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The News Frontier — February 10, 2011 06:00 PM

AOL Settled with Unpaid “Volunteers” for \$15 Million

Why the HuffPost bloggers won't be so lucky, and why that matters

By Lauren Kirchner

TAGS: AOL, Huffington Post, Labor, mergers, SEO

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When AOL acquired The Huffington Post for \$315 million this week, we at CJR wondered, among other things, whether the thousands of bloggers who have contributed free writing to The Huffington Post would continue to do so after the sale, or whether they'd feel slighted at being left out of the profits. We also asked what the merger meant for journalism in general, considering both companies' emphasis on aggregation, SEO, and opinion rather than original reporting.

Some others writing on the subject took those hypothetical wonderings to the extreme. **Tim Rutten**, writing in the *Los Angeles Times* on Wednesday, wrote that the real loser in the deal will be journalism itself. He likened The Huffington Post's business model, which emphasizes aggregation and unpaid contributors, to "a galley rowed by slaves and commanded by pirates." He writes:

The fact is that AOL and the Huffington Post simply recapitulate in the new media many of the worst abuses of the old economy's industrial capitalism—the sweatshop, the speedup and piecework; huge profits for the owners; desperation, drudgery and exploitation for the workers. No child labor, yet, but if there were more page views in it....

Dan Gillmor at MediActive got out ahead of the conversation on Monday, reacting to the news of the merger with the advice to Huffington to "do the right thing: namely, cut a bunch of checks to a bunch of the most productive contributors on whose work she's built a significant part of her new fortune"—not just because they've earned it, but because it would be a good PR move to do so. Early this morning, Guild Freelancers, a unit of the California Media Workers Guild, **called on Arianna** to "live up to your ideals" and share some of her profits from the sale with the **15,000-odd bloggers** who helped build the site:

This \$315 million buyout by AOL, along with her \$4 million annual salary as part of the deal, was built on the backs of hard-working writers who never saw a dime for their labor. Many of Huffington Post's most productive contributors broke news and provided astute analysis to regular beats, allowing Huffington to avoid hiring a paid journalist for the same coverage.

The organization also set up a **Facebook page** entitled "Hey Arianna, Can You Spare a Dime?", which is slowly gaining traction online. Kathy Frederick wrote on the page, "Every time a writer writes for free, it means another writer is having an argument with someone about getting paid enough or at all." Michael Goldfarb wrote, "Yesterday I contacted a couple of professors at Harvard Law's Berkman Center to see whether there is a case for some retroactive compensation here...anyone want to join me?"

These may just be a few voices of indignation among the many thousands of bloggers, most of whom are happy to write for free because of the readers and cachet it brings them. But the grumblings of dissent can grow, as they did in a similar situation in the early days

About the Author

Lauren Kirchner is an assistant editor at CJR.

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of the Web.

In the 1990s, America Online established a **Community Leader Program** within its membership service; community leaders were trained members who would do tasks like moderating chatrooms, reporting offensive behavior, answering questions from other subscribers, and organizing fantasy sports games. In exchange for working a certain number of hours a week, these “volunteers” would get discounts on their monthly AOL connection fee. Thousands of members took part in the program. But in 1999, a group of those Community Leaders asked the Department of Labor to **investigate** whether the program violated the Federal Fair Labor Standards Act.

On a (now-defunct) website that the group launched to air their grievances, they explained that their positions were much more like that of employees than volunteers. As such, they believed they deserved the protection that employees would have received under federal law: minimum wage and benefits. They **wrote**: “We are tired of seeing others, like ourselves, being treated like employees of America Online....We believe that AOL treats its volunteer staff as a paid staff, forcing timecards, scheduled shifts, reports, and minimum hours onto these remote staff individuals.”

The Department of Labor did not investigate America Online, so the group of volunteers took it to federal court, suing the company for back pay. Their attorney, Leon Greenberg, told *The New York Times* at the time: “AOL is a for-profit business. What community leaders did was very essential to the service in terms of what they were selling to the public. The minimum-wage laws require people get paid a minimum wage. When AOL says, ‘These people were volunteers so we didn’t have to pay them,’ I don’t see it.”

That class-action lawsuit, *Hallsisey et al v. America Online, Inc.*, attracted approximately 2,000 community leader volunteers, said Greenberg. America Online’s defense was, as expected, that “volunteers” are not entitled to the same protections as “employees,” and they petitioned the court several times to have the case dismissed. The crux of the case was this definition, and it’s a complicated one.

There are many factors to take into consideration when deciding whether someone is considered an **employee**, an **independent contractor**, or a **volunteer** under the FLSA: factors like the permanence of the relationship between the worker and the employer, the amount and nature of control the employer has over what the worker does and how he or she does it, and who profits from the relationship, and how. What the employer would like to call its workers, and what the workers would like to call themselves, are irrelevant.

In one noteworthy ruling that eventually made its way to the Supreme Court in 1985, a company was ordered to pay minimum wage to its employers even though the employees didn’t want it. *Tony and Susan Alamo Foundation v. Secretary of Labor* was based on hundreds of members of a church volunteering regular hours in the organization’s many commercial side-businesses. The workers did not expect to receive any money for their work, and, in fact, “vigorously protested the payment of wages” at trial. Nevertheless, the court decided that, because the for-profit sides of the organization were in competition with other businesses, the use of 300 unpaid workers was not only unfair to the workers, but it also gave the Alamo Foundation an unfair advantage over its competitors.

In an interview this week, Greenberg, the attorney representing the volunteers in the AOL litigation, made parallels between that case and the Alamo Foundation case. He said he felt that in both situations, the workers should have been classified as employees, not volunteers, “because of the regimented nature of their activities.” In both cases, even though the workers were offering their time willingly, there was an employer-employee type relationship at play: workers had to complete a training program, had to work for a certain number of hours a week, had to report regularly to their superiors on what they had done, and, if they failed to meet the employers’ requirements, were kicked out of the program. Employees do not have the same control (control over what work they do and how they do it) as volunteers do, under the FLSA’s definitions.

But the AOL litigation, at least, was a tricky case nonetheless. The court denied AOL’s requests for dismissal, but it didn’t move to bring the case to trial, either. *Hallsisey et al. v. America Online* sat in the court for years before AOL finally moved to settle the case in 2009. The payout was reportedly for \$15 million, although Greenberg declined to comment on the terms of the settlement (settlement figure noted [here](#), page twenty-five).

So. Could a similar case be brought against the AOL/Huffington Post behemoth, today, by the thousands of unpaid Huffington Post bloggers? It’s hard to say. Professor Ellen

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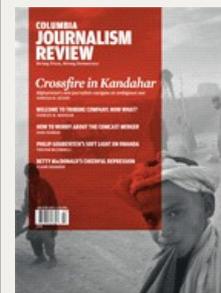
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Dannin, who teaches labor law at Penn State, said that paid and unpaid writers generally fall under the definition of **independent contractor** with regard to the FLSA law. Freelance writers are not considered employees, nor are they **volunteers**, which typically refer to people working for nonprofits, charities or religious organizations.

“The definition of ‘employee’ under the Fair Labor Standards Act, which regulates minimum wages, is very elastic, I mean it speaks to the economic realities of circumstances,” said Greenberg. “I think it’s an interesting issue. Whether it would be an issue that would be particularly viable or likely to succeed with respect to a litigation claim, I just don’t know. It would certainly be intriguing if these people were to organize somehow.”

Another professor who teaches employment law, Michael Selmi of George Washington University Law School, responded by e-mail to a question about whether The Huffington Post would under any circumstances be required to pay its writers: “That will depend on the duties of each writer, whether they are assigned jobs by Huffington as opposed to freelancers who submit stories, and whether there is a continuing relationship.”

The thousands of unpaid bloggers in question, of course, have signed no agreement with the site, and are under no obligation to submit their stories with any regularity. They do not receive assignments. If they have an idea for a post but then decide not to write it, they are not penalized by the site’s editors in any way. This lack of regimentation in that editor/writer relationship would weaken the bloggers’ (hypothetical) case against The Huffington Post.

That lack of regimentation, in fact, is exactly what many bloggers love about The Huffington Post: it’s a forum for them to express themselves **freely**, where they can potentially be read by **millions**, and use that platform to attract attention to their personal blogs or book projects or whatever else they’re working on. Founding editor Roy Sekoff, interviewed by *Bloomberg Businessweek* for an article about the fact that The Huffington Post’s model is unlikely to change anytime soon, calls it “a symbiotic relationship.” Contributors are willing to write for free in the short term because of the community they feel they are a part of, and the many other long-term benefits they feel they can get for their efforts.

When bloggers no longer feel it’s in their interest—or that it’s disproportionately too much in AOL/HuffPo’s interest—then they’ll quit, which they have every right to do. They’ll either drift off quietly, or, as is also their right, make a big splash. Mayhill Fowler is one such writer, who attracted a lot of attention with her **blog post** last year, “Why I Left The Huffington Post.” In her short e-mail to Roy Sekoff and Arianna Huffington, which she reprinted, she wrote, “Without pay and some editorial support and a reportorial community for belonging, I find it increasingly hard to find anything worthwhile to say.” Sekoff wrote back to her, wished her the best, and that was that.

After all, she was never under contract. After all, she was just one writer among many. And maybe that’s the point. Every individual writer has his or her own individual motivations for contributing for the site: to promote a book, to link back to a personal blog, to build a brand, to get clips to work towards a writing job. Together, they form a community of like-minded, but diverse, voices. And The Huffington Post is under no legal obligation to give them anything more than that forum. Under current labor law—unless we’re missing something here—The Huffington Post’s business model is perfectly legal. But is it right?

Even though the writers don’t feel that they are being used, that doesn’t mean that they aren’t. The Huffington Post reaps actual direct financial rewards from all this free labor, whereas the bloggers’ rewards are indirect, and primarily emotional. That has always been true, but the contrast is thrown into much sharper relief when we suddenly learn the extent of those financial rewards, to the tune of \$315 million.

In the Alamo Foundation case, the workers didn’t themselves feel exploited, per se, but the courts ruled that their work was unfair for other businesses competing with the foundation. Writers who contribute free content to a website may be individually happy to do so, but collectively, that work contributes to the overall trend of devaluation of writing as a skill and a profession. If the only online news sites that make money in the current publishing climate are the very ones that pay their writers the least, the danger is that this assumption that writers will never share in that success will gradually shift from a singular unfortunate trade-off to the industry norm.

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For your and your readers' further edification, Lauren, you might read Jason Linkins piece here [How The Huffington Post Works \(In Case You Were Wondering\)](#) where he explains clearly and patiently the difference between what he, a paid HuffPo journo does compared to HuffPo bloggers, and he also addresses the paid use of aggregated content. It always helps to start with the actual facts, and then make your argument. Your piece wasn't bad, but your headline and the fact that you are comparing the AOL case with HuffPost tells me that you are a mite uninformed here. Either that, you you are committed to the anti-Arianna zombie lies that are being spun out by the MSM.

Please read and let me know what you think.

Cheers.

Posted by **James** on Fri 11 Feb 2011 at 08:51 AM

Thanks for reading, James. Yes, I saw Linkins' piece yesterday - there is, of course, a difference between HuffPost's dozens of paid staff reporters/writers/editors and their thousands of unpaid non-staff bloggers (just as there is a difference between AOL's paid computer programmers and designers and unpaid volunteers). I don't think anyone's saying that their paid writers should be paid more - at issue are the thousands who aren't paid at all. In this piece, I'm only comparing the latter -- the HuffPost bloggers and the AOL volunteers. You'll see that by the end of my little thought experiment I conclude that the comparison is not, in fact, a direct one, and that's the point.

Posted by **Lauren Kirchner** on Fri 11 Feb 2011 at 10:13 AM

Yeah, I did note that you concluded that the cases weren't really comparable, nor was it comparable to the Alamo case. As I said, the piece wasn't bad; actually, it was pretty good on second reading. My objection really goes to the framing, evidenced by your subhed, and your presenting the argument of Rutten way up high, which is completely off the mark and fact-free. I thought it rather biased that you didn't present the actual *facts* as represented by Linkins and others that go to the reality, along with the distortions peddled by Rutten and seemingly the entire MSM. Perhaps I'm just taking objecting to a stylistic issue. Anyway, thanks for responding. Much appreciated.

Posted by **James** on Fri 11 Feb 2011 at 11:58 AM

IF it was proven that the HuffPo gets more readership, thus creating more public presence, ultimately resulting in the deal with AOL, due primarily to its free blogging community then conceivably that is an unfair advantage/competitive edge over newspapers who pay their writers. Those newspapers might have to join the unpaid bloggers in filing a lawsuit. Alas, however, many of the newspapers also have unpaid bloggers. A brilliant legal mind might be able to distinguish these facts and the bloggers could have their day in court.

Posted by **KathyV** on Fri 11 Feb 2011 at 06:57 PM

Jaron Lanier voiced the regrets of the Internet generation in his recent book, "You are not a gadget," in which he lamented the "information wants to be free" meme, which has turned into "You can work for us for free." I wrote about this in the blog post at <http://www.lubetkin.net/2010/01/12/open-inversions-getting-paid-%E2%80%93-and-doing-online-things-right/>.

George Lucas told Kara Swisher in response to a question about YouTube that he was amazed at how many people were willing to work for free. We have a filmmaker who just got thousands of people to submit Day in the Life videos so that he can get his name in the IMDB and go to Sundance and everywhere else on the talkshow circuit to tell how great social media and crowdsourcing is for making a movie. So far as I can tell, no one is being compensated for their contribution, but he's sure living large on the buzz.

Now, Ariana Huffington collects a \$315 million payday on the backs of people who contributed free content, and everyone is shocked, shocked, that she's not sharing it?

Come on.

They got what they deserved when they agreed to this business model.

Someone asked me a while back if I was interested in bartering for podcast production.

My response was, "Sure, I will barter podcasts for cash."

It's really simple. Don't work for people who don't pay you.

Steve "@PodcastSteve" Lubetkin Managing Partner, Professional Podcasts
LLC <http://www.professionalpodcasts.com/> @PodcastSteve on
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Posted by **Steve "@PodcastSteve" Lubetkin** on Fri 11 Feb 2011 at 08:50 PM

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