

SPECIAL REPORT

COUNTERING ONLINE CRITICISM

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Virtually every day a Company or a top executive is demonized by online criticism. Much of it is false. Oftentimes the implications are huge and negative—nearly always an incredible amount of time and effort is spent trying to determine what to do about the criticism.

This Special Report offers ways to think about this phenomenon.

A Long-Standing Issue for Public Companies

From the earliest days of the Internet, corporate short-sellers, competitors, disaffected employees and other critics have taken to message boards and other websites to disseminate false information about companies and executives. Sometimes the goal is to drive down a share price...or to besmirch the products of a rival...or to exact revenge...or simply to cause chaos. Whatever the motives, purveyors of false information have now taken their disinformation campaigns to an even more powerful and dangerous platform: the social media.

Unfortunately for corporate victims, the right to attack and smear anonymously, often with little consequence, has been consistently upheld by the courts, starting with *Reno v. ACLU*, a 1997 case in which the U.S. Supreme Court broadened the scope of online speech, stating that “any person with a phone line can become a town crier,” and concluding that “the vast democratic forum of the Internet would be stifled if users were unable to preserve online anonymity.” This is consistent with the generally accepted precept of public discourse as the “marketplace of ideas.”

Thus the legal issue has boiled down to how to balance the rights of a corporation seeking to protect its reputation—and its market cap—from false accusations against the privacy rights of those who post the unwanted negative comments. It is a balance that is often hard to achieve. In the early days of the Internet, the favored corporate strategy was to use defamation suits to counter negative online comments. A new tort of “cyber-libel” quickly emerged, with many of the early suits naming deep-pocketed Internet Service Providers like Yahoo! as the defendants on the theory that they were the “publishers” of posted statements, but more importantly had the money to cover any liability.

Congress Changes the Rules

Congress changed the rules of the game by enacting what is now Section 203 of Title V of the Telecommunications Act of 1996. Section 203 effectively blocks plaintiffs from going after the ISPs, which can no longer be treated as the “publisher or speaker” of material from a third-party. Subsequent cases involving the Drudge Report and AOL have affirmed that position, ruling that ISPs were immune from both re-publisher and distributor liability from defamatory statements made by third parties, even if the provider is given notice of the defamatory content.

So with rare exceptions, this has reduced the legal options of aggrieved corporations to going after “John Does,” the anonymous original providers of the negative content.

Increasingly sophisticated technology has enabled companies and their law firms to identify anonymous posters by obtaining subpoenas that can reveal the electronic identifiers in the registration materials the ISPs must keep on file. “People need to realize when they do the online posting bashing of a company that they can be caught pretty easily,” the *Pepperdine Law Review* quoted a Kaye Scholer lawyer as saying.

It is possible that the simple step of initiating legal action against an individual posting on the Internet or social media will solve the problem. It can be effective intimidation, given the fact that corporations usually have no realistic goal of recovering any money from the defendants, who are typically judgment-proof. In an infamous case involving HealthSouth, for example, the anonymous poster was finally identified as a \$35,000-a-year food service worker at Penn State.

Legal Action—Tread Carefully

Almost all social media experts agree that—with some important exceptions—taking or even threatening legal action against an individual poster is at best ineffective and could be disastrous. Internet trolls thrive on controversy, and there are few things they like more than being able to portray themselves as innocent victims of rich, greedy, unscrupulous corporate bullies trying to shut them down and suppress the truth.

Companies also overlook the very real danger that an angry defendant could file a counterclaim and embrace an aggressive discovery process that could involve deposing executives and obtaining sensitive documents that would wind up embarrassing the company—particularly if the counterclaim draws the attention of the Securities & Exchange Commission, which has happened in at least one case that resulted in the SEC bringing a civil fraud action against the initially aggrieved company.

Given this risk and the nearly inevitable public relations blowback, companies should refrain from heavy-handed legal responses in all cases save those that clearly represent SEC-enforceable violations of securities law.

So what's the best strategy a company can take to counter the impact of negative postings? Here are some recommendations:

Create a Real-Time Response Capability

The principal rule in corporate social media communications is that falsehoods about your company must be addressed and corrected immediately. Any falsehood that goes unchallenged can and probably will be forwarded and expanded upon. With each passing, the falsehood will gain traction and momentum, with more exposure creating more credibility.

But responding to falsehoods is in itself a difficult and risky proposition. The second principal rule in corporate social media communication is to never present the company in a negative light by trying to shut down free speech or bully commentators. Countless companies have learned this the hard way.

As a result, protecting the company's image on social media is more art than science. In most cases in which someone is posting negative opinions about the company, the proper response is not to respond at all. The risks of being portrayed as a corporate bully or getting into an online fight with trolls usually outweigh the possible benefit of a forceful response to a post few people will see anyway.

On the other hand, if someone is posting factually incorrect information about the company, it is almost always best to respond—if there is readily available evidence to prove the poster wrong.

So the task at hand is daunting: Companies must first monitor social media and identify negative references to their brand name or products. They must then decide whether the comment warrants a response. If so, the company must respond immediately with language that sets the record straight without coming off as bullying.

This is not a responsibility for junior-level communications staff. At many companies, the social media team is composed of relatively young professionals who have neither the experience nor the authority to make decisions at these levels. As a result, companies must create a management structure capable of handling this delicate process on a real-time basis. That structure must include an executive capable of:

1. Deciding when and if the company should respond to social media and Internet postings;
2. Deciding how the company should respond and what wording it should use.

Every company will have to develop a structure that works best for it. Decisions at this level should include input and sign-off from senior executives in Communications, in-house counsel and even the C-Suite. However, given the sheer volume of social media interactions, the top executives cannot get involved in every instance. In the end, someone in the social media/communications team will have to be given the authority to decide how to respond to individual social media and Internet references—including whether to leave the choice of how to handle a specific instance to the social media team, or elevate it to senior management.

The upshot: Companies must view responses to social media in general and fake news in particular as a serious element of their corporate Risk Management Programs. In doing so, they will need to dedicate the resources required for effective risk management—including senior level time and input.

Pressure Platforms for Protection

Both individually and as a group, companies should be lobbying major platforms like Facebook and Twitter to create better protections against Fake News. Facebook CEO Mark Zuckerberg has slowly come around to admitting that his platform needs to develop better tools and procedures.

In a note to users posted on Facebook, Zuckerberg described some of the “fixes” the company is implementing:

- “Stronger detection. The most important thing we can do is improve our ability to classify misinformation. This means better technical systems to detect what people will flag as false before they do it themselves.”
- “Third-party verification. There are many respected fact-checking organizations and, while we have reached out to some, we plan to learn from many more.”
- “Warnings. We are exploring labeling stories that have been flagged as false by third parties or our community, and showing warnings when people read or share them.”
- “Easy reporting. Making it much easier for people to report stories as fake will help us catch more misinformation faster.”
- “Related articles quality. We are raising the bar for stories that appear in related articles under links in News Feed.”
- “Disrupting fake news economics. A lot of misinformation is driven by financially motivated spam. We’re looking into disrupting the economics with ad policies like the one we announced earlier this week, and better ad farm detection.”

All these actions would represent an improvement over the current system and provide some increased level of protection. Companies should press Facebook and Zuckerberg to follow through on these initiatives and to develop additional ways to combat fake news.

There is another course of action available to corporations, and indeed an intriguing one: A coordinated campaign to lobby platform operators could be carried out under the auspices of a group like the U.S. Chamber of Commerce, or companies could join together in a new partnership group to collectively agitate for change. One-on-one lobbying efforts by high profile CEOs and top executives of the world’s largest companies also can have enormous influence at Facebook and other platform operators.

Explore Legal Remedies as a Group, Not as Individual Companies

There is a significant difference between fake news designed to damage politicians or political causes and fake news designed to damage a business. The former is a gauzy legal area often laden with claims of First Amendment rights, while the latter can offer redress for specific and proven falsehoods with intent to damage.

As noted above, corporations and CEOs should consider lobbying through business organizations such as the U.S. Chamber of Commerce and other trade groups, as well as meeting with lawmakers and regulators, to begin strengthening protections against fake news.

But there is always a final option available to them as well. While acknowledging the truth of the dictum that it is rarely a good idea for companies to pursue legal recourse against commentators on social media or the Internet, there is one legal strategy that could create a strong deterrence to anyone thinking of posting fake news: Shareholder lawsuits. There is ample legal precedent in the United States of shareholders filing class-action lawsuits against short-sellers whom they accuse of manipulating share prices by disseminating false information. Such an action could be organized through independent shareholder groups without any direct involvement from the company in question.

If a group of shareholders of a defamed company were to identify the originator of the fake comments and sue that person for losses—even should the perpetrator be a solitary troll with a WiFi connection and a Facebook account—it would send a powerful message regardless of the outcome of the case.

Finally, Engage Your Critics. Make it clear to shareholders and the general public that you are listening and not trying to hide from anything. McDonald's vice president for corporate responsibility, for example, used a company blog to comment on a low "raw score" (44 out of 100) in a published report about the company's environmental and social policies. Conceding the score was "humbling," the executive said, "this tells us there is much more to do," the *Wall Street Journal* reported. Go to the platform where the negative comments were first posted, and give your critics the sense that you are treating them with dignity and fairness. That not only defuses the anger but also does so in a manner that (hopefully) reflects the company's core values.

This Special Report is one of a continuing series issued by The Dilenschneider Group. Other Reports have included:

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