



## WMAACCA Technology and IP Forum:

Trash Talk? Viral Leaks? What to do When Employees  
and the Public Take to the Internet Town Square

# Speakers



**Michelle Cohen**

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# Speakers



**W. David Hubbard**

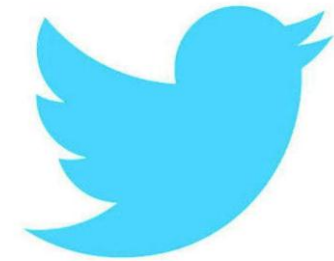
Vice President & Deputy General  
Counsel – Marketing, Verizon Communications



**Chris Ryan**

Deputy General Counsel, K12 Inc.

# “Trash Talk” – What Is It? Who is Doing It? And Where?



**Angie's list**



# Why the Explosion of Trash Talk?

- Internet sites pack more punch than traditional complaint routes
- Ease of getting word out to vent
- Anonymous usually
- Not so new - early sites like Ballysucks.com aired grievances



# The “Big Picture” of Social Media

- Over 111,000,000 users on Facebook in the US
- Approximately 175 million people on Twitter
- 800 million unique users visit YouTube each month
- Approximately 3.1 billion email accounts worldwide
- Consumers are receiving more email and other communications from companies than ever before



# Service Provider Exemptions

- Review site/message board likely immune
- In 1996, Congress enacted Section 230 of the Communications Decency Act (47 USC § 230)
- “No provider or user of any interactive computer service shall be treated as the publisher or speaker of any information provided by another information provider.”
- Early cases - AOL, Internet Service providers
- Today - Angie’s List covered by exemption –some exemptions if “involved” – content, \$\$

# Service Provider Exemptions - Copyright

- Digital Millennium Copyright Act (17 USC § 512) protects service providers if they follow certain procedures
- Service providers must explain how to give DMCA notice if person/company is requesting takedown of infringing material
- Service providers then must follow DMCA procedures - including removing material expeditiously (and replacing it in event of counter-notice)



# What About the “Authors”?

- Websites like Angie’s List and Yelp are shielded, but “writers” are not immune (re: defamation, etc.)
- DMCA protects the service provider, but the person or entity posting infringing material is still liable under copyright laws

# Northern Virginia Case Study

- Contractor v. Fairfax, VA resident for comments on Angie's List and Yelp
- Seeking injunctive relief, removal of comments and \$500,000 damages plus \$250,000 punitive

# Dietz Development vs. Jane Perez

## Angie's list

### Member Comments:

My home was damaged, and the "work" had to be done. In spite of this, Dietz sued me for alleged "monies due" for his "work." I won the case in court on summary judgment, because Dietz did not provide specifics to support his claim and so the court even barred him from bringing up that case again. Despite his claims, Dietz was not licensed to perform work in the state of VA. Further, he invoiced me for work never performed, and he sued me for work not even performed. At the end of January 2012 (over 6 months after the "work" and several months after he lost the "\$9K" case) he showed up at my door and "wanted to talk to me." I said that I "didn't want to talk to him," closed the door (Dietz stood outside muttering), and I called the police. (The police said that his reason was that he had a

# What About Those CyberSquatters?

- Generally speaking, there are two species:
  - [Brand].com
  - [Brand]sucks.com
- Content:
- Landing Page
  - Innocuous, but what about syndicated advertisements for competitors
  - The auto dealer experience

# Cybersquatters

- **Criticism Page**

- *Bosleymedical.com* (9th Circuit)
- “[T]he appropriate inquiry is whether Kremer offers competing services to the public. Kremer is not Bosley’s competitor; he is their critic. His use of the Bosley mark is not in connection with a sale of goods or services – it is in connection with the expression of his opinion about Bosley’s goods and services.”

- **Fan Page**

- Mixed bag of rulings from WIPO

# Cybersquatting Legal Responses

- Ignore
- Cease & Desist
  - Rarely works, but helpful in the event of later actions, to show intent and knowledge
  - Risk: The cranks and others often publish them, and will paint your company not only as bad actors, but suppressors of speech

# Uniform Dispute Resolution Policy

- UDRP tends to be trademark owner-friendly
- With publication of WIPO Overview 2.0, there is some predictability
- Fast, relatively inexpensive
- But – U.S. panelists are sensitive to speech issues, so “suck” sites – by domain name or content – often prevail
- Foreign panelists tend to be less forgiving

# Anticybersquatting Consumer Protection Act

## 15 USC § 1125(d)

- Not too dissimilar from UDPR
- Advantage: in rem jurisdiction for .com and .net in the E.D. Va. based on VeriSign's presence here (VeriSign is the registry operator)
- Note that ICANN's location is irrelevant (*Vizernews.com* case, DDC)
- E.D. Va. has a great deal of experience
- But: Need to show bad faith per statutory factors





**UNITED**



## Best Practices and “Viral” Case Studies

# Steps to Protect Brand from Attack

- Brand Monitoring – monitor online presence on social media to identify problems brewing and respond quickly in friendly manner
- Patterns - identify patterns in complaints - can escalate to State AG/federal agency complaint/BBB/class actions
- Brand Advocacy – use social media to help shape external perception of your company
- Customer Service – use social media to build bridges to connect with your customers and resolve their problems
- Articulate Brand Values – use social media to demonstrate good will and show insight into philanthropic or environmental causes company supports

# Establishing a Digital Brand Reputation

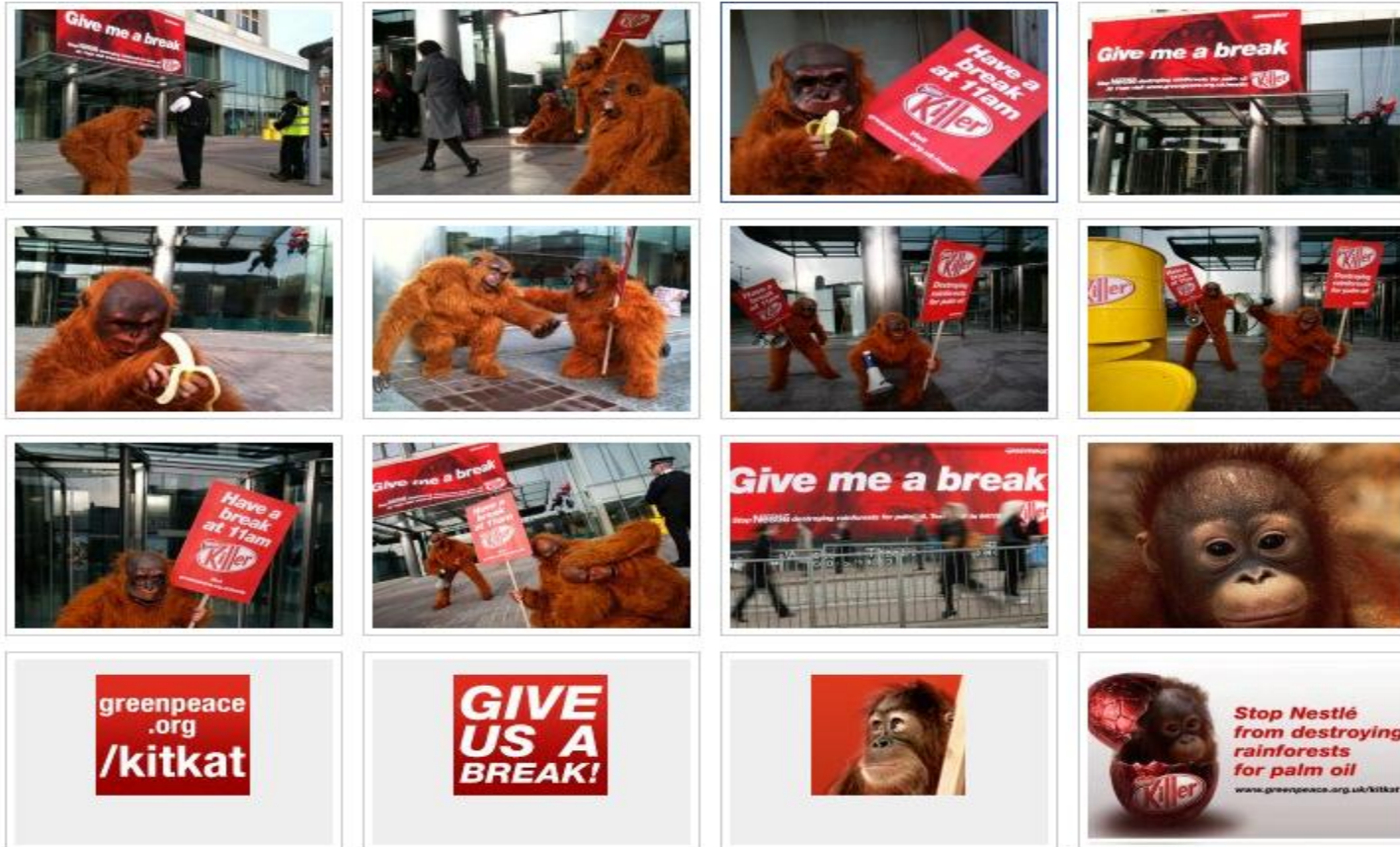
- If you don't control your brand online, someone else will
- Establish relationships with online brand advocates
- Build credibility, maintain integrity – transparency and sincerity are key
- Stay consistent with corporate culture and values
- Expand the conversation beyond just products or service issues

# Greenpeace's Facebook Page



## Give the orang-utan a break

By Greenpeace UK (Albums) · Updated over a year ago · Taken at Nestlé HQ, Croydon



Our orang-utan colleagues have swung into action against Nestlé at their Croydon HQ.

We have new evidence which shows that Nestlé - the makers of Kit Kat - are using palm oil produced in areas where the orang-utans' rainforests once grew. Even worse, the company doesn't seem to care.



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# Nestle vs. Greenpeace

Customer stated: "not sure you're going to win friends in the social media space with this sort of dogmatic approach. I understand that you're on your back-foot due to various issues not excluding palm oil but social media is about embracing your market, engaging and having a conversation rather than preaching!"

-  **Nestle** Thanks for the lesson in manners. Consider yourself embraced. But it's our page, we set the rules, it was ever thus.  
8 hours ago · Report
-  **Darren Smith** Freedom of speech and expression  
8 hours ago · Report
-  **Nestle** you have freedom of speech and expression. Here, there are some rules we set. As in almost any other forum. It's to keep things clear.  
8 hours ago · Report
-  **Paul Griffin** Your page, your rules, true, and you just lost a customer, won the battle and lost the war! Happy?  
8 hours ago · Report
-  **Nestle** Oh please .. it's like we're censoring everything to allow only positive comments.  
8 hours ago · Report



# Nestle's Facebook Page



**Nestlé** Nestlé and palm oil: we're concerned. We announced our commitment to using only Certified Sustainable Palm Oil by 2015. We have accelerated investigation of palm oil supplies to identify any unsustainable palm oil. Given our uncompromising food safety standards, we have done this in a deliberate manner as we use palm oil for food and not soap or other personal care products. More: <http://tinyurl.com/nestlepalmoil>

March 17 at 10:00am




**Nestlé** We welcome all comments, but please don't post using an altered version of our logo as your profile pic. And please read our statement to answer many questions: <http://tinyurl.com/nestlepalmoil>.

#### Statement on palm oil

[tinyurl.com](http://tinyurl.com)

There have been recent questions raised about Nestlé and palm oil. We share the deep concern about the serious environmental threat to rainforests and peat fields in South East Asia caused by the planting of palm oil plantations. ...

 March 18 at 7:11pm · Share



**Nestlé** This (deleting logos) was one in a series of mistakes for which I would like to apologise. And for being rude. We've stopped deleting posts, and I have stopped being rude.

Fri at 12:29pm · Report

# Nestle vs. Customers

- Exercise legal rights without making an announcement
- Nestle to 90,000 Facebook fans: “We welcome your comments, but please don’t post using an altered version of any of our logos as your profile pic -- they will be deleted.”
- Removing negative posts makes matters worse- not all needs response
- Train moderators to avoid argumentative tone
- Develop strategy with public relations for outbound communications in response to social media attack



# Southwest Airlines



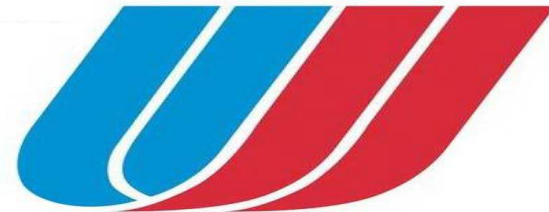


# Southwest Airlines

- Kevin Smith has 1.6 million Twitter followers
- Southwest responded within 16 minutes of Smith's first Tweet
- Southwest also posted apology & explanation of its policy and handling of the incident on corporate blog
- Over 6 days, incident generated:
  - 3,043 blog mentions
  - 5,133 forum posts
  - 15,528 tweets

# United Airlines

- United broke a passenger's guitar (Dave Carroll) resulting in \$1200 of damage
- United refused to pay for the repairs.
- In response, passenger launched a humorous music video to draw attention to United's consumer support issues on YouTube. Video has had almost 9 million views.
- After two other videos, and United donating the cost of the guitar repairs to charity per the musician's requests, United managed to lose the musician's bags.
- The story was reported to millions and was the lead on CNN (Situation Room)
- As a result, United's stock value fell considerably.
- – *The Economist* headline, 7/24/09: "Did Dave Carroll lose United Airlines \$180m?"
- In addition, U.S. Sen. Barbara Boxer (D-Cal.) championed the Airline Passenger Bill of Rights Act of 2009, citing the United debacle.



**U N I T E D**

# Company Confidential Info Leakage

- What happens when your company's confidential information such as emails, memos, or other types of documents ends up in the hands of:
  - A website or blog
  - A print or television reporter
  - A competitor or customer
  - A lawmaker
- Investigation
- Cease and desist letter
- Legal action
- Monitoring

# Top 10 Non-Litigious Responses to Trash Talk/Copyright Issues/Viral Leaks

1. Consider contacting the poster – see if the company can address their grievance
2. Ensure your computer network is being sufficiently monitored to better detect leaks
3. Set a Google News “alert” for your company’s name and primary trademarks
4. If situation serious enough, issue press release to get your side of the story out or at least some internal talking points

# Top 10 Non-Litigious Responses to Trash Talk/Copyright Issues/Viral Leaks

5. Advance planning by a reputation management/crisis communications team - CEO, PR, Marketing, HR, Legal, external adviser
6. Give employees an alternative (*i.e.* non-public) outlet to raise grievances that you can manage outside of public view (anonymous hotline)
7. Add a “non-disparagement” clause to employee settlement releases (beware whistleblower)
8. Train and remind employees about relevant policies: confidentiality, use of social media, code of conduct

# Non-Litigious Methods – Practice Tips re: Employees Issues

9. Periodically remind employees about confidentiality obligations and company monitoring of computer and network usage
10. Remind colleagues to distribute the most sensitive information on “need to know basis”

# Top 10 Litigious Methods

1. Defamation
2. Trespass (*e.g.*, email spam attack on company accounts)
3. Federal and State “computer crimes”
4. DMCA
5. Anti-CyberSquatting
6. Injunctive Relief
7. Violations of Contractual Terms - Settlements/Non-disclosures/Website terms
8. Unfair competition
9. Cyberstalking laws - if vs. particular individuals
10. Possible involvement by federal/state authorities (*e.g.*, security breach)



# Thank You

Questions??



# Appendices

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# Minimize Liability for Harassment & Defamation

Do NOT tolerate in conversations about your brand:

- Foul and abusive language
- Threats against individuals
- Hateful speech
- Flame comments about products/services
- Harassment



# Just a note re: “Flip Side”

- If your company encourages employees/customers to write favorable reviews, be aware of **FTC rules**
- FTC endorsement guides require disclosures/monitoring
- Loft Clothing stores - gave gifts/encouraged blogging
- Reverb Communications - enforcement action - pretended to be customers rating downloaded material
- Whole Foods CEO posted to stock message boards using pseudonym