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PRACTICAL WAYS TO DEAL WITH DEFAMATION AND BRAND DISPARAGEMENT ON THE WEB

Recently the anonymous blogger that named Vogue cover girl Liskula Cohen on their 'Skanks in NYC' blog was outed by Google (the host of the blog site) by order of a Manhattan court. The blogger has since taken steps to sue Google for not defending her privacy. The legal carnage continues, leaving a trail of media gossip online. Prior to Ms Cohen taking action over the alleged defamatory comments the blog was relatively unknown and, arguably, the message would simply have been lost in the ether had no action been taken. Instead, a search today of 'Liskula Cohen' on Google does not bring up Ms Cohen's successful modelling career but rather a stream of hits associating the model with allegations of promiscuity and her 'misguided' crusade to have Google 'rat out' the blogger in question.

In this article, we argue that the nature of Internet publishing requires one to take a more practical and considered approach in the case of defamatory or disparaging content.

WHY THE INTERNET IS DIFFERENT

There are numerous platforms on the web which enable individuals to publish their views easily, quickly, globally, anonymously and at little or no cost. For example, individuals can express their opinions in comments sections on most websites (e.g. the Sydney Morning Herald website allows users to comment on articles and the comments of other users), comment in online forums, establish their own blogs or operate their own website(s). Correspondence can be sent to a mass audience with the click of a button by e-mail. These factors have helped create a mindset that the web is a forum for free (and quick) speech, where individuals are not accountable or held responsible for their words and actions. As a result, the reputation of an individual, company or brand can be disparaged on the web almost instantaneously worldwide at little or no cost.

Unlike traditional print media where the authors and publishers of works are more apparent and, more often than not, within the jurisdiction of the individual, company or brand being defamed or disparaged, the Internet is relatively anonymous

and publication can occur worldwide with ease. This makes the Internet a significantly different and more difficult medium when dealing with defamation or brand disparagement. Firstly, the perpetrators often cannot be located to extract apologies, shutdown or control the damage. Secondly, in the case of those located in different jurisdictions, arguments over which law should apply to the wrongdoing often arise.

Of greater concern, however, is the viral interconnected nature of the web and the speed with which news travels across a range of platforms including social networking sites, news aggregators and blogs. Almost every online newspaper, for example, has linking tools to social networking platforms which allow users to share, comment and interact with the information. Not only does this mean that offensive content can circulate worldwide almost immediately, it also means that the worldwide masses can react and further comment on such content. Therefore, once defamatory or disparaging content is identified, attention also needs to be paid to the responses published on the web.

Further, the reaction of the target to (i.e. how the target deals with) defamatory/disparaging content will also likely be scrutinised by the Internet community. If one's actions are not well considered they may result in further damage to one's reputation. In the well known case of 2Clix and the Whirlpool chat forum, for example, the software company's attempt to sue Whirlpool as the forum operator for injurious falsehood for the damning comments about 2Clix's software posted by users on Whirlpool's discussion forums was met with an instantaneous and crippling negative response from the Internet community. This led to 2Clix to withdraw their misconceived legal action against Whirlpool and they suffered a significant blow to their reputation. Similarly, in the case of Ms Cohen, her actions in suing the blogger have led to an explosive public controversy, arguably drawing more attention to the slurs on Ms Cohen's reputation than would have occurred if she had not pursued legal action.

The Internet has become the means of choice for large scale disparagement of individuals, companies and brands today. The challenge for lawyers is to successfully negotiate the rectification or removal of such disparaging content without making the situation worse for the client.

In some circumstances, litigation may be required. However, it is increasingly clear that a litigious approach (at least as a first resort) may not always produce the desired outcome. In fact, litigation (or even the threat of litigation) may make the situation

significantly worse for the client. Accordingly, these issues must be approached cautiously and strategically.

Below we examine five practical options which should be explored before embarking on litigation.

OPTION 1: REVIEW THE TERMS OF SERVICE

For content hosted, uploaded or posted on a website it is likely that there will be 'terms of use' or 'terms of service', a 'user agreement', 'guidelines', 'statements' or the like in place that govern the use and access of and posting on such websites by users. These terms of service are likely incorporated into the sign up process, where users will be required to accept the terms of use.

In addition to setting out the terms of use of the service, such terms will often specify the conduct required of users and spell out conduct that is unacceptable. Where users do not abide by these terms the website operator will often be given the right to remove the content in question or terminate or suspend the user's account. In some cases, repeat offenders may be prohibited from establishing further accounts.

The importance of the terms of service for those disparaged is that, in the event that a user's content or conduct does not comply with the terms of service, your client may be able to bring this to the attention of the website operator and request that action be taken (without your client becoming involved with the other party).

Below is a preview of where options may be available to an aggrieved target of disparagement under the terms of use service for eight popular websites which host third party content.

	Do the terms of service provide that defamatory content is prohibited?	What are the consequences of a user posting defamatory content?
Myspace.com 'Terms of use agreement'	Yes	Removal of defamatory material, terminating membership, investigating or taking of legal action.
Facebook.com 'Statement of Rights and responsibilities'	Not specifically, but users must not post content that is hateful, threatening, unlawful, misleading or malicious	Where a user is found in breach of the Statement, Facebook may remove offending content or information or cease providing part or all of the service.
Twitter.com 'Terms of Service' and 'Twitter Rules'	No, but unlawful use of the service and any unacceptable conduct is prohibited. International users are required to comply with local laws.	None, however Twitter reserves the right to remove, refuse or distribute or terminate accounts.
Linkedin.com 'User Agreement'	Yes, and so is content which is otherwise objectionable.	Remove or disable access to infringing material, forward written notification to the infringer, take reasonable steps to notify the alleged infringer that it has removed or disabled access. Termination of accounts for repeat offenders.
YouTube.com 'Terms of Service'	Yes. Users must also comply with the YouTube Community Guidelines.	Removal of content, termination of user's access for uploading material.
Flickr.com 'Yahoo!7 Terms of Service'	Yes. Users must also comply with the Flickr Community Guidelines.	Terminating account and access to the service.
Blogger.com 'Terms of Service'	No and Google (the owner of Blogger) explicitly states that it does not remove defamatory content/blogs unless by Court order. However, users must comply with Blogger Content Policy.	Notwithstanding Google's policy on defamation, Google reserves the right to remove or refuse to distribute any content on the service.
eBay.com 'User Agreement'	Yes.	Defamed individuals can submit a claim form to request investigation and removal of the defamatory content.

OPTION 2: UTILISE EXISTING REPORTING OR DISPUTE RESOLUTION MECHANISMS

In addition to the terms of use, it is common for content hosting websites to have reporting mechanisms in place to facilitate notification of contravention of their terms of use where content is abusive, offensive, defamatory or otherwise in breach. It is usual to find these mechanisms in the following forms:

- 1.) 'Flagging' or alert buttons which allows users to bring content that is in contravention of the terms of services to the attention of the website operator by simply clicking a button.
- 2.) Complaint forms which can be completed and submitted online.
- 3.) Specific contact details, including complaint specific emails to deal with contraventions of terms of service.

Some third party content hosts also have online dispute mechanisms and processes in place to deal with disputes over content. For example, eBay has teams dedicated to enforcement and monitoring of user's rights and responsibilities on the website. In particular, eBay Australia has a dedicated policy on defamation (<http://pages.ebay.com.au/help/policies/defamation.html>) and encourages users to submit a Notice of Claim of Defamation Statutory Declaration in the case of defamation on the eBay website.

In addition, of the eight websites mentioned in the table above:

- myspace has a 'report inappropriate content' link at the bottom of every myspace page.
- Twitter has a designated law enforcement email address (lawenforcement@twitter.com), from which

it accepts subpoenas or court orders to request user information.

- **LinkedIn.com** and **Flickr.com** have reporting mechanisms for defamatory or disparaging content.
- YouTube has a flagging system in place in every post for reporting content offensive content.

Where an issue arises with defamatory or disparaging content on website which hosts third party content, these mechanisms should be utilised first. These reporting tools often feed directly to the specific persons or teams that are responsible for dealing with such issues. In our experience, the responses from using such mechanisms have been speedy and effective at both acknowledging and dealing with the issue at hand.

OPTION 3: BE PROACTIVE WITH REGISTRATION

As they say, ‘prevention is better than the cure’. While it is difficult to pre-empt where and when an individual will attempt to defame or disparage your client’s reputation or brand, defensive registration strategies may assist in avoiding (or at least limiting) specific defamatory or disparaging content. For example, depending on the nature of the brand, it may be advisable for your clients to:

- Register domain names related to their name or brand name including sucks/hate domain names. For example, **www.ihate[brand].com** and **www.[brand]sucks.com**. Given the relatively low cost of registration, it may also be prudent to register misspellings of the brand name, country-level domains and other second level domains to avoid users exploiting these domains from which to publish disparaging comments;
- Register their name or their brand name on social networks such as Facebook and microblogs such as Twitter.
- Register their name or brand on other free content services, including emails (i.e. **brand@gmail.com** or **brand@hotmail.com**), where available.

Proactive registration will also assist in establishing an authentic online presence and blocking non-authorized use of the brand name in registrations. Further, in the case of defamatory and disparaging comments, a web presence will assist your client in distributing information to the web community to rebut or rectify the disparagement, if required.

OPTION 4: BE PROACTIVE WITH MONITORING

Another way to manage brand and reputation is through monitoring Internet ‘chatter’. Where information is found early, this will enable swift and decisive action. More positively, negative comments may also be an opportunity to deal with issues at hand, rectify them and create positive feedback.

While regular searches on Google or other search engines should be the first steps to gauging the reception and reputations of individual, companies and brands online, searches should also include social networks (such as Facebook and MySpace), microblogs (such as Twitter), video sharing platforms (such as YouTube), news feeds and bulletin boards for completeness. These searches can be performed on the specific websites or, alternatively, dedicated search engines can be used. For example, **technorati.com** and **blogsearch.google.com** are effective blog searching tools.

In addition, there are several free tools and mechanisms online which can assist with brand monitoring on these platforms. These include:

- Setting up alerts with search engines such as Google and Yahoo using keywords relevant to the brand.
- Subscribing to Really Simple Syndication (RSS) feeds on blogs, news sites and particular sites of relevance (if available).
- Subscribing to online newsletters and news pages.
- Following relevant Twitter feeds.

Alternatively, there are a number of online programs and service providers which will monitor reputations and brands online for a fee, known as ‘online reputation monitoring’.

OPTION 5: SEARCH ENGINE OPTIMISATION

Where defamatory or disparaging material cannot be removed from the Internet, an alternative approach is search engine optimisation (SEO). Essentially, SEO seeks to achieve high rankings in search engines and requires creating and pulling a brand’s positive websites (e.g. official websites, Wikipedia pages on the brand, links to YouTube posts negating the disparaging content etc) into the top spots of search results and pushing the negative websites further down in the priority of search result rankings.

The rationale behind SEO is that users locate information using search engines, rather than keying in particular domain names. Accordingly, where users cannot easily find harmful content or do not know the domain name where the offending content is located, that information cannot be found readily as the top sites which will be ‘friendly’ to the reputation of the individual, company or brand.

However, SEO is not always the most appropriate response and should be considered in light of the specific circumstances of each case. Some SEO practitioners have been criticised for being manipulative and unethical in achieving search rankings. Search engines often have guidelines in place which demonstrate how searches are organised and how sites are indexed. Where available, these should always be followed in the case of SEO.¹

CASE STUDY: DEFAMATION OF LISKULA COHEN – WAS AN ALTERNATIVE AVAILABLE?

Interestingly, unlike the position of many third party content hosts, the terms of use for Blogger.com (owned by Google) explicitly state that it does not remove allegedly defamatory content from its service. Google relies on section 230(c) of the US Communications Decency Act which states that Internet services, like Blogger.com are republishers and are therefore not held liable for any allegedly defamatory. Therefore, Ms Cohen may not have been successful in the first instance by contacting Google to take down the content and/or 'Skanks in NYC' blog (Blog).

Despite this, the terms of service provide among other things that a user agrees to use the service in compliance with all applicable local, state, national and international laws, rules and regulations. Where a blog is found to be defamatory by a court, Blogger.com will remove the blog subject to the court order. Accordingly, had a court order been obtained, Ms Cohen could have had the blog taken down.

Additionally, the terms of service require users to abide by the Blogger Content Policy. The Blogger Content Policy sets out guidelines on what content is unacceptable on Blogger.com. This includes content which impersonates others, hate speech and crude content. If a user does not abide by the policy, Google reserves the right to remove or refuse to distribute any content. If any of the content on the Blog was in violation of the Blogger Content Policy, this could have been grounds for Ms Cohen to request removal of the Blog. She could have done so by flagging the Blog for review by Blogger.com and by utilising the reporting mechanisms available on their website.

Alternatively, Ms Cohen could have taken a number of self help steps, such as posting a comment on the Blog herself, established her own positive websites or utilised SEO.

Finally, the Blog had five posts in total and had a low viewing rate. Was the action taken worth the stir it has created? While the Blog has now been taken down, in our opinion had Ms Cohen taken no action, the blog would have disappeared into web oblivion.

CONCLUSION

Given the nature of the Internet today it is clear that consideration should be given to the available alternatives to litigation where there is an issue with offensive content. Further, individuals and organisation should pay much more attention to pro-actively managing their reputations and brands online.

Being proactive and aware of the nature of the Internet and the options available, rather than reacting as issues arise and simply defaulting to legal action, is key to ensuring that reputation and brand disparagement is dealt with in a way to achieve the most successful outcomes for clients. In this way, the Internet demands that practitioners engage in more creative practices to deliver their services, particularly when dealing with defamation and brand disparagement.

REFERENCES

- ¹ For example, Google's webmaster guidelines (<http://www.google.com/support/webmasters/bin/answer.py?answer=35769>) and Yahoo's Search Quality Guidelines (<http://help.yahoo.com/us/yahoo/search/basics/basics-18.html>)

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