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IP NEWSBy **Doug Bania****DEFAMATION INVESTIGATIONS:
A BIG LEAP IN FIGHTING BACK***Sticks and stones may break bones, but defamatory words on the Internet can break a brand.*

Gone are the days when rude remarks muttered around water coolers or posted in local papers have their moment and then quickly fade from the public's memory with little to no lasting impact.

In the current atmosphere where consumers are primed to "cancel" a business or celebrity that is perceived as going against their values, spurious and inflammatory statements made online can lead to a serious and lasting impact on a brand's bottom line. Yet, at the same time, Internet tools are becoming more sophisticated in measuring the impact of these disparaging and defamatory statements, paving the way for affected business owners and celebrities

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to fight back by filing defamation suits seeking to recover damages for the harm to their reputation and brand value.

DOES THE SUIT FIT?

Emotions can run high when the reputation of a business or celebrity is attacked online, and burned brand owners may be quick to want to file a defamation suit in response. Yet, success, from a business point of view, hinges upon being able to prove that the defamatory statements caused economic harm to the individual or the company. After all, insults yelled into the void are a far cry from a takedown in the court of public opinion resulting in actual financial losses. In other words, in order to succeed, the legal team must show that "but-for" the defamatory statements, the defamed company would have generated more revenue, profits and cash flow. The economic impact of online defamation is typically measured in multiple ways: lost profits, corrective advertising, and decrease in the value of the brand. Each of these measurement methodologies can benefit from the use of Internet investigation tools.

Information that can be used to identify and measure the impact of online disparagement is more available than ever,

and online analytic tools can act as a litmus test to determine whether a defamation suit can hold water before significant resources are expended to file a suit. An effective online investigation is crucial to establishing a causal connection between the disparaging statements and financial harm, quantifying harm, and ultimately proving damages in court.

THE INTERNET**INVESTIGATOR'S TOOLKIT*****Google Advanced Search***

The custom fields available with Google's Advance Search provide a more detailed method of finding current and historical information on Google. Google Advanced Search goes beyond a typical Google search and allows you to narrow down results by time period, specific website or exact phrasing.

This tool can be an excellent resource for evaluating impact and discovering whether a disparaging



statement has gone “viral” by being shared beyond the initial posting for wider distribution. By typing in all the possible defamatory phrases related to the posting at issue, you can determine if any of the search results include additional webpages stemming from the actual defamatory statements.

Google Analytics

Google Analytics tracks and reports website traffic. This versatile tool allows a website owner to discover important details about their audience, such as where their visitors are located geographically, patterns of visitor behavior when interacting with the site, and even the source that originally directed a user to the site.

When a business's or celebrity's website becomes the target of negative activity, the Acquisition Reports provided by Google Analytics can offer important information about whether the traffic is originating from a disparaging article or review website. And, because it tracks the website's historical traffic trends, Google Analytics can also provide a way to measure whether the website traffic has been affected — and how much — by mapping any increases or decreases in site activity correlated to the release of disparaging statements. If drops in traffic (or increases in negative activity) also correspond to decreases in revenue, this can reveal a link between the disparaging comments and lost profits.

Google Trends

Google Trends shows how frequently a particular term or phrase has been entered into Google's

search engine relative to total search volume over a given period. It allows the investigator to identify event-triggered spikes in keyword search volume by comparing the relative search volume of searches between two or more terms. Google Trends is especially useful for evaluating whether observed declines in revenue, lost customers, or rescinded business opportunities can be linked to the online disparagement.

Google Ads Keyword Planner

The Google Ads Keyword Planner indicates the price-per-click prospective advertisers would pay to reach a pre-defined audience based on Internet search keywords. Facebook and other social media platforms have similar advertising planner tools. These tools enable damages analysts to estimate the cost to reach a target audience based on specific interests and keywords. When defamation occurs online, Google and social analytics can measure the size of the audience exposed to the defamatory statements, then the Ad Planner tools can indicate the likely cost to communicate with the audience. Often referred to as Relief from Pay Per Click, these Ad Planner tools can be key components of a Corrective Advertising opinion.

DAMAGES CONSIDERATIONS

As mentioned, the economic impact of online defamation is typically measured in one or more ways: lost profits, corrective advertising and/or decrease in the value of the brand. A note of caution — establishing a connection between online

statements and business losses can certainly bolster a defamation case, but it is important to remember that correlation may not always equal direct causation. Additionally, even if disparaging statements do go viral, impact doesn't always mean harm. The burden is on the defamed party to show a causal link between statements made online and actual financial harm in the form of lost customers, decreased revenue, diminished growth, or other concrete measures.

If an impact is observed, deeper analysis is often needed to identify and control for other variables, industry factors, and market dynamics that could also be playing a role in order to isolate and apportion for the effects of the defamatory statements. Once the causal link is established, damages can be calculated by comparing actual performance of the company or person following defamatory statements to expected financial performance of the company or person “but-for” the defamatory statements. An unjust enrichment calculation should also be considered because it is quite possible that the defendant or defamer posted negative comments to drive traffic to their website or blog in hopes of capturing new paying customers or selling online ads.

