

# PRESERVING YOUR REPUTATION IN THE DIGITAL AGE: HOW TO PREVENT ONLINE CRITICS FROM SABOTAGING YOUR GOOD NAME

Ryan Jacobson & Jason Mayer SmithAmundsen LLC



Warren Buffet once said, “[i]t takes 20 years to build a reputation and five minutes to ruin it.” Before the Internet, businesses relied heavily on advertising and word-of-mouth to earn their reputation in a given industry. Without a soap box or a microphone, critics had little effect on a company’s marketplace reputation.

In the digital age, marketing professionals are tasked with managing a company’s online image. Consumers have a forum to describe their experiences to a massive audience; this, in turn, has given rise to a fiercely competitive and unpredictable market. With the increasing popularity of social media and grievance sites, businesses and businessmen alike are vulnerable to attack for good reason, bad reason or no reason at all.

Sites like Ripoffreport and Scambook, for instance, urge consumers to report unscrupulous business practices such as advertising fraud and unethical doctors, lawyers or contractors. Glassdoor provides a forum

to employees to anonymously evaluate internal policies, rate bosses and discuss company culture. Visitors to Yelp, Citysearch and Tripadvisor will find user reviews praising or bashing professionals in the hospital-ity, retail and travel industries.

## ONLINE REVIEWS AND REVENUE

Consumers looking to make an informed choice routinely turn to the Internet for guidance. Oftentimes the negative reviews will appear in the first few entries following a search using just the company’s name. Because of a high rate of traffic to the site, and other search engine optimization (SEO) strategies, it is not uncommon to stumble across a scathing review before finding the link to the company itself.

According to Forbes, Yelp logs more than 84 million visitors and 33 million reviews each month. One Harvard study suggests that as little as a one-star increase in rating yields a 5 to 9% increase in revenue; a one-star decrease can lead to a 10% decline.

The *Huffington Post* suggests that 49% of consumers are more likely to visit a business after reading a positive review online; 69% trust online reviews as much as a personal recommendation. If the first review encountered is harshly critical, the consumer may attach undue credibility where the comment was listed high on her search results, or, on the premise that no one would devote the time to making a false complaint. That same consumer is more likely to move on to a competitor without digging deeper to see if the negative rant was an outlier or representative of what others experienced. Forbes suggests that just one scathing review could cause as much as a 70% decline in a company’s revenue if negative comments were the first encountered by consumers.

Many companies engage in the spamming of flattering reviews, as well as compensating customers to submit positive reviews to inflate ratings and bury negative ones. Companies considering these practices

should note that false endorsements are a deceptive trade practice under Section 5 of the Federal Trade Commission Act, and getting caught can lead to substantial penalties.

### BUSINESSES FIGHT BACK

Competitors and even disgruntled employees will hide behind false accounts to accomplish their goals – not everyone is who they say they are. That was certainly the case for Notre Dame football player, Manti Te'o, who received national attention after publicly confessing he was the victim of an elaborate online 'catfishing' hoax. Similarly, a federal prosecutor resigned after two of his top lawyers admitted using fake names and accounts to post sensitive information on a leading news site.

Some businesses are fighting back to recoup lost revenue. For instance, a Virginia woman was sued for \$750,000 after posting a scathing review about her developer. The woman accused the company of damaging her home, charging for work they failed to do and 'losing' her jewelry. She warned readers: "Bottom line: do not put yourself through this nightmare of a contractor." The defamation suit alleged the woman's false representations resulted in lost work opportunities and irreversible harm to the company's reputation. In December 2012, a judge granted the company a temporary restraining order and ordered the woman to remove certain references and amend others. The Virginia Supreme Court reversed the decision ruling that the reviews should not be censored, and instructed the developer to focus on proving the comments were actionable and resulted in compensable harm.

### REMEDIAL MEASURES

To combat false publicity, business owners should be cognizant of the law and aware of a handful of remedies they can employ to preserve the reputation it took years for them to build.

First – Monitor your online reputation. A company's marketing specialist should proactively monitor its online reputation. Companies garner the most respect from site visitors when they politely, but directly address concerns. Avoid taking a defensive stance and instead address the problem by giving the business' point of view and the efforts it has (or will) undertake to correct the problem. Many businesses offer free coupons, meals or products to placate angry customers and persuade others to give them a second chance.

If you can demonstrate the review is in blatant violation of the host's guidelines, a plea to their legal department may be

worthwhile. Ripoffreport permits companies to rebut a review, or pay \$2,000 to participate in its VIP Arbitration Program, which gives the business an opportunity to prove the report was false and the author time to reply. If the third-party determines the accusation was unfounded, the site will substitute its findings for the original posting and advise readers the false statements were redacted.

Second – Know the law. The freedom of speech is not limited to compliments; but, there are risks associated with an ordinary person's extraordinary ability to affect a company's bottom line with just the click of the mouse. Similarly, there can be harsh legal consequences for those who act impulsively thinking they can hide behind a screen name or the Bill of Rights. A comment that imputes criminal conduct or a lack of competence or integrity to a business, if unfounded, may be sufficient to state a claim for defamation, commercial disparagement or tortious business interference depending upon the jurisdiction. But to truly be actionable, the offending post must contain false, verifiable facts and not opinions; an opinion is never actionable. For example, a lawsuit based on a review that claims a customer was "treated poorly," that expectations were "unfulfilled," or that service was "less than desirable" will make little headway.

Conversely, false accusations that a business committed fraud or was otherwise involved in unethical or illegal practices may pass muster. While the right to speak freely is a paramount consideration when attacking unflattering speech in the courthouse, deliberate sabotage of one's reputation and livelihood must be discouraged if committed on false pretenses. Courts rely on a number of factors when distinguishing fact from opinion: whether the statement is verifiable, whether it has a precise core meaning or is indefinite and ambiguous, and whether the literary context would influence an average reader to believe everything they read.

Third – Know your target. A scorned business will typically lash out at the host of the site with little success; Section 230 of the Communications Decency Act (CDA) affords them immunity. The only real target is the source of the defamatory posting who may be difficult to identify.

Fourth – Filing Suit. In most jurisdictions, a lawsuit for defamation must be filed within *one year* of the date the negative review is *first* published. If the author's identity is unknown, courts may require a petition for discovery before issuing subpoenas to the hosting site or Internet Service Provider

(ISP) for information about the author. As a prerequisite, the court may require the plaintiff to prove a 'likelihood of success' on the merits; in other words, that the offending statements are in fact actionable and could withstand a judgment on the pleadings.

If the petition is granted, the business might obtain the user's name, e-mail address and IP address from the hosting site, which can aid in the pursuit. A subsequent subpoena to the ISP may determine the name and address of the account holder. Beware, a clever saboteur may post his comments from an unmonitored bank of computers or use software to scramble the IP address. Hitting a dead end can be frustrating given the time and money spent while the offending speech continues its path of reputation destruction. Even if your efforts lead to the culprit, you may find he has little in the way of assets or insurance coverage.

### CONCLUSION

The Internet serves as both a shield and sword for businesses looking to increase exposure. A company faced with a damaging review should be proactive and address legitimate concerns. If the offending comment is blatantly false, and if it has been detrimental to the company's reputation and revenue stream, it may be prudent to invest in a lawyer with experience in reputation management and Internet libel law. The value of a credible online presence should not be taken for granted.



*Ryan Jacobson is a partner at SmithAmundsen LLC and co-chair of the firm's Entertainment, Media & Privacy Group. Ryan routinely counsels and defends clients experiencing Internet-related challenges including the areas of defamation, advertising, right of publicity and privacy-related claims. Though a staunch advocate for free speech rights, he is often retained by corporate clients, public figures and private persons faced with false and debilitating accusations. He may be reached at [rjacobson@salawus.com](mailto:rjacobson@salawus.com).*



*Jason Mayer is a first-year associate at SmithAmundsen LLC and a member of the Entertainment, Media & Privacy Group. Jason is a 2012 graduate of Washington University School of Law.*