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Notes from the Editors

by Denise Walsh, Edward Sturchio and Thomas Zalewski

This edition of the *Business Law Section Newsletter* contains several informative articles on a broad range of topics.

The issue contains a timely article on protecting a company's reputation in today's online environment. Also included is an insightful article examining the potential risks associated with franchises posing as licensing arrangements.

Once again, the provisions of the still somewhat new Revised Uniform Limited Liability Company Act are reviewed and analyzed, this time in the context of the forfeiture of a member's limited liability company interest. This edition also contains an in-depth article examining termination for convenience provisions in contracts with both private parties and governmental entities, as well as an article addressing good faith obligations as they relate to letters of intent.

We are pleased that Lydia Stefanowicz's regular opinion column is back! In this edition, Lydia's column tackles the issue of cross-border opinions.

As always, we hope the articles contained in this edition of the newsletter are helpful in your practice and when advising your business clients.

We encourage you to submit an article for publication on a topic of interest to you and other members of the business law community. We also welcome input from you about topics you would like to see addressed in future editions. Please feel free to reach out to any of the editors with suggestions. ■

Protecting a Company's Online Reputation

by Orville R. Cockings

The Internet offers companies an unprecedented opportunity to create brand awareness and enhance their reputation. Estimates of the number of worldwide Internet users in 2014 totaled 2.8 billion.¹ Approximately 87 percent of the U.S. population has Internet access.²

However, as Warren Buffett says: "It takes 20 years to build a reputation and five minutes to ruin it."³ Given the reach and rate at which information spreads on the Internet, five minutes is not an exaggeration. Fortunately, there are some practical measures a company can take to protect its online reputation and, in the event that negative and derogatory information gets posted online, there are legal options for seeking removal of them. This article discusses some of the measures a company can take to help prevent and address attacks on its reputation.

Preventative Measures

Does the Client Control the Places Where Customers Expect to Find it Online?

For a business client, a key component in managing its online reputation is owning or controlling the websites that users would expect the company to own or control.⁴ However, in order to increase a company's search result rankings and prevent competitors from trading off of the client's own product names, the client also should consider obtaining domain names for their products and services as well. Though not as prevalent as in years gone by, competitors have been known to register domain name variations to lure away customers from a company's actual website.

Equally important as securing a domain name is establishing a presence for the client's company and brands on social networking sites such as Facebook and Twitter.

In addition, providing blog sites or a space on a company's website where customers can discuss or provide feedback, such as 'support' forums, allows a measure of control over where complaints are lodged.

A federal U.S. trademark registration and a regional trademark such as a European community trademark (CTM) also can help a company maintain control over the use of its trademarks, service marks, and trade names. For instance, a U.S. federal trademark registration can greatly enhance a company's ability to efficiently and quickly deal with domain name squatters. While common law trademark rights and ownership will support a claim under the Anticybersquatting Consumer Protection Act (ACPA),⁵ having a federally registered mark is evidence that the mark is distinctive and that its owner was the first to use it in commerce. Moreover, while New Jersey does provide some protection for trademarks and the like, having rights that span continents can be critical when dealing with problems on the Internet.

What is the Internet Saying About the Client's Company?

It is unrealistic to expect that any one company or person can control every online outlet of potential negative publicity on the Internet. In fact, there are websites that solicit users to post negative information about people, companies, and products. By monitoring online chatter, a client may be able to prevent a problem from reaching critical mass before it might otherwise learn about it.

Online monitoring is relatively easy and often inexpensive. Services such as Google Alerts notify users by email whenever certain terms (such as a company name) are discovered on a website.⁶ Tools like Hootsuite allow companies to monitor social media outlets such as Facebook and Twitter.⁷ While companies offering monitoring services often provide their services for free to individuals, they may not be free when used by commercial enterprises, so the terms and conditions of use must be reviewed carefully when signing up for the service.

Is the Client's Site Optimized for Search Engines?

A variety of search engine optimization (SEO)

techniques may be used to increase the ranking and prominence of a website in a search engine's natural and unpaid results.⁸ Employing SEO does not remove the negative content from the Internet, but it reduces the risk that a user or potential customer will get exposed to it. It is beyond the scope of this article to discuss specific SEO techniques, except to note that some techniques are viewed harshly by the search engines and, when discovered, may actually result in a website being ranked lower than it normally would have been.

Responsive Measures

When the unfortunate happens and negative commentary threatens a company's reputation, there are some measures that may help.

Sending a TakeDown Request

A relatively fast and inexpensive option may be simply demanding that the website remove the objectionable content. Hosts of third-party content do not usually require a court order before they remove content or make it invisible to search engines. On the other hand, they often require something more than a mere statement that content falsely describes the aggrieved. Therefore, a website's policies and procedures for removing content should be carefully reviewed before contacting the site's host.

Asserting Defamation or Other Claims

If a website's policies and procedures are unable to address the harm caused to a company's reputation, a cease and desist letter or bringing litigation based on state or federal law may be the next step. One of the more obvious choices is a claim for defamation under state law, which typically arises from the publication of damaging information that is known to be false. A less obvious choice may be a claim for violation of publicity and privacy laws, which vary widely from state to state.

Given the myriad different ways that a company's reputation may be damaged, this article is not intended to describe all of the possible claims, their advantages, and disadvantages. Regardless, if the claim relates to derogatory online content, it is important to consider the Communications Decency Act of 1996.

Communications Decency Act

An important defensive shield that provides immunity to website operators against many legal claims

but that is most frequently associated with online defamation is the Communications Decency Act of 1996 (CDA).⁹ In enacting the CDA, Congress decided to treat online providers of third-party content differently than print media providers such as newspapers. Section 230(c)(1) of the CDA states that: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another content provider." Section 230(f)(2) defines an "interactive computer service" as "any information service, system, or access software that provides or enables computer access by multiple users to a computer server..." Thus, "interactive service providers cannot be held liable for publishing harmful information that is generated by a third party."¹⁰

The CDA does not shield the authors of derogatory content. Thus, if the author of defamatory content can be found, they can be sued and required to take down the content.¹¹ Derogatory content created by or at the encouragement of the online service provider is similarly not exempt from suit.¹² If the authors do not have the ability to remove the content from search engine results themselves, the search engine operator may elect to omit content from search results once they are presented with a court finding of defamation or the like. The CDA also does not extend immunity to criminal violations¹³ or certain communications-related privacy laws.¹⁴

Unfortunately, finding and successfully suing individuals that post derogatory content to social network sites can be very difficult. Moreover, many social network sites strongly resist requests to remove negative comments about businesses or products in the absence of a clear violation of law or court order. As a result, the CDA can be a significant impediment to removing defamatory or otherwise unlawful content from the Internet. For instance, at least one New Jersey court found it unnecessary to consider claims under New Jersey's Consumer Fraud Act given the broad protection afforded website operators by the CDA.¹⁵

Intellectual Property Claims

CDA immunity, however, does not extend to intellectual property law.¹⁶ Claims alleging that derogatory content violates copyright or trademark infringement are outside the scope of the CDA.¹⁷

For example, in *Amerigas Propane, L.P. v. Opinion Corp. d/b/a Pissedconsumer.com*, plaintiff American Propane alleged that the defendant misused its AMERIGAS

trademark by creating a website at “amerigas.pissedconsumer.com,” displaying a competitor’s advertisement that included the AMERIGAS mark, engaging in improper SEO so that the amerigas.pissedconsumer.com website ranked higher than the plaintiff’s site, and creating a Twitter account linked to the defendant’s website.¹⁸ American Propane alleged various claims, including federal and state common law trademark infringement, unfair competition, false designation of origin, trademark dilution, and various tort-related claims.

The court refused to dismiss the complaint, finding that Amerigas had properly alleged that Opinion Corp. used Amerigas’s trademark in commerce and in connection with goods and services for purposes of stating a claim under 15 U.S.C. §§ 1114 and 1125(a).¹⁹

Further in this regard, while the ‘intellectual property law’ exception clearly applies to federal trademark and copyright violations, the law is less settled with respect to state law-based claims. For example, state law copyright claims that survived preemption by the United States Copyright Act of 1972 have been held to fall within the intellectual property law exception.²⁰ However, courts have come to different conclusions regarding whether state law-based rights of publicity and privacy should be considered intellectual property law for purposes of the CDA.²¹

ACPA and UDRP

Another responsive measure mentioned above is ACPA, which provides a federal cause of action for registering, using, or trafficking in a domain name that is identical or confusingly similar to a trademark or

service mark, including a personal name. To establish a claim under ACPA, the trademark owner must prove that the registrant had a bad faith intent to profit from the mark, that the mark was distinctive at the time the domain name was registered, and that the domain name is identical or confusingly similar to the trademark. ACPA²² provides factors that a court may consider in determining whether bad faith exists, including whether the domain name registrant offers to transfer or sell the domain name value. Most courts will find bad faith where the registrant offers to sell the domain name. On the other hand, courts have held that a defendant to an ACPA claim does not have bad faith if the motive for registering a disputed domain name is to express customer dissatisfaction.²³

In lieu of suing under ACPA, a trademark owner may choose to proceed under the Internet Corporation for Assigned Names and Numbers’ uniform domain name dispute resolution policy (UDRP). As this is an arbitration proceeding, it is typically less expensive than suing in federal court.

Summary

There is no one-size-fits-all solution when it comes to protecting a company’s reputation from derogatory information on the Internet. However, by taking certain steps in advance and being cognizant of potential legal remedies and defenses, a company may be able to remove or at least limit the spread of such information. ■

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Endnotes

1. <http://www.internetlivestats.com/internet-users/>.
2. <http://www.internetlivestats.com/internet-users/>.
3. http://www.huffingtonpost.com/2013/08/30/warren-buffett-quotes_n_3842509.html.
4. <http://www.searchenginejournal.com/7-expert-tips-protect-online-reputation-seo-social-media/128115/>.
5. 15 U.S.C. § 1125(d).
6. <https://www.google.com/alerts>.
7. http://signup.hootsuite.com/pro-ent-na-english-r7t/?mkwid=sr0F78KRS_dc&pcrid=42922225774&pkw=hootsuite&pmt=e&gclid=CLvSzIDxsMUCFdQRHwodFIAXA.
8. Beel *et al.*, Academic Search Engine Optimization (ASEO): Optimizing Scholarly Literature For Google Scholar & Co., *Journal of Scholarly Publishing*, 41 (2): 176–190, Jan. 2010. doi: 10.3138/jsp.41.2.176. University of Toronto Press. Downloaded from www.docear.org.
9. See 47 U.S.C. § 230.

10. See *Soporano v. Grindr, LLC*, No. 14-04522, 2015 U.S. Dist. LEXIS 30795, at *6 (D.N.J. March 13, 2015).
11. See, e.g., *Rooks v. Krzewski*, No. 306034, 2014 Mich. App. LEXIS 604 (Ct. of Appeals Mich. April 3, 2014).
12. *Amerigas. Propane, L.P. v. Opinion Corp. d/b/a Pissedconsumer.com*, No. 12-713, 2012 U.S. Dist. LEXIS 84679, at *37-43 (E.D. Pa. June 19, 2012). See also, e.g., *Fair Hous. Council of San Fernando Valley v. Roomates.com*, No. 12-713, 2012 U.S. Dist. LEXIS 84679, at *37-43 (E.D. Pa. June 19, 2012). Other courts have found, on the other hand, that simply selecting posts or deciding not to remove posts are entitled to immunity. See, e.g., *Jones v. Direty World Entm't Recordings LLC*, 755 F.3d 398 (6th Cir. 2014).
13. See 47 U.S.C. § 230(e)(1).
14. See 47 U.S.C. § 230(e)(4).
15. *Milgram v. Orbitz Worldwide Inc.*, 419 N.J. Super 305 (N.J. Sup. Ct., Law Div., Essex County 2010).
16. 47 U.S.C. § 230(e)(2) states: "Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property."
17. *Universal Commc'ns Sys., Ing. v. Lycos, Inc.*, 478 F.3d 413, 422423 (1st Cir. 2007); *Atl. Recording Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690 (S.D.N.Y. 2009).
18. *Amerigas Propane*, 2012 U.S. Dist. LEXIS 84679, at *2-4.
19. *Id.* at *43.
20. *Atl. Recording Corp.*, 603 F. Supp. 2d at 702-704.
21. *Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288 (D.N.H. 2008); *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102 (9th Cir. 2007).
22. See § 1125(d)(1)(B)).
23. *Mayflower Transit, LLC v. Prince*, 314 F. Supp. 2d 362 (D.N.J. 2004).