Online and social media have revolutionized the way in which companies interact with their customers. It has allowed companies to engage their customers, to target their interests, and to solicit their feedback. At the same time, however, it has created a number of challenges for managing corporate reputations. We live in an age where consumers are solicited to provide feedback on their purchases. For example, when a customer buys something on Amazon.com, they are asked to provide feedback on the product. When the next consumer purchases that same item, they have the benefit of the comments of prior purchasers. Businesses solicit customers to “like” their products on Facebook and instantaneous feedback is provided via Twitter on consumer experiences with products and services. Email list serves for neighborhoods are places where people living in communities seek input on purchases or experiences with local and online businesses. Companies have to monitor a variety of online and social media to keep track of trends and respond to issues before they attract attention. They also have to monitor these sites for potentially defamatory comments and then make the difficult business and legal judgment on what to do about those that are false. Here are some recommendations on how to navigate these difficult judgments.

1. Be willing to tolerate annoying comments and criticism. Companies who make use of online and social media have to learn to put up with a lot of adverse comments in these same fora. The overriding principle of the First Amendment is that we encourage a variety of views in the marketplace and counter unfavorable speech with more speech. Being tolerant means recognizing that statements can go viral and be difficult to control given the nature of the Internet. At the same time, much of online and social media commentary is made and received with the understanding that it is just one person’s experience or viewpoint and should be taken with a grain of salt. Not every adverse comment warrants a full-blown counter-offensive.

2. React to false statements in a positive way. Know what consumers are saying about your company or its products and services and react responsibly and dispassionately to the issues that are raised. For example, one company that I represent encountered a number of comments on blogs related to contaminants in their products. The company knew the statements were false, but rather than sue the people making the statements, the company tested the products and posted the results on its own website. Whenever these same issues arose from time to time, the company was able to point out how it was responsive to the concerns and addressed them with concrete answers. Combating false statements this way can add to customer satisfaction and even promote good public relations.

3. Use the administrative procedures of online and social media. All online and social media have guidelines for those who use their websites. Every company should be aware of the terms of use and/or community guidelines of these media. Sometimes statements that are clearly false or that show animus against a company can be taken down through these
administrative procedures. They also may be used to take down fraudulent profiles that purport to be connected to your business and sometimes are used as sources of false information about your business. Successfully taking advantage of these administrative procedures costs little and sends the message to other users that false and malicious statements are not welcome.

4. Request a retraction, you may be pleasantly surprised when it is taken seriously. Many states have laws that require a party who is contemplating bringing a defamation action to first request that the maker of the statement retract it. Many entities or individuals will, when faced with the prospect of a lawsuit and proof of the falsity of the statement, agree to take it down. This is certainly true of traditional print media, but it is less true of Internet media. The entities or individuals operating on the Internet may not be able or willing to devote the resources necessary to verify statements as traditional print media do, and generally, they are not as concerned with their overall reputation for getting it right. They also may be emboldened by the fact that they are judgment-proof because they do not have sufficient assets against which a judgment could be enforced. Or, they may be motivated by the importance of advancing a political or other viewpoint. If you opt to request a retraction, it should have teeth, but be mindful of the risk that your request may be posted and become the target of further commentary.

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5. Think twice before bringing a defamation action. Defamation actions are hard cases to win. The law favors free speech and imposes heightened standards and burdens of proof on plaintiffs. Only false statements of fact can be pursued, not statements couched as opinions. Remember truth is a defense and you should not bring a case unless you are willing to live with a full exploration of what the truth is. Every company contemplating a lawsuit has to consider the public relations implications of the suit as well. It can produce negative publicity and give undue attention to an individual who has an agenda against the company, even raising the individual to rock star status in that community. It also can backfire against the company if it is portrayed as the corporate giant attacking the poor consumer who is merely exercising their First Amendment right to free speech. Finally, lawsuits can go on for a number of years and get bogged down in expensive discovery. Vindication may come long after the statement that led to the legal action was made, and therefore, may have little effect on recovering the company's damaged reputation compared to the amount of resources spent in litigation.

6. If you do choose to litigate a defamation action, be strategic about which ones to pursue. For example, statements by competitors about your product may warrant legal action. Competitors have become very aggressive on using testing and statements related to comparisons of products to attract consumers to their products. A lawsuit against a competitor can be used to point out the false statements and to preserve your customer base. Be aware, however, that information related to testing and the veracity of those statements will be the subject of discovery and may attract press attention. Companies can deal with this issue by being prepared to file the lawsuit, having done all of the testing it can to substantiate its own claims about its products and to expose the false nature of a competitor's statements. Companies should also consider the use of confidentiality orders after the lawsuit is filed to protect the information it produces from public disclosure.

7. Know that ISPs are immune from suit in the United States. When contemplating a defamation action, be aware that a company cannot go after the online entity or social media that facilitated the publication of the defamatory statement. Under Section 230 of the Communications Decency Act, "no 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." 47 U.S.C.A. § 230(c)(1). Thus, the Internet service provider of a website that publishes a defamatory statement or an entity like Google that sponsors a blog are immune from suit in the United States. From a strategic standpoint, you must go after the entity or individual responsible for posting the defamatory content. Unlike the deeper pockets of the company hosting the site where the defamatory statement is published, the average online or social media user frequently has little to no resources.

8. Be prepared to encounter out dated state laws that have not been adapted to fit the information age. Defamation is a creature of state law and every state is different in how it treats defamation claims. Many states' laws were written at a time when
the Internet and computers did not exist. There is a constant tension that arises when laws meant for print media are stretched to accommodate circumstances that were never contemplated. The burden is on the company that wants to pursue a defamation action to determine where to bring suit, what set of laws will apply, and whether those laws will be favorable to the company when addressing defamation in online and social media. In a recent case from New Jersey, the court refused to extend to a blogger the traditional news reporter's privilege against revealing the identity of confidential sources. The blogger failed to show that she was part of any news media organization or that her purpose in making the alleged defamatory statement was to disseminate news to the general public. Rather, she was just one commentator on a site where anyone could post a comment. This is one example favorable to defamation plaintiffs, but how courts will treat online and social media speakers will likely be as diverse as the Internet itself.

9. Be aware of defenses to a defamation claim and the risks associated with state anti-SLAPP statutes. Many states have conditional privileges that may defeat a defamation action. For example, some states have laws that provide that certain communications are privileged if they are made in good faith in the performance of a legal or moral private duty or with a good faith intent to protect the interest of the speaker. These privileges, in many cases, can be defeated only by a showing of "actual malice," which is a difficult standard to meet under the First Amendment. Despite its terms, actual malice does not mean that the speaker acted out of hatred or spite. Rather, to meet this standard, a company has to prove that the speaker actually knew that the statement was false or in fact had serious doubts as to whether it was true. The fact that the speaker happens to dislike a particular company, even greatly, is not enough to overcome the conditional privileges that exist in many states to protect the free speech of its citizens.

In addition, many states have enacted anti-SLAPP statutes to protect individuals and entities against lawsuits, including defamation actions, that may have a chilling effect on the right of free speech. Although these statutes vary in terms of who or what type of speech is covered and the level of protections afforded, some provide that a successful defendant is entitled to damages and recovery of its attorney's fees and costs. Before filing a lawsuit in a state with an anti-SLAPP statute, a company should assess the risk that the defendant will succeed in raising this defense and what the costs may be beyond simply losing the defamation case.

10. Consider whether to sue abroad. If you are a global business that makes use of online and social media around the world, consider whether the United States is the right jurisdiction in which to bring a defamation action. Many countries have different legal standards than those in the United States, such as the United Kingdom. It can be cheaper to bring suit in the United Kingdom than in the United States because they do not have the expensive discovery system that the United States has and because they have a rule that requires the loser to pay the winner's legal fees. If the company has a significant relationship to that jurisdiction, the underlying facts and circumstances are related to that foreign jurisdiction, and the company has a clear case of defamation, it may be better to file suit in another country. The court order can then be used with online and social media to take down the false and defamatory statements.

Be aware, however, that US courts and US-based ISPs may not respect the judgment obtained in a foreign jurisdiction. In 2010, Congress passed the Protecting the Images of Our Enduring and Established Constitutional Heritage Act ("SPEECH Act"). The SPEECH Act makes it difficult for a US court to recognize a foreign judgment for defamation unless the court determines that the foreign court provided the same protection as what the First Amendment provides in the US or if the party against whom the judgment was entered abroad would have been found liable for defamation in the US. The party opposing the enforcement of the foreign judgment also is entitled to their attorney's fees and court costs if they prevail in preventing the enforcement of the foreign judgment. As a practical matter, however, we have found that large ISPs and other large online companies like Google and Facebook are willing to respect a foreign judgment in taking down defamatory content.

Managing a company's reputation on the Internet can be challenging. If a company encounters potential defamatory statements, it may be helpful to consult with an attorney at an early stage. A small investment in legal advice at the outset can have big returns and save money in the long run.

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