



5 things to consider before firing back at online critics

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(Editor's note: Curtis Smolar is a partner at Ropers Majeski Kohn & Bentley. He submitted this column to VentureBeat.)

A reader asks: My business has been hit with several negative reviews online that I believe are unfair. Can I stop them?

Answer: In general, you cannot stop someone from saying something negative about your company unless they are violating a law, such as libel.

Defamation and/or libel are generally untrue statements that damage your reputation. But if the negative comments are true, then you may not have recourse. Additionally, there are exceptions to defamation, one of which is "opinion." If someone is clearly voicing just an opinion, it may be excluded from defamation if it is clearly noted. For example, if you say that "it is my opinion that a physician injured me." That may not be true and may hurt the doctor's reputation, but they may not have a cause of action because, after all, it is just your opinion.

It might be tempting to file suit or defend yourself aggressively, but before you react, here are five things to consider:

Avoid sending a nasty demand letter – This is really a practical issue. If you send a vicious note to someone who has already been saying bad things about you, it is almost guaranteed that your letter will end up on their web site, and could go viral from there. One great example of this is when ThinkGeek was supposedly selling Unicorn Meat online with the tag, “the other white meat.” The pork industry sent a cease and desist letter to ThinkGeek demanding they stop advertising. Not surprisingly, the letter was posted.

Creative speech limitations can backfire – Recently, in an attempt to reduce the medical malpractice risk for doctor, one company came up with an ingenious plan: Have patients assign all their rights in any future Internet posts to the physician. That way, or so the theory went, if the patient posts a bad review on a website, the physician, as the copyright holder, can send a Digital Millennium Copyright Act (DMCA) takedown notice with the website and have the comments removed.

While it’s certainly a creative approach, an effort like that basically amounts to prior restraint on free speech. Most (if not all) judges would toss the clause, noting that it falls under the fair use doctrine.

For example, there are several sites online that amend a company’s registered trademark with the word “sucks.” Those sites, not surprisingly, then complain about the product/company. Federal Courts have held that such “gripe sites” may be protected. The courts in the trademark cases have said that such a use by consumers is a valid exercise of free speech and not the type of harm that the law was meant to protect.

Have a sense of humor – Do you have rights? Sure you do. And you can exercise those rights to keep people from saying bad or even untrue things about your company, but the court may say, essentially, “lighten up.”

Many copyrights and trademarks are subject to the parody exception of the fair use doctrine. Sasha Baron Cohen depended on this when assuming his familiar character “Ali G.” While dressed as Ali G, he said some clearly derogatory, if not defamatory statements about a girl he actually knew when he was younger. The woman sued based on the fact that what he was saying damaged her image. The court held, in an unpublished opinion, that no reasonable person, when looking at Ali G would think he was being serious and that the parody exception applied.

Complain to the website – Many websites have terms of service which prohibit outright badmouthing of a company. Such a procedure may resolve your issues faster than anything else. (It should be noted that the European Court of Justice recently came down on the side of free speech over the Internet. While not directly related to this issue, it may change the way the U.S. sees issues of free speech.)

Try to make it right - The best Yelp posts I have seen from owners of companies are those in which the company tries to make the consumers happy. Problems are acknowledged by the company and overstatements by the customer are often retracted.

Remember, the only one that loses from fighting with customers is you.

Startup owners: Got a legal question about your business? Submit it in the comments below or email Curtis directly. It could end up in an upcoming “Ask the Attorney” column.

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