and responsible business practices are particularly compelling. This innovative form of collaboration and

providers offer connectivity among crowd members, but do not farm out tasks to the crowd. *Id.* at 328–29.

193. See *supra* Part I.A.

194. See Felstiner, *supra* note 3 (explaining the inapplicability of employment law); *supra* Part II.A (explaining the inapplicability of agency law). Exploitation of the employment market system is not the same as worker exploitation, nor are the concepts mutually inclusive. Exploitation of the employment market system involves using gaps in the employment system to reap personal gains, such as crowdsourcing tasks to circumvent internal research and development costs. See *supra* Part I.A.2. Worker exploitation, in contrast, involves using individuals' labor or ideas without paying them decent wages, forcing them to work in inhumane conditions, or requiring too many working hours. See, e.g., *supra* Part I.C.

idea development has spurred economic growth and participation across a broad spectrum of businesses and disciplines,¹⁹⁵ which cuts in favor of encouraging crowdsourcing practices through a low-liability regime. In contrast, the social goal of promoting responsible business practices implicates a more robust liability scheme. Crowdsourcing itself is not inherently irresponsible. But when firms realize substantial profit gains without making appropriate representations to third parties regarding crowdsourced information, there are equitable justifications for imposing liability. To achieve a workable balance between innovation and responsible business practices, courts should consider the various characteristics of the particular crowdsourcing model at issue—particularly anonymity, quality-control mechanisms, and payment structure.

Anonymity is important because liability should stem from culpability. When third-party harm stems from the actions of crowd workers, it is intuitive that those workers should face liability. The pool of crowd workers, however, is global and widely diverse.¹⁹⁶ Thus, even if specific crowd workers were identifiable, litigation against them is impractical. Workers may not be subject to US jurisdiction and may not have sufficiently deep pockets to satisfy judgments against them. It therefore makes little sense to cabin liability to the originally culpable party (the crowd worker). Rather, expanding liability to the firm, as the party profiting from this anonymous source of labor, should be potentially subject to liability.

The extent of firm liability for worker-generated content should depend on the quality control mechanisms, specifically the filtering or monitoring mechanisms, employed in each crowdsourcing model. Consider, for example, two otherwise-identical firms that host discussion fora on their websites to troubleshoot users' computer problems. Firm *D* is in no way involved with the content of the discussion forum; Firm *E* employs moderators to regularly verify the accuracy and appropriateness of the discussions. Again, intuition suggests that Firm *D* should be more liable for hosting a discussion forum under its auspices without any quality control. On the other hand, given that third-party harm occurred, Firm *E* should be more liable because the moderator system lends credence to the reliability of the information in the discussion forum.

Ostensibly at least, the diffusion of bad information and resulting harm are minimized when firms employ quality-control systems, but there is a tension between incentivizing firms to filter and monitor by reducing liability and holding firms accountable when

195. See *supra* Part I.B.

196. See *supra* note 87.

information that passes these protections causes harm. If firms face liability either way, the perverse result is that the firm will use fewer quality-control measures because such measures are costly. Quality control then would be a worthwhile undertaking only if it substantially reduced the probability that third-party harm would result. The costs and complications of such a system, however, may offset the benefits of crowdsourcing so as to prevent at least some firms from adopting a crowdsourcing model.

Despite this paradox, promoting quality control to reduce the diffusion of bad information should be part of the social goal to promote responsible business practices. Therefore, courts should generally consider filtering and monitoring systems as mitigating factors in the liability inquiry. Courts should not view quality-control mechanisms as tacit approval of all crowdsourced information that comes through the firm. Importantly, courts must not only consider merely the existence of a quality control system, but also its efficacy. Consequently, liability will still attach to firms that nominally have quality-control mechanisms but implement them poorly or in bad faith.

The courts' perception of a firm's quality-control responsibilities may shift based on the payment structure. In a volunteer or cognitive-piecework model, monitoring responses in a significant way is impractical,¹⁹⁷ making it appealing not to consider the existence of a quality-control mechanism as tacit approval for crowdsourced information. The contest model warrants a different approach, however. Because the payment structure is set up to reward only the information or ideas that the firm considers the best and worthy of implementation,¹⁹⁸ the firm is expressly approving crowd-generated content. Harm that stems from the firm's adoption of a certain idea is readily attributable to the firm, and firms should not be able to dodge liability for their choice to implement a crowdsourced solution.

B. Framework

Despite the imperfect match between agency law and crowdsourcing liability,¹⁹⁹ agency principles still provide an appropriate framework for addressing third-party liability claims in a crowdsourcing context.²⁰⁰ The basic relationship between parties in

197. See *supra* text accompanying notes 101–102.

198. See *supra* Part I.A.2.

199. See *supra* Part II.A.

200. See *supra* text accompanying notes 180–182.

the crowdsourcing context—a firm distributes tasks to the crowd for the firm’s benefit, and the crowd may directly interact with third parties on the firm’s behalf—mirrors the flow of services and benefits in the traditional principal-agent relationship.²⁰¹

The appropriate theory or theories of agency liability that will most easily adapt to crowdsourcing analysis are less certain. Many of these theories appeal to a sense of reasonableness,²⁰² and despite the subjectivity of a reasonableness inquiry, the inherent flexibility of such an inquiry is the best guide in uncharted areas of technological development. Reasonableness allows the courts first to determine the values they want a liability scheme to promote and, second, to shape the reasonableness inquiry to promote those values. While this smacks of judicial legislation, the absence of a reasonableness determination would prevent courts from engaging in timely responses to technological developments that warrant liability.

Apparent-authority and estoppel theories are the most appealing liability theories to guide courts with respect to crowdsourcing. Both depend on the injured third party’s reasonable assessment of the relationship between the firm and the crowd.²⁰³ Promoting responsible business practices is the underlying value that guides this reasonableness inquiry. Decisions such as *Lawson*, *Rainey*, *Bates*, and *Fire Insurance Exchange* already mark a trend regarding the reasonableness of relying on crowdsourced information. They suggest a difference based on whether the content is used for general information or specific guidance.²⁰⁴ More adapted to crowdsourcing, firms should not incur liability when they make clear representations that certain information, ideas, and so forth were crowdsourced and not otherwise vetted. On the other hand, equity suggests that firms should face liability when they purport to be the source of various information and ideas.

Incorporating these general values into the reasonableness inquiry is fact specific and may depend on whether the company disseminated crowdsourced information in some official capacity, made any disclaimers, or publicized any sort of quality-control system. For example, it seems more reasonable for a third party to rely on information in a moderated discussion forum hosted by an official website than to rely on the same information in a non-moderated forum from a website unassociated with the firm.

201. Compare *supra* Part I.A (discussing crowdsourcing relationship structures), with *supra* text accompanying notes 111–112 (discussing agency relationships).

202. See *supra* Part II.A.

203. See *supra* text accompanying notes 127, 132.

204. See *supra* Part II.C.1.

Apparent authority and estoppel are also desirable because they are the least threatening theories to innovation. The most innovative aspects of crowdsourcing occur at the production phase rather than the consumption phase. The paradigm shift involves the changing relationship between firms and laborers, thinkers, and collaborators.²⁰⁵ These changing relationships create the margins where profits and innovation increase.²⁰⁶ Any changes in third-party interaction are not the fundamental crowdsourcing characteristics that the law should preserve. Therefore, a liability scheme based on apparent authority and estoppel that directs the reasonableness inquiry outwards to the third party is not a serious threat to innovation through crowdsourcing.

The other three theories of liability still leave much to be desired in a crowdsourcing application. Actual authority is unreliable because liability depends on the reasonable beliefs of an amorphous, diverse, and diffuse crowd, and a rigorous inquiry into those beliefs is impractical if not impossible.²⁰⁷ Further, this theory could stifle the most innovative aspects of crowdsourcing by effectively regulating the relationship between the firm and the crowd.²⁰⁸ *Respondeat superior* remains inapposite to crowdsourcing analysis because it requires a well-defined employment relationship that is clearly absent.²⁰⁹ Ratification is also inappropriate because applying this theory cuts against promoting a liability scheme that rewards quality controls.²¹⁰ Therefore, a keen judicial assessment of third-party users' reasonableness, shaped by the twin goals of promoting innovation and responsible business practices, should guide the application of apparent-authority and estoppel-liability principles to crowdsourcing.

IV. CONCLUSION

Crowdsourcing is the new frontier in business management and innovation.²¹¹ The relationship structures across various crowdsourcing models are unique and novel in the legal field, and courts currently have little guidance for addressing third-party liability claims in this context.²¹² Nevertheless, the agency-law

205. Howe, *supra* note 6; *see also* Felstiner, *supra* note 3 (quoting Kaufman, *supra* note 6).

206. *See supra* Part I.B.

207. *See supra* text accompanying notes 125–126.

208. *See supra* text accompanying notes 194–195.

209. *See supra* text accompanying notes 129–130.

210. *See supra* Part III.A.

211. *See, e.g.*, Howe, *supra* note 6.

212. *See supra* Part II.B.

liability theories of apparent authority and estoppel provide a framework for establishing a liability scheme that promotes responsible business practices without stifling innovation. Courts should impose liability in ways that encourage quality controls and disclosure regarding crowdsourced information without erecting barriers between firms and crowd workers. The reasonableness inquiries inherent in the theories of apparent authority and estoppel afford courts the flexibility to timely respond to technological developments while promoting economic and social values.

Crowdsourcing's continued development may result in further crystallization of crowdsourcing models, more divergent business structures that fall under a broad crowdsourcing umbrella, or both. As this development occurs, it will be necessary for courts to refine the reasonableness analysis to keep pace with these changes and be responsive to third parties' expectations and common experiences. Courts will also be able to refine the interest and values they wish to promote as trends among crowdsourcing liability claims come to the fore. Similarly, legislatures, consumer advocates, shareholders, and commercial interest groups may join the fray of parties concerned with the legal implications of crowdsourcing. There is no doubt crowdsourcing's trajectory will pave the way for further research in this area.

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