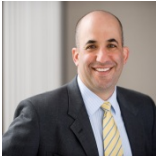


Pitfalls in Managing Online Reputations



Eric M. David

June 2, 2016

Subscribe to News and Insights

 Via RSS

Via Email



Whether you represent sports stars and high-profile entertainers, or hometown doctors, architects, and restaurateurs, you have almost certainly gotten calls in the past several years asking for your help in dealing with something posted online that is causing your client distress.

In the most common case, your restaurant owner client is angry about an anonymous review posted on Yelp that accuses her of serving spoiled food and of being rude. She is certain that the review was posted by a competitor (or a disgruntled former employee), and she insists that the review is both false and defamatory. The client tried to get Yelp to take down the review, but Yelp was unhelpful, so she comes to you for help.

With the proliferation of mobile phones with high-quality cameras, and a seemingly insatiable appetite for social media content on Facebook, Twitter, Snapchat, and Instagram, online reputation management is a full-time job for celebrities and small business owners. It is also now an important job for their attorneys. Effective representation in this area, however, requires a nuanced understanding of civil procedure, state tort law, federal communications law, and, of course, the First Amendment. While civil and criminal law provide attorneys with effective tools to vindicate the rights of their clients whose reputations are being harmed online, those tools are counter-balanced by procedural hurdles and statutory privileges that can make it complicated and expensive to address online defamation.

To guide the analysis, consider the case of Sarah Jones, a school teacher and a cheerleader for the local National Football League team. (Based on the facts of *Jones v. Dirty World Entm't Recordings LLC*, 755 F.3d 398 (6th Cir. 2014)). In 2009 and 2010, she was the subject of a series of posts on a gossip website. These posts, which were submitted anonymously, included pictures of Ms. Jones and made a variety of defamatory statements. While anonymous third parties created and submitted the posts, the website operator often added his own commentary to the third-party posts. Horrified at the posts, Ms. Jones first communicated directly with the website operator to ask him to remove the posts. When that failed,

she sought legal help.

Can You Sue the Website?

The first instinct for most attorneys in cases like this is to write an angry letter to the website demanding that it take down the posts, requesting that the website turn over any identifying information it has on the anonymous third party who wrote the post, and threatening litigation if the website fails to comply. While such a letter might feel good to write, it may not achieve the desired result. In fact, it is very likely that there is no cause of action against the website, a legal reality that most websites that rely on third-party content or user-generated content (e.g., Yelp and other review websites, YouTube, etc.) know quite well.

More specifically, they know that Section 230 of the Communications Decency Act, 47 U.S.C. § 230 ("Section 230"), provides website operators who post user-generated content with broad immunity from most legal claims arising from that content. This immunity would bar any tort claims against the website for defamation, false light invasion of privacy, or publication of private facts. Under Section 230, it will not suffice that a website operator actively encourages defamatory postings by third parties or even comments on those postings. Instead, the operator has to materially contribute to the defamation, either by changing the content to make it defamatory or setting up the website in such a way as to require the user to contribute unlawful content.

Can You Sue the Speaker?

While Section 230 likely bars most tort claims against a web operator for user-generated content, no such immunity exists for the third party (i.e., the user who generated the content). If the third party can be identified, he or she may face liability for defamation and related torts, as well as for copyright and misappropriation claims. One of the challenges in those cases is how do you identify the anonymous content provider?

As with their generally broad interpretation of Section 230, courts in the past decade have developed a body of law aimed at protecting anonymous Internet posters from having their identities revealed by website operators. Website operators like Yelp and others are well aware of this body of law, and they are very familiar with the geographic limits of state subpoenas. As a result, they typically require a litigant seeking the identity of an anonymous poster to jump through every possible procedural hoop, and there are many of them available.

Pre-Litigation Considerations

Finally, if you represent a high-profile figure, it is always important to remind your client of the high bar he or she will have to overcome to succeed on a defamation claim by virtue of his or her status as a public figure. In addition to having to prove actual malice (i.e., knowledge of falsity or reckless disregard for whether the statement was true), your client is making her reputation an issue in the case, and, therefore, a proper subject of discovery. Depending on the nature of the alleged defamation, the discovery requests your client will face are likely to be personal and uncomfortable.

* * *

Courts across the country have interpreted the First Amendment to require a plaintiff making a claim arising from Internet speech to overcome a number of procedural and legal hurdles, starting with identifying the defendant and carrying all the way through the merits analysis of the case. Moreover, Section 230 has made it almost impossible to recover damages from a website for user-generated content. As a result, an attorney familiar with these various hurdles stands the best chance of properly advising his or her high-profile client on how to respond to Internet speech.