

Protecting your reputation via your legal and regulatory rights



► Inside

Protecting the reputation of your company, brands and key individuals

The means of protection

What to do if a damaging publication or broadcast is threatened?

What to do if publication or broadcast takes place?

Popular myths fostered by the media

Protection from unwanted media attention—Do's & Don'ts

Long term media strategy for dealing with the media



Media Management – What is it?

“The exercise of restraint over the media by means of the threat and/or use of all available legal and regulatory mechanisms”

Protecting the reputation of your company, brands and key individuals

1. According to the World Economic Forum, your most valuable asset is your reputation. It should therefore be guarded jealously when it is under threat from the commercial media.
2. There is a commercial value to the media in damaging reputations. Your best means of defence is to provide them with a commercial disincentive to do so. This is most effectively delivered by the threat of damages and legal costs.
3. For most corporate entities the regulators (IPSO/Ofcom) are the primary means of preserving reputation from media damage from the commercial media.
4. The commercial and social media is growing exponentially. Since negative news (in particular) now spreads virally, it is essential to take swift and decisive action in a media crisis.
5. Your key individuals have a legal right to their reputation (and privacy) by virtue of Article 8 of the European Convention of Human Rights. Your company has this right under well established UK law. There are legal and regulatory means of protection against unlawful attacks on your reputation and you are fully entitled to insist on your rights being respected by the media.

The means of protection – Legal and Regulatory

Legal Protection

The protection available against adverse media coverage falls broadly into two categories: the laws of confidence/copyright/trademark and defamation. The law can prevent the publication of private and confidential material. It cannot normally prevent, by way of an injunction, the publication of material which affects reputation. For privacy and confidentiality issues, the law provides the remedies both of injunction and

damages. The credible threat of a regulatory or legal challenge is the most effective way of dissuading the media to publish damaging material.

Regulatory Protection

1. Press

The principal regulatory bodies covering the media all publish codes of practice. For the press there is the Independent Press Standards Organisation (IPSO).

2. Broadcast

For all broadcast content there is Ofcom. The BBC also publishes its own Guidelines.

Which one should I use?

It is possible to combine the benefits of both your legal and regulatory protection. The advantage of threatening the media with legal proceedings is that it carries with it a possible financial consequence, which presents it with a commercial incentive to correct its errors. The regulatory codes can be deployed both as a disincentive to the media to publish damaging material, and as a basis for demanding suitably prominent corrections and apologies.

What to do if a damaging publication or broadcast is threatened?

The need for speed

If you are to have any chance either of preventing the publication/broadcast taking place, or at least ensuring that it is substantially less damaging than would otherwise be the case, then it is essential to act quickly.

How long do I have?

For broadcast you normally will have around a week for such programmes as “Watchdog/ Dispatches/Panorama”. For print and/or online you can have a matter of minutes; but more normally around two hours for the following day; or around 24 hours for a “Sunday”.



What do I do?

All available rebuttal material should be gathered as quickly as possible. This should then be communicated to the publisher/broadcaster in writing in a way that communicates clearly that if an inaccurate/misleading story is published/broadcast takes place, the publisher/broadcaster will be held to account for it.

Who should communicate this?

The options are for the company/individual themselves to communicate with a publisher/broadcaster; the PR company, or a media lawyer. Usually, the most effective way of communicating the danger of an errant broadcast/article is the subject of formal challenge is for the subject of communication to come from a media lawyer.

Who should receive the communication?

For a newspaper/news website the communication should go ideally to the journalist, the Editor and the in-house lawyer. This means that at least one of the important decision makers has the key communication. For broadcast, you are normally communicating with an independent production company making the television programme, in which case that independent production company and the broadcaster should receive a copy of the communication, along with the legal department of the broadcaster.

What to do if publication or broadcast takes place?

Legal Remedies

The usual form of legal protection for reputation is defamation, although there are other legal actions available. The law in this country is more favourable to the claimant than in the United States or Europe. Once a claimant establishes that the words published were damaging to reputation, then the burden of proving a defence falls on the media.

The Defamation Act 2013 has made bringing libel actions more difficult. Precisely how its provisions will apply is not yet clear. Where a libel action can be presented as viable it can still be a potent threat.

The vast majority of libel actions settle before trial. Often the threat of legal proceedings is sufficient to obtain an apology, damages and payment of legal costs.

Regulatory Remedies

Where the IPSO Code is breached in the form of a *"substantial inaccuracy"*, it stipulates that a correction should be published *"promptly and with due prominence"*. An apology should be published *"whenever appropriate"*. Where there are (mere) inaccuracies, a newspaper must provide a fair opportunity for reply. IPSO will undoubtedly have many inadequacies but may provide a quick cheap remedy.

Ofcom will adjudicate complaints of unfairness to the subject of a broadcast, either how they are treated as part of the broadcast itself or how they are ultimately portrayed. The BBC also has its own internal complaints process.

Ofcom and IPSO have the theoretical power to administer fines for breaches of their Code. Practically speaking it is their power to order the publication/broadcast of an adjudication which is the primary remedy for those suffering reputational damage.

There is hope!

You are *not* impotent in the face of intrusive or damaging material being published or broadcast. Combining recourse to the law and complaints to regulatory bodies can provide means of correction and compensation (although compensation is only available via the law). A corporate claimant carries more clout than an individual because it would be perceived as having greater financial muscle.

The sooner action is taken the quicker the damage can be undone. Bad news travel swiftly and virally and needs to be stopped in its tracks. The offending newspaper or broadcaster will also take more seriously an immediate response than one which is delayed.

When tackled with sufficient determination, the media will often give way. One high profile client obtained from a tabloid newspaper a front page apology which

covered the entirety of the first page on the day after the offending publication. I have obtained an apology read on the FIVE main evening news on behalf of another high profile client a couple of days after being instructed without proceedings being issued. Working with a well-known PR firm, we obtained a prominent apology and retraction in the Financial Times – again without proceedings being threatened.

There is therefore no need to feel that there is nothing that can be done when you are treated unfairly by the media. The media will however be merciless to any subject of saleable material which shows a reluctance to defend itself. By contrast where a corporation or individual establishes that it will protect its reputation/brand the media will be far more cautious in damaging it.

Popular myths fostered by the media

1. **There is no effective means of defending yourself against them;** many individuals and corporations have successfully done just that
2. **If you stand up against them they will only make things worse for you in the future;** in fact the reverse is generally true.
3. **If you threaten legal proceedings you will be perceived as being defensive;** in fact both the public and the rest of the press generally treat such a threat as the most credible denial of the defending allegations.
4. **If you threaten legal proceedings it will simply increase circulation of the story;** the reverse is true. The media organisation publishing the offending material will be contacted by all the other media corporations in order to establish whether there has been a threat of legal proceedings, in which case they are far less likely to repeat the story.



5. You will get a fair and satisfactory response from the media without lawyers, and if you instruct them you will make the situation worse; the media – especially the press – is very reluctant to admit error or compensate its victims. It will generally take little notice of a complaint unless it is from a lawyer.
6. If you do nothing, then the story will just go away; in fact it will be stored to be republished (if not challenged) on suitable subsequent occasions, and probably syndicated throughout the world.

Protection from unwanted media attention – Do's

Invest in your reputation

You have worked hard to develop your business/brand reputation. Do not be passive when the media wants to trade it for money.

Have expert crisis PR in place

Have in place a dedicated crisis PR team on standby 24/7. You could also have access to PR professionals as well as specialist media-legal advice.

Remember the media needs you too

With the ever shrinking budgets available to the media – particularly the print press – journalists in your industry sector need to maintain relationships in order to generate copy.

Remember news is a perishable commodity

Often the best tactic to avoid damaging copy being published is to force the newspaper into a position of indecision as to whether to publish or not. If the line can be held long enough, then the journalist/newspaper will often move onto another story.

Deploy your rights under the IPSO/Ofcom codes

The IPSO guide stipulates that journalists and photographers *“must neither obtain nor seek to obtain information or pictures through intimidation, harassment or persistent pursuit.”* They also *“must not persist in telephoning, questioning, pursuing or photographing individuals after having been asked to desist; must not remain on their property after having been asked to leave and must not follow them.”*

The guide also obliges newspapers to *“take care not to publish inaccurate, misleading or distorted material”*.

Deploy your legal rights

If journalists are on your property against your will, they are trespassers and should be told to leave. If they do not, you are entitled to call the police. This threat will normally have the desired effect. Continued unwanted press attention can also amount to unlawful harassment.

Remember that all copy published by the media has to be checked by lawyers

Every word that is published or broadcast by the media is checked by a media lawyer. If there is a credible legal threat before, then the story may be abandoned.

Remember the burden of proof is on the media

If the media publishes a damaging allegation, they will generally be obliged by both the law and regulators to prove that these allegations are true if challenged. Often allegations (particularly newspaper) are published on very thin evidence, so if a credible legal or regulatory threat is made prior to publication/broadcast, the story may be pulled.

Solve international reputation problems in the UK

The UK has unusually claimant friendly media regulation laws – much more so than the US or Europe. Use them to get a published apology here to deploy worldwide.

Deploy your media lawyer

Reminding the media of your rights via a media lawyer will usually have a sobering effect, especially if your lawyer has a good record of inflicting defeats on them.

Protection from unwanted media attention – Don'ts

Never ignore a media crisis – bad news about you will re-emerge if not addressed

The media will recycle any negative story – often with less restraint than when first aired – unless you have made it clear to them that you will not tolerate its republication.

Never say “no comment” – it will be taken as an admission of guilt

Studies show that the general public will treat a response of “no comment” as an admission on the part of the victim of a negative story that they have no basis on which to refute it.

Never engage in spontaneous dialogue with a journalist investigating a damaging story

There is media training available for dealing with an aggressive investigative journalist. Without being trained, the likelihood is that you will do your own reputation or that of your company further damage.

Never talk to a journalist on the telephone except on the assumption that you will be taped

Most journalists tape telephone conversations. If the result is helpful to the journalist, it will be deployed against you later. If it is not, it is generally “lost”.

Never be fooled by “we just want to get your side of the story to give a balanced view”

This is often put forward to try to persuade you to create a conflict which may not actually exist. It is also an attempt to obtain the benefit of the public interest defence. Always take expert PR or legal advice before you respond to this kind of question.

Unless you have confidence in the journalist, never rely on being “off the record”

Unless you have a history of dealings with a particular journalist, and know him or her to be trustworthy, you must assume that anything you say to a journalist will be taken down and appear in print on some later date.

Never issue a press release before getting expert professional advice

Once you have gone “on the record” in the form of a press release this is a position from which it is very difficult to retreat without doing considerable damage. You should not therefore do so before having taken (ideally) both expert PR and legal advice.

Never tell the media anything which is untrue or about which you are unsure

If the media can establish that any “on the record” statement you have made is untrue, then they can freely accuse you of dishonesty.



Once that accusation can safely be made, then a number of accusations can follow, and a media crisis can turn into a disaster.

Ensure all who access confidential material are bound by confidentiality agreements

Everyone who has access to confidential information about your company should be bound by a watertight confidentiality agreement. It does not provide absolute protection, but if those agreements are in place and effective your position is much stronger.

Never put confidential material in your dustbin

Some journalists utilise confidential material which has been placed (unshredded) into dustbins. Ensure that all your confidential material is securely disposed of.

Long term strategy for dealing with the media

The commercial media exists to make a profit. It wants to make money out of trashing your reputation and that of your brands and/or key individuals. If it can be persuaded that publication of an article about you will not be profitable, then generally speaking it will not publish that material. This can be done by convincing the media that there will be a price to pay for publishing defamatory material about your company.

A key secret of long term Media Management is to disincentivise the media from publishing either damaging or intrusive material about you by raising the prospect of a legal and/or regulatory challenge if they do so. In order to understand how this is done, you must appreciate the two critical questions which are asked of all material which is disseminated by the media:

1. **Is there a legal issue? i.e. is it an infringement on reputation or privacy?**
2. **If the answer to the above question is YES, then will they hold us to account?**

The material which the media most wants to publish in order to attract viewers/readers and therefore advertising will generally attract the answer "YES" to the first question. The only disincentive which you can provide for the protection of your clients is to instil into the

minds of the decision makers that the answer to the second questions is also "YES".

Every word published by the media must be passed by a lawyer who will assess the risk of being challenged via a regulator/court. This judgment will be based largely on the company's past record of protecting its reputation. If that lawyer perceives a real risk of legal proceedings the likely advice will be not to publish in which case the likelihood of your company being the subject of unwanted media attention is significantly reduced.

The 20 questions most commonly asked at media management seminars

1. Can Corporates sue for libel?

Yes: in most respects they enjoy the same entitlements/privileges as an individual claimant although the new Defamation Act requires companies to show the likelihood of serious financial loss. Larger corporations have the huge advantage of the defendant knowing that the action can be fully funded. Since public vindication rather than damages is generally the priority, their right to financial compensation can be exchanged for a prominent retraction. The majority of well-funded and well-run actions should result in settlement long before a trial.

2. Is libel the only suitable form of legal action?

No. There is also Malicious Falsehood, Negligent Misstatement, Breach of Copyright, Privacy, Breach of Confidence etc.

3. Are there any other regulatory bodies which can assist?

Yes. For broadcast there is Ofcom. For the print media there is IPSO. Both publish codes of practice which can assist.

4. Can I get the benefit of both?

If carefully deployed, you can get the benefit both of the regulatory and legal remedies available.

5. Have corporate claimants been successful in the past?

Many times. Marks & Spencer, Collins Stewart and Body Shop are just three of the many

leading companies who have successfully sued media corporations for libel.

6. What must a claimant prove to win a libel action?

A claimant needs to prove that the words were defamatory (damaging to their reputation). After that the burden of proof falls on the defendant to establish a defence.

7. Does the claimant have to prove either that the words were untrue, or that the publisher knew that the words were untrue?

No. In this jurisdiction (and similar commonwealth jurisdictions), the factual burden of proof is on the defendant to prove either that the words are true or that they were published responsibly.

8. What remedy can we expect to obtain?

Apology

I have obtained (for example) an apology and retraction on the main evening news of a terrestrial broadcaster, and a full front page apology in the tabloid newspaper the day after I was instructed. The prominence of the apology will depend on the seriousness of the libel, and on the vigour with which the media corporation is pursued.

Statement in Open Court

This is a formal Statement read in front of a Judge in Open Court (with the press present) where the claimant's lawyer sets out the allegations made, and their retraction by the defendant. The defendant's lawyer then confirms this. This is then reported in the press, and lawyers throughout the media mark the story as one which should not be repeated.

Damages

This is generally less important to a company unless financial loss has been caused, in which case it can be recovered from the media corporation.

Costs

In the event of a positive outcome, the majority of your costs should be recoverable from the defendant media corporation.



9. Is not litigation slow and expensive?

Usually a credible threat of litigation is sufficient and proceedings are generally not necessary where the cause is good. I have succeeded in obtaining apologies as soon as 24 hours after being instructed.

10. Is there not a PR downside in a large corporation suing a newspaper/broadcaster?

The reverse; particularly as the likelihood of repetition of the allegations is greatly reduced by threatening or taking legal action. Such a response also sends the clearest signal that the allegations are challenged, and the subject of them is confident enough to refute them in court. More importantly, the action will mark out your company as one which will take action if libelled, which has a definite long-term PR benefit.

11. Should we only sue where we can guarantee a successful outcome?

No. If this were the criteria then no claimant (corporate or otherwise) would ever go to the law. There are huge advantages for a corporate claimant (as I set out above). There are advantages in making a point even if the outcome is not an outright win. Claimants who sue even when their prospects of winning are uncertain are actually perceived by the media as a greater danger. This reduces the danger of damaging allegations being published in the future.

12. What if the legal action runs into difficulties?

It is normally possible – however great the difficulties – to achieve a discreet and cost-effective settlement of a legal action. However, the purpose of such actions must be considered in the long-term context. Companies which take steps to protect their reputation are treated with much more care by the media than those that do not. Any outlay not recovered should be treated as a worthwhile PR expense.

13. Won't we suffer more adverse attention from the media if we take them on?

No – in fact the reverse is true. If the media perceives a possible financial penalty in publishing allegations against you, it is less likely so do so. It is critical to an understanding of how the media works to be aware of how the decision is made to publish/broadcast contentious material.

The decision is always a financial one. The decisionmaking process (which always includes a lawyer) addresses two questions:

- (a) **Is it defamatory? If so:**
- (b) **Will they (i.e. you!) hold us to account?**

14. How can we reduce the danger of adverse treatment we suffer at the hands of the media?

It is essential that so far as your company is concerned, the answer to that second question is YES. If you gain a reputation amongst media lawyers for being a corporation which never takes steps to defend its reputation then you will be categorised as a soft target. When before publication the question is asked “Will [you] hold us to account”, and the answer is “NO”, then there is no financial disincentive to the broadcaster/publisher to disseminate the adverse material about you. Without that disincentive you are likely to be treated as fair game by the media

15. Doesn't the media have a neutral stance about our image/product/brand – i.e. no axe to grind?

No. The media has an insatiable appetite for bad news. Everything from consumer programmes to the highest quality international suppliers of financial information need to disseminate negative information about products/corporates/brands like yours in order to sell their information and advertising space.

16. Why have our corporate lawyers not told us about this?

Large corporate law firms cannot do media work at a profit and so tend to give negative or incorrect advice about the media. Some have large media clients creating a conflict. The expertise necessary to use the legal/regulatory framework to achieve media management will only be found in lawyers without a conflict who work exclusively (or nearly exclusively) in a media environment. They must have expertise in:

- (a) **The individuals within and mentality of the major media corporations (by acting for and against them);**
- (b) **(Both sides of) media litigation and regulatory disputes;**
- (c) **All the relevant forms of regulatory action.**

17. What will happen if we do nothing – won't the story just disappear?

No. An unchallenged negative story will suffer constant repetition if not challenged. Print journalists in particular always pad out articles with stories drawn from the electronic “clippings file”. Journalists often draw from such material in gathering material for new items about you. Unless that story will be known to carry a legal problem it will be repeated next time your company/brand/product is in the news. Eventually the story will become set in stone and you will get a reputation in the media for being a safe target for profitable libel.

18. Aren't the legal resources of the Media Giants infinite?

No. None of them have limitless legal budgets or infinite internal personnel resources. Fierce competition in the media and shrinking profits ensure that. None of them want to spend money taking on substantial corporate claimants.

19. We are a Global Company. Why take action here?

The regulation of the media in this country is more favourable to the claimant than (say) the US where there is no IPSO equivalent and to win a libel action you need to prove malice, i.e. that the material was untrue and that the publisher knew it was untrue. Here the burden of proof is generally on the media defendant to justify the publication of defamatory material.

20. What about the Future?

The problems that corporations face will increase as the standard of investigative journalism is pushed down by tightening budgets. Recently whole programmes have been exposed as fakes. The media is looking for easy targets for attack. Make sure it is not you.

Preventing Press harassment

The Problem

Persistent intrusion by the tabloids into the private lives of high profile individuals and celebrities relies on their victims not knowing the legal and regulatory protection available. The purpose of this note is to inform and empower individuals who suffer this form of abuse to minimise the distress and irritation that it causes.



Regulatory protection for high profile individuals and celebrities comes from the PCC/IPSO Code. Paragraph 3 of the Code (below) quotes the right to privacy set out in Article 8 of the European Convention on Human Rights. Legal protection comes from two recent statutes (Human Rights Act and the Prevention of Harassment Act), and the case law interpreting it.

Protection under the IPSO Code

Privacy

- i. Everyone is entitled to respect for his or her private and family life, home, health and correspondence, including digital communications. Editors will be expected to justify intrusions into any individual's private life without consent.
- ii. It is unacceptable to photograph individuals in private places without their consent.

Note - Private places are public or private property where there is a reasonable expectation of privacy.

Harassment

- i. Journalists must not engage in intimidation, harassment or persistent pursuit.
- ii. They must not persist in questioning, telephoning, pursuing or photographing individuals once asked to desist; nor remain on their property when asked to leave and must not follow them.
- iii. Editors must ensure these principles are observed by those working for them and take care not to use non-compliant material from other sources.

Legal Protection

The Cases

The effect of the introduction of Article 8 into our legislation has been to create a form of privacy law in the UK. The reporting and photographing of private activities, even where celebrities are involved, is now unlawful. Injunctions have been obtained by celebrities to prevent harassment via the civil court – and the criminal courts can also make such orders.

The Statutes

Section 42(2) of the Criminal Justice and Police Act 2001 empowers a policeman to order a journalist away if the resident of a property is either being harassed or suffering stress.

Under the Protection from Harassment Act 1997 a journalist must not act in a way which amounts to harassment.

Options to deal with the problem

Deploy the IPSO

IPSO will intervene where the Code is being breached. We have often succeeded by this method in the past, since once a newspaper knows that its activities are being overseen by IPSO, it will generally be more inclined to comply with the Code.

When prompted the PCC/IPSO will remind editors that their journalists must comply with the PCC/ IPSO Code, and also that the editors must not use material which has been obtained in breach of the Code. The more information that can be provided to the IPSO officers, the more effective they are likely to be.

Deploy your Lawyer

We write to all the most likely miscreants in Fleet Street citing the PCC/IPSO Code and law, requiring them to get their photographers and journalists off our client's back.

We can also draft a "cease and desist" letter for the journalists and photographers who are doing the harassing, and get a process server to serve letters on them (we could if necessary identify them by the registration number and model of their car). This would inform them that if they persist in this action, we will obtain an injunction against them based on the Protection from Harassment Act. This is likely to have the desired effect.

If it does not do the trick, we can apply to the High Court for an appropriate injunction to force the individuals concerned to desist. We may also be able to obtain an injunction to prevent photographs or information being published which would constitute an invasion of our client's privacy.

Deploy the Police

You are also entitled to make a complaint of harassment to the police. The police should be politely reminded of their powers under the Criminal Justice and Police Act, and of the offence under the Protection from Harassment Act to persuade them to move on intrusive photographers or reporters.

We would be very happy to undertake this on your behalf. In our experience the police generally take more notice of lawyers because they find it more difficult to justify to us not using their powers against the press than to people who do not know what those powers are.

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