STOP SPREADING THE NEWS: A FIVE-STEP GUIDE TO HANDLING UNLAWFUL CONTENT POSTED ON SOCIAL MEDIA & OTHER PUBLIC PLATFORMS

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The depth and breadth of social media platforms, and the global reach of those platforms, have empowered people around the world. From Facebook to Twitter to LinkedIn to Wordpress, these platforms have given voices to the voice-less, have put the dissemination of news and information at the hands of millions, and have widened every avenue of discourse, from topics of political and social significance, to community and personal interest, and more. As a result, what is posted on social media ranges widely, from highly curated content to informative news to impulse-inspired and dubious content. From time to time, the nature of the content posted on social media platforms is not simply innocuous; indeed, it can be harmful or destructive for the individuals or businesses to which the content relates.

If someone posts defamatory, offensive, infringing, private, or otherwise unlawful content about you or your business on a social media or other public platform, the following five steps can serve as a guide to help you address and remove the unlawful content.

PRESERVE THE EVIDENCE

On-line content is ephemeral and can disappear as quickly as it was posted. If someone posts something unlawful about you or your business on any social media platform, preserve the evidence immediately. You can do this by way of a screenshot or a photograph or by printing the content so that it clearly shows the unlawful post in the context and location where it was found. If possible, capture the name of the poster, the relevant URL, the date and time, and any other information that will support when, where, and who posted the content.

WEIGH THE PROS AND CONS OF TAKING ACTION

When your intellectual property, reputation, or privacy is violated, the natural inclination is to react immediately. Before you take action, however, weigh the pros and cons. Pros include: managing your reputation; possibly removing the unlawful content; protecting your privacy and/or intellectual property rights; and/or potentially recovering damages.

Cons, on the other hand, include: expending resources that are disproportionate to any benefit (or, similarly, detracting from important business matters); becoming involved in protracted and expensive litigation; or

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needlessly drawing attention to content that is otherwise not reaching an audience of any significance.

In short, while the content may be upsetting to see, consider whether the content is actually unlawful - and whether the effect on you or your business warrants expending the time and effort required to remove it.

ANALYZE THE CONTENT BEFORE TAKING ACTION

If you decide to move forward with efforts to remove the content, with the guidance of an attorney, carefully analyze the nature of the content. For example, does the content infringe your intellectual property rights? Or, is the content false and defamatory, harassing, or offensive? Does the content amount to a violation of your privacy? Get clear on the type of content that has been posted and the legal implications of the content so you can move forward in a streamlined, efficient way.

TAKE ACTION

If you and your attorney determine that the content is infringing your copyright (*i.e.*, copying and displaying your literary work, photograph, music or other copyrightable work), you may be able to submit a takedown notice through the social media platform where the content appears. Nearly every social media platform has a designated agent to handle copyright matters and most provide easy-to-use forms for submitting a copyright takedown notice.

If the content is infringing your trademark (*i.e.*, using your trademark in a way that would confuse consumers into believing the content is authorized by, sponsored by, or affiliated with your business), then you may consider issuing a cease and desist letter or utilizing the takedown requests offered by some social media platforms that permit trademark owners to report trademark infringement.

If you determine that the content is defamatory, offensive or harassing or violates your privacy, as a first step, work with a lawyer to investigate whether built-in mechanisms are available on the relevant social media platform, and report and request removal of the unlawful content to the platform directly. When available, this is advisable as the built-in mechanisms may provide a more streamlined and cost-conscious method for removing content as compared with other potential action steps. If reporting mechanisms are not available or do not accommodate your particular circumstances, consider whether to send a cease and desist letter drafted by a lawyer and/or file an in-court action demanding removal of the unlawful content, enjoining the content creator or others from posting similar content, and requesting damages. If you are directing correspondence to the creator of unlawful content, keep the tone professional, as the correspondence itself often ends up in a public forum.

If the creator of the unlawful content is unknown, you will have to work closely with an attorney to initiate a lawsuit and serve a subpoena on the social media site administrator or owner to discover the identity of the individual(s) behind the content. Before a subpoena is issued, courts generally consider whether the elements of your

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underlying claim (*i.e.*, infringement, defamation, etc.) have been met. Courts are, however, sensitive to the balance between the First Amendment right to speak anonymously and the rights of publicity and privacy. While the First Amendment does not include a right to defame, harass, or violate another's privacy, courts want to be sure the conduct is actionable before taking extreme measures (*i.e.*, granting an order that may be construed as restricting speech). If and when the content creator is "unmasked," you may then move forward with your removal, injunction, and damages action.*

**NOTE: With some exceptions, Section 230 of the Communications Decency Act protects the platform that displays the content (that is, the platforms themselves, whether Facebook or Twitter or LinkedIn, or otherwise, are likely protected). Thus, any liability generally falls with the user of the platform/drafter of the content.*

BE PROACTIVE

To ensure your online presence is well managed and well maintained, proactively monitor content and proactively address any negative content about you or your company. Consider appointing a social media expert to oversee all of your company social media accounts as well as monitor the web (via Google alerts, hashtags, etc.) for mentions of your company so that any negative content may be brought to the attention of the company as soon as possible.

Train your employees in best practices for using social media accounts (both personal and corporate) and provide avenues for airing grievances so your employees are less likely to air such grievances publicly. (Note: There are significant National Labor Relations Act implications to monitoring employee speech online and thus consult with a lawyer before implementing any policies or providing any restrictions or limitations in this regard.)

Finally, preemptively and regularly launch positive campaigns via social media designed to show your brand in a favorable light and reinforce the goodwill associated with your intellectual property. Ensure that these efforts are fully optimized so as to rank highly in any Google searches relating to you or your company.

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