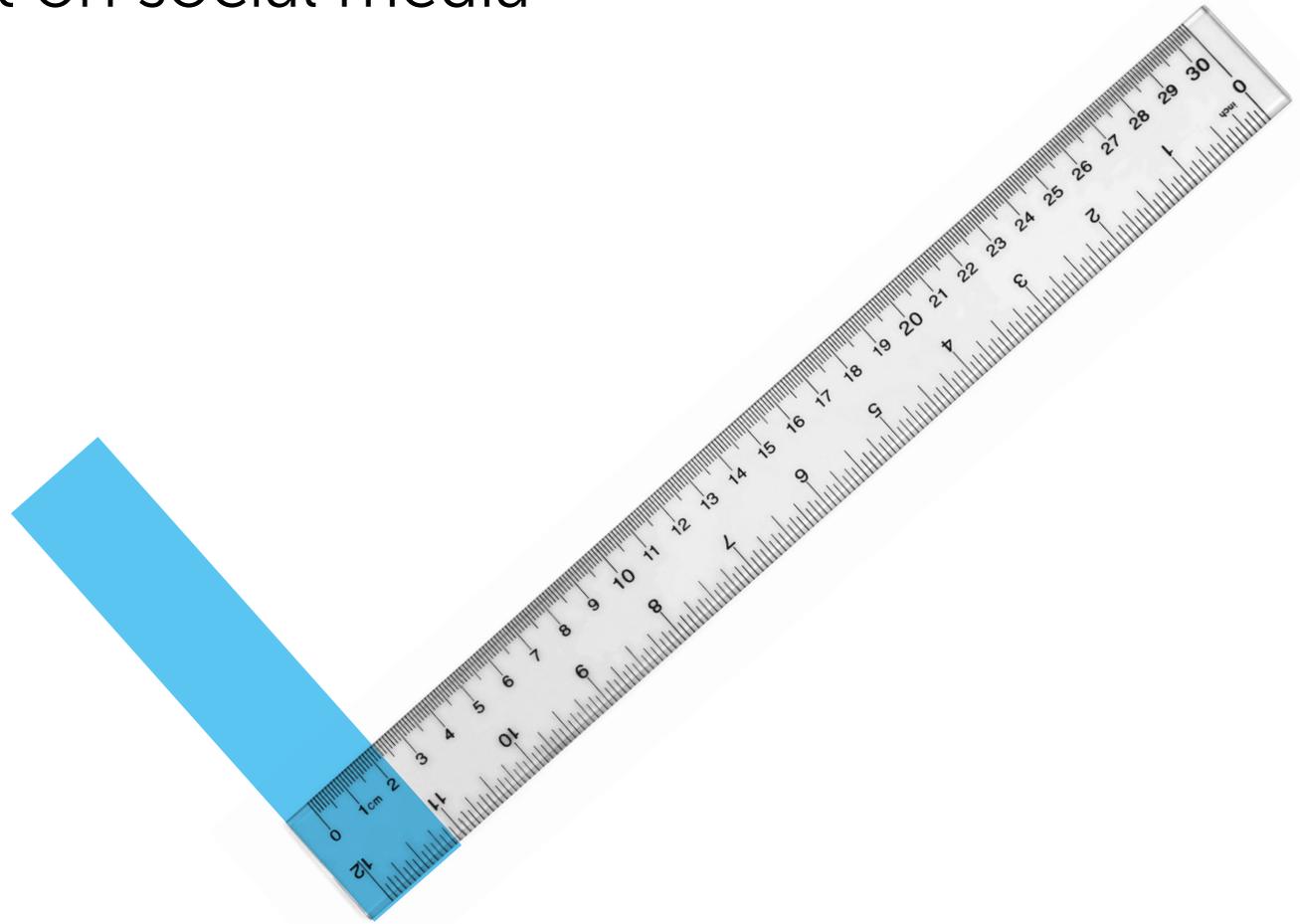


Setting the record straight

Our guide to reputation management on social media

Click to begin





Introduction

In this practical guide, we highlight the key grounds for complaints and/or action against those publishing material online that seek to damage your reputation or that of your key personnel. This includes action against those responsible for operating sites.

There is a distinction to be drawn between publications (primarily in defamation) where the author is identifiable and publications where the author has sought to publish under the cloak of anonymity.

We've dealt with anonymous posts first and then summarised the common grounds for challenging adverse material with a view to it being removed from the internet which are:

Anonymous posts



Privacy



Defamation



Breach of confidence



Harassment



Copyright infringement

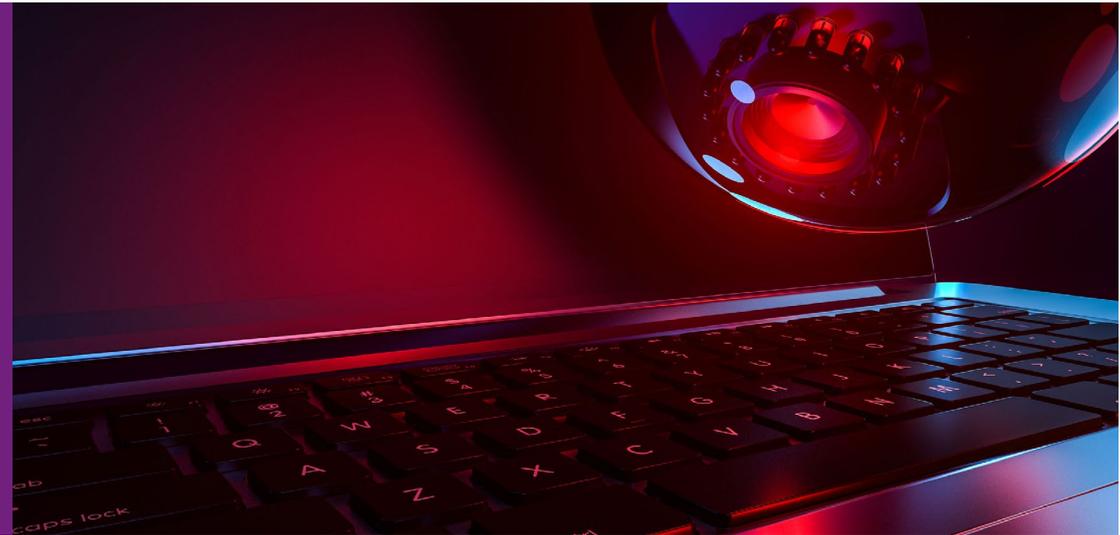


Trade mark infringement





Anonymous posts



Social media offers the protection of anonymity and, while many platforms contain terms which require users to only create one account and for users to supply genuine details in the creation of that account, these terms are frequently breached.

There are, however, options available to companies and individuals to **combat anonymous users** using social media to cause malicious reputational damage.

The easiest and cheapest step to take against a social media post is the **social media platform's own reporting systems**. Generally, all social media platforms and forum host sites have their own policies on use of their platform and there is often an inbuilt reporting procedure to allow individual posts to be reported for breach of user terms. Although many reports made in this manner result in no action being taken by the platform or site operator, platforms can react quickly and favourably if the post violates a community rule which is subject to intense public scrutiny.

Anonymous defamatory posts



The Defamation Act 2013 allows an action for defamation to be brought **against the operator of a website** for a statement posted on that website. Website operators can rely on the **defence** that the operator did not post the statement on the website but this **defence is defeated** if the claimant shows all of the following:

- it was not able to identify the person who posted the statement
- it provided the operator with a notice of the complaint in relation to the statement
- the operator did not respond to the notice of complaint in accordance with the provisions of **The Defamation (Operators of Websites) Regulations 2013** (the "Regulations")

The Regulations:

- contain a list of specific information which needs to be contained in the notice of complaint made to website operators
- this triggers a process for the website operator to follow, including:
 - sending notice of the complaint to the poster of the statement within **48 hours** of receipt of a notice of complaint
 - the notice from the website operator to the poster must contain specific information as required by the Regulations, including a deadline for response which must be the fifth day after the notification is sent
 - should the poster respond in writing to the website operator within the prescribed time and refuse to remove the statement complained of, they must also provide their full name and address to the website operator as well as confirmation of whether these details can be released to the complainant
- if the website operator is not able to contact the poster of the statement, it **must remove** the statement complained of from the locations identified in the notice of complaint within 48 hours
- the website operator must **acknowledge** the complainant's notice of complaint within 48 hours of receipt confirming that either a notice has been sent to the poster or that the statements have been removed
- if the poster fails to respond to the notice from the website operator or responds to consent to the remove, the website operator must remove the posts complained of within 48 hours after the deadline for response has passed and notify the complainant of the same
- if the poster responds in a compliant manner and does not wish the statement to be removed, the website operator must notify the complainant within 48 hours and provide the poster's full name and address, if the poster has provided consent for this to be provided

Issue

- what if the poster does not consent to either removal or provision of his name and address to the complainant?

Solution

- a Norwich Pharmacal order



Anonymous posts



Norwich Pharmacal order



NPOs are made under the equitable jurisdiction of the court as established in *Norwich Pharmacal v Commissioners of Customs & Excise*.

A NPO is usually obtained where a party knows that wrongdoing has taken place and, although it does not know the identity of the wrongdoer, it has identified a third party, such as a website host, who has the necessary information. A NPO, once made, requires a respondent to disclose certain information, e.g. the real name and address behind an onscreen username, to the applicant.

The applicant does not need to have a definite intention to commence proceedings against the wrongdoer to obtain a NPO.

The requirements for obtaining a NPO is as follows:

- there is no other procedural provision that would provide the appropriate relief
- the respondent is likely to have relevant documents or information
- there is a good arguable case that there has been wrongdoing
- the respondent is not a "mere witness" to the wrongdoing - the respondent is involved (albeit innocently) in the wrongdoing
- the order is necessary in the interests of justice, and is not sought for an improper purpose
- the applicant is good for the cross-undertaking in damages, i.e. it can afford to pay damages if it later turns out that the order should not have been made.

However, note that the above principles have been developed extensively through case law and the merits of any given NPO application should be assessed in light of the particular circumstances of the case.

A challenge faced using an NPO route is that the procedure can be costly if the NPO is opposed by the other side.

A further challenge is that the user behind the post may have used a fake account, in which case the cost and time invested in an NPO may have been wasted.



Privacy

Legal elements



Privacy is a fundamental right, protected under article 8 of the European Convention on Human Rights (the "Convention") and article 7 of the Charter of Fundamental Rights.

The Convention protects a person's right "to respect for his private and family life, his home and his correspondence."

The key cause of action in such cases is misuse of private information without consent of the individual, usually through publication in a public forum. This is commonly known as "doxing."

For action to be taken under privacy, the following elements must hold true:

- that the individual has a reasonable expectation of privacy, taking into consideration all circumstances, including the type of information and the attributes of the claimant
- that publication of the material intrudes into the individual's privacy. Some material is considered more sensitive, e.g. an individual's health, sexual relationships or home address
- the intrusion of the individuals privacy should not be trivial

The above elements need to be balanced against the publisher's freedom of expression in the publication of the private material - whether public interest outweighs the individual's right to privacy is a key consideration. This can be more obvious in circumstances where publications involve celebrities and politicians in the public eye but may also potentially be deployed in defence of publications against prominent members of an organisation.



Remedies and challenges



Swift action should be taken to require **immediate removal** of the damaging publication. Depending on the social media platform, steps can also be taken to trace any sharing of the original post.

An **injunction** can be sought to prevent the dissemination of such information, but these can be difficult to police in the social media context. When private information has been posted online, it can spread very quickly, and the process of obtaining an injunction can itself attract greater publicity.

Compensatory **damages** and account of profits can also be sought but in the past the sums awarded have been rather low.

It can also be challenging to find the original poster of harmful information online, as many such posts are published using disposable accounts, but it may be possible to counter this by using the procedure for when an author is unidentifiable.

What's actionable?



- picture of an individual not in the public eye eating dinner at home with their family
- online publication of a home address or private telephone number not in the public domain
- publication of an extract from a personal diary

What's not actionable?



- publication of a home address or private telephone number which is already in the public domain e.g. if the home address was used on Companies House
- a photograph of an employee in a public environment



Defamation



Legal elements



The Defamation Act 2013 defines a defamatory statement as one which must have caused, or is likely to cause **serious harm** to the reputation of a claimant. Note that, for an entity which trades for profit, it is not serious harm unless it has caused or is likely to cause **serious financial loss**.

The author of a defamatory statement can rely on various defences to justify the publication of the statement. Broadly, the most commonly encountered defences are:

- **Truth** – the meaning of the statement complained of is substantially true.
- **Honest opinion** – the statement must be an opinion (rather than a statement of fact), which indicates the basis of the opinion, and which is an opinion that an honest person could have held on the basis of the true, or privileged (see below), facts at the time.
- **Publication on a matter of public interest** – which the defendant reasonably believed was in the public interest, having regard to all circumstances of the case.
- **Qualified privilege (common law)** – the statement was made without malice, in circumstances where the author and recipient of the statement had an interest in or duty to make / receive the communication, e.g. reporting a suspected crime to the police, or an employer giving a reference to a potential employer of one of its employees.

In general, a potential defamation action is subject to a limitation period of one year, which starts to run from the date the statement is first made to the public. Any cause of action against subsequent publication of the original defamatory statement is treated as having accrued on the date the original statement is first made to the public, unless the subsequent publication is materially different from the original publication.

Remedies



Remedies available for defamation include:

Removal of the publication – either by court order or agreement of the author.

Damages – compensatory damages is the primary remedy for defamation.

Injunction – there are practical challenges to obtaining an injunction for an action in defamation and these are very rarely granted.

Statement in open court following a negotiated settlement of the dispute.

Publication of a **summary of the court's judgement**

What's actionable?



- an individual falsely tweets that a company is using undocumented workers
- a prominent online social media account that makes false allegations concerning a company's financial position suggesting solvency issues
- a social media post by an individual falsely stating that they are aware of a supermarket selling non-halal meat as halal

What's not actionable?



- a tweet from an ex-employee stating that he didn't like his colleagues
- the negative opinions a former/current employee holds of a company which indicates the facts upon which those opinions are founded
- an image/photograph in a public setting of a senior member of a company's executive team overlaid with text amounting to vulgar abuse (in extreme cases this could fall foul of harassment laws or a more serious offence under the Malicious Communication Act).



Breach of confidence



Legal elements



A cause of action will arise where the defendant is proved to have used confidential information obtained from the claimant without its consent.

The leading case of *Coco v AN Clark Ltd* established that information is confidential if:

- it has the necessary **quality of confidence** – it must be of limited public availability and capable of clear definition and limits
- the recipient of the information must have **known** that the information was confidential
- the recipient must have been under an **obligation** to maintain confidentiality – this obligation could arise out of a contract or from the broader circumstances, including the nature of the information, the circumstances in which it was obtained and notice of the confidentiality
- a **third party** not directly involved in the original disclosure could also have an obligation of confidentiality if they know that the information is confidential. This is particularly relevant in the social media age, where social media users come across 'leaked' information, and reshare it on their Twitter or Instagram page. While these users may not think they are acting unlawfully, they could have an obligation of confidence which would be breached by sharing the information

The quality of confidence can be lost once the information is regarded as common knowledge. Once publication of confidential information is discovered, action should be taken quickly as publication on a variety of public forums could lead to the loss of the confidential nature of the document.

Wrongdoers may attempt to hide behind anonymous username or VPNs. The **Norwich Pharmacal** route could be considered for identification of these wrongdoers to enable further action to be taken.

Remedies



The remedies most commonly awarded include:

Account of profits

Damages – a breach of confidence which allows competitors to gain an advantage, to the detriment of the defendant, can result in damages being granted.

Injunction – to prevent further dissemination of the confidential information. It is important to act as quickly as possible if this remedy is being considered as delay could defeat an injunction application.

What's actionable?



- a tweet about the profit margins on certain products from a current/former employee who obtained confidential profit margin data as part of their job
- publicly sharing a confidential client list belonging to the company, which was obtained in the course of employment
- discussing the terms of a settlement, in breach of the terms of confidentiality contained in the settlement

What's not actionable?



- an Instagram post sharing the company's financial filing, after the filing has already become publicly available
- sharing the confidential client list belonging to the company which was originally published by someone else, four weeks after the original post and after dissemination of the information in several newspaper articles



Harassment



Legal elements



Where an individual has been the target of unwanted communications, including on social media, the protections offered under the Protection from Harassment Act 1997 can be used to stop the unwanted conduct.

Companies can assist an employee to take action under harassment.

The key elements which need to be shown to bring a successful claim are:

- that the conduct has occurred at **least twice**
- the conduct is targeting the company or person
- the conduct amounts to **harassment** of the claimant (which includes but is not limited to conduct causing alarm and distress)
- a **reasonable person** would consider the conduct to amount to harassment

Depending on the nature of the conduct the company/individual should consider whether the police should be notified immediately, especially where there is a threat of physical assault, stalking or where a series of communications that could result in serious psychological damage

Remedies



The remedies available to a victim harassment are:

Damages – this can include compensation for anxiety caused by the harassment and any resulting financial loss, although damages claims are in practice relatively rare.

Injunction – in considering whether to grant an injunction, the court can take into account the likelihood of future harassment. Breach of an injunction constitutes contempt of court and can result in a prison sentence and/or fine.

What's actionable?



- a disgruntled customer posting messages designed to cause distress on social media in relation to a store manager, including sending the victim direct messages, on a number of occasions
- an ex-employee makes threatening calls and repeatedly sends threatening emails to the directors

What's not actionable?



- repeated requests from the press for comment in relation to a recent commercial event is generally not harassment (although it could become actionable if those requests became too intrusive, frequent or cause distress)



Copyright infringement

Legal elements



Copyright is a type of intellectual property which seeks to protect the form of expression of ideas, rather than the ideas themselves. Unlike registered trade marks, copyright subsists automatically in a work once it is created and, in the UK, there is **no copyright registration system**.

Copyright protects two broad groups of materials:

- emails, letters, legal documents, articles, spreadsheets, drawings, architects plans, photographs, and images
- sound recordings, films or broadcasts

Copyright gives the owner the **exclusive right** to use the work, and is infringed by a third party who copies a 'substantial part' of the work without the owner's permission, unless the act carried out falls under an exception. The key exceptions are: minor infringement, educational use, public interest, works situated in public places and fair dealing.

Fair dealing is a key exception, and covers use for the purposes of criticism or review, research and private study, reporting current events, quotation, caricature or pastiche.

Copyright is a property right which can be bought, sold or otherwise transferred. Copyright owners can license others to use protected works while retaining ownership themselves.

Remedies and challenges



Remedies can include:

Interlocutory relief – including Norwich Pharmacal orders, search orders, freezing orders and interim injunctions.

An order for **delivery up**.

Seizure / Forfeiture of infringing copies and other articles.

Damages or **account of profits**.

What's actionable?



- a social media post using pictures taken from company's website to promote their own page
- a full length video of a popular TV show posted on an individual's Instagram page

What's not actionable?



- a review of a company's product which quotes the description of the product
- a tweet containing a quote from a popular book





Trade mark infringement



Legal elements



There are two main ways to protect trade marks:

Registration - to be registrable, a trademark must be capable of being represented in a manner which enables the registrar and the public to determine the clear and precise subject matter of the protection afforded to the proprietor. The trademark must be capable of distinguishing goods/services of one undertaking from those of others. Further, a trademark must not be descriptive when used in connection with the goods/services to be provided under the name/logo, it must be distinctive, and not generic.

Passing-off - in the UK, unregistered trade marks can be protected under the tort of passing-off, which requires three key elements:

- the claimant shows that goodwill has been built up in the name/logo or associated get-up through the use of the mark(s) such that consumers will associate the mark(s) with the claimant's brand
- a misrepresentation by a third party through use of a name/logo/branding that there is a trading connection with the claimant. Alternatively, a third party falsely misrepresents that the claimant has endorsed a business/product
- damage to the claimant's goodwill arising out of the misrepresentation

It is always advisable to register and renew trade marks.

Infringement of a trade mark can occur through the **unauthorised use** by third-parties of an identical or similar mark in relation to identical or similar goods and services for which the trade mark is registered such that there is a likelihood of **confusion** on the part of the public

Well-known trade mark registrations could attract greater protection due to the reputation which has been built up in the mark, such that it may be possible to object to the use of an identical/similar mark on goods/services which are dissimilar to those provided, if it can be shown that the third party use of the mark is without due cause and takes unfair advantage of or detriment to the registration.

Remedies and challenges



Injunction - this can be sought to stop a defendant from using the trade mark in relation to the goods/services.

Damages or account of profits can be sought where relevant.

Removal - the court could order removal of the trade mark from goods.

Delivery up / destruction - this mostly applies to goods but could cover the destruction of marketing materials which contain the infringing sign.

What's actionable?



- an individual promoting his health food business with a logo very similar to that of another company
- a social media post which uses a company's logo to attempt to disguise the post as an official communication from that company

What's not actionable?



- a shop carrying the name of an individual owner, which existed prior to the claimant's business



This guide is intended to give an overview of the main legal tools available, to assist with the management of your company's reputation. It does not set out a comprehensive picture of the law in all of the areas covered and is not tailored to any particular circumstances your company may be facing. It should not therefore be seen as a substitute for carrying out research or obtaining legal advice.





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