

MORE ON **CYBERSECURITY & PRIVACY** **COMMERCIAL/FINANCIAL** by **INA B. SCHER** and **DANIEL A. DINGERSON**

# 4 ways to combat online cyber-defamation

**W**ITH THE EVER-EXPANDING ROLE OF SOCIAL media and the Internet, negative online reviews can spread virtually unchecked. Although some reviews are limited to statements of opinion that, generally, are legally protected, businesses and individuals are increasingly subject to attacks that include false statements constituting online defamation.

The legal avenues for addressing defamatory comments and obtaining their removal from websites can be difficult to navigate. The Communications Decency Act of 1996 generally protects Internet forum providers—including Google, Facebook, Twitter, and Yelp—from liability for content posted by their users, which results in there being little incentive—and, arguably, a disincentive—for these entities to self-police their websites. Accordingly, many websites require a court order or judgment establishing that

statements are defamatory before removing any user content.

Moreover, websites will sometimes refuse to remove any posted material without an order directed to that website requiring the removal of specific defamatory statements, and then the website may remove only that limited portion of the review, leaving behind other negative comments. Because reviews frequently are posted in multiple places, or reposted by numerous websites, it can be difficult and expensive to obtain an order relating to every unique

occurrence of the information on the Internet.

Efforts to remove online defamatory statements are frequently further delayed because posts were submitted anonymously or via pseudonym. In those situations, a defendant typically must be identified before a judgment or order finding that an online statement is defamatory may be obtained. The legal process to do so can be lengthy and costly, requiring subpoenas to collect information from a variety of sources, including the websites where the comments are posted, and the Internet service providers for the individual who posted the comments.

Faced with such legal hurdles, some companies have tried to preemptively combat the problem by including provisions for liquidated damages in their terms and conditions that penalize their customers and clients for posting any negative comments.

While such contractual provisions are intended to be effective even against otherwise-protected speech, including opinions, there is significant risk in imposing these terms on customers. One state—California—has already outlawed them via the passage of the “Yelp” bill (California Civil Code § 1670.8, which went into effect January 1, 2015), while a similar bill—the Consumer Review Freedom Act—has been passed by the U.S. Senate.

Despite the significant barriers to obtaining removal of online comments, companies need not heed Dante’s familiar warning—“Abandon hope all ye who enter here”—when faced with negative and defamatory online reviews. In fact, a number of strategies are available to counsel to take advantage of websites’ own procedures and legal processes to have reviews removed.

First, any copyrighted material—including photographs and logos—can typically be removed quickly and easily simply by providing notice of a copyright violation to the website where the material is posted. Pursuant to the Digital Millennium Copyright Act, Internet websites must comply with conditions set forth in the Act regarding notice and take-down of infringing material in order to qualify for certain “safe

harbors” that protect websites from liability based on their users’ activities.

Second, reviews including defamatory material often also violate a website’s terms and conditions of service. In those situations, websites are often willing to remove material without a court order pursuant to their agreements with their customers to uphold the standards self-imposed by the website.

Finally, legal process is available if needed. In New York there are two procedures that aid efforts to identify anonymous online commentators: (1) filing for pre-litigation disclosure, for the limited purpose of obtaining discovery; and (2) filing a “John Doe” complaint, which can be done prior to discovering the identity of a defendant. These two procedures can be used to seek discovery from entities that possess information (such as IP addresses and customer details) needed to identify the poster. Once a defendant has been identified, courts can issue orders finding that material is defamatory. Such orders can often be used to persuade search engines—such as Google, Yahoo!, and Bing—to voluntarily “de-index” instances of the defamatory material across many websites. Although the material will continue to exist on source websites, most searches

will not reveal the webpage where it exists, effectively preventing the material from being found and allowing companies to avoid the costly process of removing each reposting.

### *Tactics to Combat and Neutralize Defamatory Reviews*

- Invoke the DMCA to obtain removal of material that violates a copyright by providing notice from the copyright holder or its agent.
- Notify websites of any violations of their terms of service and request removal in compliance with those terms.
- Use legal processes to identify anonymous users and obtain orders requiring removal.
- Request that search engines voluntarily “de-index” occurrences of defamatory material from their search results.

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