

Online Negativity: How to Fight Back

By David Gurnick, Tal Grinblat and Nicholas S. Kanter



As the use of the internet has grown, individuals and businesses are becoming increasingly vulnerable to electronically posted falsehoods, invasions of privacy, revenge and other negative content through review websites, social media and information hacks. There are several strategies and legal tools for victims and lawyers to fight back against improper negative online speech.

THE INTERNET IS A POWERFUL CHANNEL FOR communication, with great strengths compared to other media. It has been referred to as the “largest public space in human history.”¹

Internet communications can reach an unlimited number of people worldwide. In contrast, the reach of television and radio broadcasts are limited by geography. Internet communications are stored. Once written, messages can be accessed repeatedly and over extended lengths of time. Television and radio broadcasts are transitory.

Unlike television, radio and print, the internet is interactive, enabling two-way participation. And internet messages can be more dynamic in their range of designs, text, visuals, audio, and use of data, compared to other communication methods. The internet’s capacity so far seems unlimited. Almost every message ever sent remains accessible. Internet messages appear on desktops, laptops, tablets, phones, and even wristwatches—comprising a larger number of access points compared to the number of televisions or radios, or print runs of books and periodicals.

While the internet is a source of information and communication, its power can be misused. People and businesses suffer from electronically posted falsehoods, disparagements, exaggerations, invasions of privacy, rants, revenge, and other negativities that become widely and permanently accessible. These posts come from disgruntled ex-employees, dissatisfied customers, competitors, political opponents, ex-sweethearts, and pranksters. Compounding these problems is a widely-held sense that little can be done to effectively challenge or remove or obtain other relief for improper negative content posted on the internet.²

But the despair over negative online content is partly misplaced. While the internet benefits from principles of free speech, First Amendment protection has limits. Increasingly, victims, lawyers and other consultants discover creative ways to fight back against improper negative online speech. This article discusses several strategies.

Various Categories of Negative Online Speech

As use of the internet has grown, so have the ways people can send false, defamatory or other negative messages or content. A perpetrator can post content that is false, disparage a product or service, expose embarrassing private facts, use someone copyrighted content without the owner’s consent, or misuse someone else’s trademark.

Review and Rating Websites. At sites like Angie’s List, Avvo, Yelp, and TripAdvisor, satisfied or dissatisfied customers, or students in the case of the professor/teacher ratings sites, can post compliments, but can also post rants, criticisms or even false information.

Revenge Websites. These sites invite submissions, purported facts, embarrassing photos or other content as a way to obtain vengeance for perceived wrongs done against them by ex-friends, ex-lovers, employers, co-workers, neighbors, or others.

Social Media. Social platforms allow negative comments like Facebook posts, YouTube comments, Tweets or Reddit posts, all with potential to go viral quickly.

Information Hacks. Private content, such as internal emails and memos from within Sony, or subscriber identities from the Ashley Madison website, for example, can be exposed.

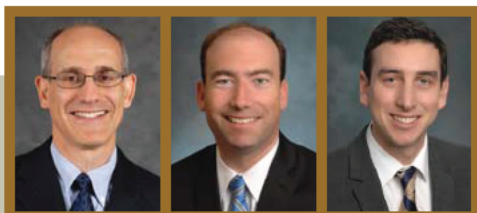
Personal Sites. False or defamatory statements are easily made on blogs or other sites.

Challenges to Fighting Back

The United States has a strong commitment to the First Amendment and free speech.³ Partly from this commitment, Congress enacted Section 230 of the Communications Decency Act, stating that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”⁴ This provision grants website operators broad protection against claims arising from speech posted by third parties.

Immunity from liability frees web hosts from legal risk or any sense of obligation to restrict content posted on their sites. Provocative content may attract more visitors. This may benefit the host.

Free speech has also been used to protect anonymous online posters. For example, *Thomson v. Doe*⁵ concerned an anonymous review on a site that posts reviews and ratings of lawyers. The lawyer was accused of lacking basic business skills, detachment from fiduciary duties, professional failures, and not protecting a client. The lawyer subpoenaed the website (Avvo) seeking the poster’s identity. The Washington State Court of Appeals relied on the First Amendment to rule that because the lawyer did not make a prima facie evidentiary showing of defamation, the subpoena would not be enforced.



David Gurnick, Tal Grinblat and Nick S. Kanter are with the Lewitt Hackman firm in Encino. Their practices include defense of reputation on the internet, franchising, trademarks, and copyrights and litigation. They can be reached at dgurnick@lewitthackman.com, tgrinblat@lewitthackman.com and nkanter@lewitthackman.com, respectively.

Another variant of the free speech defense is the anti-SLAPP statute. Laws in California, 28 other states, and the District of Columbia let a defendant obtain early dismissal of actions deemed to chill free speech. These lawsuits are referred to as “Strategic Lawsuits Against Public Participation,” hence the acronym, “SLAPP.”⁶ Under these laws, when an action is brought arising from something the defendant said, the defendant can ask the court to dismiss the action, on the ground that it is an improper SLAPP lawsuit.

Recently, an online lender suffered the dismissal of an action as a SLAPP.⁷ A husband and wife seeking a home loan misrepresented information. After the lender’s loan commitment expired, the lender told the customer it could not fund the loan. Soon after, negative posts appeared on websites. Among these were statements that: “The guy that was supposed to handle closing could barely speak English;” “Everyone I talked to at this company were [sic] incompetent. They reviewd [sic] my credit rating and promised a quick close. Then the list of things got longer and longer;” and “They asked for an explanation of \$200 out of a \$30,000 deposit to make sure we were not ‘borrowing money’ for closing. It was my sons [sic] birthday money for god’s sakes!!!!”

An appellate court upheld dismissal of the lawsuit under Texas’s SLAPP statute, ruling that the statements were not defamatory; that implying someone is incompetent is nonactionable opinion; and stating that the lender was excessively demanding was a subjective opinion.⁸

But not all SLAPP motions are successful. In *Clay Corporation v. Colter*, a Nissan dealer in Massachusetts sued two brothers over a Facebook page called “Boycott Clay Nissan,” an online petition and a Twitter account used to urge potential customers not to do business with the dealership. The brothers claimed the dealer fired their sister because she had brain cancer and they posted that the dealer discriminated against cancer patients and was unethical. The dealer denied the allegations and claimed it invited the sister to return to work and offered to pay her back pay.

Massachusetts’ SLAPP statute is narrower than in other states, protecting only against claims for trying to influence the government. The court found the car dealer’s claims were not for efforts to petition the government, and therefore denied the SLAPP motion.⁹

There are other legal, cultural and technological challenges to fighting against negative online content. One of these challenges is the ease for posters to conceal their identities. The ability to speak anonymously on the internet “allows individuals to express themselves freely without fear of economic or official retaliation or concern about social ostracism.”¹⁰ Also, content circulates fast on the internet. Large portions of posted content are quickly searched and

copied to other locations and archived. Sites draw information from other sites and save cached copies of content. Search engines continuously crawling and indexing the web make it easy to find information. Once any content is posted, it can soon appear elsewhere, and is unlikely to ever disappear.

Many people might be surprised at how much information about them is already publicly available. Numerous sites contain names, addresses, phone numbers, family histories, identities of relatives, work histories, social relationships and the like. Many people are astounded that social networks like Facebook and LinkedIn are able to accurately suggest or identify people with whom a subscriber has family or social relationships.

Accidental releases of information, misdirected emails, inadvertent posts, and intentional releases of hacked information are additional sources of unwanted online information. These challenges are compounded by the slow pace at which lawmakers and courts are able to assess and address these circumstances, compared to the speed of transmissions on the internet and the dexterity of social media commentators, bloggers and hackers.

Practical Strategies and Legal Tools for Fighting Back

The many challenges do not mean that the goals of avoiding, stopping, fighting back or remedying negative online reviews and content are hopeless. Individuals, businesses, legislatures and courts are increasingly aware of these problems. And a variety of strategies and tools for fighting back are increasingly coming into focus. Different methods and combinations of methods must be selected for any particular situation.

Proactive Conduct. While self-evident, one way for businesses and individuals to reduce the incidence of negative comments is to use care in their activities and operations, acting properly, trying to avoid giving offense, delivering quality products and services at fair prices, being attentive to customers, apologizing promptly and sincerely for mistakes, and being kind and nice. These steps, even if followed rigorously, will not avoid all negative comments. Some people cannot be pleased. Some are looking for a dispute. Some will become upset at even the mildest perceived slight. But following these principles will reduce the number of people who may think they have a grievance, and reduce the number of negative comments about a particular individual, group or business.

Take No Action. Sometimes taking no action is the best action. No one wants a negative email or tweet, or negative online review on Yelp, RipOff Report or elsewhere about themselves. But a response that disputes the review, or criticizes the person who posted it, may have an effect that is opposite what is desired. That response may draw more attention to the message. Instead, silence may avoid drawing attention, so that the message soon becomes obscured by hopefully more favorable messages.

A thoughtful look and assessment whether the negative post has any real and substantial affect, and real costs, is worthwhile. With increasing numbers of negative content, revenge and the like on the internet, more people today understand that not every rant or criticism is to be taken seriously. Sometimes, it is better to ignore a negative post rather than engage and draw more attention to a remark that would otherwise have passed into obscurity.

Business Terms and Conditions. In some business relationships it may be appropriate to include in the company's standard website terms and conditions or in service agreements, a clause in which customers agree not to post negative online statements or not to make any post, without first getting the company's written consent. This method will not work in every relationship. But there are environments in which it could work, such as a small business with an intimate clientele.

Check Sites Terms of Use and Procedures. Most websites that accept posts from the public and most social media have terms of use that are accessible from their home page and other pages. Often these terms include a procedure for responding to negative or other inappropriate content. For example, the well-known magazine *The Economist* encourages the public to post messages. Its website states:

The Economist welcomes your thoughts, comments and arguments. To post comments to our blogs and articles or participate in our online debates, you must first register. During registration, you may select a pen name, which will appear alongside anything you post to Economist.com.¹¹

The magazine's terms of use state:
It is not possible for The Economist to fully and effectively monitor Messages [for] infringement of third-party rights. If you believe that any content infringes your legal rights, you should notify The Economist immediately by contacting our customer service centre for your region or by using the "Report Abuse" function on reader comments. Repeated misuse of the "Report Abuse" function will result in your access to the Forums being terminated.¹²

In the above statement, the phrase "customer service centre" is a link that can be clicked on to reach the contact information page. Therefore, in the event of a post that contains defamatory, infringing or other inappropriate content, one potential course of action is to use the magazine's stated procedure, contact the customer service center, explain the problem, and request that the content be removed.

An aggrieved person need not be restricted to the site's stated procedure. Other steps are possible. One additional step is to identify a decision maker or influential person at the company, such as an officer or legal counsel. Contact those persons to request assistance. For many sites that do not include contact info or have only limited contact info available online, other sources of information may exist from which decision makers or influential persons can be identified. Here are some examples:

- If the social media or site has a registered trademark, contact information for the site or for their trademark lawyer may be found at the U.S. Trademark office database, www.uspto.gov.
- If the site has registered a copyright, possibly some contact info would be at www.loc.gov.
- The site may have an agent to receive DMCA (Digital Millennium Copyright Act) notices. The list and contact information for agents is at http://copyright.gov/online/list/a_agents.html.
- If the person to be contacted is an attorney, such as the website's general counsel, contact information on the person can possibly be found at the state bar's website.

With this information a request can be made to the site to remove the content, and the request can be elevated to someone higher up in the company.

Ask Poster to Remove or Modify. Other possibilities include communicating with the poster directly or offering some restitution or discount in the future. Where someone posted a negative online review they can be asked politely to remove or edit it. Sometimes a polite response setting forth an explanation of what happened is helpful. Sometimes the response might be a post on the same website, maintaining a calm demeanor, and stating the facts. Sometimes offering the poster a modest discount at their next visit will be welcome. These steps should be taken with care, to avoid inflaming the poster and leading to multiple rounds of criticism.

Post a Polite Response. On many sites, bulletin boards and forums it is possible to post a response. A brief, respectful, even-tempered response explaining the circumstance, expressing regret for what happened, or for the poster's experience, and if appropriate, mentioning corrective action that was or will be taken, can partially neutralize some ill effects of a negative post. It does this by providing an alternative view to those who read the post.

Cease and Desist Demand. The next level of escalation is a formal demand that the poster “cease and desist” from their presumably unlawful conduct. Even these kinds of letters present a range of options. In one famous matter, counsel for the Jack Daniel’s company sent a polite and friendly cease and desist letter to a recipient who was infringing its trademark. That letter, available on the internet,¹³ is a model for trying to solve a problem without inflaming emotions or tempers. Letters with a more aggressive tone are also possible. However, as with everything else, cease and desist letters should be drafted with care, as it is fairly usual for recipients of these letters to post these on line as well.

Get Other Posts. An effective countermeasure to negative posts is to enlist other customers, friends and associates to post their own comments or reviews. This method may have the effect of causing negative reviews to be pushed down in the feed that contains such information.

DMCA Takedown Notice. The DMCA¹⁴ includes a procedure for notifying internet websites of content that infringes a copyright and requiring them to remove that content.¹⁵ Under the notice and takedown procedure, a copyright owner submits a notification, including a list of specified elements, to the service provider’s designated agent. The service provider, by removing or blocking the content identified in the notice, becomes exempt from monetary liability and from liability for any claim based on having taken down the material.¹⁶

Complain to and Enlist Assistance of Government. A course of action that is inexpensive is to seek assistance of government officials and agencies. The Federal Trade Commission, U.S. Attorney General, state consumer protection agency, state attorney general, local consumer protection agencies, U.S. senators, U.S. representatives, state senators and state assembly members, and county and city officials are all possible sources of assistance. Where a perpetrator is in a regulated industry, or within the scope of a regulatory agency, then other possible sources of help are agencies that regulate the perpetrator. As is true for the other tools discussed in this article, seeking the government’s assistance will not always be effective, but it is an option to consider and could be effective in some instances.

Litigation. Because of costs, time commitments and unpleasantness, litigation is rarely a first or preferred course of action. Rather, it is typically a course of last resort if the others have failed, or if assessment indicates the others are not likely to succeed. Courts can provide assistance to help identify an anonymous perpetrator. In some recent cases, courts have supported the issuance of subpoenas to identify anonymous posters.

As one example, in *In Re Anonymous Online Speakers*, an action was brought by a multi-level marketing company, complaining of an internet smear campaign by a company that provided its distributors with training, seminars and motivational literature. The multi-level marketing company deposed an employee of the defendant, asking him to identify certain anonymous online speakers. The employee refused and the district court ordered him to testify to identities of some internet posters. The Ninth Circuit recognized the importance of being able to speak anonymously, but ruled such right has limits. Because the district court required the marketing company to show it had evidence to prove all elements of its claims, the Ninth Circuit upheld the ruling requiring disclosure of identities.¹⁷

Courts are a forum for seeking injunctive or monetary relief for damage caused by posts that are unlawful and cause injury. Some legal theories that justify awards of damages include unlawful posting of sexually explicit material about someone¹⁸ libel, slander, defamation, disparagement, unfair business practices, infringement of copyright or trademark, misappropriation of trade secrets, invasion of privacy, breach of contract, or violation of a right of publicity.

Some cases have awarded substantial damages to victims of negative online statements. In *Miss Universe L.P. v. Monnin*, a beauty pageant company won a \$5 million award against a contestant who published defamatory statements

on Facebook and spoke on the *Today* show, claiming the pageant was rigged.¹⁹ In *American University of Antigua College of Medicine v. Woodward*, a former medical student claimed his school routinely defrauded students, falsified grades, breached contracts, violated civil rights, committed crimes, and participated in ending the student's career. A U.S. District Court issued an injunction against continuing to publish these statements.²⁰

In *Jones v. Dirty World Entertainment*, a jury awarded \$38,000 of compensatory damages and \$300,000 of punitive damages in favor of a cheerleader against a website operator that encouraged and even added his own comments to posts indicating that the cheerleader had sexually transmitted diseases and slept with every member of a professional football team. The court also denied the defendant's claim of immunity under the Communications Decency Act.²¹


Other creative responses are also possible. According to one report, a restaurant owner responded to an influx of negative Yelp reviews after he stopped advertising on the site by encouraging customers to intentionally post one-star reviews. Customers complied, though the additional reviews were humorous and tongue in cheek.²²

Pay the Ransom. Some sites claim that signing up for their paid services have no affect on the placement of comments, but widespread anecdotal evidence disputes that. So while not first or desirable on anyone's list, another choice is to sign up for the services the site offers. Some business owners complain the fee is akin to a shakedown charge offered by organized crime or others for so-called "protection," but it may be a less costly choice to avoid further damage to the reputation of an individual or business.

Use Online Reputation Service. Online services claim they can help remove negative online postings. Examples include ReputationDefender²³ and Integrity Defenders.²⁴ These organizations charge fees for their services. ReputationDefender's claims include: "we push up the good and push down the bad,"²⁵ and that it will monitor blogs and websites for material that might be damaging or distressing to a client and "use [its] array of proprietary techniques developed in-house to correct and/or completely remove the selected unwanted content from the web."²⁶

Questions have been raised about the effectiveness of these companies and methods they use. A respected law review notes "ReputationDefender refuses to disclose the exact nature of its so-called destruction tools." The review notes that the service uses the DMCA "notice and take-down procedures of copyright law," (which are discussed above), "send[s] emails to blogs and websites hosting information that its clients want to disappear,"²⁷ and "likely also engage[s] in ... astroturfing and search-engine optimizing."²⁸

Possibly anyone could, on their own, take some of the steps these services perform. But individuals or businesses may have better uses for their resources, and the charges for such services can be modest, making them at least an option to be considered among the tools to fight negative online content.

It is not necessary to just accept the injury and frustration that comes with being a subject of negative communications on the internet about oneself or one's business. Many tools and strategies exist for responding and fighting back. 

¹⁹ David S. Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity under Section 230 of the Communications Decency Act*, 43 Loy. L.A. L. Rev. 373, 377 (2010).

²⁰ See e.g., Bartow, *Internet Defamation As Profit Center: The Monetization Of Online Harassment* 32 Harv. J. L. & Gender 383, 389 (2009) ("Neither civil nor criminal laws offer effective tools to prevent, address, or punish online speech, which is viewed by many as being vested with very broad First Amendment protections.") and 423 ("countless . . . harassment victims [are] vulnerable today with no relief from extensive, invasive, and degrading public comments about their looks, intelligence, and personal lives.")

²¹ See e.g., *Balboa Island Village Inn v. Leman* 40 Cal. 4th 1141, 1147 (2007) ("The First Amendment to the United States Constitution provides that 'Congress shall make no law . . . abridging the freedom of speech....' This fundamental right to free speech is 'among the fundamental personal rights and liberties which are protected by the Fourteenth Amendment from invasion by state action.' (*Lovell v. Griffin* (1938) 303 U.S. 444, 450, *Gitlow v. New York* (1925) 268 U.S. 652, 666). Numerous decisions have recognized our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.' (*New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 270)" (original ellipses, internal parallel citations omitted).

²² 47 U.S.C. Sec. 230(c)(1).

²³ 2005 WL 4086923 (Wash. App. 2015). See also *Krinsky v. Doe* 6 159 Cal.App.4th 1154 (2008) (subpoena to Yahoo seeking identity of anonymous poster quashed for failure to make prima facie showing of defamation).

²⁴ For a list of state anti-Slapp statutes see www.anti-slapp.org/your-states-free-speech-protection/.

²⁵ *American Heritage Capital, LP v. Gonzalez* 436 S.W.3d 865 (Tx. App. 2014).

²⁶ *Id.*

²⁷ *Clay Corp. v. Colter* 30 Mass. L.R. 429 (Mass. Superior Court (2012)).

²⁸ *In Re Anonymous Online Speakers* 661 F.3d 1168, 1173 (9th Cir 2011) (quoting *McIntyre v. Ohio Elections Commission* 514 U.S. 334, 341–42 (1995) (some internal punctuation omitted)).

²⁹ www.economist.com/help/postcommentsteo.

³⁰ www.economist.com/legal/terms-of-use#usercontent.

³¹ <https://brokenpianoforpresident.files.wordpress.com/2012/07/jd-letter-entire-big1.jpg>.

³² 17 U.S.C. §512 et seq.

³³ 17 U.S.C. §512(c)(3).

³⁴ 17 U.S.C. §512(g)(1). The subscriber or poster can respond by filing a counter-notification, asserting that the material should not have to be removed.

³⁵ *In Re Anonymous Online Speakers* 661 F.3d 1168, 1176. See also, *Warren Hospital v. Doe* 63 A.3d 246 (N.J. Superior Ct. 2013) (hospital was entitled to disclosure of identity(s) of individual(s) who hacked into hospital's intranet to compose and send defamatory emails to hospital employees).

³⁶ Cal. Penal Code Sec. 647 (criminalizing nonconsensual distribution of sexually explicit images) and Cal. Civ. Code Sec. 1708.85 (providing victim a private cause of action).

³⁷ 952 F.Supp.2d 591 (S.D.N.Y. 2013).

³⁸ *American University of Antigua College of Medicine v. Woodward* 837 F.Supp.2d 686, 701 (E.D. Mich. 2011).

³⁹ 965 F.Supp.2d 818 (E.D. Ky. 2013).

⁴⁰ See, *How one restaurant fought Yelp's alleged extortion* (Assoc. Press. Oct. 13, 2014) accessible at <http://nypost.com/2014/10/13/restaurant-fights-yelps-alleged-extortion/>. See also www.huffingtonpost.com/2014/10/02/botto-bistro-yelp_n_5923910.html.

⁴¹ www.reputation.com.

⁴² www.integritydefenders.com.

⁴³ www.reputation.com/about-us.

⁴⁴ Bartow, *Internet Defamation as Profit Center*, supra note 2 at 424.

⁴⁵ Bartow, *Internet Defamation as Profit Center*, supra note 2 at 425.

⁴⁶ Bartow, *Internet Defamation as Profit Center*, supra note 2 at 426. According to Professor Bartow, "Astroturf" is commentary manufactured to appear authentic, but is actually deceptive, it is internet content springing from artificial grass roots (hence the name), engineered to falsely appear as originating from diverse, geographically distributed, independently acting individuals. *Id.* at 426-427.