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Navigating Reputational Harm in the Digital Age: Methods of Addressing Anonymous Negative Comments in Social Media



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Managing companies' reputations is no longer as simple as advertising campaigns to attract consumer attention. The growth of social media and the online presence of companies are both an opportunity and a potential pitfall.

While expanding the marketplace for goods and services, social media also provides consumers and others a platform to make damaging comments about companies that can lead to long-term reputational harm in a very short period of time. If handled properly, these kinds of postings can enhance a company's reputation. Companies must consider a range of options when confronting damaging comments, many of which are posted anonymously. Companies should take a proactive approach to managing their online reputations by monitoring postings on their own websites, social media and other consumer-oriented websites that solicit feedback.

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This article explores the range of options available to companies in responding to anonymous postings. These include self-help and administrative remedies to rebut negative comments or to have them removed and "John Doe" litigation to unmask the identity of anonymous posters whose comments give rise to a defamation claim. In many instances, nonlitigation options provide an adequate resolution for a company whose reputation has been threatened or actually harmed. Litigation may be considered for cases where reputational harm is great. If the company operates internationally, it should consider whether a jurisdiction outside the U.S. is a better forum for litigation. Litigation, however, should be reserved for extreme cases because consumers and others may view it as a tactic to chill free speech.

I. Nonlitigation Options for Addressing Anonymous Postings

To manage their online reputations, companies should monitor anonymous postings in different forums, including the company's official website, social media forums such as Facebook and Twitter and blogs and other websites that collect consumer feedback, such as Yelp. Many options involve the use of social media to respond to the comments before they rise to the level of a defamatory posting and include administrative or other remedies offered by social media outlets or other websites.

■ Using a company's online and social media presence as a platform to counter negative comments is the first line of defense.

Companies must establish their own online presence, especially through social media, to market their brand and reputation and to counteract negative feedback from consumers and attacks by competitors. Companies need to know what is being said about them in real time and respond in a positive way. By interacting regularly with consumers who visit their websites or affiliated social media sites, companies are more likely to resolve issues quickly and prevent their escalation into reputational harm. Companies should not turn to social media for the first time when a negative posting is made. They must use their established presence to counteract or respond to negative comments.

Companies also need to use social media and their websites to create and post positive material. By posting videos, pictures or articles, companies can take advantage of search engine optimization techniques to push negative or false comments down the list of search results. This further minimizes reputational harm.

■ Rebutting negative comments and using website administrative remedies are important steps before considering litigation.

If an anonymous posting cannot be handled informally through a company's online and social media platforms, most websites have complaint procedures or other administrative remedies to remove negative or false comments.

The starting point is to review a website's terms of service or use for possible violations by the anonymous poster. For example, Yelp's terms of service require that users agree not to write fake or defamatory reviews and not to violate a third party's rights, including breach of a copyright or trade secret. Companies prepared to explain how the posting is false or unlawful are more likely to be successful in having it removed under a website's terms of service or use.

If the website will not remove the posting, the company should consider posting a response on the website. Most websites permit replies that address or rebut the issues raised in the original posting. This is an effective way for companies to insert their positions without being perceived as stomping on free speech.

While some websites have policies against removing negative comments, they may have other procedures that a company can use. For example, *riporffreport.com* has an arbitration program in which a false statement of fact can be submitted to a neutral arbitrator. If found to be false, the statement will be redacted from the report.

II. The Litigation Alternative—Lawsuits to Unmask the Identity of Anonymous Posters

When the options discussed above fail to address egregious or repeated instances of defamatory postings, a company should consider suing to unmask the identity of the anonymous poster. Litigation is a last resort because it might be viewed as a tactic to silence an anonymous poster with a legitimate complaint. Moreover, the First Amendment's protection of anonymous speech extends to Internet users.¹ Courts may be reluctant to compel disclosure of the anonymous poster's identity for fear it will chill legitimate speech, and a defamation plaintiff cannot prove its case without that disclosure.

The competing interests between free speech and protecting reputations have led to different unmasking standards in the U.S. Where a company brings suit could impact the likelihood of success. A Virginia appellate court recently upheld a subpoena to Yelp in a defamation suit by a business against seven anonymous reviewers who allegedly posted false statements about the

business.² The court rejected Yelp's First Amendment defense and found that the elements required by Virginia's unmasking statute³ were met. The business had to show that it had a good faith basis to believe that the comments were defamatory. The business relied on evidence that the anonymous reviewers misrepresented themselves as customers. It searched its customer database but could not match any alleged work done for the anonymous reviewers to work actually performed.

In New Jersey, to uncover the identity of an anonymous defendant, the plaintiff must show sufficient evidence supporting a prima facie cause of action, and the court must balance the strength of that case against the defendant's First Amendment right to anonymous free speech and the need for disclosure. Applying this standard, a New Jersey court rejected an attempt to compel Yahoo to disclose the identity of someone who posted negative comments on a Yahoo bulletin board.⁴ Delaware has adopted an even higher unmasking standard that requires the plaintiff to withstand a summary judgment motion to unmask the anonymous defendant.⁵

III. Global Options for Responding to Negative Anonymous Postings

In the U.S., companies with damaged reputations cannot access the deeper pockets of ISPs and other website operators, which are immune from liability for defamatory statements made by third-party users under Section 230 of Communications Decency Act (CDA), 47 U.S.C. § 230. The CDA's broad grant of immunity is not likely to change in the foreseeable future. In fact, many courts have rejected challenges to the scope of that immunity, even where the ISP is put on notice of a user's defamatory comments.⁶

Immunity from notice-based liability is not the norm in other countries. In European Union nations, "hosting intermediaries" are not liable unless they have actual knowledge of users' unlawful activity.⁷ French law provides that website operators cannot be held liable for third-party content if prompt action is taken to remove it or block access once the operators are actually aware of its defamatory nature.⁸ Similarly, in Morocco, an ISP is subject to civil liability if it has knowledge or reason-

² *Yelp, Inc. v. Hadeed Carpet Cleaning, Inc.*, 752 Va. App. 678, 752 S.E.2d 554 (2014).

³ Va. Code § 8.01-407.1.

⁴ *Dendrite Int'l, Inc. v. John Doe No. 3*, 342 N.J. Super. 134, 775 A.2d 756 (2001).

⁵ *John Doe No. 1 v. Cahill*, 884 A.2d 451 (Del. 2005) (rejecting attempt to unmask identity of persons posting criticism of elected official on Internet blog).

⁶ See, e.g., *Universal Comm. Systems, Inc. v. Lycos, Inc.*, 478 F.3d 413, 420-21 (1st Cir. 2007) (upholding immunity against different theories that website was "manifestly aware" of illegal nature of anonymous posts); *Global Royalties, Ltd. v. Xcentric Ventures, LLC*, 544 F. Supp.2d 929, 932 (D. Ariz. 2008) (applying immunity although website on notice from author of alleged defamatory content); *Black v. Google, Inc.*, 2010 BL 188147 (N.D. Cal. Aug. 13, 2010) (rejecting theory that inadequate dispute resolution process was an exception to immunity despite website's notice of problematic content).

⁷ Council Directive 2000/31, of the European Parliament of 8 June 2000 on Certain Legal Aspects of Information Society Services, Electronic Commerce, in the Internal Market, 2000 O.J. (L178) 7, 4.

⁸ Article 6-II, *Loi pour la Confiance dans l'Economie Numérique* [Law for Trust in the Digital Economy] 2004.

¹ See, e.g., *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341-42 (1995) ("in the field of literary endeavor, the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry").

able grounds to be aware that content published on its website is unlawful.⁹ Under Australian law, Internet intermediaries with servers in Australia can be both civilly and criminally liable for offensive content posted by third-party users if they fail to take prompt action once on notice.¹⁰

In England, the *Tamiz v. Google, Inc.* case held that a website operator was arguably a “publisher” and could lose the hosting defense in section 1(1) of the Defamation Act 1996, and thus, be liable for the defamatory comments of a third-party user, once on notice of a complaint and where there was a subsequent failure to take action to remove the offending content within a reasonable time.¹¹

Website operators have also been granted a new defense under the Defamation Act of 2013 against defamation claims based on comments posted by third-party users. To qualify for the defense, website operators must follow strict notice-and-takedown procedures upon receiving a notice of complaint and the claimant cannot identify the poster. Courts have discretion to accept actions outside of prescribed time limits “in the interests of justice.” While it is too soon to know for certain how this regulatory scheme will fare in practice, it is intended to provide a streamlined and straightforward approach.

⁹ Dahir No. 1-05-192 of 15 Moharrem 1427 (14 February 2006) enacting Law No. 34-05. Amending and Supplementing Law No. 2-00 on Copyright and Related Rights, Art. 65.4.

¹⁰ Broadcasting Services Act 1992 (Cth) pt 9 (Austl.); Criminal Code Act 1995 (Cth) (Austl.).

¹¹ *Tamiz v. Google, Inc.*, [2013] EWCA Civ. 68, [2013] 1 W.L.R. 2151 (Feb. 14, 2013).

Regulations¹² detail the notice procedures and time limits. For example, within 48 hours of receiving a complaint, the website operator must notify the poster, who has five days to send a response. If the website operator has no means of contacting an anonymous poster, it must remove the statement within the 48 hours, or, if the poster can be contacted but fails to respond timely, the posting must be removed. If the poster chooses to remove the posting personally within five days, the website operator is deemed to have complied. These procedures provide a way for defamatory postings to be removed quickly and the reputational harm alleviated. Only if the poster is willing to take affirmative action by sending a timely response asking that the posting not be removed will the website operator still have the defense. In this circumstance, the website operator must notify the complainant within 48 hours of receiving the response from the poster that it will not remove the posting and will not reveal the poster’s identity without consent.

Companies with a global presence whose reputations have been harmed should consider making a complaint under the laws of another jurisdiction where notice of defamatory comments triggers liability on the part of the Internet intermediary. Given the reality that many anonymous posters are judgment-proof, the end goal is often to have the negative posting simply removed. Invoking the laws of another jurisdiction may be a company’s best option to achieve that goal.

¹² The Defamation (Operators of Websites) Regulations 2013, available at http://www.legislation.gov.uk/ukdsi/2013/9780111104620/pdfs/ukdsi_9780111104620_en.pdf.



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