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Before You Hire That Online Reputation Manager, Consider Your Legal Alternatives

By Michelle Sherman

"Sticks and stones may break my bones, but words will never hurt me." Think again. No one wants their reputation, the name of their business, or their products dragged through the mud on the Internet. There are now web specialists called "online reputation managers," who claim to manipulate Internet search results so the negative links will appear further down the list of results, and hopefully be missed. The lead story in the New York Times, Sunday Styles Section (April 3, 2011), "Erasing The Digital Past," describes a few companies in this business, and their fee structures which can average from $5,000 to $10,000 a month for high level executives or celebrities, to $120 to $600 a year for run of the mill cases.

For a business with a high profile, public relations nightmare; a single embarrassing incident that received lots of media attention; or a vocal critic that keeps posting on the Internet, an online reputation manager may be the preferred business approach. However, for businesses, who are the victim of an unscrupulous competitor, its rogue employees or its overzealous but uninformed public relations company, there is a legal alternative worth considering.

1. **The FTC's Guides Concerning The Use Of Endorsements And Testimonials In Advertising Prohibit Negative Reviews With An Undisclosed Bias**.

In October 2009, the FTC revised its Guides Concerning the Use of Endorsements and Testimonials in Advertising ("Guides") to include reviews posted on the Internet, such as endorsements by bloggers. For example, the Guides require bloggers to disclose if they have received any freebies or other benefits for their posts. The Guides also require that someone endorsing a product needs to disclose any material connections between the endorser and the advertiser. The same guideline would apply to someone who works for a competing business and posts a negative review.

The FTC is enforcing these Guides, and recently settled an administrative complaint against Tennessee-based Legacy Learning Systems Inc. and its owner, Lester Gabriel Smith (collectively, "Legacy Learning"). In its complaint, the FTC alleged that Legacy Learning was responsible for misleading online reviews that were represented to be posted by "consumers", who endorsed the company's series of guitar lesson DVDs. According to the FTC's complaint, Legacy Learning hired people to write positive reviews of its guitar courses on websites and online publications. On March 15, 2011, the FTC announced a proposed administrative settlement with Legacy Learning agreeing to pay $250,000. Legacy Learning also agreed, among other things, to monitor and submit monthly reports about its 50 revenue-generating affiliate marketers to ensure the affiliates are not misrepresenting themselves as independent users or ordinary consumers.

Similarly, if a business reasonably believes that it is the target of fake, negative reviews, the business may want to take the following steps to have the fake reviews removed, and the unlawful advertising practice stopped.

2. **Identify With Reasonable Certainty The Source Of The Negative Reviews, And Seek Their Removal.**

If a business is finding itself the target of negative reviews that sound remarkably the same, or reviews that point consumers from the business to its competitor, then there is a good chance that the business is the victim of unfair and deceptive advertising practices in violation of the FTC's statutory prohibitions. 15 U.S.C. § 45. Other indicators of a fake review include: (1) clumps of like-minded negative reviews written within days of each other; and (2) a number of reviews with only one star in an attempt to bring down the business' legitimate positive ratings. There are several actions that a business can take to address these negative, fake reviews.

First, once the competing business is identified with reasonable certainty, consider sending a letter to its in house counsel and CEO. It may be that senior management is not aware of what is happening, and will take steps to make it stop. This letter should make them aware of the reviews, why you believe the company is responsible for the reviews, and how these reviews are unlawful and can result in civil liability under federal and state unfair competition and false advertising statutes (*e.g.* Lanham Act § 43; and California Business and Professions Code Sections 17200 *et seq.*, and Sections 17500 *et seq.*).

Second, send a letter to the Internet service provider asking them to remove the suspect reviews or blog posts on the grounds that the reviews appear to be unlawful under the FTC Guides. Under Section 230 of the Communications Decency Act, the Internet service provider (*e.g.* WordPress, Amazon, Yelp) is not required to take action in response to your request. However, most of these Internet service providers include in their Terms of Service the right to remove content, and it is in their interest to ensure that their sites are viewed as credible sources of information by consumers. For example, Yelp expressly provides in its Terms of Service that a review can be removed if Yelp believes the review violates Yelp's content guidelines. Yelp's Content Guidelines prohibit, among other things, someone taking part in the "writing [of] a fake or defamatory review, trading reviews with other businesses, or writing a review that you were paid for either directly or indirectly by the business being reviewed."

Third, if neither of the above approaches results in the fake reviews being removed, then your company may want to lodge a complaint with the FTC. However, this alternative is unlikely to result in immediate action since the FTC is inundated with complaints. Nevertheless, the complaint letter should provide the FTC with as much information and evidence of the fake reviews as possible. If there are any ways in which consumers are being harmed by the fake reviews, especially if it is a harm relating to public safety, be sure to highlight this in your communications with the FTC as well. The FTC has a process for entering complaints into a centralized online database that is used by civil and criminal law enforcement authorities worldwide. The FTC site states that it does not resolve individual consumer complaints.

And, finally, your business can file a legal action against its competitor and anyone acting on its behalf, because fake, negative reviews are unlawful and can be the basis for damages and injunctive relief.

For further information, please contact Michelle Sherman at (213) 617-5405. (Follow me on Twitter!)