Take Down That Webpage

RIGHT NOW

How Companies Can Respond to Unfavorable Postings and Best Practices for Online Reputation Management

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by Brett R. Harris

Over the last decade, technology has driven fundamental changes in the way people communicate and become informed as to the world around them, globally and locally. The internet has also revolutionized commercial advertising, as it has opened up new venues for consumers to learn about businesses, products and services. Previously, consumers became informed through traditional media sources, advertisements paid for by the commercial enterprises and local word of mouth. Today, instead of pulling out the telephone book and flipping through the Yellow Pages, consumers turn to search engines and online review sites. Contrary to the adage, "I read it online, so it must be true," there is no editorial board or fact-checking staff for the internet. Since anyone can create a blog or post comments online, what are the implications when negative information is posted about a person or business? What legal recourse is available to have information removed from social media platforms?

Regulation of Internet Speech

As the internet developed as a means of communication, questions were raised about the power of the government and courts to regulate the distribution of materials over it. In a landmark ruling in *Reno v. American Civil Liberties Union,*[1] the United States Supreme Court struck down certain provisions of the 1996 Communications Decency Act[2] (CDA), a federal law censoring 'indecent' online communications. The unanimous Court designated the internet as a free speech zone, confirming the application of the First Amendment to this venue for public speech.[3] In *Reno*, the Court aligned the internet with traditional media having broad First Amendment protections, as distinguished from broadcast media or outlets with lesser coverage.[4]

Although the Court struck down the aspects of the CDA deemed to be unconstitutionally overbroad government regulation of speech, the ruling left intact other important aspects of the CDA. Specifically, Section 230 of the CDA[5] provides protection for internet service providers and users from liability against them based on the content posted by third parties. This shields internet message boards from suit when they do not exercise editorial control over postings. The federal law significantly limits the pursuit of damage claims by immunizing websites that allow passive postings (distinguished from the posters themselves).

While First Amendment rights are accorded great protections under the law, they are not absolute, and are subject to limitations under traditional legal principles, including defamation, contract rights and intellectual property claims. As such, these can be bases for challenging online content and seeking to have it removed.

Defamation as Grounds for Removal of Online Content

Under New Jersey law, defamation is defined as a false statement about an individual or business, communicated to a third party and published by the speaker either negligently or with malice, provided the individual or business that is the subject of the false statement suffers damages.[6] The statute of limitations in New Jersey for alleging defamation is one year from publication of the defamatory statement,[7] and cases have interpreted the time period to run from the date of posting for internet publications.[8] The term defamation is used generically for both spoken communications (slander) and written communications (libel). Typically, online defamation claims will be examined as libel, although video and live feed messages could be

slander. The concept underlying defamation is the notion that an individual or business has an inherent interest in their reputation, and the courts provide remedy when that reputation has been injured, causing damages to the plaintiff.[9]

It is important to know that falsehood is a necessary element for a defamation claim.[10] If the statement is merely negative (but not inaccurate), or is an expression of a personal opinion that cannot be objectively tested for truth, then the defamation will not give grounds for removal of postings. Further, the standard of proof to assess defamation may be either negligence or actual malice, depending upon the status of the plaintiff as being a public figure and if the subject matter of the communication is one of public concern. Defenses to defamation claims may be asserted based on privileges, either absolute (such as the privilege granted to those involved in judicial or legislative proceedings[11] or with consent of the plaintiff) or conditional (such as that accorded to the press[12] and the privilege of defending self-interest in response to defamatory statements).[13] When faced with negative comments about a person or business online, a legal review can be conducted to see whether a cause of action may exist for defamation, to assess the strength of any defenses to the claim, and to consider whether damages can be proven.

Harassment as Grounds for Removal of Online Content

Cyber bullying or anti-harassment legislation[14] is not as relevant to businesses but may give recourse to individuals targeted by online speech that is hateful, discriminatory or harassing. From an employer's perspective, it is important to have an acceptable internet and social media usage policy in place, coordinated with company policies outlawing discrimination and harassment, to insulate the company from liability for online speech by employees that is unlawful or violative of others' rights.

Contract Rights as Grounds for Removal of Online Content

Enforcement of contract rights is another means courts have used to unmask anonymous online posters and to require the removal of certain statements on the internet about a business or its customers.[15] These situations occur when information posted online is proprietary business information a party can show is subject to obligations of non-disclosure. Thus, companies need to be proactive in protecting their confidential information and trade secrets. This can be accomplished through a comprehensive approach to business practices and agreements, including adopting appropriate policies for employees addressing confidentiality, incorporating reminders of the terms in exit interview procedures, entering into nondisclosure agreements with service providers and business partners, and implementing physical and network security to protect sensitive data. Ideally, written contracts can provide a basis for a demand letter to take down postings that include confidential information and, upon failure of the website to promptly respond, may give grounds for immediate action by the courts in the form of injunctive relief.

Contractual claims may also be the basis to remove postings under non-disparagement clauses in contracts or policies. However, confidentiality and non-disparagement clauses may not always be enforceable or legally binding. For example, federal law protections under the National Labor Relations Act[16] protect the rights of employees to discuss their working conditions.[17] And recently, in the wake of the #MeToo Movement, legislation has been enacted in California[18] and New Jersey[19] to prohibit non-disclosure provisions in sexual harassment settlement agreements.

Infringement as Grounds for Removal of Online Content

Sometimes a business is faced with the challenge of removing information online that is unauthorized use of its own content. Copyright and trademark infringement on the internet are rampant given the technological ease of copying and reposting content online; however, just because a party puts their information online does not mean they abandon their intellectual property rights. In fact, these rights are expressly protected under federal legislation known as the Digital Millennium Copyright Act (DMCA).[20] Title II of the DMCA, the Online Copyright Infringement Liability Limitation Act, grants exemption to online service providers from liability for copyright infringement by users of the online forum as long as the website meets certain conditions, including not exercising editorial control over content, having no actual or constructive knowledge of the infringement and responding to notices of infringing material being posted on the network.[21] This notice is referred to as a DMCA takedown notice, and is a critical tool that can be used by a company when its information is misappropriated online. The notice identifies work that is infringed and the legal grounds of ownership, and typically results in prompt removal of the material by the website.

Companies can strengthen their position in takedown notices by actively protecting and policing their intellectual property assets with appropriate disclaimers on the company's website and other materials, including copyrighted content. Further, enhanced remedies are available to pursue infringers online if a company registers and protects its trademarks.

Anonymity as Obstacle in Seeking Removal of Online Content

In order to assert a claim, the identity of the speaker must be known. Many online forums are enabled for anony-

mous postings or use of screen names without readily identifiable contact information for the speaker. From a psychological perspective, the anonymity often emboldens posters who speak more bluntly and perhaps in a defamatory way because of the perceived lack of accountability. While the website operator may be immune from the underlying liability for defamatory statements under Section 230 of the CDA,[22] they must still respond to subpoenas requesting information about anonymous posters. While First Amendment rights protect anonymous speech in general, when the speech is defamatory or is contrary to legal obligations, courts will compel disclosure of information that can lead to the identity of the online speaker.

In New Jersey, the 2001 decision in *Dendrite International v. Doe*[23] sets factors for courts to consider when evaluating a request for an order to compel an internet service provider to reveal the identity of an anonymous poster. They are: 1) the plaintiff must make good faith efforts to notify the anonymous poster and permit a reasonable time to respond; 2) the plaintiff must specifically identify the poster's allegedly actionable statements; 3) the complaint must set forth a *prima facie* cause of action; 4) the plaintiff must present sufficient evidence for each element of the plaintiff's claim; and 5) "the court must balance the defendant's First Amendment right of anonymous free speech against the strength of the *prima facie* case presented and the necessity for the disclosure of the anonymous defendant's identity."[24]

Unfavorable but not Unlawful Postings

With the increasing prominence of social media as a means to communicate and share views, companies are frequently confronted with unfavorable portrayals of their businesses, products or services online. This may arise in the context of employer rating sites such as Glassdoor, a website where employees and former employees anonymously review companies and their management. Also, numerous websites present forums for crowd-sourced consumer reviews such as Yelp! for local businesses and restaurants and Healthgrades or Vitals, online resources with ratings of physicians and hospitals. Negative postings, while inconvenient to a company, may not be defamatory, illegal, infringing or in violation of contractual terms. Thus, legal grounds may not be available to compel removal from a website. The next step for recourse is to review if grounds exist to request online content be taken down based on a violation of the particular website's terms of use. These policies, often referred to as 'community guidelines,' may provide a process to contact the website moderator or the poster to request removal of objectionable content.

Ratings websites often have procedures for company responses to postings/ratings. This is more of a public relations rather than legal endeavor, but legal considerations should be reviewed before posting an online response or launching a campaign to counter negative publicity. Responses should not disclose confidential information about customers or personal information about employees that could give rise to a claim against a company. Particularly, there are concerns about health information in the case of customers of medical practices or personal information about present or former employees. The poster can disclose their own information, but the business may face a Health Insurance Portability and Accountability Act (HIPAA) violation in doing so.

In the context of professionals such as lawyers or physicians responding to postings, ethical obligations of confidentiality are also implicated. Professionals should also assess postings of disgruntled patients or clients to determine if they may be a precursor to a malpractice action, and review insurance coverage terms to see if notice to a carrier may be appropriate.

Businesses may try to dilute the effect of negative postings on rating websites by encouraging satisfied customers to post favorable reviews. Some businesses conduct user satisfaction surveys that provide links to the rating sites to those responding with high marks. Individuals or companies can also pursue a public relations response by engaging the services of a reputation or brand management firm. These firms often use strategies to redirect search engines from the unfavorable posts.

Sometimes ignoring a posting may be the best option, especially if the poster has an active social media footprint. Before responding, conduct a practical assessment as to the personality and online habits of the poster, as well as their relationship with the target. They may just be venting and will move on to the next post about someone or something else.

In some instances, responses may cause the postings to stop, but in others they may fuel the fire. In fact, threatening legal action may backfire in the public forum, with the poster seeking public sympathy by countering with a post of the cease and desist letter received. If a person or company determines a response is warranted, the response should be prepared in a measured tone without undue disparagement, so as not to escalate matters.

Conclusion

This article has discussed situations where an individual or company may pursue legal avenues to remove online defamatory content, confidential information or protected intellectual property assets. But its lessons should be heeded as well by anyone operating a website or social media forum. Any content posted online can be challenged by others as defamatory or violating contract

or intellectual property rights. As such, companies should monitor their own online venues (including their websites, Facebook pages and Twitter accounts), include proper disclaimers for online content, provide employees with guidelines as to appropriate internet and social media activities and limit control of social media outlets to those with authority to speak for the company. ⚖

Endnotes

1. *Reno v. American Civil Liberties Union,* 521 U.S. 844 (1997).
2. Title V of the Telecommunication Act of 1996 (P.L. 104-104, 110 Stat. 133).
3. *Reno*, *supra*, 521 U.S. at 885.
4. *Id.* at 870.
5. 47 U.S.C. §230.
6. *DeAngelis v. Hill*, 847 A.2d 1261, 1267-68 (N.J. 2004).
7. N.J.S.A. 2A:14-3.
8. *Churchill v. State*, 876 A.2d 311, 319 (N.J. Super. Ct. App. Div. 2005).
9. *Printing Mart–Morristown v. Sharp Elecs.*, 116 N.J. 739, 764-6 (1989).
10. *Ward v. Zelikovsky*, 136 N.J. 516, 530 (1994).
11. *See Restatement (Second) of Torts* §§ 586-87 (1977); *see also Hawkins v. Harris*, 141 N.J. 207, 213 (1995) (*citing Erickson v. Marsh & McLennan Co., Inc.*, 117 N.J. 539, 563 (1990)); *Williams v. Kenney*, 379 N.J. 118 (App. Div. 2005).
12. *Salzano v. North Jersey Media Group, Inc.*, 201 N.J. 500 (2010).
13. *Erickson*, *supra*.
14. N.J.S.A. 2C:33-4.1.
15. *Dendrite International, Inc. v. Doe No. 3*, 342 N.J. Super. 134 (App. Div. 2001).
16. 29 U.S.C. §§151-169.
17. *See Hispanics United of Buffalo*, NLRB Administrative Law Judge Decision, Case No. 3-CA-27872 (Sept. 6, 2011) (finding protected activity when employee Facebook posts criticizing a colleague solicit feedback from fellow employees).
18. Cal. Civ. Code §1001 (codifying California Senate Bill 820 approved Sept. 30, 2018, effective Jan. 1, 2019).
19. P.L.2019, c.39 (enacted effective March 18, bars provisions in employment contracts that waive rights or remedies; bars agreements that conceal details relating to discrimination claims).
20. Pub. L. 105-304, 112 Stat. 2860 (1998) codified at 17 U.S.C. §101 *et seq*.
21. 17 U.S.C. §512.
22. *See* text accompanying note 5.
23. *Dendrite, supra*.
23. *Id.*