

THE LEGAL OBLIGATIONS OF SEARCH ENGINE OPTIMIZATION FIRMS

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As the Internet becomes increasingly accessible, businesses are focusing more attention on their online presences and regularly hire outside firms to optimize their websites in order to rank higher on Google and gain search engine traffic. A business not familiar with search engines, however, is less equipped to ensure that its search engine optimization firm is using reputable techniques. Not using reputable techniques can result in a search engine penalty, which can range from the webpage's rankings being lowered to the website being removed entirely from the search engine. This Note explores the possible causes of action a business has against a search engine optimization firm that uses nonreputable techniques without the client's consent when it leads to penalty. This Note also proposes reforms that can better protect such businesses.

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INTRODUCTION

Achieving high rankings on popular search engines is an invaluable way of increasing traffic to a website. But *how* a website gets to the top on Google matters. Take the case of Rap Genius, a popular lyrics website that allows users to annotate song lyrics and other works.¹ In December 2013, Rap Genius invited blog owners to join its blog affiliate program, in which Rap Genius would link to bloggers' websites in exchange for bloggers linking to Rap Genius.² Anticipating that fans would search for lyrics from Justin Bieber's soon-to-be released album, Rap Genius's links contained the album's song titles in an effort to rank highly for those terms.³ This tactic is considered spam, and Google penalized Rap Genius by removing it from its top search results.⁴ Before the penalty, Rap Genius often appeared at the top of Google's results for searches of songs and lyrics. After the penalty, Rap Genius did not even rank highly for the search term "Rap Genius."⁵

Search Engine Optimization ("SEO") has become an integral and profitable component of almost every business's marketing strategy. A properly optimized website will have better visibility on search engine results and will gain free, organic traffic. To properly optimize a website, certain elements of each webpage must be updated to ensure relevance to the particular keyword for which the business wishes to rank highly.⁶ For instance, if a hotel business in Tucson, AZ wants its website to rank highly on Google for the keywords "Hotels in Tucson," then the website must contain those keywords in certain areas. Then, when a search engine indexes the website, it will notice that it is a website devoted to hotels in Tucson.

As the Internet becomes increasingly accessible, businesses are focusing more attention on their online presence and regularly hire outside firms to optimize their websites. But a business not familiar with SEO is less able to ensure that its SEO firm is using reputable techniques. There are both ethical and unethical methods of SEO, known as *white hat* and *black hat*, respectively. Using black hat techniques can result in a search engine penalty, which can range from the

1. Josh Constine, *Google Destroys Rap Genius' Search Rankings as Punishment for SEO Spam, but Resolution in Progress*, TECH CRUNCH (Dec. 25, 2013), <http://techcrunch.com/2013/12/25/google-rap-genius/>.

2. *Id.* Incoming links can help increase a website's rankings on Google. See *infra* note 42 and accompanying text. Using links for the sole purpose of fooling Google into increasing the website's rankings, however, can result in a penalty from Google. Constine, *supra* note 1.

3. Constine, *supra* note 1. After Google announced it was investigating Rap Genius, Rap Genius apologized in an open letter and suggested that these types of tactics were common among its competitors. *Id.*

4. *Id.*

5. *Id.*

6. James Grimmelman, *The Structure of Search Engine Law*, 93 IOWA L. REV. 1, 8–9 (2007).

webpage's rankings being lowered to the website being removed entirely from the search engine.⁷

A penalized business has to build a new website on a new domain to regain lost traffic. The money invested on the first website will be lost because the business is forced to invest in an entirely new website if it wants to gain a valuable presence on search engines. And it is impossible to predict whether the new webpage will rank highly even after it is reoptimized.

As businesses increasingly turn to the Internet to sell their products, SEO firms are selling their services by promising higher rankings on search engines. But companies need protection against SEO firms that use black hat SEO. Of the legal remedies currently available to companies harmed by a firm's use of black hat SEO, consumer protection and breach of contract actions are the most promising. The law, however, has largely failed to adapt to reflect the new world of modern marketing. This Note proposes reforms for the protection of SEO clients and will discuss the benefits of these protections to both clients and the SEO industry.

Part I of this Note will explain the basics of search engines, SEO, and search engine penalties. SEO is not discouraged by Google because it can help provide a useful experience to website visitors. On the other hand, techniques that are designed solely to manipulate Google into increasing a website's rankings without providing users with useful information are considered unethical and are prohibited by Google. Search engines have algorithms designed to detect the use of black hat SEO and will penalize sites discovered doing so.⁸

Part II will explore the legal remedies currently available to clients whose SEO firms engage in black hat SEO. Four possible causes of action exist: (1) common law fraud; (2) negligent misrepresentation; (3) state consumer-protection laws; and (4) breach of contract. The first two causes of action are difficult to satisfy and are thus poor avenues for relief. State consumer protection and breach of contract causes of action are easier to satisfy, and thus are the most likely to be successful.

Finally, Part III will propose legal reforms to protect businesses harmed by an outside firm's use of black hat SEO. This Note proposes creating a new fiduciary class and enacting more specific consumer-protection laws. Commentators have advocated for increased protection of Internet users from deceptive marketing, and this Note aims to add to the discussion that businesses that hire outside marketing firms that use nonreputable SEO marketing techniques

7. Matt Goulart, *Black Hat vs. White Hat SEO—Everything You Need to Know*, BUS. 2 CMTY. (Sept. 18, 2014), <http://www.business2community.com/seo/black-hat-vs-white-hat-seo-everything-need-know-01011885>.

8. Matthew Braga, *Google's New Search Algorithm to Crack Down on "Black Hat Webspam"*, ARS TECHNICA (Apr. 26, 2012), <http://arstechnica.com/business/2012/04/googles-new-search-algorithm-to-crack-down-on-webspam/>. Google, in particular, refuses to reveal its algorithm, because disclosing it would allow "spammers" to "use that knowledge to game the system, making the results suspect." Tom Krazit, *Google's Fight to Keep Search a Secret*, CNET (July 15, 2010), <http://www.cnet.com/news/googles-fight-to-keep-search-a-secret/>.

should also be protected.⁹ Recognizing a new fiduciary class will establish a duty of care owed to clients by SEO firms. Enacting SEO-specific consumer-protection laws will help state courts deal with harms caused by black hat SEO firms more efficiently. This Note similarly advocates for the protection of businesses that hire SEO firms by exploring legal remedies and proposing meaningful reform. Holding SEO firms accountable will reduce spam and other harmful content. This benefits SEO firms, the businesses who hire them, and Internet users.

I. WHAT EXACTLY IS SEARCH ENGINE OPTIMIZATION?

Before delving into the world of SEO, a basic explanation of what a search engine is and how it works is critical. Although rudimentary, the explanation that follows is necessary to understand how making changes to a website can improve its search engine visibility.

A search engine is a website that contains a large index of websites, making it easier for Internet users to find information.¹⁰ Most search engines operate the same way: they use automated programs—commonly referred to as “spiders” or “robots”—to crawl websites and webpages that will be added to the search engine’s indexes.¹¹ A webpage contains a type of code, usually not visible to website visitors, called metatags, which instruct spiders on what information to collect from the site.¹² When crawling the website, the spiders will pay attention to

9. Victor T. Nilsson, Note, *You’re Not from Around Here, Are You? Fighting Deceptive Marketing in the Twenty-First Century*, 54 ARIZ. L. REV. 801, 825 (2012). Nilsson encourages “more litigation under existing laws that offer remedies for harms associated with misleading SEO. Legal scholarship has previously called on the FTC to take on deceptive marketing practices.” *Id.*

10. *What Is a Search Engine?*, BBC (June 6, 2013), <http://www.bbc.co.uk/webwise/0/22562913>. In the United States, the top three search engines are Google, Bing, and Yahoo!, in that order. Ashley Zeckman, *Google Search Engine Market Share Nears 68%*, SEARCH ENGINE WATCH (May 20, 2014), <http://searchenginewatch.com/article/2345837/Google-Search-Engine-Market-Share-Nears-68>. Google consistently takes the largest share of the search engine market in the United States, taking 67.4% of the market share in August, with Microsoft and Yahoo! taking 19.3% and 10%, respectively. See *comScore Releases August 2014 U.S. Search Engine Rankings*, COMSCORE (Sept. 17, 2014), <http://www.comscore.com/Insights/Market-Rankings/comScore-Releases-August-2014-US-Search-Engine-Rankings>. This Note will mainly focus on Google’s algorithms and penalties, only considering the algorithms and penalties of Bing and Yahoo! when appropriate.

11. See Rand Fishkin, *Beginner’s Guide to SEO*, MOZ (Mar. 1, 2013), <http://moz.com/beginners-guide-to-seo> [hereinafter *Beginner’s Guide to SEO*]; see also Eric Goldman, *Search Engine Bias and the Demise of Search Engine Utopianism*, 8 YALE J.L. & TECH. 188, 190 (2006) (“Search engines do not index every scrap of data available on the Internet. Search engines omit (deliberately or accidentally) some webpages entirely or may incorporate only part of a webpage.”); *How Search Works*, GOOGLE, http://www.google.com/intl/en_us/insidesearch/howsearchworks/thestory/ (last visited Nov. 11, 2014). Search engines typically differ in how they crawl, index, and retrieve a website when a search is made. Niva Elkin-Koren, *Let the Crawlers Crawl: On Virtual Gatekeepers and the Right to Exclude Indexing*, 49 J. COPYRIGHT SOC’Y U.S.A. 165, 172–73 (2001).

12. REBECCA TUSHNET & ERIC GOLDMAN, *ADVERTISING & MARKETING LAW: CASES AND MATERIALS* 880 (2d ed. 2014).

the metatags, as well as other content on the webpage, and, together, these pieces of information will determine how the webpage is indexed and retrieved for a specific search query.¹³

A search is a request for information on a particular topic made on a search engine by a user.¹⁴ After a search is made, the search engine uses an algorithm to look through its directory and select the websites that are most relevant to the search.¹⁵ Using the information gathered when crawling, the search engine will then display its results in order from most to least relevant.¹⁶

A. How Search Engine Optimization Can Help Websites Improve Their Visibility Online

In theory, SEO is not about gaming the system, but rather about creating the best possible user experience.¹⁷ SEO enables Internet users to find the information they are looking for more efficiently by matching a website's content, including metatags, with the users' search queries. Specifically, SEO entails making changes to certain parts of a webpage, including its metatags, to convince search engines to rank it higher, and thus, increase traffic to the website.¹⁸

Although search engines do not usually reveal their algorithms, some factors that help improve rankings are well-known.¹⁹ One of those factors is the written content that appears on a webpage.²⁰ If relevant to the keywords that are being targeted, this type of content will help improve search engine rankings.²¹ In particular, Google states that website creators should “[g]ive visitors the

13. IAN BALLON, *E-COMMERCE & INTERNET LAW* 9.10 (2d ed. 2014).

14. Grimmelmann, *supra* note 6. A search engine must determine what the intentions of the user are, such as making “navigational queries (when the user wishes to find a specific site or datum), informational queries (when the user wishes to find information on a topic), and transactional queries (when the user wishes to perform an activity, such as purchasing a good).” *Id.*

15. *Id.* Search engines use various factors to determine the relevance of a website to the search that was made by a user. *Beginner's Guide to SEO*, *supra* note 11.

16. Grimmelmann, *supra* note 6, at 8–9.

17. Victoria Edwards, *SEO Basics: 8 Essentials When Optimizing Your Site*, SEARCH ENGINE WATCH (Dec. 31, 2013), <http://searchenginewatch.com/article/2259693/SEO-Basics-8-Essentials-When-Optimizing-Your-Site> (explaining that SEO allows a site to better “[communicate] with . . . search engines [a website's] intentions so they can recommend the website for relevant searches”).

18. Grimmelmann, *supra* note 6, at 13. By filling the metatags and other parts of a website with information relevant to a certain topic, the website can increase in rankings. *Id.* at 7–8.

19. *Steps to a Google-Friendly Site*, GOOGLE, <https://support.google.com/webmasters/answer/40349?hl=en> (last visited Nov. 11, 2014) [hereinafter *Google-Friendly Site*].

20. *Search Engine Land's Guide to SEO*, SEARCH ENGINE LAND, <http://searchengineland.com/guide/seo/content-search-engine-ranking> (last visited Nov. 11, 2014).

21. *Google-Friendly Site*, *supra* note 19.

information they're looking for."²² In other words, if a website owner is going to optimize a website to target a particular keyword or phrase, the topic of the website's content must be relevant to that keyword or phrase.²³ For example, to optimize a webpage for the keyword "cupcakes," the website content should include information relevant to cupcakes.²⁴ Content is just one example of the various SEO techniques that can improve a website's rankings on a search engine.²⁵ The same SEO techniques that can help a website and that are approved by search engines, however, can be abused to improve rankings without having to follow search engine quality guidelines.²⁶

B. Black Hat SEO vs. White Hat SEO

There are ethical and unethical tactics that can be used to improve a webpage's rankings.²⁷ *Black hat SEO* means using unethical, and most likely spam-like, techniques that are prohibited by search engine guidelines.²⁸ Black hat SEO techniques are mainly employed to "game the system" to achieve higher rankings in a short amount of time, without providing quality content to website visitors.²⁹ While black hat SEO can provide temporary results, the consequences can be very costly.³⁰ *White hat SEO*, on the other hand, involves the use of ethical tactics that typically are meant to enhance user experience.³¹ Because they focus on the user and not on gaming the search engine, white hat techniques are sometimes approved, and even encouraged, by search engines.³² In fact, Google encourages website owners to use SEO to gain search engine traffic as long as the website provides its visitors with quality content that is relevant to the targeted

22. *Id.* Another important factor is other websites linking back to the website that is being reoptimized. *Link Schemes*, GOOGLE, <https://support.google.com/webmasters/answer/66356?hl=en> (last visited Jan. 22, 2015) [hereinafter *Link Schemes*].

23. Allison Halter, *5 Tips to Achieve Alignment Between SEO Keyword Strategy & Content*, SEARCH ENGINE LAND (Sept. 9, 2009), <http://searchengineland.com/5-tips-to-achieve-alignment-between-seo-keyword-strategy-content-25430>.

24. See *Google-Friendly Site*, *supra* note 19 ("In creating a helpful, information-rich site, write pages that clearly and accurately describe your topic. Think about the words users would type to find your pages and include those words on your site."). For a more in-depth discussion of SEO, see Nilsson, *supra* note 9.

25. *Google-Friendly Site*, *supra* note 19.

26. *Id.*

27. Alan Perkins, *SEO: Sleepwalking Ever Onwards?*, SILVERDISC (Jan. 11, 2005), <http://www.silverdisc.co.uk/articles/seohats>.

28. Peter J. Meyers, *Black Hat or White Hat SEO? It's Time to Ask Better Questions*, THE MOZ BLOG (Mar. 21, 2013), <http://moz.com/blog/black-hat-or-white-hat-seo-ask-better-questions>. Spam is information that is of little or no value to the searcher, and it can fill the search engine results with the use of black hat SEO. JASON MCCORMICK, *SEO MADE SIMPLE FOR 2011*, at 244 (2011). For example, numerous links from websites that are not related to the site they link to can be considered spam. See David Segal, *The Dirty Little Secrets of Search*, N.Y. TIMES, Feb. 13, 2011, at BU1.

29. Goulart, *supra* note 7.

30. Meyers, *supra* note 28.

31. *Google-Friendly Site*, *supra* note 19.

32. *Id.*

keywords or phrases.³³ In reality, search engines benefit from websites that are ethically optimized.³⁴ If a search engine sends traffic to a particular page because of the way the website is optimized, and if the website provides users with what they are looking for, then the search engine will become more trustworthy.³⁵ Thus, white hat SEO techniques involve properly optimizing a website for long-term success by following search engine guidelines.

Website publishers often turn to black hat SEO to gain better search engine traffic for a variety of reasons, including: a need to boost their website's rankings after already properly optimizing a webpage; the desire to improve their website's rankings more quickly; or simply because they want to rank higher without properly optimizing a website.³⁶ Almost every website owner wants his site to appear on the first page of a Google search, but the reality is that not all websites, even if optimized properly, will be ranked in the top search results on the first page.³⁷ Being in the top of the search results is important because "[s]earchers usually consider only the top few search results; the top-ranked search result gets a high percentage of searcher clicks, and clickthrough rates quickly decline from there."³⁸ Black hat SEO can provide provisionally high rankings, leading to more search engine traffic and sometimes even temporarily increased profits.³⁹ But black hat SEO tactics will almost certainly lead to a search engine penalty⁴⁰ because they are mainly employed to "game the system" and achieve higher rankings in a short amount of time without providing quality content to website visitors.⁴¹

Before discussing the consequences of using black hat SEO, it is worthwhile to briefly explore the most common tactics that are being used by SEO firms to "game the system." Currently, one of the most effective ways to increase a website's rankings is to create links from other websites to the webpage that the SEO wishes to rank, most commonly referred to as *link-building*.⁴² Google places

33. *Id.*

34. Alan Perkins, *Ethical Search Engine Optimization Explained*, SILVERDISC (Feb. 10, 2005), <http://www.silverdisc.co.uk/articles/ethical-seo/> [hereinafter *Ethical Search Engine*].

35. *Id.*

36. See Rand Fishkin, *White Hat SEO: It F@#\$ing Works*, THE MOZ BLOG (Apr. 10, 2011), <http://moz.com/blog/white-hat-seo-it-fing-works-12421> [hereinafter *White Hat SEO: It Works*].

37. Rand Fishkin, *Why Reputable SEO Firms Don't Promise Guaranteed Search Engine Rankings*, THE MOZ BLOG (Sept. 2, 2008), <http://moz.com/blog/why-reputable-seo-firms-dont-promise-guaranteed-search-engine-rankings>.

38. Goldman, *supra* note 11.

39. *White Hat SEO: It Works*, *supra* note 36.

40. *Black Hat - White Hat*, HIGH RANKINGS ADVISOR (Nov. 3, 2004), <http://www.highrankings.com/issue119#seo>.

41. Goulart, *supra* note 7.

42. *Google-Friendly Site*, *supra* note 19. Having links that point to a particular website does not constitute black hat SEO. *Id.* Rather, creating *unnatural* links from one webpage to another is considered black hat. *Id.* For example, a website publisher who links to another website, believing that the second website has good ideas, is considered natural. *Id.* On the other hand, creating links from one website to another for the sole purpose of fooling a search engine is considered unnatural link building. See *id.* Unnatural linking

a high value on links, viewing links from one webpage to another as votes.⁴³ The more links a webpage or website has, the more authority Google will accord to the website.⁴⁴ Furthermore, these types of “votes” are considered by Google as one website vouching for another website, which shows Google that the website receiving the link has valuable content that is helpful to visitors.⁴⁵ Black hat SEO, on the other hand, involves building links from one site to the other without the website receiving the link necessarily having any valuable content.⁴⁶ Rather than writing content that other websites will want to link to, website owners can purchase links from other website owners, exchange links (“link to me and I’ll link to you”), or post comments with links embedded on online forums.⁴⁷ Overstock.com’s SEO strategy in 2011 is good example of unnatural link building, because it offered college students and faculty discounts in exchange for links to Overstock.com on college or university websites.⁴⁸ As a result, Overstock.com ranked near the top for terms like “laptop computers,” but after it received a penalty from Google for employing such tactics, the website did not appear until the fifth or sixth page of Google search results for the same terms.⁴⁹

Other black hat SEO tactics that Google and other search engines prohibit include keyword stuffing, duplicate content, cloaking, and automated software. *Keyword stuffing* refers to overloading a webpage with keywords or key phrases in order to trick a search engine into categorizing the keyword-stuffed page as relevant for that particular keyword.⁵⁰ In its quality guidelines, Google states that repeating the same words or phrases often makes a sentence sound unnatural, which can lead to a negative user experience.⁵¹ *Duplicate content* involves copying a large amount of content from other websites.⁵² *Cloaking* entails presenting content or URLs to website visitors that are different than the content presented to search engine spiders.⁵³ One example of cloaking is using white text on white background—the search engine bots will be able to see the text, which may

includes significant link exchanges between websites, purchased links, and low-quality directories. *Link Schemes*, *supra* note 22.

43. *Google-Friendly Site*, *supra* note 19.

44. *Id.*; *Beginner’s Guide to SEO*, *supra* note 11.

45. *Link Schemes*, *supra* note 22; *Google-Friendly Site*, *supra* note 19.

46. *Link Schemes*, *supra* note 22.

47. *Id.*

48. Amir Efrati, *Google Penalizes Overstock for Search Tactics*, WALL ST. J. (Feb. 24, 2011, 12:01 AM), <http://www.wsj.com/news/articles/SB10001424052748704520504576162753779521700?mg=reno64-wsj&url=http%3A%2F%2Fonline.wsj.com%2Farticle%2FSB10001424052748704520504576162753779521700.htht>

49. *Id.*

50. *Irrelevant Keywords*, GOOGLE, <https://support.google.com/webmasters/answer/66358?hl=en> (last visited Jan. 22, 2014).

51. *Id.*

52. *Duplicate Content*, GOOGLE, <https://support.google.com/webmasters/answer/66359?hl=en> (last visited Nov. 11, 2014).

53. Barry Schwartz, *Google Vows Renewed Look at Cloaking in 2011*, SEARCH ENGINE LAND (Dec. 28, 2011), <http://searchengineland.com/google-vows-to-look-at-deceptive-cloaking-techniques-59802>.

contain keywords, but the user is unlikely to see it.⁵⁴ Finally, Google specifically warns website owners and publishers against automated programs that are meant to produce links and content.⁵⁵ For example, automated software can create content by taking snippets from content on other websites that include the keyword that the SEO wishes to target.⁵⁶ Another example is article-spinning software, which has become very popular.⁵⁷ Rather than rewriting a piece of content manually, an automated software program can take a piece of content and “spin” it by replacing the original words in the piece with synonyms.⁵⁸ As a result, a new content piece is produced that is often unreadable, and, therefore, low quality.⁵⁹

Black hat SEO tactics clearly do not focus on user experience, such as providing website visitors with the content they are seeking, but instead attempt to trick search engines into ranking a webpage higher for certain keywords or phrases.⁶⁰ Thus, when considering whether to use black hat SEO, a website owner should understand that search engines, like Google, have filters in place to detect unethical techniques.⁶¹ And, to fight against unethical SEO practices, search engines will penalize websites that are suspected of using such techniques.⁶²

C. Search Engine Penalties

Black hat SEO tactics are often used by SEO firms without the knowledge of the client and can lead to a search engine penalty. Before describing the penalties associated with black hat SEO, it is informative to review a case in which black hat SEO was used without the client’s knowledge. For example, on July 13, 2013, Seikaly & Stewart filed a lawsuit against The Rainmaker Institute (“TRI”), a marketing firm that specializes “in helping small to medium-sized law firms generate more clients and increase revenue fast.”⁶³ According to the

54. *Cloaking vs Image Replacement: Hiding Text Is Not a Bad Thing*, MOZ (July 16, 2007), <http://moz.com/ugc/cloaking-vs-image-replacement-hiding-text-is-not-a-bad-thing>.

55. *Automatically Generated Content*, GOOGLE, <https://support.google.com/webmasters/answer/2721306?hl=en> (last visited Nov. 11, 2014).

56. Jennifer Slegg, *Matt Cutts on Auto-Generated Content: Google Will Take Action*, SEARCH ENGINE WATCH (Sept. 6, 2013), <http://searchenginewatch.com/sew/news/2293280/matt-cutts-on-autogenerated-content-google-will-take-action>.

57. Suzanne Edwards, *Eight Good Reasons Why Spinning Articles Is Bad for Your Website*, SEARCH ENGINE J. (Dec. 14, 2011), <http://www.searchenginejournal.com/eight-good-reasons-why-spinning-articles-is-bad-for-your-website/37737/>.

58. *Id.*

59. *Id.*

60. *Google-Friendly Site*, *supra* note 19; Goulart, *supra* note 7.

61. P.J. Fusco, *32 Ways to Trip a Google Spam Filter*, SEARCH ENGINE WATCH (Apr. 30, 2014), <http://searchenginewatch.com/article/2342238/32-Ways-to-Trip-a-Google-Spam-Filter>.

62. *Id.*

63. Complaint at 1, *Seikaly & Stewart, P.C. v. Fairley*, No. 2:13-cv-01502-MHB (D. Ariz. July 24, 2014) [hereinafter Complaint]; *About Us*, RAINMAKER INST., <http://www.therainmakerinstitute.com/aboutus.html> (last visited Oct. 12, 2014).

complaint, the plaintiff attended a TRI seminar in 2011, in which TRI promoted its ability to establish a web presence for clients by creating blog and link-building techniques that Google would recognize.⁶⁴ During the seminar, TRI analyzed participants' websites, demonstrating how their rankings were low and "needed improvement through the techniques available from TRI."⁶⁵ Seikaly & Stewart entered into two contracts with TRI, in which TRI provided blog-writing, social media, and link-building services for a total of \$45,000.⁶⁶

In its complaint, Seikaly & Stewart alleged the links were generated by automated processes.⁶⁷ They further claimed that these links were essentially worthless, as compared to the quality links they were led to believe would be used, and could have actually been detrimental to their website.⁶⁸ In agreeing that TRI would create more than 2,000 inbound links for its client's website, Seikaly & Stewart also asserted that they were misled "into believing that the sheer number of links created would yield positive optimization results."⁶⁹ Finally, the complaint stated that TRI made these misrepresentations and implemented these techniques while aware that they violated Google's policy and guidelines.⁷⁰

The techniques used by TRI may be prohibited by some search engines and can lead to a penalty. Google is constantly updating its algorithm to detect and remove low-quality websites and websites using unethical, black hat SEO techniques.⁷¹ Some updates are more significant than others.⁷² For example, in 2011, Google released its "Panda" algorithm update, which targeted websites containing copied content as well as low-quality original content.⁷³ In 2012, Google launched its "Penguin" algorithm update, which targeted websites with a large quantity of unnatural backlinks.⁷⁴ Penalties for websites targeted by these

64. Complaint, *supra* note 63, at 6.

65. *Id.* at 7.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* TRI created these links in 2011 and Google updated its algorithm to penalize unnatural link-building in 2012. Marie Haynes, *Your Google Algorithm Cheat Sheet: Panda, Penguin, and Hummingbird*, THE MOZ BLOG (June 11, 2014), <http://moz.com/blog/google-algorithm-cheat-sheet-panda-penguin-hummingbird>. However, Google's position against unnatural link building was evident before the update as it had penalized Overstock.com in early 2011 for offering discounts in exchange for links. Efrati, *supra* note 48. JCPenney was also penalized by Google for creating thousands of spam links in February. Segal, *supra* note 28.

71. Jennifer Slegg, *Not Ranking in Google: Is a Manual Penalty, Algorithmic Change, or Content to Blame?*, SEARCH ENGINE WATCH (Mar. 26, 2014), <http://searchenginewatch.com/article/2336544/Not-Ranking-in-Google-Is-a-Manual-Penalty-Algorithmic-Change-or-Content-to-Blame> [hereinafter *Not Ranking in Google*].

72. *Id.*

73. Danny Sullivan, *Google Forecloses on Content Farms with "Panda" Algorithm Update*, SEARCH ENGINE LAND (Feb. 24, 2011), <http://searchengineland.com/google-forecloses-on-content-farms-with-farmer-algorithm-update-66071>.

74. Haynes, *supra* note 70; *see supra* note 42 and accompanying text (discussing unnatural backlinks).

algorithms differ in severity.⁷⁵ For example, Google penalizes its worst offenders by blacklisting them, which removes them from its search results.⁷⁶ Recovering from such penalties is very difficult, and most SEO professionals agree that recovery of a blacklisted website is not worth the cost it would take to attempt to recover it.⁷⁷ Even if Google decided to reinclude a website after it has cleaned up its SEO tactics, there is no guarantee that the website will ever recover its previous rankings.⁷⁸ In less severe cases, a website's rankings may only be decreased, moving it away from the top search results.⁷⁹ In these situations, recovery may be as simple as undoing the unethical SEO that was performed on the website.⁸⁰

A website that is hit with a Google penalty can result in a significant economic loss to the website owner. To begin with, the business will lose the money it invested in re-optimizing its website. In Seikaly & Stewart's case, Seikaly & Stewart paid the SEO firm \$45,000 to reoptimize their website.⁸¹ In addition, if a website is blacklisted from Google's index and the company wishes to continue to gain traffic from the search engine, the business will also lose any more money it invests in the original website because it is more cost-efficient to move on and create a new site.⁸² Thus, the business will have to invest in an entirely new website.⁸³ Because the use of unethical techniques can lead to a loss of investment and damage to the business itself, it is important for businesses that hire SEO firms or professionals to know their potential legal remedies in case the firm uses black hat SEO without the client's authorization.

II. POTENTIAL CAUSES OF ACTION AGAINST BLACK HAT SEO FIRMS

As discussed, black hat SEO tactics can cause enormous problems for websites seeking to improve their search engine optimization.⁸⁴ Many businesses who seek the help of black hat SEOs do not realize that the tactics these companies use may actually harm their websites in sometimes irreversible, but always costly,

75. Kristine Schachinger, *Pure Spam: What Are Google Penalties & What to Do to Recover*, SEARCH ENGINE WATCH (June 21, 2013), <http://searchenginewatch.com/article/2276498/Pure-Spam-What-Are-Google-Penalties-What-to-Do-to-Recover>.

76. *Id.*

77. Jayson DeMers, *The Definitive Guide to Google Manual Actions and Penalties*, FORBES (June 16, 2014), <http://www.forbes.com/sites/jaysondemers/2014/06/16/the-definitive-guide-to-google-manual-actions-and-penalties/>.

78. *Id.*

79. *Not Ranking in Google*, *supra* note 71.

80. *Id.*

81. Complaint, *supra* note 63, at 7.

82. Eric Ward, *When the Best SEO Move Is to Kill the Site*, SEARCH ENGINE LAND (Feb. 25, 2014), <http://searchengineland.com/best-move-kill-site-184568>.

83. Moving a website that has been penalized to a new domain in an attempt to leave the penalty behind can result in Google penalizing the new domain. Barry Schwartz, *Google Penalties Might Follow You to a New Domain Name*, SEARCH ENGINE ROUNDTABLE (Feb. 25, 2014), <https://www.seroundtable.com/google-penalty-site-move-18163.html>.

84. *See supra* Section I.C.

ways. Unfortunately, the recourse for companies whose websites are penalized for the use of black hat SEO tactics is extremely limited.

A. Common Law Fraud

Before unfair-trade-practices statutes were enacted in each state, common law fraud was the only claim available for recovery against fraudulent trade practices.⁸⁵ Today, common law fraud is still available as a cause of action in most jurisdictions, but the elements of the claim can be difficult to prove.⁸⁶ In addition to the burdensome task of proving various elements, punitive damages may be unavailable to the plaintiff.⁸⁷ Therefore, in many cases, consumers are better off pursuing “both a statutory cause of action and common law fraud, to have a chance at actual damages, attorneys’ fees, and punitive damages.”⁸⁸

To establish a claim of common law fraud, a plaintiff must typically satisfy the following elements: (1) a representation; (2) its falsity; (3) its materiality; (4) the speaker’s knowledge of its falsity or ignorance of its truth; (5) the speaker’s intent that its representation should be acted upon by and in the manner reasonably contemplated; (6) the hearer’s ignorance of its falsity; (7) his reliance on the truth; (8) his right to rely thereon; and (9) his consequent and proximate injury.⁸⁹

In Arizona, the test to determine whether a statement is a misrepresentation is whether the least sophisticated person would be misled.⁹⁰ The technical correctness of the statement is irrelevant if it has the capacity to mislead.⁹¹ Additionally, a “half-truth” representation—disclosing some facts and concealing others—may also be actionable as a false representation.⁹²

85. CCH, ¶ 1060 *Common Law Fraud*, in STATE UNFAIR TRADE PRACTICES LAW, ¶ 1060 (2012).

86. *Id.*

87. Jeff Sovern, *Private Actions Under the Deceptive Trade Practices Acts: Reconsidering the FTC Act as Rule Model*, 52 OHIO ST. L.J. 437, 438 (1991); Stephen Buckingham, *Distinguishing Deception and Fraud: Expanding the Scope of Statutory Remedies Available in Pennsylvania for Violations of State Consumer Protection Law*, 78 TEMP. L. REV. 1025, 1027 (2005).

88. Jean Braucher, *Deception, Economic Loss and Mass-Market Customers: Consumer Protection Statutes as Persuasive Authority in the Common Law of Fraud*, 48 ARIZ. L. REV. 829, 849 (2006).

89. *Nielson v. Flashberg*, 419 P.2d 514, 517–18 (Ariz. 1966) (quoting *Moore v. Meyers*, 253 P. 626, 628 (Ariz. 1927)). In the complaint, Seikaly & Stewart alleged common law fraud against the TRI for promoting its link-building schemes as effective for higher placement on Google, even though the defendant knew that link-building was against Google’s guidelines and was, ultimately, harmful. Complaint, *supra* note 63, at 13. The plaintiff further alleged that it reasonably relied on TRI’s claims and was damaged by TRI’s representations. *Id.* At the moment, this case is still pending, but after the defendants moved for judgment on the pleadings, the U.S. District Court for the District of Arizona held that Seikaly & Stewart properly stated a common law fraud claim. *Id.*

90. *Madsen v. W. Am. Mortg. Co.*, 694 P.2d 1228, 1232 (Ariz. Ct. App. 1985).

91. *Id.*

92. *Coleman v. Watts*, 87 F. Supp. 2d 944, 952 (D. Ariz. 1998) (quoting *Equitable Life Ins. Co. of Iowa v. Halsey, Stuart & Co.*, 312 U.S. 410, 425 (1941)).

The speaker must also have knowledge that his representation is false.⁹³ This element can be satisfied through dishonest, willful, and intentional actions.⁹⁴ Ignorance of truth can also make a misrepresentation actionable, but the speaker must have been unreasonable in believing his statement was true.⁹⁵ In addition, the plaintiff must show that the defendant intended for the hearer to rely on the statement, which is difficult to prove.⁹⁶ To satisfy this element, the plaintiff must have believed the statement to be true.⁹⁷ The plaintiff must then show that he had a right to rely on the statement, which has been interpreted to mean that the reliance was reasonable.⁹⁸

Suing a firm using black hat SEO under a common law claim can be very difficult. The first step is to determine whether an SEO professional who promised to improve a website's performance on search engines and used black hat tactics that led to the penalty made any false statement of material fact. The issue is not whether the SEO actually succeeded in improving the website's rankings, but, rather, whether he made a false statement or representation by agreeing to perform a service in a way that the SEO professional knew would harm the website, while representing that the service will benefit the website.⁹⁹

Under the Arizona standard of whether the least sophisticated person would be misled, a promise to improve rankings on a search engine, such as Google, may be regarded as a misrepresentation.¹⁰⁰ In particular, the website owner or client will likely not be familiar with SEO at all, will not know about search engine guidelines, and will most likely not know about penalties imposed by search engines for using black hat techniques. Like the plaintiff who attended the defendant's seminar in *Seikaly & Stewart, P.C. v. Fairley*,¹⁰¹ website owners may only understand that SEO can bring them traffic and more revenue.

The next step in proving a common law fraud claim is to determine whether the SEO performer knew his representation was false. This element can be satisfied if the SEO performer knew his tactics could lead to a search engine penalty. However, it becomes very difficult to prove this element if the SEO

93. *Id.*

94. *Nielson*, 419 P.2d at 518.

95. *Klinger v. Hummel*, 464 P.2d 676, 678 (Ariz. Ct. App. 1970).

96. *Nielson*, 419 P.2d at 518.

97. *Peery v. Hansen*, 585 P.2d 574, 577-78 (Ariz. Ct. App. 1978).

98. *Stratton v. Am. Med. Sec., Inc.*, 266 F.R.D. 340, 348 (D. Ariz. 2009); *Parks v. Macro-Dynamics*, 591 P.2d 1005, 1008 (Ariz. Ct. App. 1979) (“[T]he right to rely need not be affirmatively pleaded, however, so long as the averment showed the reliance was reasonable.”).

99.^{??} Is promising high rankings without delivering those results actionable? What about promising higher revenue or more conversions? The Arizona Supreme Court has held that representations “as to the future value or profitability or prospects of a business” are opinions and do not constitute fraud. *Dawson v. Withycombe*, 163 P.3d 1034, 1047 (Ariz. Ct. App. 2007) (quoting *Law v. Sidney*, 53 P.2d 64, 66 (Ariz. 1936)).

100. *See Tavilla v. Cephalon, Inc.*, 870 F. Supp. 2d 759, 776 (D. Ariz. 2012).

101. Complaint, *supra* note 63, at 13.

performer refuses to admit that he knew the representation was false.¹⁰² Further, it becomes even more difficult if an SEO performer is unaware of the harmful effects of black hat SEO. The SEO performer, however, would be unreasonable in believing his black hat methods would not be harmful, because there is an abundance of literature that discusses the best practices for optimizing a website.¹⁰³ In addition, Google publishes the guidelines SEO performers need to follow in order to avoid a penalty.¹⁰⁴ Although Google's guidelines are available to the public, the clients should not bear the responsibility of familiarizing themselves with them. First, the guidelines may not be within the area of expertise of business managers. Second, effective SEO usually requires some level of technical expertise, which is why clients hire SEO specialists in the first place.¹⁰⁵

The seventh common law fraud element—whether the defendant intended for the plaintiff to act upon the misrepresentation—can be inferred from a defendant making a material misrepresentation.¹⁰⁶ This element requires a website owner to become aware that the representation made by the black hat SEO performer is false, which is easily satisfied.

The next two elements require that the plaintiff relied on the statement and that he had a right to rely on the statement. To have the right to rely on a representation, the representation must be shown to have been true or false at the time it was made.¹⁰⁷ This may entail a complex analysis because at the time the promise to improve rankings was made, the work on the website had not yet begun. Further, if an SEO professional plans to use black hat methods, the harm to the website will not occur until it is penalized by a search engine, and the time between the implementation of black hat methods and a penalty is difficult to predict. Finally, the damages element can be proven if it is shown that the website owner will lose the money spent on the original website and the money paid to the SEO professional.¹⁰⁸

Thus, because determining whether the defendant knowingly made a false representation and whether the plaintiff relied and had a right to rely on those representations can be burdensome, a plaintiff with a penalized website may want to consider exploring other causes of actions or adding a common law fraud claim to his complaint.¹⁰⁹

102. If the defendant does not admit bad intent, then the plaintiff will have to rely on circumstantial evidence. Braucher, *supra* note 88, at 852.

103. *Beginner's Guide to SEO*, *supra* note 11; *Google-Friendly Site*, *supra* note 19.

104. *Google-Friendly Site*, *supra* note 19.

105. Adam Audette, *Technical SEO: Tools and Approach*, SEARCH ENGINE WATCH (Apr. 4, 2011), <http://searchenginewatch.com/sew/how-to/2063967/technical-seo-tools-and-approach>.

106. Braucher, *supra* note 88, at 852.

107. *Denbo v. Badger*, 503 P.2d 384, 386 (Ariz. Ct. App. 1972).

108. *Staheli v. Kauffman*, 595 P.2d 172, 176 (Ariz. 1979).

109. *See* *Sovern*, *supra* note 87, at 438.

B. Negligent Misrepresentation

There are two types of liability within negligent misrepresentation. The first involves negligent misrepresentation that causes physical injury or damage to property.¹¹⁰ The second involves economic injury.¹¹¹ Certainly, negligent misrepresentation can lead to liability if it results in personal injury or property damages.¹¹² In Arizona:

[S]ome special relationship between the parties has been required . . . [I]t is necessary that the relationship of the parties, arising out of contract or otherwise, be such that one has the right to rely on the other for information, that the one giving the information should owe to the other a duty to give it with care, that the person giving the information should have, or be chargeable with, knowledge that the information is desired for a serious purpose, that the person to whom such information is given intends to rely and act on it, that, if the information given is erroneous, the person to whom it is given will be likely to be injured in person or in property as a result of acting thereon, and that the complaining party is injured by the erroneous information.¹¹³

On the other hand, most courts have held that economic harm, by itself, as opposed to personal injury or property damage, is usually insufficient to create liability.¹¹⁴ The economic loss doctrine, which is one of the most confusing doctrines in tort law,¹¹⁵ refers to “pecuniary or commercial loss that does not arise from actionable physical, emotional or reputational injury to persons or physical injury to property.”¹¹⁶ Recovery under tort for pure economic loss is frequently rejected by courts.¹¹⁷ The rationale behind the economic loss doctrine is that plaintiffs, rather than resorting to tort law, can recover for breach of contract when their harm is purely economic.¹¹⁸

110. DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, *THE LAW OF TORTS* § 666 (2d ed. 2011).

111. *Id.*

112. *Id.*

113. *Ariz. Title Ins. & Tr. Co. v. O’Malley Lumber Co.*, 484 P.2d 639, 645 (Ariz. Ct. App. 1971).

114. DOBBS, HAYDEN & BUBLICK, *supra* note 110.

115. R. Joseph Barton, *Drowning in a Sea of Contract: Application of the Economic Loss Rule to Fraud and Negligent Misrepresentation Claims*, 41 WM. & MARY L. REV. 1789, 1790 (2000) (“In states adopting the economic loss rule, courts struggle with the questions of if, when, and how the economic loss rule should apply to claims arising out of a defendant’s fraudulent conduct. Accordingly, courts have designed diverse rationales in determining when, and if, the economic loss rule should bar recovery in a misrepresentation claim.”).

116. Dan B. Dobbs, *An Introduction to Non-Statutory Economic Loss Claims*, 48 ARIZ. L. REV. 713, 713 (2006).

117. *Id.*

118. Barton, *supra* note 115. Parties entering into an agreement have the ability to negotiate duties, additional warranties, and other terms of sale. *Id.* at 1797. On the other

In some cases, however, negligent misrepresentation that results only in economic injury can result in liability when the defendant was under a duty to exercise reasonable care.¹¹⁹ Defendants generally do not owe a duty of care to strangers with whom they are not in a contractual relationship, and, in some cases, they do not even owe a duty of care if there is a contractual relationship.¹²⁰ With contracting parties, if the duty of care arises solely from the contractual relationship, then the proper remedy is under contract law.¹²¹ But if a duty of care arises independent of a contractual relationship and that duty is breached, then the proper remedy is under tort law.¹²²

Following the language of *Arizona Title Ins. & Trust Co. v. O'Malley Lumber Co.*,¹²³ the contract between the website owner and the SEO firm may qualify as a special relationship arising out of a contract. And, the website owner, as previously discussed, may have a right to rely on the information provided by the black hat SEO firm due to not having expertise in the field. Additionally, the SEO firm, in convincing the website owner to hire it, can be said to have had knowledge that the website owner would rely and act on the information it was providing and that the information was desired by the website owner for a serious purpose. Further, if the SEO firm does not disclose the use of black hat techniques and then uses those techniques on the client's site, promising to improve the website's rankings can be regarded as erroneous information. Because black hat methods are unapproved by search engines, and because search engines use algorithms meant to detect these types of techniques, it is likely that the website owner will be injured as a result of acting on the information given by the black hat SEO firm.

In the case of an SEO firm that promises better search engine results and uses black hat methods that eventually do harm to the website, the penalized website can certainly be viewed as a type of damage and not a stand-alone economic harm. Traffic from search engines is very important for businesses that sell or advertise online, and their ability to advertise or appear on search engines can be lost after a search engine penalty.¹²⁴ Smaller businesses or businesses that are not as well known as large retailers may be even more reliant on search engine traffic. With a search engine penalty, the ability to produce revenue from the search engine, which was available before black hat SEO techniques were used, is essentially eliminated. And, in particular, the money spent by the business to build its original penalized site and the money spent creating a new website will be lost.

hand, "tort duties arise to protect individuals unable to protect themselves from the unscrupulous actions of others and irrespective of the existence of a contract." *Id.*

119. DOBBS, HAYDEN & BUBLICK, *supra* note 110.

120. *Id.*

121. Barton, *supra* note 115, at 1797.

122. *Id.* at 1797–98.

123. 484 P.2d 639, 645 (Ariz. Ct. App. 1971).

124. The importance of search engine traffic can be demonstrated by retailers like JCPenney, who reported \$376 million in online sales in May of 2011 alone, 7% of which came from organic search results. Danny Goodwin, *JCPenney's Google Penalty Up, So Are Profits*, SEARCH ENGINE WATCH (May 24, 2011), <http://searchenginewatch.com/sew/news/2073559/jcpenney-s-google-penalty-profits>.

If a penalty or loss of search engine traffic is not considered a type of damage to property by courts and is instead considered a stand-alone economic harm, the economic loss rule applies. After all, even if the website is penalized by a search engine, the website itself is still operational and can still receive visitors.¹²⁵ Further, if the website sells products, visitors will still be able to buy products on the website. In addition, if the service performed by the SEO firm is harmful and not what the client expected, the harm must be addressed by contract law. For instance, if the website owner does not receive what he expected, then the SEO might simply be in breach of contract.¹²⁶ While the type of damage that a website incurs can be difficult to determine, the most difficult element to satisfy when pursuing a claim for negligent misrepresentation is whether the black hat SEO performer owes a duty of care to its client.¹²⁷ Aside from having a contractual obligation, the SEO black hat performer may not owe any other duty of care. The fact that the client does not know about SEO and the search engine guidelines does not create a special duty between the SEO performer and the client.¹²⁸ Deference to a party's superior knowledge is not enough to establish a fiduciary relationship, unless the "knowledge is of a kind beyond the fair and reasonable reach of the alleged beneficiary and inaccessible to the alleged beneficiary through the exercise of reasonable diligence."¹²⁹ In this case, information about SEO and search engine guidelines is readily available online.¹³⁰

While these are all important considerations, the economic loss rule may still not apply in the context of an SEO firm utilizing black hat methods. Although the website is still operational after a search engine penalty,¹³¹ the website will not be able to draw traffic from certain channels—in this case, from the search engines that have penalized the website. The service provided by a black hat SEO firm, in leading to a search engine penalty, can be considered defective. However, the black hat service is not the only part of the website that becomes defective, because the website is harmed as well.¹³²

125. Barry Schwartz, *Got a Google Penalty? Should You Start a New Site?*, SEO ROUNDTABLE (Mar. 4, 2014), <https://www.seroundtable.com/google-penalty-new-site-18200.html>.

126. Murphy Farrell Dev., LLLP v. Sourant, 272 P.3d 355, 364 (Ariz. Ct. App. 2012).

127. Van Buren v. Pima Cmty. Coll. Dist. Bd., 546 P.2d 821, 823 (Ariz. 1976) ("A claim for relief for negligent misrepresentation is one governed by the principles of the law of negligence. Thus, there must be 'a duty owed and a breach of that duty before one may be charged with the negligent violation of that duty.'").

128. See Taeger v. Catholic Family and Cmty. Servs., 995 P.2d 721, 727 (Ariz. Ct. App. 2007) (quoting Denison State Bank v. Madeira, 640 P.2d 1235, 1242 (1982)).

129. *Id.*

130. See *Beginner's Guide to SEO*, *supra* note 11; *Google-Friendly Site*, *supra* note 19.

131. Schwartz, *supra* note 125.

132. See Carstens v. City of Phoenix, 75 P.3d 1081, 1083 (Ariz. Ct. App. 2003) ("The economic loss rule bars a party from recovering economic damages in tort unless accompanied by physical harm, either in the form of personal injury or secondary property damage."); *E. River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 866 (1986)

This is analogous to a developer who promises to redesign a person's physical business in order to get more customers in the door but damages the shop in the process.¹³³ In this scenario, the developer would not only violate building codes, but also cause physical damage to the store that would not be purely economic.¹³⁴ The same analysis applies to an SEO professional or firm that uses black hat tactics without its client's knowledge that eventually lead to a penalty. As mentioned above, the damage to the website is not the loss of traffic, but the penalty that removes the possibility of ranking on search engines.

C. Consumer Protection

Whereas common law fraud can be difficult to prove, consumer-protection laws may be easier to enforce and are often more appealing to plaintiffs. Consumer-protection laws were widely enacted in the 1960s and 1970s, and now every state has at least one consumer-protection law.¹³⁵ Furthermore, all states have statutes that establish a private cause of action for consumers.¹³⁶ These laws generally allow recovery for victims of deceptive and unfair practices, and they often go "beyond clear and outright dishonest[y]."¹³⁷ In comparison to common law fraud, consumer-protection laws have more relaxed standards and, therefore, are easier to prove.¹³⁸

In particular, the intent-to-deceive requirement of common law fraud is typically not required by consumer-protection laws. This means that sellers can be held liable for innocent misrepresentation, including ignorance of the statement's falsity.¹³⁹ Further, some states do not require that the plaintiff rely on the false representation and most states do not require that the plaintiff be justified in relying on the false statement.¹⁴⁰ Equally important, consumer-protection laws allow for multiple types of remedies, including minimum damages, multiple damages, and attorneys' fees.¹⁴¹ Finally, these types of laws allow for punitive damages.¹⁴²

(holding that the economic loss rule did not apply where supertanker turbines malfunctioned causing damage only to themselves).

133. See *Stuart v. Weisflog's Showroom Gallery, Inc.*, 753 N.W.2d 448, 463 (Wis. 2008) (holding in part that improvement contractor's violation of building codes, which led to damages in the property, while remodeling a home constituted noneconomic damages).

134. See *id.*

135. Braucher, *supra* note 88, at 829. Professor Braucher notes that most consumer-protection laws have been broadened, and few have been narrowed, in scope. *Id.* Further, no consumer-protection law has ever been repealed. *Id.*

136. Buckingham, *supra* note 87, at 1034. Although some state statutes do not explicitly state a consumer has a private right of action, some courts have held that a private right of action is implied. *E.g.*, *Holeman v. Neils*, 803 F. Supp. 237, 242 (D. Ariz. 1992).

137. Braucher, *supra* note 88, at 829.

138. *Id.*

139. DEE PRIDGEN & RICHARD M. ALDERMAN, CONSUMER PROTECTION AND THE LAW § 3:2 (2014).

140. *Id.*; *Sovern*, *supra* note 87, at 450–51.

141. Braucher, *supra* note 88, at 830.

142. *Id.* at 843.

Arizona's consumer-protection statute—the Consumer Fraud Act (“CFA”)—is a broad-reaching statute and requires that a plaintiff prove fewer elements than common law fraud.¹⁴³ To begin with, the definition of a fraudulent statement is very broad and includes “any deception, deceptive or unfair act or practice, fraud, false pretense, false promise, misrepresentation, or concealment, suppression or omission of any material fact.”¹⁴⁴ In regard to fraudulent statements, the statute does not specify other requirements.¹⁴⁵ Thus, under A.R.S. § 44-1522(A), the use of any misrepresentation is an unlawful practice.¹⁴⁶ Although the statute does not have an intent requirement, Arizona courts have stated that the conduct must be voluntary.¹⁴⁷ Next, the standard of whether the least sophisticated person would be misled, like in common law fraud cases, is also used in consumer-protection cases.¹⁴⁸ Additionally, Arizona courts have interpreted the CFA to include a “consequent and proximate” injury requirement.¹⁴⁹ Finally, the Arizona consumer-protection statute protects against false statements made in connection with the sale or advertisement of services, not just goods or objects.¹⁵⁰

Under the Arizona CFA, alleging a consumer-fraud claim against an SEO firm that promised to improve rankings and then later used black hat tactics can be simpler than using a common-law fraud cause of action. For starters, because the statute goes beyond tangible goods, SEO services fall under the CFA.¹⁵¹ Thus, the first step in the analysis is whether promising to improve rankings, but then using harmful techniques, constitutes a misrepresentation. This type of promise or statement can be analyzed in the same way as discussed in the common law fraud section above. Applying the standard of whether the least sophisticated person would be misled by the statement, it is easy to see how a website owner can be misled into believing that the black hat SEO performer would improve the website's rankings.¹⁵² A black hat SEO performer can promise high rankings without revealing that he will be using techniques that will ultimately harm the

143. Ariz. Rev. Stat. § 44-1522(A) (2013) (“The act, use or employment by any person of any deception, deceptive or unfair act or practice, fraud, false pretense, false promise, misrepresentation, or concealment, suppression or omission of any material fact with intent that others rely on such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice.”).

144. *Id.*

145. *Id.* In the case of a concealment, suppression, or omission, the plaintiff is required to prove the seller intended others to rely on the concealment, suppression, or omission. *Id.*

146. *Powers v. Guar. RV, Inc.*, 278 P.3d 333, 338 (Ariz. Ct. App. 2012).

147. *Id.* (“[T]he described conduct refers to activities that by their very nature require voluntary conduct in the sense of action that undertaken freely.”).

148. *Madsen v. W. Am. Mortg. Co.*, 694 P.2d 1228, 1232 (Ariz. Ct. App. 1985).

149. *Powers*, 278 P.3d at 338.

150. Ariz. Rev. Stat. § 44-1521(5) (2014); *Woods v. Sgrillo*, 859 P.2d 771, 772 (Ariz. Ct. App. 1993) (noting that the sale of services is covered by the Consumer Fraud Act).

151. *See* Ariz. Rev. Stat. § 44-1521(5) (2014).

152. *See Tavilla v. Cephalon, Inc.*, 870 F. Supp. 2d 759, 776 (D. Ariz. 2012); *Madsen*, 694 P.2d at 1232.

website. Further, search engine guidelines, SEO techniques, and penalties are not common knowledge.

Next, the plaintiff does not have to prove that the black hat SEO performer intended to misrepresent himself, but only has to show that the defendant intended the general act of making the misrepresentation.¹⁵³ In this case, the plaintiff could show that the search engine optimizer made the statement voluntarily. Finally, the plaintiff would have to prove an injury that resulted from the misrepresentation, which would be the search engine penalty.

While suing a black hat SEO performer under a state consumer-protection law may be less burdensome than common law fraud, there are few reported cases in which consumers have filed actions against SEO firms. In 2008, the State of Washington sued a marketing company that, among other services, offered SEO to smaller businesses.¹⁵⁴ The suit alleged a violation of Washington's consumer-protection law.¹⁵⁵ There, the state sued the company, Visible.net, in part because the company misrepresented itself by promising high rankings and increased sales and never delivering on those promises.¹⁵⁶ The defendant stated on its website that it could achieve "improved rankings, popularity, authority, and brand recognition online."¹⁵⁷ It also made other claims on its website, such as, "Just like my last client, you will be blown away when you can see what having [a top] search engine ranking can do for your business and your pocketbook." Although the trial court found these statements deceptive and in violation of the state's consumer-protection law, the case was ultimately settled for \$250,000.¹⁵⁸ The defendants also promised not to misrepresent their ability to significantly increase traffic by achieving top search engine rankings in the future.¹⁵⁹

D. Breach of Contract

Breach of contract, unlike the other causes of action this Note explores, is a remedy that arises out of contract law rather than tort law.¹⁶⁰ To state a breach of contract claim, a plaintiff must allege that: (1) a contract existed; (2) it was breached; and (3) the breach resulted in damages.¹⁶¹ Further, a "victim of a material or total breach is excused from further performance" under the contract,

153. See *Powers*, 278 P.3d at 338; PRIDGEN & ALDERMAN, *supra* note 139, at § 3:2 ("[S]ellers can be held liable for even innocent misrepresentations.").

154. Complaint, *Washington v. Visible.net*, No. 08-2-38947-2 SEA (King Cty. Super. Ct. 2008), http://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Home/News/Press_Releases/2008/Visible%20complaint.pdf.

155. *Id.*

156. *Id.*

157. *Id.*

158. Press Release, Wash. State Office of the Attorney Gen., *Washington Company that Promised Web Hits will Reboot Its Sales Tactics* (July 8, 2010), <http://www.atg.wa.gov/news/news-releases/Washington-company-promised-web-hits-will-reboot-its-sales-tactics>.

159. *Id.*

160. Barton, *supra* note 115, at 1789.

161. *Steinberger v. McVey*, 318 P.3d 419, 435 (Ariz. Ct. App. 2014).

meaning that a client who paid for SEO services and unknowingly received the use of black hat tactics may not have to make any additional payments for services under the contract.¹⁶² However, a general lack of punitive damages might make a breach of contract claim unappealing to plaintiffs.¹⁶³

An SEO firm who enters into a contract with a website owner and then uses black hat SEO methods without the client's knowledge that lead to a search engine penalty can certainly be considered to have breached a contract to improve the rankings of the client's website. The first element, whether a contract exists, can be easily satisfied if the parties form an agreement.¹⁶⁴ Second, using black hat SEO methods is certainly a breach of contract because the client is not expecting to have the website penalized by the search engine. In a sense, the black hat SEO performer is not performing his duty, because the SEO was hired to improve the website's rankings. Thus, instead of improving rankings on search engines, the black hat SEO performer is achieving the opposite result by employing techniques that will be detrimental to the website in the long run. Further, because black hat SEO efforts are counter to what the client is actually asking for—improved rankings—the breach can be considered material. Therefore, the client may be excused from completing his own required performance under the contract: paying for the service.

Finally, assuming there is a penalty, the client can easily show the damages from the breach, which may include the money paid for the service to reoptimize the website and the money invested in the website that was penalized. Although the client will likely recover for these two types of damages, the client will not be able to recover punitive damages under a breach of contract cause of action.¹⁶⁵ Thus, while the elements of breach of contract may be easier for a plaintiff to prove, clients may opt for a cause of action that will allow them to collect a larger damages award.

III. POLICY CHANGE RECOMMENDATIONS

As discussed in Part II, causes of action currently available to websites harmed by the use of black hat SEO are poorly tailored for the circumstance. Therefore, change is needed to better protect consumers and companies that have come to rely on their online advertising through the use of search engines like Google.

162. Murphy Farrell Dev., LLLP v. Sourant, 272 P.3d 355, 364 (Ariz. Ct. App. 2012) (noting that the “victim of a minor or partial breach must continue own performance”); RESTATEMENT (SECOND) OF CONTRACTS § 242 (1981).

163. H. S. J., *Damages—Punitive Damages for Breach of Contract*, 12 TEX. L. REV. 508, 509 (1934); Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897) (“[D]uty to keep a contract at common law means a prediction that you must pay damages if you do not keep it,—and nothing else.”).

164. See Complaint, *supra* note 63, at 13. The plaintiff website owner entered into two separate contracts with the SEO firm for a total of \$45,000. *Id.*

165. See H. S. J., *supra* note 163, at 509; Holmes, *supra* note 163, at 462.

A. A New Fiduciary Class

First, this Note proposes that the courts create a new fiduciary class between SEO professionals and their clients. Courts have recognized new fiduciary classes before, and, although there is no bright-line rule that can help determine whether a fiduciary relationship exists, courts have recognized new fiduciary classes when there is inequality between the parties, or when one party exhibits dependence on the other.¹⁶⁶ Furthermore, other avenues for relief have been demonstrated to be ineffective.¹⁶⁷ Additionally, after a plaintiff has established that a fiduciary relationship exists and was breached, the burden shifts to the professional to prove that he “dealt fairly and candidly with his client.”¹⁶⁸ In defining this new fiduciary relationship, courts can draw upon a fiduciary duty similar to the one used in attorney–client settings.¹⁶⁹ In attorney–client relationships, the lawyer has a duty to exercise “the most scrupulous honor, good faith and fidelity to his client’s interest.”¹⁷⁰ This requires an attorney to be open, honest, and to refrain from any concealment or deception of the client.¹⁷¹

There are many benefits to recognizing a new fiduciary class in the context of search engine optimizers and their clients. One of the main benefits is specialization.¹⁷² In the context of SEO, imposing a fiduciary duty on search engine optimizers that is owed to their client will develop their expertise in the field of SEO. The fiduciary duty will require search engine optimizers to act in the interest of the client, which includes becoming familiar with Google’s and other search engine’s SEO policies. In other words, the search engine optimizer will have to consider whether the SEO methods are harmful to the client’s website. Further, if SEO professionals can continue to specialize in the field of SEO, this will allow their clients to continue managing their own businesses. Finally, establishing a new fiduciary duty will also protect the SEO industry. As search engine optimizers gain more expertise, and as unethical SEO techniques are abandoned, the SEO industry will improve its reputation and gain trust.¹⁷³

A possible barrier to recognizing a new fiduciary class between a search engine optimizer and the client is whether the client “can protect himself from abuse of power.”¹⁷⁴ But will a client be able to protect himself by reading about

166. Meredith J. Duncan, *Legal Malpractice by Any Other Name: Why a Breach of Fiduciary Duty Claim Does Not Smell as Sweet*, 34 WAKE FOREST L. REV. 1137, 1149–50 (1999).

167. *Id.* at 1159.

168. *Id.*

169. Tamar Frankel, *Fiduciary Law*, 71 CALIF. L. REV. 795, 804 (1983) (“Courts currently examine existing prototypes, such as agency, trust, or bailment that are defined as fiduciary. Then, courts create rules for new fiduciary relations by drawing analogies with these prototype.”).

170. Kevin William Gibson, *Breach of Fiduciary Duty*, 22 DEL. L. WKLY. 28, 28 (2004). Dependence on another party can involve an instance where one party has superior knowledge or expertise. *Id.*

171. *Id.*

172. Frankel, *supra* note 169, at 803.

173. *White Hat SEO: It Works*, *supra* note 36.

174. Frankel, *supra* note 169, at 811.

SEO and Google's best-practices guidelines? While these sources are available online, SEO is a vast field that can be very technical, and business owners may not be familiar with search engines and website development.¹⁷⁵ Therefore, expecting business owners to know about black hat SEO and its possible consequences may be too burdensome.

B. Enacting Digital Marketing Consumer Protection Laws

States should enact consumer-protection laws that hold digital-marketing professionals who use unethical practices accountable. Such laws should be broad enough to prohibit not just black hat SEO, but also other methods that result in harm to the clients across various media, like social media and online review sites.¹⁷⁶ Having such broad statutes can help the law adapt faster to any type of future online marketing techniques that are harmful.

The consumer-protection statutes should have the following elements: (1) use of unethical tactics;¹⁷⁷ (2) without the client's consent; (3) that result in the client's website receiving a penalty or injury; and (4) apply to any instance where a consumer hired an SEO firm or professional. First, the statutes should prohibit the use of tactics that are prohibited by whatever online medium (search engine, social media platform, or online review website) the professional is hired to improve without the consent of the client. For example, in the context of SEO, a search engine optimizer will not be able to use black hat SEO techniques without his client's consent because they are prohibited by the search engine. An SEO professional should have no problem locating a search engine's policies that identify prohibited tactics. If the client gives consent for the SEO professional to use black hat techniques, then the professional will not be liable for any penalty that results from such practices. Next, the statutes should allow plaintiffs to file actions against the black hat SEO firms only if the use of such tactics resulted in a penalty or other type of injury. The fourth element should be included because it will prevent courts from reading a broad duty from the statute.

C. Stronger Enforcement from the Federal Trade Commission

Enforcement must happen at the federal level as well. To begin with, the Federal Trade Commission ("FTC") is empowered to prevent individuals and businesses from using unfair methods of competition or deceptive acts or

175. See *Beginner's Guide to SEO*, *supra* note 11.

176. Online review sites, like Yelp, allow customers and clients to review businesses and products. Jayson DeMers, *How to Get Online Reviews for Your Business*, FORBES (Apr. 30, 2015), <http://www.forbes.com/sites/jaysondemers/2015/04/30/how-to-get-online-reviews-for-your-business/>.

177. In the context of SEO, an unethical tactic would be anything prohibited by the search engines that can lead to a penalty. See Kristine Schachinger, *SEO 101: Meet the White Hats, Gray Hats, Black Hats & Asshats*, SEARCH ENGINE WATCH (Oct. 4, 2012), <http://searchenginewatch.com/sew/opinion/2214534/seo-101-meet-the-white-hats-gray-hats-black-hats-asshats>.

practices.¹⁷⁸ In addition, the FTC “may find an act or practice unfair if it causes substantial injury to consumers that they could not reasonably have avoided themselves as long as countervailing benefits do not outweigh the injury.”¹⁷⁹ Clearly, in using black hat SEO methods without the knowledge of their clients, SEO performers are causing economic injuries to consumers. Further, because the use of the Internet is ever growing, it is important for the FTC to step in and protect businesses and website owners who rely on outside firms for reoptimization. As another commentator has observed, the “FTC retains the power to continually expand its focus to keep pace with the evolution of the marketplace and to develop new enforcement priorities as times change.”¹⁸⁰

CONCLUSION

Consumer-protection laws and breach of contract claims may be the best remedy against SEO firms that use black hat methods without their clients’ consent. A common law fraud cause of action will be difficult to prove, particularly because it has numerous elements to satisfy, including the burdensome intent requirement.¹⁸¹ Negligent misrepresentation is also not a viable cause of action because the duty of care element may be too difficult to establish. On the other hand, consumer-protection laws and breach of contract claims are better causes of action because of their relaxed standards and because they have fewer elements to satisfy. Properly optimized websites that provide useful content (even if selling a product) can be beneficial for the user, search engine, and the website owner. However, SEO can be abused, and, in some cases, the website owners are the ones who suffer. A search engine can penalize a website, but it is impossible for it to prevent a black hat SEO firm from reoptimizing more websites. Thus, the best way to curtail the use of black hat SEO, at least when it is used without the knowledge of clients, is to make remedies more accessible to website owners and for the FTC to join in the effort of monitoring SEO use.

178. 15 U.S.C. § 45(a)(2) (1914); see Brooke E. Crescenti, Note, *Undercover Marketing: If Omission Is the Mission, Where Is the Federal Trade Commission?*, 13 J.L. & POL’Y 699, 739 (2005).

179. Nilsson, *supra* note 9, at 817.

180. Crescenti, *supra* note 178, at 738–39.

181. Pace v. Sagebrush Sales Co., 560 P.2d 789, 793 (Ariz. 1977).