



## **Holding companies to account in cyberspace: the threat posed by Internet-based, anti-corporate campaigners**

Tom Burns,  
University of Aberdeen<sup>1</sup>  
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### **Introduction**

The Internet is thought to be a significant factor in promoting the rise of anti-corporate sentiment since 1995. It is also thought to have enabled a disparate range of activists, ranging from NGOs, environmentalists, labour rights activists, human rights campaigners and anti-corporate and anti-globalisation activists to exert much greater pressure on companies to change their methods of business and to make them more socially and environmentally responsible, particularly where these companies operate in less developed countries that may have weak labour laws, lax environmental laws and little respect for human rights.

In many cases the companies that are picked as targets for demonstrations and boycotts are companies with strong brand names and high corporate reputations in the business world. This is because their opponents see them as highly visible symbols of a system that appears to put profit above other social and environmental concerns and not necessarily because these companies are seen as the “worst offenders”. Anti-corporation campaigns run on the Internet or organised through this medium have undoubtedly had some effect on corporate operations as well as on public and political opinion and these campaigns continue to cause companies a great deal of concern. However, these companies should not be thought of as merely passive victims suffering assaults on their business reputations and brands. Companies have often responded to these threats to their businesses by using the law to stifle protests.

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<sup>1</sup> Any comments or observations on this draft, work-in-progress paper would be gratefully received. The author can be contacted at [t.burns@abdn.ac.uk](mailto:t.burns@abdn.ac.uk)

They are also constantly seeking new methods to deal with the developing and evolving threat from the anti-corporate campaigners who appear to be so adept at using the Internet as an important tool in their campaigns.

This article seeks to examine the extent to which companies can be held accountable for their alleged social and environmental failings by activists exploiting the potential of the Internet and it seeks to evaluate effectiveness of the corporate response to those campaigns, especially where law and technology is used to defend corporate reputations.

The basic structure of the article is as follows

### Structure

1. An examination of reputation as a valuable corporate asset and as an Achilles heel for companies
2. An examination of the use of the internet as a campaign tool against companies
3. The costs of damaged corporate reputations
4. An evaluation of the main corporate strategies to deal with threats to business reputations
  - 1 the legal strategy
  - 2 the technological strategy
  - 3 the use of reputation risk management technique
  - 4 The engagement strategy,
5. Conclusions

## **1. Reputation as a corporate asset and as a corporate weakness**

Companies understand the value of a good reputation and spend considerable sums maintaining them. They realise that a generally positive image of the company can be built up where the company focuses on its core competences and delivers quality goods and services to customers on a consistent basis. Skilful marketing and advertising can also support and promote the intrinsic merits of the company's

products and services, thereby further enhancing its reputation. Where a company is successful in achieving a good reputation, this can be a source of competitive advantage<sup>2</sup> (e.g. in terms of market share). Reputation can also be viewed as a business asset<sup>3</sup>. It is an asset that can be enhanced by turning the company name into a brand. The added value provided by the brand is often referred to as “brand equity” which has been defined as “set of assets (or liabilities) linked to a brand’s name and symbol that adds to (or subtracts from) the value provided by the product or service to a firm and/or that firm’s customers”.<sup>4</sup> Accountants have made various attempts to measure brand equity in financial terms for an on-going business and the methods used are fairly complex<sup>5</sup>. However, some experts believe that a reasonable indication of the considerable financial value of a good reputation can be found in take-over situations. In these cases a good reputation is often acknowledged in the purchase price that a bidder might pay for a business. For example, in the case of Nestlé’s bid for the British confectionary firm, Rowntree Mackintosh in 1988, Nestlé paid £2.55 billion for the target company even although the physical assets of Rowntree Mackintosh (in terms of plant and stock) only accounted for one fifth of that purchase price.<sup>6</sup> The reputation of the Rowntree Mackintosh Company as a purveyor of quality confectionary and the strength of the company’s branded products (such as “*Kit Kat*”, “*Smarties*” and “*Polo Mints*”) as market leaders accounted for a significant part of the price paid for the “goodwill” of the company<sup>7</sup>.

For many anti-corporate campaigners, companies with high reputations in the business world and strong brand names are the best targets to draw the public’s attention to the failures of the capitalist system in its current state. As the veteran American activist, Ralph Nader noted: “Global brand name recognition has an

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<sup>2</sup> Reputation can be one of the foundation stones of corporate success according to Professor John Kay. See John Kay: “Foundations of Corporate Success” Oxford, OUP 1995 at page 92

<sup>3</sup> Peter Sheldon Green “Reputation Risk Management” London, Financial Times/ Pitman Publishing Co 1992 describes reputation at the very beginning of his book as something that “can often be the single most valuable asset which a business owns” (at page xi). The company’s reputation is normally included in the “goodwill” of the business. Goodwill can be allocated a value in monetary/accountancy terms when a business is purchased.

<sup>4</sup> D.A. Aaker “Building Strong Brands” New York, Free Press 1996, at page 7

<sup>5</sup> See R. Pike and B. Neale “Corporate Finance and Investment: Decisions and Strategies” Hemel Hempstead, Prentice Hall, 1993 at pages 82 to 84

<sup>6</sup> Peter Sheldon Green op cit at page 2

<sup>7</sup> For further examples of bidding companies paying considerable sums to acquire businesses with strong reputations and strong product brands, see David Arnold “The Handbook of Brand Management” London, Century Business, 1992, Chapter 10 on Brand Valuations

Achilles heel of vulnerability. The better known a brand name is, the more vulnerable it is. The consumer movement is just beginning to use Internet technology to exchange information around the world about everything from product recalls to safety complaints”<sup>8</sup> By the late 1990s the Internet was being used to build coalitions of interest groups (including trades unionists, human rights activists, environmentalists and anti-globalisation activists) against the selected corporate target and to organise widespread protests and boycotts against companies with global brand name recognition. Many of these campaigns were successful in hurting corporate reputations, damaging brands and impairing the profitability of their corporate targets.

## **2. The use of the Internet as a campaign tool against companies**

The rise in the popularity of the Internet in the 1990s coincided with the increasing public concerns over the impact corporate activities on the economy, society, politics and the environment. This made the public receptive to the anti-corporate messages that campaigning groups were able to disseminate through the Internet. The roots of this public disaffection with companies can be traced back to the late 1970s and 1980s, but it reached new levels of dissatisfaction in the 1990s for reason outlined below and this has created a greater readiness on the part of sections of the public to participate in direct actions against companies in the forms of protest demonstrations, boycotts and political lobbying. Although there were some notable corporate scandals in Britain and the USA in the 1980s<sup>9</sup>, it was in 2002 following the collapse of the energy giant, Enron<sup>10</sup> that the public witnessed some of the largest corporate scandals<sup>11</sup> on record (and in Britain some of the most devastating examples of corporate management failures<sup>12</sup>). These have lowered public confidence in

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<sup>8</sup> Ralph Nader, quoted in J. Larkin, “Strategic Reputation Risk Management,” Houndmills, Palgrave/MacMillan, 2003 at p123

<sup>9</sup> For example the Maxwell pensions scandal

<sup>10</sup> The Enron Corporation was the biggest corporate bankruptcy in American history with debts of \$63.4 billion, until the collapse of Worldcom in July 2002 with debts of \$103.8 billion. The other major corporate insolvencies in America in the wake of Enron include, Global Crossing with debts of \$24.1 billion, Adelphia, with debts of \$22.4 billion and Kmart with debts of \$17 billion.

<sup>11</sup> Since the collapse of Enron there has been close scrutiny of the financial reports of America’s major companies. This intense scrutiny has brought to light a number of major accounting scandals. The most notable of these has been the collapse of Worldcom (where executives booked routine costs as business investments) and Xerox scandal (where there was financial mis-reporting of equipment leases).

<sup>12</sup> For example the Maxwell pensions scandal, or the poor management decisions that contributed to the collapse of Marconi or the decline of Equitable Life.

companies' financial probity. Nor did public concerns over corporate activities end with financial scandals or issues associated with mismanagement. Economically and socially, the effects of factory closures in Western countries and the concomitant transfer of jobs to cheaper locations in less developed countries by a number of large companies has increased job insecurity in the home states of these multinational companies and has further helped to increase the general anti-corporate public mood, especially where some of these companies are reporting high profits and large pay deals for their directors. News stories that revealed that some large companies were complicit in the poor treatment of workers by sub-contractors in the less developed countries caused public outrage. This outrage was fuelled by the fact that the highly-priced branded goods being sold to customers in the West were being made cheaply for those companies by poorly paid workers who were working long hours under some dreadful conditions. Matters were made worse for these companies, from a public relations perspective, when it was revealed that some of these workers were children.

Furthermore, stories that companies were spending large sums of money to lobby governments for favourable treatment in trade, tax and regulatory matters<sup>13</sup> and in some cases were prepared to work with regimes in other parts of the world with poor human rights records added to the public unease about how companies operated as economic and political actors.

Another factor that made the public more receptive to the anti-corporate agenda of the various campaign groups being disseminated over the Internet was public concerns over the environmental effects of corporate activities. This also reached new heights during the 1990s. Scientific data started to reveal an increase in polluting gases, a growing hole in the ozone layer, a significant reduction in natural habitats and the shrinking of the tropical rain forests. This led to public demands for tougher environmental controls. The emergence of evidence that global warming is occurring has added further impetus to the cause of environmental protection. Consequently, campaign groups are putting pressure on companies (as well as governments) to play a leading role in reducing environmental damage.

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<sup>13</sup> Companies have successfully lobbied for the lowering of the tax burden on business and for deregulation. In the UK the Government has set up the Better Regulation Unit in the late 1990s with the aim of cutting "red tape" that "burdens" business.

The cumulative effect of these trends has been the start of a re-evaluation of the fundamental relationship between society and business, which began in the 1990s. There may be less tolerance for the view (as so eloquently propounded by Milton Friedman) that “the social responsibility of business is to increase its profits”.<sup>14</sup> Instead there is a growing public conviction that companies exist at the pleasure of society. According to this view, corporate behaviour and methods of operation should fall within the guidelines set by society. Companies, like governments, should be subject to a “social contract” (i.e. an implied set of rights and obligations) which requires them to bear the social and environmental costs of their activities and to mitigate these costs where ever this is possible. Although the specifics of the social contract may change in the light to new circumstances, the central belief that the social contract is the source of business legitimacy<sup>15</sup>. The campaigning groups have been advocating the social contract theory to encourage governments to regulate where companies appear to be shirking their social and environmental obligations.

There has been a response to this lobbying from the business community that shows that it too is no longer prepared to tolerate the old view that the pursuit of profit to the exclusion of social and environmental concerns is acceptable basis for conducting business.<sup>16</sup> Indeed many British businesses would claim that through their charitable giving and community involvement programmes over the years they have never accepted the Friedman view of the goal of business should only be about profit. One result of this change in attitudes since the 1990s is the rising number of companies prepared to adopt the precepts of the Corporate Social Responsibility (or CSR) movement, which requires companies to take into account the concerns of the workers and the local community; to act in an environmentally responsible way and to be involved in community projects. Under CSR companies are also required to report on the impact of the economic activities on society and the environment and how they are trying to ameliorate the negative effects of their activities. However, many activists remain sceptical about this corporate trend and are concerned that the CSR

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<sup>14</sup> M. Friedman: “The Social Responsibility of Business is to Increase its Profits” The New York Times Magazine, September 13, 1970.

<sup>15</sup> T. Donaldson: “Constructing a social contract for business” in T. Donaldson & P. Werhance: “Ethical issues in Business” (2<sup>nd</sup> Edition), pp 153-165 Englewood Cliffs, Prentice Hall, 1983

<sup>16</sup> Most businesses in Britain have tended not to adhere strictly to the Friedman philosophy. Many businesses have engaged in philanthropy and sponsorship of community activities.

reports are often un-audited. Sceptical critics of CSR are also concerned that, in some cases, the companies' commitment to the CSR precepts may be weak because their chief reason for adopting the CSR principles has been to boost the company's public relations image.

Given this background it is possible to understand how activists in the estimated 26,000 NGOs with operations in more than one country (such as Friends of the Earth, Conservation International, CorpWatch, and Greenpeace)<sup>17</sup> were able to tap into this public discontent with companies to further their various causes. In this process the use of the Internet has played, and will continue to play, a vital role.

Although the Internet was still a fairly new technology in the early 1990s, anti-corporate groups and NGOs were quick to exploit its potential to gain publicity and public support for their causes. Through the use of e-mail and discussion groups on the Internet, information about corporate activities in different parts of the world could be gathered, collated and then disseminated to the public via the activists' web sites. The advantage of disseminating information through the Internet is that it effectively eliminates the problems that campaigning groups used to face about getting exposure for their stories through the traditional media. In this respect the Internet acts as an unmediated mass-broadcasting medium for the activists, where they can disseminate their views largely free from the traditional media's editorial control. Furthermore, the activists have discovered that they have a better chance of getting their stories onto the traditional media by using the Internet. With proliferation of television stations in the 1990s and the consequential demand for news stories to fill their 24-hour news needs, activists realised that they could gain greater publicity for their own stories of corporate misdeeds, if they could interest the traditional media with stories that were suitably sensational and sure to provoke public outrage. Activists soon discovered that their Internet stories covering issues affecting human health and safety or human rights or labour rights or the environment could capture the interest of the traditional media and help the campaigners reach a mass audience. Activists have also found that web sites, such as IdealsWorks, which can guide

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<sup>17</sup> J. Larkin: "Strategic Reputation Risk Management," Houndmills, Palgrave/ MacMillan, 2003 at p17

consumer-spending power towards companies that act in a socially or environmentally responsible manner, can also encourage good corporate behaviour.<sup>18</sup>

The Internet soon became a crucial factor in building international coalitions with people who shared some of the same concerns about the social, political and environmental impact of companies. Taking their inspiration from Tim Berners-Lee<sup>19</sup> who once said that, “the web is more a social creation than a technical one... designed... for social effect, to help people work together, and not as a technical toy”<sup>20</sup> activists have been using e-mails, discussion groups and other forms of conversational media on the Web to engage others in their campaigns. The Internet has permitted the creation of a loose alliance of anti-capitalist activists, trade unionists, environmentalists and various NGOs that were successful in disrupting trade talks in Seattle, in December 1999, Washington and Melbourne in 2000 and Quebec, Gothenburg and Genoa in 2001.<sup>21</sup>

The Internet has also proved to be an invaluable tool for organising and co-ordinating protests and boycotts of company products. As one public relations expert admitted, “one of the major strengths of pressure groups...is their ability to exploit the instruments of the telecommunications revolution. Indeed, the beauty of the Net for activists is that it allows coordinated international actions with minimal resources and bureaucracy”.<sup>22</sup> Klein gives several examples of the Internet being used by activists to co-ordinate their protests. In one case an action group of environmentalists, were able to block major roads in a number of cities by using the Internet to co-ordinate the assembly of hundreds of people at the targeted road sites at very short notice, which caught the authorities unprepared.<sup>23</sup> In another case, Klein records how an international campaign of protest against the sports ware company, Nike was co-

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<sup>18</sup> The philosophy of IdealsWork is stated in their home page: “Change companies and change the world. No matter which issues you care about, chances are that companies have a lot to do with them. Changing the practices of companies is a key to building a brighter future. And as powerful as companies are, there's something even more powerful: you. Companies do what customers want. In fact, the main reason companies have not been more environmentally and socially responsible is because customers haven't demanded it. IdealsWork is here to change that — by giving you information about what companies do, and making it easy for you to do something about it.”

See <http://www.idealswork.com/home.asp?from=/index.asp>

<sup>19</sup> He is credited with inventing the World Wide Web

<sup>20</sup> Tim Berners-Lee: “Weaving the Web” London: Orion Books, 1999 at page 133.

<sup>21</sup> R. Burnett & P. D. Marshall: “Web Theory” London, Routledge, 2003 at page 166-167

<sup>22</sup> Naomi Klein: “No Logo”, London, Flamingo, 2000, at page 395

<sup>23</sup> *ibid*, pp312-315

ordinated at the local level by using the Internet to send downloadable pamphlets for distribution at local protest rallies. Later that same day the campaigners were able to use the e-mail facility to allow local groups to file detailed e-mail reports of their local protests in order to disseminate a complete picture of the day's events and successes during this international protests to all of the other groups taking part in that day of action against the company.<sup>24</sup>

The Internet as a vehicle for the instant transmission of stories and reports has allowed campaigners to catch companies unprepared for the assaults that have been inflicted upon their reputations. When reports of corporate wrongdoing are circulated on the web and are picked up by the broadcasting and print media, companies have sometimes found it difficult to present a clear rebuttal of the allegations made against it as it can take the company some time to assemble the facts to present a coherent case against the accusations of corporate culpability (assuming, of course, that the company in question is innocent of wrongdoing).

As the Internet develops new media, activists have been quick to exploit their potential. Podcasts give the anti-corporate activists the chance to disseminate information about corporate failings to the concerned public at a time and place of each listener's choice. In addition, the emergence of the new conversational media on the web in the form of wikis<sup>25</sup> (which is a group communication medium that allows the users to edit the content and the organisations of the contributions on the web page) and in the form of web logs or "blogs" offer activists new ways of engaging their supporters and even their opponents in dialogue. Web logs or "Blogs" are being used to inform supporters and the public about the latest developments in their campaigns and they encourage responses to these developments by offering a facility to add to the campaigner's blog. Blogs are becoming particularly important for NGOs and other dissident voices to make their views heard. Blogs have been referred to as "a new form of journalism"<sup>26</sup>. Blogging permits anyone with a computer and a blogging programme, such as "Typepad," to post stories about corporate misdeeds

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<sup>24</sup> *ibid*, p395

<sup>25</sup> Ward Cunningham, the creator of the first wiki in 1995, defines a wiki as "a piece of server software that allows users to freely create and edit web page content using any web browser. A Wiki support hyperlinks and has a simple text syntax for creating new pages and cross links between internal pages". See <http://wiki.org/wiki.cgi?WhatIsWiki>

<sup>26</sup> Larry E. Ribstein "Initial Reflections on the Law and Economics of Blogging" (2005) University of Illinois College of Law, Law and Economics working paper No 25 at page 3

and to have those stories disseminated world wide on the Internet. Unlike print or broadcast journalism, there is no vetting of these stories before they are disseminated, so views and stories that may not have been published in the traditional media can find an outlet in blogs. Technically, a blog or web log is simply a web page where the author can post his or her views on any topic. It has been defined as “a hierarchy of text, images, media objects and data, arranged chronologically, that can be viewed in an HTML browser”<sup>27</sup> The key technical features which enable blogs to work so effectively have been described by Professor Ribstein in some detail. He states that “each blog has a title, date and perma-link that gives is web address. The home page has the most recent posts. If enabled by the author, readers can insert comments below each post. RSS feeds let people who use news aggregators such as Bloglines<sup>28</sup> to “subscribe” to the blog. This is one way blogs are disseminated quickly across the web. Each blog post “pings” or notifies, change aggregators to signal the web that the post has been made. A track-back address enables the other blogs to ping the blog when they refer to it. The blog author can then track who is referring to him and the blog itself includes a running record of track-backs under each post. Blogs have blogrolls that establish the blog in communities of other blogs”<sup>29</sup>

However, despite the enabling technology that makes it so easy to create a blog, there remains one big problem with this technology. This is that there is no guarantee that it will be read by significant numbers of people, unless it can be found easily on the web in a Google search. For a blog to appear in a high-ranking position in a “Google blog search” and thereby increase its readership, its content would need to have some credibility so that the number of incoming referral links would be significantly to allow it to rank highly in a Google blog search.

From the discussion above, it is clear that activists have been able to tap into a mood of public discontent and are using the Internet in new and imaginative ways to make their campaigns against socially and environmentally irresponsible companies more

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<sup>27</sup> David Winer “What makes a weblog, a weblog?” May 2003, available at <http://blogs.law.harvard.edu/whatMakesAWeblogAWeblog>.

<sup>28</sup> “Bloglines” is a free online service for searching, subscribing, creating and sharing news feeds, blogs and rich web content. With Bloglines, there is no software to download or install; all one has to do is register as a new user and one can instantly begin accessing a personal account any time, from any computer or mobile device. See [www.bloglines.com](http://www.bloglines.com)

<sup>29</sup> Larry E. Ribstein: “Initial Reflections on the Law and Economics of Blogging” (2005) University of Illinois College of Law, Law and Economics working paper No 25 at page 4

effective. Perhaps Tony Juniper of Friends of the Earth was not exaggerating when he claimed the Internet is “the most potent weapon in the toolbox of resistance.”<sup>30</sup>

### **3. The costs of damaged reputations**

Although companies spend a great deal of time and money in building a positive reputation with suppliers, customers and regulators over a period of many years, a reputation can turn out to be a very fragile thing. If a company is responsible for serious incident it is possible that the company’s reputation will be damaged permanently. A dramatic example of how a company’s reputation can be shattered in the aftermath of a disaster is the case of Union Carbide in Bhopal, India. This case also illustrates how, in the pre-Internet era, the traditional print and broadcasting media was more than capable of helping to demolish a company’s reputation by saturation coverage of stories about corporate failings. It also provides a warning to companies in our current period that if they find themselves in a situation similar to that of Union Carbide they might find the destruction of their corporate reputations greatly accelerated as a result of the power of the Internet.

In the Union Carbide case a 50% owned Indian subsidiary<sup>31</sup> of Union Carbide was the site of an industrial accident in Bhopal, India that claimed the lives of thousands. The accident was caused when a leak at the chemical plant released 42 tons of toxic gas into the air causing 2,000 deaths immediately, and a subsequent 4,000 deaths. The gas cloud also injured 200,000 people living in close proximity to the plant resulting in 60,000 of them suffering permanent injury. This accident led to the American parent company being described as the perpetrator of the world’s worst industrial disaster.<sup>32</sup> After the accident, it took Union Carbide 5 years to offer a settlement to the victims. It then took a further five years for the Indian courts to sift the claims and award the compensation. The accident and its aftermath left the reputation of Union Carbide in tatters, leading to its sales and profits dropping dramatically. In the period from 1984 to 1992, the company’s sales fell from \$9,900 million in 1984 to \$4,800 million in 1992 and as a consequence the company had to reduce its workforce from 98,400 to

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<sup>30</sup> Quoted in Naomi Klein: “No Logo” op cit, p 396

<sup>31</sup> Union Carbide owned 50.9% of the shares and the Indian government and other Indian interests held the remainder.

<sup>32</sup> D. Dembo, W. Morehouse and L. Wykle “Abuse of Power: Social Performance of Multinational Corporations: The Case of Union Carbide” New York. New Horizon Press, 1990 page 5.

12,000 The chairman of Union Carbide recognised the impact of the disaster on the company's fortunes when he said: "[In the 1970s] our safety record was unequalled among manufacturers. Our employees were healthier than most other people, and we were aggressively establishing ourselves competitively in the markets of the world. Then, in a few short years, our world seemed to change. Today we are one of the most feared and misunderstood industries in the history of the planet".<sup>33</sup>

In the age of the Internet companies are facing a tougher challenge when they try to protect their reputations in the wake of disasters or scandals. Bad news about the company can go "global" very quickly, but the company might be reluctant or unable to offer an equally quick response. Sometimes this is because the company under scrutiny will want to investigate the allegations about its activities for itself in order to be in possession of the full facts. However, the delay in responding to their accusers is more often because the company will want to clear their statements with their legal advisers before issuing them to an inquiring media. It was in this age of the Internet that Arthur Andersen, the global accountancy firm, found its reputation destroyed following a criminal investigation at one of its branch offices in Texas.

Arthur Andersen was formerly one of the "big five" auditing firms in the world<sup>34</sup>.

Like the other members of the "Big Five", Andersen consisted of a network of local partnerships, enjoying a fairly high degree of autonomy and linked together under a general master partnership agreement. The global brand of Arthur Andersen lost its credibility and professional reputation in the eyes of its corporate clients worldwide when its Texas partnership shredded documents and deleted computer files that related to the local partnership's work at Enron following a subpoena from Federal officials for Enron-related documents<sup>35</sup>. Although the Andersen organisation was ultimately only fined \$500,000 (£322,000) and sentenced to five years probation for the offence<sup>36</sup>, the reputation of the global firm was so badly damaged by what had happened in its Texas branch that the business collapsed<sup>37</sup> and 28,000 people lost their

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<sup>33</sup> D. Dembo, W. Morehouse and L. Wykle op cit, page 1.

<sup>34</sup> The other major firms (now known as the "big four") are PwC, Ernst & Young, Deloitte and KPMG

<sup>35</sup> P. C Fusaro & R. M. Miller: "What Went Wrong at Enron" Hoboken, New Jersey, John Wiley & sons Inc, 2002, p124-131

<sup>36</sup> "Enron auditor fined \$500,000" BBC News <http://news.bbc.co.uk/1/hi/business/2334761.stm>

<sup>37</sup> Dale Neef: "Managing Corporate Reputation and Risk" Boston (USA), Butterworth-Heinemann, 2003 at page 192

jobs.<sup>38</sup> Later, the American Supreme Court decision overturned the conviction in 2005, but that legal victory has done little to revive what has been left of the former accounting giant.<sup>39</sup>

The Andersen and Union Carbide cases are extreme examples of companies that have failed to live up to their corporate reputations and have had to pay the ultimate price for their alleged defaults. However, in the normal course of events, anti-corporate campaigns can have effects on companies that may fall far short of corporate destruction, but nevertheless do hurt the companies' operations and revenues and put significant pressure on them to change their corporate behaviour. In a number of high profile cases documented by Klein<sup>40</sup> some well-known companies, such as Nike, McDonald's, Shell, were targeted for direct action by campaigners. The use of the Internet played a key role in all of these campaigns<sup>41</sup> and the net results of the various protests; boycotts and bad publicity for the companies concerned was a change in corporate behaviour to meet at least some of the demands of their opponents. As Klein concludes from her review of a larger number of campaigns: "Dozens of brand-based campaigns have succeeded in rattling their corporate targets, in several pushing them to substantially alter their [corporate] policies".<sup>42</sup>

Thus, in many cases the company may decide that it is cheaper to compromise than resist the demands of the activists that are damaging their corporate reputations

#### **4. An evaluation of the main corporate strategies to deal with threats to corporate reputations**

Companies could adopt an adversarial or a conciliatory approach towards their critics. They could even adopt a mixture of both if that would improve their chances of success. The choice will largely depend upon the circumstances of each case. Currently companies have four main strategies to deal with the threat from groups using the Internet. The first of these is to use the law to protect the company's reputation from unjustified attack. The second is to use technology to block or

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<sup>38</sup> "Andersen conviction overturned" CNN Money.com at [http://money.cnn.com/2005/05/31/news/midcaps/scandal\\_andersen](http://money.cnn.com/2005/05/31/news/midcaps/scandal_andersen)

<sup>39</sup> *ibid*, p1

<sup>40</sup> N.Klein *op cit*, chapter 16

<sup>41</sup> *ibid*, pp395-396

<sup>42</sup> *ibid*, p 361

counteract negative stories on the Internet. Thirdly, companies may decide to adopt a reputation risk management strategy, which among other things may help the company to anticipate and then eliminate potential problems that could harm the company's reputation. And finally, companies may decide to adopt a conciliatory approach towards their critics in order to engage their opponents in discussions over how to deal with the issues that are causing the activists concern. Let us examine each of these in turn to determine their scope and identify their possible limitations.

#### 4.1 Law

There are a number of laws, which can be used to prevent unjustified and damaging attacks on a company's reputation via the Internet. The most obvious one is the law of defamation. Although this is a law that is used more often by natural persons, the law of defamation also protects corporate reputations.<sup>43</sup> In addition, various other laws such as the tort of injurious falsehood, the common law of passing off, trademark law, the rules governing Internet domain names and even copyright law could have some role to play in the defence of a corporate reputation over the Internet. What shall become apparent from this analysis is that the legal option is not the complete solution for companies engaged in a struggle with activists. In some cases legal action has had the unfortunate consequence for the claimant company in assisting the protesters to reach a wider audience as a result of the publicity surrounding certain trials. Thus, while the legal strategy may be a very important one for companies, it should not be the only option a company considers.

With regards to the law of Defamation, it is important to state that there is a basic principle in our society that critics of companies should be allowed to uncover corporate wrongdoing and publish devastating stories about companies if these stories are based on the facts that have been obtained from investigations into corporate activities. The law will not protect a corporate reputation that is unwarranted and there is a wider public interest in having wrongdoers held to account in law. However, if a company's critics are careless or mendacious and defamatory statements are published on a web page, these falsehoods are potentially actionable by the company

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<sup>43</sup> If a company's business or property is affected by defamatory statement it has the right to sue for damages. This principle was established in the nineteenth century: *Metropolitan Saloon Omnibus Ltd v Hawkins* (1859) 4 H & N 87; *South Hetton Coal Co Ltd v North Eastern News Association Ltd* [1894] 1 QB 133

in any jurisdiction in the world where the company has a presence. This exposes the defamer to a range of legal liabilities ranging from criminal actions in some jurisdictions<sup>44</sup> to claims for financial compensations in most other jurisdictions.

England is a popular jurisdiction for companies seeking to sue for defamation because the English law of defamation is “claimant-friendly” in terms of (*inter alia*) the scope of the law, the evidential burden placed upon defendants and the limited range of defences to a defamation action in England. The other great attraction of the English law of defamation is that the financial compensation for the successful claimant can be very high indeed.

In England, the tort of defamation is defined as “the publication of a statement which reflects on a person’s reputation and tends to lower him in the estimation of right-thinking members of society generally, or tends to make them shun or avoid him.”<sup>45</sup>

Written statements about a company that are untrue and damaging to the corporate reputation, which appear on a web page would come within this definition.

The person making the defamatory statement would liable to pay financial compensation to the company and because English law libel awards can be large, this law may act as a deterrent to some would-be defamers. However, there are a number of problems associated with pursuing this remedy. If the defamatory statement was composed in another country and published on a foreign ISP the case is likely to long and expensive as a result of its probable complexity involving “a mixture of publication, burden of proof, jurisdiction and discretion of the courts”<sup>46</sup> Another possible problem is ascertaining the identity of the author of the defamation. The author may go to some lengths to remain anonymous by, for example, posting the material on the web from an Internet café using a false identity. This could make it difficult for the company to trace the author. Professor Lloyd in the latest edition of his book, “*Information Technology Law*”<sup>47</sup> lists a number of other situations where it can be difficult to trace the true author of a defamatory statement. The true author

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<sup>44</sup> Ian J Lloyd: “*Information Technology Law*” (Fourth Edition) Oxford, OUP 2004 at page 686. The author notes that in Germany, defamation is primarily a criminal law issue, while the authors, W. V. H. Rogers: “*Winfield & Jolowicz on Tort*” (Fourteenth edition) London, Sweet & Maxwell 1994 at page 312 noted that Brazilian defamation law was criminal only.

<sup>45</sup> W. V. H. Rogers: “*Winfield & Jolowicz on Tort*” (Fourteenth edition) London, Sweet & Maxwell 1994 at page 312

<sup>46</sup> G J H Smith (Ed): “*Internet Law and Regulation*” London, FT Law and Tax, 1996 at page 45

<sup>47</sup> Ian J Lloyd: “*Information Technology Law*” (Fourth Edition) Oxford, OUP 2004, see chapter 31 on Defamation

might use another person's ISP account (without the knowledge of that person) to post the defamatory message and avoid detection as happened in the case of *Stratton Oakmont v Prodigy* (1995).<sup>48</sup> An author may also impersonate another individual in on a web page or email in order to deceive the company.<sup>49</sup> Finally, there are technical facilitates available to assist users who would wish to remain unidentifiable. Professor Lloyd gives the example of an author using an anonymous remailing service where service strips out the details of the original author and forwards the message to the addressee without identifying the author. The only way for the company to find out the identity of the author would be to obtain the cooperation of the operator of the facility, but this may be difficult if, as is often the case the remailing operator is based in another jurisdiction.<sup>50</sup> Even if a service provider is willing to assist a company with the identification of an anonymous poster, that cooperation could be limited by the data protection legislation. In the case of *Totalise v Motley Fool Ltd* (2001)<sup>51</sup>, the service provider refused to provide a company with the identity of an anonymous contributor to a bulletin board because it would cause the service provider to breach both its own contractual terms (which, *inter alia*, promised the users of the service confidentially) and the provisions of the Data Protection Act 1998. Although the court, in this case ordered that the relevant information be handed over to the company to identify the author of the defamatory statement, the Court of Appeal recognised that privacy issues do have a role to play and that service providers are not required to hand over person data automatically following a request from a company alleging defamation.<sup>52</sup>

Another limitation of using the law of defamation is that the defendant could be a "man of straw" (i.e. he may lack the financial resources to pay the damages awarded by the court). Worst still, the defendant may not only be impecunious but determined to use the court to publicise more widely his or her allegations against the company through the possible mass media coverage of the trial. The so-called "McLibel" trial where the fast food giant McDonald's sued two unemployed activists, illustrates the point that a (partial) victory in court may ultimately fail to protect the company's

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<sup>48</sup> *ibid*, p 689. *Stratton Oakmont v Prodigy* (1995) 195 NY Misc LEXIS 229

<sup>49</sup> *ibid*, p689, Lloyd notes that the it is now possible to forge email messages

<sup>50</sup> *ibid*, p689

<sup>51</sup> [2001] EWCA Civ 1897

<sup>52</sup> Lloyd, p689-690

reputation. In the McLibel case<sup>53</sup> the media interest in the allegations made by the defendants about McDonald's operations generated a great deal of bad publicity for the company. It also made the company a target for anti-capitalists and environmentalists to attack via the Internet. The McSpotlight website<sup>54</sup> detailing stories about the Company became a popular site as a result of the protracted court case and it continues to generate bad press for the Company to this day.

The other, perhaps more promising route for the company seeking to protect its reputation is to use the law of defamation against the Internet Service Provider. This is possible because the English law of libel allows the claimant to sue not only the author of a defamatory statement, but also anyone who disseminates the libel. As Professor Rogers points out, "every repetition of the defamatory statement is a fresh publication and creates a fresh cause of action the publisher of the defamation"<sup>55</sup>. For an ISP based in Britain, this rule could expose it to greater risks that would normally be the case for the print media. Under the Limitation Act 1980, section 4A actions for defamation must be commenced within one year of the publication of the disputed statement. However, in the context of a publication of a defamatory statement online, the case of *Loutchansky v Times Newspapers Ltd* (2001)<sup>56</sup> has established that there is a new publication of the defamation each time a reader accesses the site and therefore a new cause of action with its own limitation period.

This exposes the ISP to the risk of defamation claims for an indeterminate period of time, if the offending material is archived and not completely withdrawn from the site<sup>57</sup>. This rule and the high level of damages an ISP may have to pay out in settlement of a successful claim has made ISP extremely anxious about their exposure to claims and has heightened their desire to minimise this risk, wherever this is possible.

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<sup>53</sup> See also <http://www.mcspotlight.org/case/index.html> for further information about the litigation from the point of view of the defendants.

<sup>54</sup> <http://www.mcspotlight.org/>

<sup>55</sup> W. V. H. Rogers: "Winfield & Jolowicz on Tort" (Fourteenth edition) London, Sweet & Maxwell 1994 at page 337

<sup>56</sup> [2001] EWCA Civ 1805

<sup>57</sup> This would be different under American law, which has a single publication rule, which establishes that the cause of action arises at the time of the first publication of the defamation and will expire at the end of the limitation period.

The vulnerability of the ISPs to claims is further demonstrated by the limited scope of the defences available to them under the Law of Defamation in England. Although the ISP could claim the statutory defence of innocent dissemination under section 1(2) of the Defamation Act 1996, this defence could be easily and effectively undermined by a company informing the ISP that the server is hosting a site that contains defamatory material about the complainant. This will put the ISP in an invidious position. If the ISP refuses to remove the material or is slow to remove the offending material (perhaps because it wishes to investigate the complaint to see if it is justified) the ISP could find itself liable in defamation (*Godfrey v Demon*).<sup>58</sup> As a result of this case a number of ISPs in the UK have decided that the safest thing to do in terms of avoiding liability under the law of defamation is to adopt a policy of withdrawing material from their servers where someone alleges that it is defamatory.<sup>59</sup> Therefore companies seeking to defend their reputations have come to realise that the ISPs, at least in the UK, are soft targets. However, ISPs outside the UK may not necessarily feel so intimidated into withdrawing an alleged libel merely at the request of a company with an international reputation seeking to use the English law of Defamation. In the case of *Tenikoff v Matusevitch*<sup>60</sup> a US court refused to enforce the damages awarded to a British claimant who successfully sued an American citizen on the grounds that the grounds that “the cause of action on which the judgment [was] based [was] repugnant to the public policy of the State”<sup>61</sup>. The possibility that a foreign court may not enforce an English defamation damages award may provide an incentive for activists who write critical comments about companies and are concerned about the threat of defamation actions against themselves and their ISPs to seek ISP outside the UK.

#### 4.1.1 Injurious falsehood claims

The tort of injurious falsehood<sup>62</sup> protects the corporate interest in goodwill and economic reputation. To some extent it overlaps with the tort of defamation. The key interest being protected by this tort is the financial prospects of the business, rather than its reputation as such. A defendant is liable for injurious falsehoods if he

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<sup>58</sup> [1999] EMLR 542

<sup>59</sup> Lloyd op cit, p695

<sup>60</sup> 702 A 2d 230 (1997)

<sup>61</sup> Lloyd op cit p 703

<sup>62</sup> Also referred to as malicious falsehood

intentionally harms the claimant's business by telling untruths,<sup>63</sup> for example by maliciously disparaging the quality of the company's goods, or claiming that the working methods of a company are "inadequate" when this is factually not the case.<sup>64</sup>

To succeed in the claim, a company must prove four things: that the defendant's statement about the company or its property is untrue;<sup>65</sup> that the statement was published to third parties (with the effect that these parties may be deterred from contracting with the company); that the defendant was motivated by malice when he made the statement, and that the false statement caused the claimant a pecuniary loss.

Provided the company has the facts and figures to disprove the claims made by the defendant, it may be easier for the company to make a successful claim against the defendant if the injurious statements are made on the Internet. An injurious falsehood published on the Internet may expose the defendant to extensive liability, as the defendant will be liable for any re-publication of the falsehood, which is the natural and probable result of the original publication.<sup>66</sup> The claimant will not have to prove special damages in terms of the company's pecuniary loss because the falsehood is displayed on the Internet. The statutory rule is that "if the words upon which the action is founded are calculated to cause pecuniary damage to the plaintiff and are published in writing or other permanent form" then general damages may be awarded.<sup>67</sup> Potentially the most difficult issue for the claimant is the requirement to prove malice.<sup>68</sup> The key test is that the statement is not only false and injurious, but it is made in bad faith.<sup>69</sup> This element of bad faith may be proved in a number of ways.

For example, if the claimant can show that the defendant made the statement knowing it was false<sup>70</sup>, or that he made it recklessly, unconcerned whether the statement was true or false, then the burden of proof is discharged. Thus, the tort of injurious falsehood may offer the company claimant a significant weapon to defend the

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<sup>63</sup> "An action will lie for written or oral falsehoods ... where they are maliciously published; where they are calculated in the ordinary course of things to produce, and where they do produce actual damage..." *Ratcliffe v Evans* [1892] 2 QB 524 at 527

<sup>64</sup> *London Ferro-Concrete Ltd v Justicz* (1951) 68 RPC 261

<sup>65</sup> *Royal Baking Powder Co v Wright, Crossley & Co* (1900) 18 RPC 95 at p99

<sup>66</sup> *Cellactite & British Uralite v H H Robertson & Co* (1957) *Times*, 23 July

<sup>67</sup> This statutory rule was first introduced by section 3 of the Defamation Act 1952

<sup>68</sup> *Loudon v Ryder (No 2)* [1953] Ch 423

<sup>69</sup> *Halsey v Brotherhood* (1881) 19 Ch D 386 at 388

<sup>70</sup> *Wilts United Dairies Ltd v Thomas Robinson, Sons & Co Ltd* [1957] RPC 220

company's financial interests from verbal attacks on the Internet, provided that the author of the falsehoods can be found and there are no jurisdictional and enforcement problems.

#### 4.1.2 Parody and Sucks.com sites

Companies may also be troubled by the existence of sites that ridicule or disparage the company's image. These are known respectively as parody sites and sucks.com sites.<sup>71</sup> As a first line of attack, aggrieved companies might be tempted to consider using trademark law or the common law of passing off to have the domain names of these removed from the register of domain names. The use of these laws has worked fairly well in relation to rival businesses that have tried to cash in on the goodwill and high reputation for quality product or services that a company has achieved. They have also worked effectively against cyber-squatters<sup>72</sup> where the possibility of providing a domain name that was the same name as an existing business with a good commercial reputation could be restrained on the grounds that the person who registered the disputed name were "equipped with or intending to equip another with an instrument of fraud" (*BT, Virgin, Marks & Spencer plc (and others) v One in a Million* case)<sup>73</sup>. Furthermore, an individual has used the law of passing off (somewhat controversially<sup>74</sup>) to exclude others from using her name on Internet domain names without her agreement. This possibility was established in the WIPO Administrative Panel decision in the case of *Jeanette Winterson v Mark Hogarth*.<sup>75</sup> However, it may be unlikely that a company will be able to challenge successfully those parody domain names and "sucks.com" domain names under either of these particular laws.

This may be the case because the authors of those domain names are not trying to engage in trade of any sort and so will probably fall outside the scope of trade marks law and the law of passing off. Such a result would be in accord with the principle purpose behind these particular laws, which is to prevent unfair competition by rival

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<sup>71</sup> Paul Todd: "E-Commerce Law" London, Cavendish, 2005 at page 27

<sup>72</sup> C. Colston "Passing off: the right solution to domain name disputes?" [2000] LMCLQ 523, at p526-527

<sup>73</sup> [1998] 4 All ER 476 at 493

<sup>74</sup> Catherine Colston criticises the decision as being an unreasonable extension of the application of the law of passing off where there was no actual trading interest at stake. See C. Colston: "Passing off: the right solution to domain name disputes?" [2000] LMCLQ 523, at p534-535

<sup>75</sup> <http://arbiter.wipo.int/domains/decisions/html/2000/d2000-0235.html>

traders. Besides, even if the company were to be successful in using these laws to remove the offending domain name of a parody or “sucks” site, the authors of these offending could simply rename their sites and attack the company of their choice and be confident that when an Internet user types in the company’s name on a Google search, the sites that attack the company’s reputation will be listed.<sup>76</sup>

Using trademark law and the law of passing off to attack the content of parody and sucks.com sites is another possibility for companies. Normally, if a parody or satire works well the audience will know that it is an attempt to poke fun at a company’s goods or services. Consequently, there is little chance that the audience will think that the site is designed to steal their custom from the ridiculed company. Therefore a passing off claim will often fail in these cases.<sup>77</sup> Indeed, it is rare for a successful passing off claim to be made against a satirist.<sup>78</sup> Where a satirist was sued successfully under the law of passing off was in the case of *Clark v Associated Newspapers*.<sup>79</sup> In that case a newspaper published a satirical column called the “Alan Clark Secret Diaries”. The column bore the famous diarist’s photograph and name and although the column also stated that this was how “Peter Bradshaw imagines how the great diarist might record” events, the judge held that on the evidence presented by Clark, it was likely that a substantial number of readers of the newspaper may have been misled about the true authorship of the column, therefore a deceptive misrepresentation amounting to a passing off had occurred. However, once again, the precedent value of this case might be in doubt in the normal parody site on the Internet. Most of these sites are run on a non-profit basis and provided the defendant was not involved in commerce, this law is not likely to apply. Similarly, actions against parody sites and sucks.com sites for infringement of a trade mark law under sections 10 (1) to (3) of the 1994 Trade Marks Act are likely to fail on the grounds that in order to infringe the mark must have been used in the course of trading.

Finally, companies might be tempted to use the law of copyright and the law on confidentiality either to prevent the publication of internal company documents on

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<sup>76</sup> for example by typing in McDonalds in a Goggle search, the McSpotlight site is listed along with the official Company web site. Similarly a search for Walmart will show the “walmartsucks” site <http://www.walmartsucks.org/>

<sup>77</sup> See *Miss World v James St Productions* [1981] FSR 309

<sup>78</sup> See M. Spence “Intellectual Property and the Problem of Parody” (1998) 114 LQR 594

<sup>79</sup> *Clark v Associated Newspapers* [1998] RPC 261

web sites by means of an injunction, or to sue those responsible for the postings, especially if these documents reveal information which could harm the company's reputation. However, if the defendant can establish that it is in the public interest to have these documents revealed (e.g. because the documents reveal evidence of serious wrongdoing by the company) then the company's reputation will have to be re-assessed in the light of those new facts.<sup>80</sup>

#### 4.2 Technological solutions?

Companies can monitor the Internet for negative publicity and hostile sites, or hire specialist firms to do that job for them. Such monitoring can help the company to identify and address genuine consumer and stakeholders' concerns. It can also alert the company to any unjustified vilification of its name and give it the opportunity to counter these claims by presenting factual evidence that may support and legitimise the company's contested acts. Consultancy firms like Evolve24, Intelliseek and BuzzMetrics have the ability to find and analyse any blogs that attack the reputations of individual companies. They can also provide an estimate of the seriousness of the threat.<sup>81</sup> Other consultancy firms are able to offer crisis management systems that utilise blogs. CooperKatz, the public relations firm can advise firms on how to set up a "lockbox blog". This is a site that is hidden behind an Internet firewall, which typically contains corporate statements, pre-packaged information and video clips that have been designed to address foreseeable (but perhaps not likely) problems that could generate bad publicity for the company. This lockbox could be opened and released very quickly on to the Internet to assuage public concerns in the immediate aftermath of a crisis.<sup>82</sup>

Partly as a pre-emptive measure to boost the company's reputation and partly as a marketing tool, some companies such as Dyson, Telewest and Sony have been sponsoring blogs. These blogs are created with the aim of reaching new customers and strengthening the links with existing customers. They also serve to promote positive views about the companies' products or services.<sup>83</sup> To increase their credibility in the eyes of potential customers, a few companies have been prepared to

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<sup>80</sup> Cambridge Nutrition Ltd v BBC [1990] 3 All ER 241

<sup>81</sup> The Economist: "The blog in the corporate machine" 11<sup>th</sup> February 2006, page 65

<sup>82</sup> *ibid*, p66

<sup>83</sup> Financial Times: "Brands enter the blogosphere" 20<sup>th</sup> December 2005

allow some criticism of their products or services to be posted on their corporate blogs, or their employees' blogs in order to demonstrate that the company is a responsive company, ready to accept criticism and equally ready to remedy any problems brought to its attention concerning its products or services. By listening to their stakeholders, these companies hope to engender more loyalty and develop a more solid long-term relationship with their customers, not only to lay the foundations of future success<sup>84</sup>, but also to provide the brand with a degree of public goodwill that may help them survive any future attacks on their corporate reputations.

### **4.3 The management of the risks to reputation**

As Neef has pointed out “in many ways companies have a lot more to lose today than even 10 years ago, simply because the potential for being caught and exposed, by activists, lawyers, government agencies and the media, is greater than ever before.”<sup>85</sup> Therefore, companies need to be proactive in the management of risks to their reputations. There are a number of risk management specialists who have written books on the subject, setting out various frameworks for reputation risk management<sup>86</sup>. These may vary in their details, but an overall pattern of recommendations does emerge which could be regarded as a common core of the subject. All recognise that reputation is built upon perception and that perception is vulnerable to real and imaginary threats<sup>87</sup>. The goal of a reputation risk management system is to identify and prevent the avoidable threats and control and minimise the unavoidable threats. The first essential step in creating a risk management system is to create a team of managers with the task of focusing on risk management and prevention. This coordinating team needs to have the full backing of the board so that it has power within the organisation to impose the controls necessary to achieve their goals. The first task of the risk managers is to identify the threats to the company's

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<sup>84</sup> Financial Times: “Who’s afraid of the big bad blog?” 4<sup>th</sup> November 2005

<sup>85</sup> Dale Neef “Introduction” page vii

<sup>86</sup> For example, Peter Sheldon Green: “Reputation Risk Management” London, Financial Times/Pitman Publishing Co 1992, Adam Jolly: “Managing Corporate Reputations” London, Kogan Page, 2001; Gary Davies: “Corporate Reputation and Competitiveness” London, Routledge, 2002; Dale Neef “Managing Corporate Reputation and Risk” Boston Mass, Butterworth Heinemann 2003; Judy Larkin: “Strategic Reputation Risk Management” Houndmills, Palgrave MacMillan, 2003; Charles A Fishkin: “The Shape of Risk: A New Look at Risk Management” Houndmills, Palgrave MacMillan, 2006

<sup>87</sup> For example see Judy Larkin op cit for a sustained analysis of this phenomenon in chapter 3 on “perception or reality? A risky business” p 86 to 120

reputation from within the organisation and from outside the organisation. Then the task is to assess those risks by estimating their probability and their likely effect on the organisation's good name. Clearly, those threats that are very likely to occur and are likely to cause grave damage to the organisation are the ones that must be eliminated or at least minimised as a priority. Risk avoidance and reduction methods must be put in place for the other perceived threats to the company's reputation, especially for the low probability but high cost threats that could cause a crisis for the company. This usually involves further training for employees and the promotion of a culture where problems can be reported without the employees having to fear that the act of reporting a problem may incur the risk of the employee being discriminated against in any way. This "identify and fix" approach may be of limited value if it merely leads to a patched up system of governing behaviour and addressing known problems. For a more comprehensive approach to reputation risk management, advocates of the technique often suggest that the company should engage with the workforce to develop codes of conduct. It is recognised that an effective and comprehensive code of conduct can help to provide a framework for employee and management decision-making and control. The risk management experts also seem to agree that the reputation risk management procedures should be accommodated within the company's wider risk management programmes<sup>88</sup> as it may be complementary to, and overlap with other risk management systems such as financial risk management, health and safety risk management and the requirements of the Turnbull Report on the management of internal risks as part of the obligations of the Combined Code on Corporate Governance, as amended 2005.<sup>89</sup> Finally, the various authors suggest the creation of a detailed crisis management procedure so that if the worst case scenario happens, there will be an identifiable spokesperson ready to answer questions from the media or regulators about the crisis and there will be a

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<sup>88</sup> See Larkin, *op cit*, pages 20 -21 and Sheldon Green, *op cit*, Chapter 4 "The Bottom Line of Reputation Risk Management". In this chapter Sheldon Green outlines the financial case for adopting RRM. One of his observations is that a reasonable percentage of the cost of this programme might already be in place for it in most companies. This is because funds will have already been allocated to the reduction of many other types of business risks in the company and given the overlap between this form of risk management and reputation risk management, some of the costs of managing risks to reputation may have already been paid for.

<sup>89</sup> The Turnbull Report sets out the best practice for the internal control of risk and was first published in 1999. It has now been amended. The directors of listed companies are now required to confirm in the annual report that they have dealt with (or are planning to deal with) any significant failings or weaknesses highlighted by the internal control system. For the new guidance see the "Internal Control: Revised Guidance for Directors on the Combined Code" available at [www.frc.org.uk/corporate/internalcontrol.cfm](http://www.frc.org.uk/corporate/internalcontrol.cfm)

systems for briefing all relevant top personnel about the problems and alerting a “trouble-shooting” team to find out and report on the causes of the problem and the measures that may be necessary to eliminate it, or at least minimise the damage the problem has caused. There would seem to be a consensus among the reputation risk management specialists that if a crisis does occur the preservation of the company’s reputation will depend upon how far the company is perceived to have taken full and reasonable precautions to guard against the circumstances which threaten it; how effective the company has been in reacting to and minimising the damage caused, and how far the company is seen to be genuinely concerned about what has happened at a level beyond that of purely business considerations<sup>90</sup>.

#### **4.4 Engagement**

Companies might seek to limit the attacks upon their reputations and brands by engaging with their opponents. There are a number of possible advantages to be gained from this strategy. If the company invites opponents to help it draft corporate codes of conduct and it then acts in a manner that would meet the approval of its critics, this compromise would undermine the legitimacy of any further attacks on the company. Listening to, and acting upon, the legitimate concerns of the activists may even help the company to achieve better results as it may enhance the company’s reputation among its customers. Some companies have found that if they are able to sustain a generally favourable public image, this could be of great value to the company in times of crisis (i.e. in so far as it may help the company to recover from the crisis more quickly than would otherwise be the case).<sup>91</sup>

Even if some of their critics refused to co-operate in drafting codes, this strategy could still be useful in splitting the opposition. A code drawn up by the company itself, which addresses at least some the critics’ concerns, may mollify the moderates and reduce the momentum of the activists’ campaign. Alternatively the company’s offer to the activists to take part in drafting a code may have the effect of separating the moderates from radicals and the resulting corporate code might give the company

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<sup>90</sup> Sheldon Green, *op cit*, p171

<sup>91</sup> See, for example the case of Johnson & Johnson which was a company that was able to recover very quickly from a major crisis largely because it had a good reputation and acted ethically in the immediate aftermath of the crisis in Dale Neef “Managing Corporate Reputation and Risk” Boston Mass, Butterworth Heinemann 2003, pp 111 to 112

more scope for discretion. The existence of a suitable code of conduct either drafted by the company itself or drafted in consultation with the activists could also help the company to avert the threat of regulation.

The main problem with this strategy from the company's point of view is the difficulty in persuading the activists to take part in the code-building project. Many activists might be sceptical about the good faith of the companies involved and may view the attempts at negotiation as a tactic to split the opposition.

However, if their opponents do take part in consultations over codes of conduct, there are dangers for the companies concerned. The resulting code might turn out to be tougher than the company had planned. There is also the problem that the activists will be more likely to scrutinise the company more closely after the introduction of the code in order to check that the company is complying with it, rather than simply using it as a public relations smokescreen behind which the company can carry on business as usual. If activists were to discover that a company, which has created its own code of ethical and environmental conduct, is not following its own rules of conduct, then the damage to the company's reputation could be worse than if the company had no code, because the company could be accused of being hypocritical, cynical and untrustworthy.

Thus if a company were to adopt this strategy of engagement and code building, it would need to be prepared to follow the resulting code.

## **5. Conclusions**

Activists who wish to attack the social, political, economic or environmental record of a company can now do so with greater ease and with greater effect by using the Internet. The Internet has enabled activists to change public opinion, build international coalitions, organise protests and boycotts and galvanise politicians into taking action, which sometimes results in regulation. Companies that have been the targets of the activists' campaigns have, in many cases, changed their behaviour, particular when the campaigns start to harm sales and profits and raise the spectre of possible regulation. However, it is clear that companies are not prepared to be passive victims in these attacks. In the early years of the Internet companies often turned to

law to stifle the opposition. But on occasion this strategy could backfire spectacularly when the activists began to use the courts to reveal the inner working practices of these companies and to generate greater publicity for their accusations against the company concerning poor working practices or alleged environmental damage. As a result, companies are no longer automatically turning to law to confront their opponents but are exploring other strategies to reduce the threat of damaged reputations. One hopeful development has been the development of a risk management strategy to protect reputations, which has the advantage of preventing many of the problems that anger the activists from arising in the first place. The other promising strategy is one of engagement. If companies can involve the activists in creating company policies that can satisfy the desires of both parties, then many acrimonious disputes fought in the public forum and over the Internet might be avoided. However, whether the different desires of the parties can truly be reconciled remains to be seen. What is not in doubt, from this analysis is the fact that activists have found the Internet to be a highly effective tool for helping them to hold companies to account for social and environmental failures and companies are still trying to find ways to counter this onslaught on their reputations and brands.