

FABRICATING FEEDBACK: BLURRING THE LINE BETWEEN BRAND MANAGEMENT AND BOGUS REVIEWS

*Kaitlin A. Dohse**

TABLE OF CONTENTS

I.	Introduction	364
II.	Background	366
	A. The History of the (Fake) Consumer Review	366
	B. The Credibility and Importance of Consumer Reviews	367
	C. The Business of Bogus Reviews	370
	D. Developments in Online Advertising and Reputation Management	372
III.	Analysis.....	375
	A. Current Law and Guidelines Regarding Fake and/or Compensated Reviews.....	375
	1. Analogizing to Blogger Disclosure Guidelines	376
	2. Compliance Through Site-Specific Standards.....	377
	B. Companies Controlling the Conversation.....	379
	1. Faking Flattery	379
	2. Negative Fake Reviews and Defamation Claims	381
	C. Reviewers for Hire	383
	D. How the Law Affects Online Reputation Management.....	385
IV.	Recommendation	387
	A. Current Enforcement Challenges.....	388
	B. Detection and Deterrence	388
	1. Detecting Fake Reviews	388
	2. Changing Site Policies.....	389
	3. Calling Out the Culprits.....	390
	C. Legislative Action	391
V.	Conclusion	391

* Juris Doctor, University of Illinois College of Law, 2014. Bachelor of Journalism, University of Missouri, 2011. I would like to thank my family and friends for their constant support and encouragement of my goals. I am also grateful for the helpful comments and suggestions of my note editors, John Kendzior and Josh Gross, during the writing and editing of this Note.

I. INTRODUCTION

As social media and online communication develop, Internet users are exchanging information and expressing themselves in innovative ways. What has remained fairly constant is these users' willingness to share their opinions online.¹ Whether their thoughts come in the form of blog posts, tweets, or Amazon.com (Amazon) reviews, consumers are taking to technology to share product and service reviews that glow² or gripe.³ Since the Internet has become such a popular retail marketplace,⁴ it is not surprising that the popularity of product and service reviews has also increased.⁵

This tech-savvy version of word-of-mouth marketing is so popular because consumers are more likely to search for—and trust—reviews written by other consumers.⁶ In fact, more than sixty percent of consumers read online reviews before making a purchase.⁷ Product manufacturers also rely on these reviews to detect product issues and discover information about competitors.⁸ What is troublesome is trying to determine how many of these reviews are, in fact, the honest opinions of real customers rather than positive posts paid for by a company.⁹

Increasingly, businesses are penning their own positive reviews or hiring writers to produce content they can pass off as a genuine consumer opinion.¹⁰ Unfortunately, consumers are falling for them.¹¹ This deceptive advertising

1. Robert Sprague & Mary Ellen Wells, *Regulating Online Buzz Marketing: Untangling a Web of Deceit*, 47 AM. BUS. L.J. 415, 415 (2010).

2. Grant Martin, *Fake Nautical Restaurant on TripAdvisor Gets Glowing Reviews*, FORBES (July 29, 2013, 11:16 AM), http://www.forbes.com/sites/grantmartin/2013/07/29/fake-restaurant-on-tripadvisor-gets-glowing-reviews/?utm_campaign=techtwitter&utm_source=twitter&utm_medium=social.

3. See Raphael Brion, *Graham Elliot's Unopened Resto Gets a Negative Yelp Review*, EATER (Sept. 1, 2010), <http://eater.com/archives/2010/09/01/graham-elliots-grahamwich-gets-negative-yelp-review.php> (detailing the story of a consumer who posted a one-star restaurant review for an unopened sandwich shop).

4. In 2012, 167 million Americans purchased an item online. Thad Rueter, *E-Retail Spending to Increase 62% by 2016*, INTERNET RETAILER (Feb. 27, 2012, 9:52 AM), <http://www.internetretailer.com/2012/02/27/e-retail-spending-increase-45-2016>.

5. Feng Zhu & Xiaoquan Zhang, *Impact of Online Consumer Reviews on Sales: The Moderating Role of Product and Consumer Characteristics*, J. MARKETING RES., Mar. 2010, at 133 (noting that “[w]ith the Internet’s growing popularity, online consumer reviews have become an important resource for consumers seeking to discover product quality”).

6. Sprague & Wells, *supra* note 1, at 415.

7. Graham Charlton, *E-Commerce Consumer Reviews: Why You Need Them and How to Use Them*, ECONSULTANCY (Mar. 21, 2012, 11:30 AM), <http://econsultancy.com/us/blog/9366-e-commerce-consumer-reviews-why-you-need-them-and-how-to-use-them>.

8. Nitin Jindal & Bing Liu, *Opinion Spam and Analysis 219* (2008) (unpublished paper), available at <http://184pc128.csie.ntnu.edu.tw/presentation/09-04-06/Opinion%20Spam%20and%20Analysis.pdf>.

9. This phenomenon of fake or paid reviews serves as yet another reminder that it is hard to know who is the actual author of an online comment. As the saying goes, “[o]n the Internet, nobody knows you are a dog.” Bin Wang, *Audience Intelligence in Online Advertising*, in ONLINE MULTIMEDIA ADVERTISING: TECHNIQUES & TECHNOLOGIES 262, 268 (Xian-Sheng Hua, Tao Mei, & Alan Hanalic eds., 2011).

10. See generally BING LIU, SENTIMENT ANALYSIS AND OPINION MINING 113 (Graeme Hurst, ed., 2012), available at <http://www.morganclaypool.com/doi/pdf/10.2200/S00416ED1V01Y201204HLT016> (explaining the reasons why individuals and companies engage in opinion spamming).

11. See, e.g., Myle Ott et al., *Finding Deceptive Opinion Spam by Any Stretch of the Imagination 309* (June 20, 2011) (unpublished paper), available at <http://www.aclweb.org/anthology/P/P11/P11-1032.pdf> (comparing an authentic hotel review with a deceptive hotel review and analyzing the differences between the two).

practice has several names, including “undercover promotion,”¹² “astroturfing,”¹³ and “opinion spam[ming].”¹⁴ Computer scientist and researcher Bing Liu finds, for some product categories, thirty percent of all online reviews are fakes.¹⁵ Technology research and advisory company Gartner predicts that by 2014 ten to fifteen percent of *all* social media reviews will be the product of undercover promotion.¹⁶ This is problematic for consumers trying to seek an honest opinion, as well as for companies and writers engaging in the deception. Consumers risk wasting their time and money on products and services unworthy of these positive reviews. Meanwhile, the undercover promoters likely face violations of state¹⁷ and federal¹⁸ consumer protection laws for their deception—if they get caught. Undercover promotion also prompts a larger question: “If we can hardly tell the difference between honest Abe and some sketchy company hired to boost ratings, what good are ‘consumer’ reviews anyway?”¹⁹

This Note will explore the laws prohibiting undercover promotion and how, if at all, these laws affect online reputation management. Part II will delve into the history of consumer-generated product reviews, including when fake reviews came into existence. Then, Part III will analyze how to apply current law to these fake reviews, using recent litigation and news items. It will also track how fake reviews play into online reputation management or public relations. Next, Part IV will propose recommendations for how to curb this deceit while giving companies the latitude to promote their businesses in new, exciting ways. The Note will conclude briefly in Part V.

12. “Undercover promotion” is defined as “an intentionally concealed connection between a person promoting a product and the product advertiser.” Anne Keaty et al., *Can Internet Service Providers and Other Secondary Parties Be Held Liable for Deceptive Online Advertising?*, 58 BUS. LAW. 479, 481 (2002).

13. See, e.g., Press Release, N.Y. State Office of the Attorney Gen., Attorney General Cuomo Secures Settlement with Plastic Surgery Franchise that Flooded Internet with False Positive Reviews (July 14, 2009) [hereinafter Press Release, Plastic Surgery], available at <http://www.ag.ny.gov/press-release/attorney-general-cuomo-secures-settlement-plastic-surgery-franchise-flooded-internet> (discussing the penalties to a plastic surgery practice for its “astroturfing” employees).

14. Jindal & Liu, *supra* note 8, at 219.

15. Karen Weise, *A Lie Detector Test for Online Reviewers*, BLOOMBERG BUSINESSWEEK MAG. (Sept. 29, 2011), <http://www.businessweek.com/magazine/a-lie-detector-test-for-online-reviewers-09292011.html>.

16. Press Release, Gartner, Gartner Says by 2014, 10-15 Percent of Social Media Reviews Will Be Fake, Paid for By Cos. (Sept. 17, 2012) [hereinafter Press Release, Gartner], available at <http://www.gartner.com/it/page.jsp?id=2161315>.

17. Although state law will vary depending on the jurisdiction, most states enforce their consumer protection laws through their state’s office of the attorney general. For a listing of all states and their consumer protection agencies, see *Index of State and Local Government Agencies*, USA.GOV, <http://www.usa.gov/directory/stateconsumer/index.shtml> (last updated Mar. 7, 2013).

18. See 15 U.S.C. §§ 45, 52 (2012) (detailing the federal consumer protection laws prohibiting fake online reviews).

19. Allison McCann, *Who Has the Most Fake Consumer Reviews?*, BUZZFEED (June 20, 2012, 4:51 PM), <http://www.buzzfeed.com/atmccann/who-has-the-most-fake-consumer-reviewers>.

II. BACKGROUND

A. *The History of the (Fake) Consumer Review*

It is clear that now, “[r]eviews by ordinary people have become an essential mechanism for selling almost anything online; they are used for resorts, dermatologists, neighborhood restaurants, high-fashion boutiques, churches, parks, astrologers and healers,” to name just a few.²⁰ Although consumer-generated product reviews existed long before the Internet,²¹ the ability to share these opinions instantaneously and in such a large forum was not possible until Amazon developed the “customer review” in 1995.²² For the online retailer, these reviews created “community” for its customers but also provided free content to fill the white space on the newly developed site.²³ Amazon CEO Jeff Bezos views the customer review as a key tool to aid customers in their purchase decisions.²⁴

Glen Fleishmann, Amazon’s catalog manager, was the first to use the term “customer review” to distinguish consumer-written book reviews from professionally written book reviews posted on Amazon.²⁵ Of course, the company soon broadened its product offerings beyond books and now allows users to utilize the same customer review system for every product.²⁶ Although Amazon stresses the importance of letting the “truth loose” with customer reviews, the company was not immune to fake reviews back in the late Nineties,²⁷ and it certainly is not now.²⁸ Rather, it is yet another site burdened by policing consumer-driven content.²⁹

Today there are countless websites that offer consumers the chance to review or rank products and services.³⁰ Online customer reviews are common for nearly every product and service from books to music to wine.³¹ Part of the value of a genuine consumer-generated review is that it can describe the actual

20. David Streitfeld, *The Best Book Reviews Money Can Buy*, N.Y. TIMES (Aug. 25, 2012), <http://www.nytimes.com/2012/08/26/business/book-reviewers-for-hire-meet-a-demand-for-online-raves.html?pagewanted=all>.

21. See, e.g., Trevor Pinch & Filip Kesler, *How Aunt Ammy Gets Her Free Lunch: A Study of the Top-Thousand Customer Reviewers at Amazon.com* 6 n.8 (June 12, 2011) (unpublished manuscript), available at <http://www.freelunch.me/filecabinet> (offering the UK Automobile Association and French Michelin Guide as examples of consumer reviewing).

22. Yubo Chen & Jinhong Xie, *Online Consumer Review: Word-of-Mouth as a New Element of Marketing Communication Mix*, 54 MGMT. SCI. 477, 477 (2008).

23. ROBERT SPECTOR, AMAZON.COM: GET BIG FAST 131–32 (HarperBusiness 2000).

24. HBR IdeaCast, *Jeff Bezos on Leading for the Long-Term at Amazon*, HARV. BUS. REV. (Jan. 3, 2013, 6:39 PM), <http://blogs.hbr.org/ideacast/2013/01/jeff-bezos-on-leading-for-the.html>.

25. SPECTOR, *supra* note 23, at 132.

26. Pinch & Kesler, *supra* note 21, at 13.

27. SPECTOR, *supra* note 23, at 133–34.

28. Pinch & Kesler, *supra* note 21, at 11.

29. See generally *Profile and Community Guidelines*, AMAZON, http://www.amazon.com/gp/help/customer/display.html/ref=hp_16465231_profcommguide?nodeId=14279631 (last visited Sept. 16, 2013) (explaining Amazon may remove content that is “harmful to [its] systems, network, reputation, or goodwill”).

30. See, e.g., Chen & Xie, *supra* note 22, at 477 (listing BevMo.com, BN.com, cduniverse.com, circuitcity, GameStop.com, computer4sure.com, c-source.com, half.com, goodguys.com, and wine.com as examples of sites on which users may review the products).

31. *Id.*

product usage experience rather than seller-created product information, which typically focuses on specific product attributes.³² Researchers have also found there is a great difference between third-party or professional reviews and consumer reviews.³³ Chen and Xie use the example of a camera.³⁴ In their research, they found that a professionally written review of the Kodak Easy Share Z 740 strictly emphasized technical failings of the product, whereas consumers posted positive details about how the camera performed for photographing birds, kids' sports, overseas vacations, and other activities.³⁵ Similar to Amazon's customer reviews, these opportunities to reflect on product experiences offer potential buyers valuable, personal information before they commit to purchase.

B. *The Credibility and Importance of Consumer Reviews*

In order to better understand why maintaining integrity in consumer reviews is important, it is vital to understand how consumers use these resources. A Forrester Research study found that half of the users who visit a retail site with consumer postings say that consumer reviews are important or extremely important in their purchase decisions.³⁶ Other studies have found that consumers prefer—and trust—the opinions of regular people like them rather than experts.³⁷ In fact, these consumer reviews are considered almost twelve times more trusted than manufacturer descriptions.³⁸

Even if consumers get a personal recommendation for a product or service from another “regular” person, such as a friend or family member, they might also do a quick Internet search to verify the information.³⁹ Further, a recent survey found that sixty-four percent of consumers go online to search for consumer or user reviews before purchasing a product.⁴⁰ And the content of the review—or number of stars—will likely affect the potential customer's decision to buy.⁴¹ The survey found eighty percent of consumers decided to not buy a product after reading negative information online.⁴² Even more consumers (eighty-seven percent) confirmed their decision to purchase after

32. *Id.* at 479–80.

33. *Id.* at 480.

34. *Id.* at 480–81.

35. *Id.* at 481.

36. *Id.* at 477–78.

37. Mehdi Ghazisaeedi et al., *Trustworthiness of Product Review Blogs: A Source Trustworthiness Scale Validation*, 6 AFR. J. BUS. MGMT. 7498, 7498 (2012).

38. Charlton, *supra* note 7.

39. Interestingly, a recent study found that seventy-two percent of respondents trusted online reviews and recommendations as much as personal ones from friends, family, and colleagues. Myles Anderson, *Study: 72% of Consumers Trust Online Reviews as Much as Personal Recommendations*, SEARCH ENGINE LAND (Mar. 12, 2012, 10:00 AM), <http://searchengineland.com/study-72-of-consumers-trust-online-reviews-as-much-as-personal-recommendations-114152>.

40. Press Release, Cone Comm'ns, Game Changer: Cone Survey Finds 4-out-of-5 Consumers Reverse Purchase Decisions Based on Negative Online Reviews 2 (Aug. 30, 2011), *available at* http://www.conecomm.com/stuff/contentmgr/files/0/286c351989671ae74994fec139863bb2/files/2011_cone_online_influence_trend_tracker_release_and_fact_sheet.pdf.

41. *Id.* at 3.

42. *Id.*

reading positive information online.⁴³ With so many consumers relying on online reviews, there is a pressing need to ensure these opinions are authentic.

Ensuring honesty in consumer reviews is important not only for ethics reasons but for economic reasons too. Unsurprisingly, researchers have found that positive reviews mean higher profits in several industries.⁴⁴ In the restaurant industry, for example, economists at the University of California at Berkeley recently studied the link between Yelp reviews and restaurant popularity.⁴⁵ The researchers found that an increase of a half-star rating on a five-star scale made it nineteen percent more likely that a restaurant's seats would be full during peak dining times.⁴⁶ Simply put, more stars meant fewer seats. They also believe positive crowd-sourced, or consumer-generated, Yelp reviews create a higher bump in popularity for restaurants that have not obtained a Michelin star or another prestigious culinary accolade.⁴⁷ Other academics have found that positive consumer reviews of specific dishes can also drive the demand for those specific meals.⁴⁸

Consumer ratings or reviews also appear to influence moviegoers' decisions to see films.⁴⁹ Liu found that Yahoo Movies message board reviews have an effect on box office earnings.⁵⁰ Although Liu did not link the increased word-of-mouth with an *attitude* change in potential filmgoers, he found that an increase in attention to the film led to higher box office revenue.⁵¹ In studying advertising and the motion picture industry, Babutsidze found that if a movie's advertising campaign is too aggressive, it often leads to consumer disappointment because the movie failed to meet lofty expectations.⁵² This results in negative word-of-mouth messages, and deters other potential customers from seeing the movie.⁵³ In essence, when and how consumers share opinions about movies affects the amount of money they make at the box office.

43. *Id.*

44. Michael Anderson & Jeremy Magruder, *Learning from the Crowd: Regression Discontinuity Estimates of the Effects of an Online Review Database*, 122 *ECON. J.* 957, 957 (2011); Yong Liu, *Word of Mouth for Movies: Its Dynamics and Impact on Box Office Revenue*, *J. MKTG.*, July 2006, at 74, 81 (2006); Press Release, Sarah Yang, UC Berkeley, *Crowd-Sourced Online Reviews Help Fill Restaurant Seats, Study Finds* (Sept. 4, 2012) [hereinafter Press Release, Yang], available at <http://newscenter.berkeley.edu/2012/09/04/yelp-reviews-boost-restaurant-business/>.

45. Anderson & Magruder, *supra* note 44, at 957; Press Release, Yang, *supra* note 44.

46. Anderson & Magruder, *supra* note 44, at 957.

47. *Id.* at 968.

48. See Hongbin Cai et al., *Observational Learning: Evidence from a Randomized Natural Field Experiment*, 99 *AM. ECON. REV.* 864, 866 (2009) (finding demand for the top five dishes increases thirteen to twenty percent when diners learn the identity of the top five dishes).

49. Liu, *supra* note 44, at 81.

50. *Id.* at 82.

51. *Id.* at 86.

52. Zakaria Babutsidze, *Advertising and Word-of-Mouth in Motion Picture Industry* 10 (Feb. 10, 2011) (unpublished manuscript), available at <http://andromeda.rutgers.edu/~jmbarr/EEA2011/babutsidze.pdf>. *But c.f.* Enrico Moretti, *Social Learning and Peer Effects in Consumption: Evidence from Movie Sales*, 78 *REV. ECON. STUD.* 356, 389 (2011) (finding a revenue increase of thirty-two percent when consumers tell their peers they were pleasantly surprised by the movie).

53. Babutsidze, *supra* note 52, at 10.

Online reviews of books also impact book sales.⁵⁴ Chevalier and Mayzlin study the impact of online book reviews and rankings on relative book sales using Barnes & Noble's and Amazon's websites.⁵⁵ The authors found that on each website the mean number of stars awarded to a book is greater than four (on a five-star scale), which is implausibly positive.⁵⁶ The strong connection between positive reviews and profits certainly provides an incentive for some authors to do whatever they can do to obtain positive reviews for their writing.⁵⁷ Some authors have hired undercover review writers to promote their books⁵⁸ or have taken on pseudonyms and written the fake reviews on their own.⁵⁹ Author Stephen Leather admitted in a recent author panel that he created pseudonyms to cause "buzz" about his own books, calling this practice "sockpuppetry."⁶⁰ Leather also explained that he gets his friends involved in the undercover promotion as "sockpuppets" as well.⁶¹

Unsurprisingly, there are mixed opinions about the credibility of book reviews posted online. Some authors have created an online petition to voice their frustration with fake or manipulated online reviews in the book industry.⁶² In retaliation of the "sockpuppetry" and undisclosed purchased reviews, several authors banded together to create the "No Sock Puppets Here Please" petition.⁶³ The authors who signed the petition agreed to never use phony reviews and promised to condemn that behavior.⁶⁴ The petition also recognizes that readers must be vigilant and do their part to drown out the manipulators.⁶⁵

As information economics studies show, the availability of truthful, helpful online reviews also translates to greater confidence in consumer purchase decisions and saved time.⁶⁶ Genuine consumer-generated reviews

54. Judith A. Chevalier & Dina Mayzlin, *The Effect of Word of Mouth on Sales: Online Book Reviews*, 43 J. MARKETING RES. 345, 345 (2006).

55. *Id.*

56. *Id.* at 347.

57. See David Streitfeld, *Giving Mom's Book Five Stars? Amazon May Cull Your Review*, N.Y. TIMES (Dec. 22, 2012), <http://www.nytimes.com/2012/12/23/technology/amazon-book-reviews-deleted-in-a-purge-aimed-at-manipulation.html> ("Nowhere are reviews more crucial than with books, an industry in which Amazon captures nearly a third of every dollar spent. . . . So writers have naturally been vying to get more, and better, notices.")

58. Streitfeld, *supra* note 20.

59. E.g., Suw Charman-Anderson, *Fake Reviews: Amazon's Rotten Core*, FORBES (Aug. 28, 2012, 1:30 PM), <http://www.forbes.com/sites/suwcharmananderson/2012/08/28/fake-reviews-amazons-rotten-core/> (providing examples of fake reviews purchased by author John Locke and penned by author Stephen Leather).

60. See stevemosby, *Leather* (3), LEFT ROOM (Aug. 4, 2012, 7:50 PM), <http://www.theleftroom.co.uk/?p=1731> ("I'll go onto several forums, from the well-known forums, and post there, under my own name and under various other names and various other characters. You build this whole network of characters who talk about your books and sometimes have conversations with yourself.")

61. See *id.* ("One person on their own, difficult to create a buzz. If you've got ten friends, and they've got friends, and you can get them all as one creating a buzz, then hopefully you'll be all right.")

62. NO SOCK PUPPETS HERE PLEASE, <http://nosockpuppets.wordpress.com/> (last visited Sept. 3, 2013).

63. *Id.*

64. *Id.*

65. *Id.* ("No single author, however devious, can compete with the whole community. Will you use your voice to help us clean up this mess?")

66. Susan M. Mudambi & David Schuff, *What Makes a Helpful Online Review? A Study of Consumer Reviews on Amazon.com*, 34 MIS Q. 185, 190 (2010).

can add value to many stages of the consumer-decision-making process.⁶⁷ Mudambi and Schuff explain that exploring information and alternatives through online reviews provides greater consumer satisfaction in the online channel.⁶⁸ Helpful online reviews can also offer a source of differentiation and create awareness about an “unfilled product need, thereby bringing the purchase decision process full circle.”⁶⁹

In essence, the strong link between positive reviews and profits means there is an incentive for product manufacturers, authors, and others to develop promotional buzz about their products. Although some consumers and business rivals are becoming more informed about the existence of manipulated reviews,⁷⁰ there is a need for yet more research about credibility of opinions in the online context.

C. *The Business of Bogus Reviews*

Although beneficiaries of reviews often generate their own fake content, sometimes they solicit fakes through the Web. Presently, sites such as Freelancer.com post review-writing gigs that users can bid for.⁷¹ If selected for the assignment, writers can earn anything from two dollars to several hundred dollars for their work.⁷² While it is legal to freelance, failing to disclose the connection between the writer and the employer is illegal.⁷³ When posting these “freelancing” opportunities on Freelancer.com and other sites, the product sellers use several techniques to carry out their undercover promotions without being detected. Several job descriptions require that “writers” they hire use a company-written review, but post it on several forums under the writers’ own usernames or e-mail addresses.⁷⁴ That is not the only strategy used to prevent detection of these fake reviews. Other sellers require the compensated review writers to use a U.S. computer server, post the reviews over a designated period of time, or post at various times of day in order to make the review appear authentic.⁷⁵ Sometimes there is a higher paycheck for writers who post from an account that has been acknowledged as a top reviewer or earned an Elite status on Yelp, for instance.⁷⁶

67. *Id.* at 186 (citing PHILIP KOTLER & KEVIN LANE KELLER, *MARKETING MANAGEMENT* (Prentice Hall 12th ed. 2005)).

68. *Id.* (citing Rajiv Kohli et al., *Understanding Determinants of Online Consumer Satisfaction: A Decision Process Perspective*, *J. MGMT. INFO. SYS.*, Summer 2004, at 115, 130).

69. *Id.*

70. *See, e.g.*, Mike Deri Smith, *Fake Reviews Plague Consumer Websites*, *GUARDIAN* (Jan. 26, 2013), <http://www.theguardian.com/money/2013/jan/26/fake-reviews-plague-consumer-websites> (discussing how large online businesses such as Amazon and Yelp have begun to crack down on fake reviews).

71. *Write Reviews Online Jobs*, *FREELANCER*, <http://www.freelancer.com/work/write-reviews-online/> (last visited Sept. 3, 2013).

72. *See id.* (listing examples of requests to write online reviews for compensation).

73. 16 C.F.R. § 255.5 (2012).

74. *E.g.*, *Reviews & Likes Needed on Review Website*, *FREELANCER*, <http://www.freelancer.com/projects/Internet-Marketing-Data-Entry/Reviews-amp-Likes-needed-Review.2694215.html> (last visited Oct. 29, 2013) (saying review text can be supplied by the employer).

75. Weise, *supra* note 15.

76. *Id.*

Fiverr.com (Fiverr) is another site that connects writers with individuals and companies looking for a review.⁷⁷ For as little as five dollars, review solicitors may purchase a fake positive product review or hire someone to attack negative reviews already written about their product or service.⁷⁸ For individuals and companies wanting to place a fake review on a specific site, they can search for postings offering five-dollar Amazon reviews,⁷⁹ five-dollar Urbanspoon reviews,⁸⁰ and so on. Other Fiverr users say they will post on any site the review solicitor chooses.⁸¹ The writers-for-hire try to entice purchasers by mentioning how “authentic” their writing sounds.⁸² Some offer to write several posts about the same business, just using different social media accounts on different days.⁸³ Others say they will post a review supplied to them by the company using different accounts and different Internet Protocol (IP) addresses to prevent detection of the fake reviews.⁸⁴ In short, it is easy to find writers-for-hire willing to post fake reviews for a low price.

No matter which site the writer places the review on, and how the writer and purchaser connect, if the review is fabricated or completely untrue, and it is not disclosed, then the writer and purchaser could be liable for a violation of federal and potentially state law, which this Note will explore in Part III.⁸⁵

77. See *Writing & Translation, Reviews*, FIVERR, <http://fiverr.com/categories/writing-translation/writing-reviews> (last visited Oct. 29, 2013) (listing current offers to complete writing or translation projects for five dollars).

78. *Id.*

79. *E.g., I Will Write a Glowing Review of Your Product or Service for \$5*, FIVERR, <http://fiverr.com/zandramoore/write-a-glowing-review-of-your-product-or-service> (last visited July 14, 2013) (“All you need to do is just tell me what you want the review to say, and then you can leave the rest up to me.”).

80. *E.g., I Will Provide You with Original Content for Your Urbanspoon Listing for \$5*, FIVERR, <http://fiverr.com/whyseoaboutseo/provide-you-with-origianl-content-for-your-urbanspoon-listing> (last visited Sept. 3, 2013) (“You are also welcome to supply me with your own precise and specific text. Need more then [sic] one, feel free to order more for different contextual reviews.”).

81. *E.g., I Will Create a Sparkling Review for Your Business for \$5*, FIVERR, <http://fiverr.com/aligtee/create-a-sparkling-review-for-your-business> (last visited Sept. 3, 2013) (“I will use my ‘Word-Smithing’ Talents [sic] to write a *sparkling* review for you, your services, your product or your business in general on all of the popular review sites using my very own existing accounts! I understand there are different arenas for different industries and I am familiar with them all and already have accounts on each :) Whether you’re a dentist, plastic surgeon, own a deli or a pizza parlor, remodel kitchens or mow lawns. . . I’ve got you covered.”).

82. *E.g., I Will Post a Positive Google Reviews Real and Organic Only for \$5*, <http://fiverr.com/googlereviews/give-you-4-permanent-and-sticky-us-google-reviews> (last visited Sept. 3, 2013) (offering “positive” reviews and packages that make the reviews “look more natural”).

83. See *Search Results for Separate Accounts*, http://fiverr.com/gigs/search?query=separate+accounts&order=&x=0&y=0&search_in=sub_category&sub_category=writing-reviews&category=writing-translation (last visited Sept. 3, 2013) (compiling a list of authors willing to write multiple fake reviews and post them under different account names).

84. *I Will Leave 1 REALISTIC Review or Testimonial for \$5*, FIVERR, <http://fiverr.com/choochypuss/leave-2-realistic-reviews-feedback-comments-or-testimonials-from-new-emails-and-ip-addresses> (last visited Sept. 3, 2013) (“I deliver reviews [sic] that use new IP’s and emails for every account. I also write them in a realistic non B.S. way. They might might [sic] even have spellings/grammar [sic] mistakes on purpose to further push that idea [sic] of a customer quickly logging in to leave a review.”).

85. See 16 C.F.R. § 255.5 (2012) (“When there exists a connection between the endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorsement (*i.e.*, the connection is not reasonably expected by the audience), such connection must be fully disclosed.”).

D. Developments in Online Advertising and Reputation Management

To comprehend how fake reviews correspond to online advertising and reputation management, it is also important to know the history of these industries. Advertising has been part of the U.S. culture and economy for centuries.⁸⁶ As Kirchhoff explains, the first known advertisement published in the United States was in the *Boston News-Letter* in 1704; it was an ad for an estate in Oyster Bay, New York.⁸⁷ In 1729, Benjamin Franklin's *Pennsylvania Gazette* came onto the scene with pages of ads.⁸⁸ Today, Americans see 500 to 1,000 advertising messages daily in print, on TV, and online.⁸⁹

These ads help the public by informing it about products and services that increase competition.⁹⁰ However, misleading or false advertising like fake reviews can cause consumers to buy products that are inferior, harmful, or unnecessary.⁹¹ The problem of fake reviews is just one of many current legal issues in the Internet advertising context.⁹² The government has also recently cracked down on advertising targeting children and consumer tracking.⁹³ The common thread in these issues is the use of deception by the advertiser.

Online advertising has developed concurrently with online reputation management, a type of public relations for online image. Although some businesses use social media to blast out fake, positive brand messages, other businesses have started to play defense, hiring reputation management agencies to locate false or defamatory reviews about their product or service.⁹⁴ The agency then blocks "false, misleading or irrelevant content" or combats negative material by "replacing it with positive, truthful content."⁹⁵ Research firm Gartner predicts more reputation management companies will form, offering services in "reputation defense versus reputation creation."⁹⁶

Reputation.com is one example of a reputation management company playing defense for both individual and company brands.⁹⁷ Since its creation in 2006, Reputation.com has stated its belief that "individuals have the right to control how they look online."⁹⁸ Reputation.com advertises that it will bury misleading personal information and ensure its clients are not confused with other people who have the same name.⁹⁹ Besides its reputation maintenance

86. Suzanne M. Kirchhoff, *Advertising Industry in the Digital Age*, in ADVERTISING DEVELOPMENTS AND ISSUES IN THE DIGITAL AGE 1, 4 (William L. Poulsen ed., 2011).

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. Jasmin Melvin, 'Do Not Track' Internet Spat Risks Legislative Crackdown, REUTERS (July 23, 2012), <http://www.reuters.com/article/2012/07/23/internet-tracking-idUSL2E8IN7YG20120723>.

94. See, e.g., *Personal*, REPUTATION.COM, <http://www.reputation.com/online-internet-privacy-software> (last visited Sept. 3, 2013) (detailing the company's online reputation management services).

95. *About Us*, REPUTATION.COM, <http://www.reputation.com/about> (last visited Sept. 16, 2013).

96. Press Release, Gartner, *supra* note 16.

97. REPUTATION.COM, <http://www.reputation.com/> (last visited Sept. 16, 2013).

98. *About Us*, *supra* note 95.

99. *Id.*

plans, it also offers privacy protection plans to monitor and eliminate its clients' personal data on the web.¹⁰⁰

There are several other companies who have become part of the online reputation management circle. BrandsEye started providing a beta version of its programs in 2006.¹⁰¹ Compared to Reputation.com's defensive PR strategy, BrandsEye offers more traditional PR work, but translates it to the Web. For instance, it monitors how its clients are "mentioned" in social media, and analyzes if the mentions are positive, negative, humorous, etc., rather than just aggregating the data or counting the number of times the client appears in search engines lists.¹⁰² Blue Fountain Media offers a mix of offensive and defensive PR work.¹⁰³ It detracts from negative brand information by utilizing search engine optimization, so its clients' positive pages come up first, and creating a positive social media presence for its clients, among other tactics.¹⁰⁴

Review Trackers, on the other hand, has found its niche in the business of online reviews. Review Trackers scours websites solely to compile, organize, and analyze online reviews written about its business clients.¹⁰⁵ It neither writes reviews for its clients, nor eliminates fake ones. Instead, it supplies "online review alerts" so the client "can listen and respond to all online reviews about [its] business."¹⁰⁶ There are countless businesses offering similar review-oriented services.¹⁰⁷

Unfortunately, it can be easy to cross the line from permissive reputation management or review tracking to prohibited conduct. An ABC TV station in Denver, Colorado, found out a woman was filtering negative customer reviews under the guise of reputation management for her clients.¹⁰⁸ Ginger Jones's company, Buzz Reactor, requested, collected, and posted customer reviews on Google Places—but only if the reviews were positive.¹⁰⁹ Jones did not post reviews if customers awarded her client fewer than three out of five possible stars.¹¹⁰ Jones also created Google accounts for the specific purpose of posting the positive reviews and used the same accounts to post reviews about several of her clients.¹¹¹

100. *Personal*, *supra* note 94.

101. *About Overview*, BRANDSEYE, <http://www.brandseye.com/about-us/overview/> (last visited Sept. 3, 2013).

102. *Crowd*, BRANDSEYE, <http://www.brandseye.com/features/crowd> (last visited Sept. 16, 2013).

103. *Blue Fountain Media CEO Gabriel Shaolian Lectures on Online Reputation Management*, BLUE FOUNTAIN MEDIA (Apr. 1, 2010), <http://www.bluefountainmedia.com/company-news/blue-fountain-media-ceo-lectures-on-online-reputation-management/> ("The best defense is a good offense.").

104. *Online Reputation Management*, BLUE FOUNTAIN MEDIA, <http://www.bluefountainmedia.com/online-reputation-management> (last visited Sept. 16, 2013).

105. *Here's How It Works*, REVIEWTRACKERS, <http://www.reviewtrackers.com/tour/> (last visited Sept. 16, 2013).

106. *Id.*

107. Other examples of review management services include ReviewBuzz.com, ReviewPush.com, ChatMeter.com, TestimonialShield.net, and ReputationRanger.com.

108. Amanda Kost, *Woman Paid to Post Five-Star Google Feedback*, THE DENVER CHANNEL.COM (May 21, 2012), <http://www.thedenverchannel.com/news/woman-paid-to-post-five-star-google-feedback>.

109. *Id.*

110. *Id.*

111. *Id.*

It is not just small businesses that have come into the spotlight for manipulating consumer reviews. There are several well-known instances of fake online reviews, endorsements, and deceptive online comments by larger companies.¹¹² For example, Whole Foods CEO John Mackey created a fake pseudonym based on his wife's name and used it to post favorable information about his own company and criticize a rival online before Whole Foods acquired it.¹¹³ Under the name "rahodeb," Mackey wrote comments about the Wild Oats grocery chain on Yahoo! financial message boards, including questions about why consumers would purchase shares of Wild Oats.¹¹⁴ Mackey engaged in the conduct for several years, from 1999 until the middle of 2006, and posted more than 1,100 entries.¹¹⁵ As far as the legality of his behavior, former SEC Chairman Harvey Pitt explains, "It's clear that he is trying to influence people's views and the stock price, and if anything is inaccurate or selectively disclosed he would indeed be violating the law. At a minimum, it's bizarre and ill-advised, even if it isn't illegal . . ." ¹¹⁶ Is the risk of facing government regulators for posing as a genuine consumer even worth it? What about the potential for public backlash when a company or individual is "outed" for fake or deceptive reviews? Part IV of this Note will discuss the idea of public backlash further. In Mackey's case, when the media started to report about his "alter ego," he fired back by defending himself on the Whole Foods company website.¹¹⁷ He also faced an investigation by the SEC as a result of his comments.¹¹⁸

Besides scheming potential customers, some astroturfers attempt to extort the very person or business the fake review is about.¹¹⁹ As one recent news broadcast reported, realtors recently discovered fake ratings about them posted on the website *realtor-complaints.com*.¹²⁰ When the realtors requested that the Webmaster remove the reviews, he refused to do so, unless they paid one hundred dollars per review.¹²¹ However, real estate trade association attorneys

112. E.g., Arlen Parsa, *Belkin's President Responds to the Daily Background Report About Faked Product Reviews*, DAILY BACKGROUND (Jan. 18, 2009), <http://www.thedailybackground.com/2009/01/18/belkins-president-responds-to-the-daily-background-report-about-faked-product-reviews/> (explaining how Belkin reacted to one of its employees soliciting fake reviews of Belkin products); see also Russ Taylor, *DeLonghi Faking Its Amazon Product Reviews*, RUSS TAYLOR EPHEMERA (June 9, 2009), <http://www.russtaylor.info/home/2009/6/9/delonghi-faking-its-amazon-product-reviews.html> (noting that a DeLonghi communications representative posted Amazon reviews of company products).

113. *Whole Foods CEO Used Fake Name to Knock Rival*, CHRON (July 12, 2007) [hereinafter *Fake Name*], <http://www.chron.com/business/article/Whole-Foods-CEO-used-fake-name-to-knock-rival-1830788.php>.

114. *Id.*

115. *How Whole Foods C.E.O. Led 2 Lives*, DEALBOOK (July 12, 2007, 8:36 AM) [hereinafter *Led 2 Lives*], <http://dealbook.nytimes.com/2007/07/12/whole-foods-ceo-posted-online-attacks-about-wild-oats/>; *Fake Name*, *supra* note 113.

116. *Fake Name*, *supra* note 113.

117. *Led 2 Lives*, *supra* note 115.

118. Peter Lattman, *Should Whole Foods CEO Be Punished?*, WALL ST. J. (July 16, 2007, 9:14 AM), <http://blogs.wsj.com/law/2007/07/16/should-whole-foods-ceo-be-punished/>.

119. See, e.g., *Look Out for Fake Online Reviews* (Fox 17 television broadcast Feb. 1, 2013), available at <http://fox17online.com/2013/02/01/look-out-for-fake-online-reviews> (explaining one realtor's experience as the victim of a fake review scam).

120. *Id.*

121. *Id.*

launched an investigation into the site’s practices after noticing similar wording in many of the reviews and seeing a discrepancy between the domain’s registration date and its claimed founding.¹²² The website shut down approximately two weeks later.¹²³

It is clear that astroturfers come in various forms—freelancers, company employees, business rivals, and even on occasion a corporate officer. No matter the form, the problem of fake online reviews is rampant.

III. ANALYSIS

Analyzing the legal implications of writing and posting fake online reviews is not an easy task. This Part will cover how fake reviews fit into current law, discuss the legal ramifications for both employers and writers engaged in the fake review business, and evaluate how, if at all, the current laws affect creativity in online reputation management and advertising. This Part approaches these topics by using relevant case law and recent legal proceedings to explain how courts have applied the law to this escalating issue.

A. *Current Law and Guidelines Regarding Fake and/or Compensated Reviews*

The Federal Trade Commission (FTC) is the independent governmental agency charged with bringing legal action against individuals and companies who violate federal consumer protection and antitrust laws.¹²⁴ The FTC Act states that unfair methods of competition and dissemination of false advertisements are illegal.¹²⁵ The FTC publishes “Guides” in order to educate the public about the best practices for complying with these FTC Act restrictions.¹²⁶ Although the Guides are not binding law, as administrative interpretations of the FTC Act, they are entitled to substantial deference in court.¹²⁷ Advertising is one of the major topics, and industries, covered by the FTC Guides.¹²⁸

122. Stacey Moncrieff, *Don’t Let Your Reputation—or Your Wallet—Fall Prey to Scam Complaint Site*, NAT’L ASS’N REALTORS (Jan. 10, 2013), <http://speakingofrealestate.blogs.realtor.org/2013/01/10/don%E2%80%99t-let-your-reputation%E2%80%94or-your-wallet%E2%80%94fall-prey-to-scam-complaint-site/>.

123. Mark K. Hicks, *Realtor-complaints.com Shuts Down After Realty Trade Associations Investigate*, REALTY TIMES (Jan. 29, 2013), http://realtymtimes.com/rtpages/20130129_investigation.htm; Stacey Moncrieff, *Fake Complaint Site Now Dormant*, NAT’L ASS’N REALTORS (Jan. 24, 2013), <http://speakingofrealestate.blogs.realtor.org/2013/01/24/fake-complaint-site-now-dormant/>.

124. *About the Federal Trade Commission*, FED. TRADE COMMISSION, <http://www.ftc.gov/ftc/about.shtm> (last visited Sept. 3, 2013).

125. 15 U.S.C. §§ 45, 52 (2012).

126. See *Legal Resources*, FED. TRADE COMMISSION, <http://business.ftc.gov/legal-resources/all/33> (last visited Sept. 17, 2013) (listing laws, rules, and FTC Guides).

127. See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (“We have long recognized that considerable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations.”).

128. See *Guidance Documents: Advertising and Marketing*, FED. TRADE COMMISSION, <http://business.ftc.gov/legal-resources/1/33> (last visited Sept. 17, 2013) (listing all of the FTC guidance

The specific action of posting fake or compensated reviews without disclosing the nature of the review falls under the FTC Dot Com Disclosure Guide, originally published in 2000 and updated in March 2013.¹²⁹ This Guide is the Internet-focused counterpart to the FTC Guides Concerning Use of Endorsements and Testimonials in Advertising (Endorsements Guides).¹³⁰ In 2009, the FTC published revisions to the Endorsements Guides in order to clarify how blogger endorsements are treated under the FTC Act.¹³¹ In essence, the Endorsements Guides define an endorsement as “any advertising message . . . that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser.”¹³² Fake or compensated online reviews would likely be considered “endorsements” under this definition as well, even if the 2013 FTC Dot Com Disclosure Guide does not articulate the issue of fake consumer reviews directly.¹³³

1. *Analogizing to Blogger Disclosure Guidelines*

Although neither of the Guides discusses *specific* examples of how fake online reviews are treated by the FTC, it is likely that the FTC would treat the failure to disclose similarly to a blogger disclosure situation.¹³⁴ For instance, pursuant to federal regulations governing the use of endorsements and testimonials in advertising, if the writer of an online review earns compensation for posting the review, there is a duty to disclose the writer’s connection to the retailer or service-provider.¹³⁵ Not only is the *retailer* liable for a failure to disclose the connection, but the *writer* may be liable as well.¹³⁶

One potentially analogous situation offered by the Endorsements Guides is about an employee of a company that produces one of the leading portable music players in the industry.¹³⁷ The employee visits online message boards frequented by MP3 player fans and posts messages on the boards praising his

documents by selecting “Advertising and Marketing” from the drop-down menu and then “Laws, Rules, and Guides” from the sub-menu/tabs).

129. FED. TRADE COMM’N, DOT COM DISCLOSURES: HOW TO MAKE EFFECTIVE DISCLOSURES IN DIGITAL ADVERTISING (2013), available at <http://www.ftc.gov/os/2013/03/130312dotcomdisclosures.pdf>.

130. 16 C.F.R. § 255 (2013).

131. Press Release, Fed. Trade Comm’n, FTC Publishes Final Guides Governing Endorsements, Testimonials (Oct. 5, 2009) [hereinafter Press Release, FTC], available at <http://www.ftc.gov/opa/2009/10/endortest.shtm>.

132. 16 C.F.R. § 255.0(b) (2012).

133. One critic has also pointed out that the updated Dot Com Disclosure Guide is “still heavily weighted toward ‘big company’ digital advertising and does not provide much guidance for nontraditional marketing and advertising programs.” Sara Hawkins, *What Marketers Need to Know About the New FTC Disclosures*, SOC. MEDIA EXAMINER (May 1, 2013), <http://www.socialmediaexaminer.com/ftc-2013-disclosures/>.

134. See, e.g., Len Glickman & Jessica Fingerhut, *User-Generated Content Recent Developments in Canada and the United States*, ENT. & SPORTS LAW., Nov. 2012, at 3, 12 (noting that connections between bloggers and product manufacturers that consumers would not expect must be disclosed).

135. See 16 C.F.R. § 255.1(d) (stating advertisers are “liable for false or unsubstantiated” comments made by their endorsers and for failure “to disclose the material connections between themselves and the endorsers”).

136. *Id.* (“Endorsers also may be liable for statements made in the course of their endorsements.”).

137. 16 C.F.R. § 255.5.

employer's products, all without saying that he works for the company.¹³⁸ As the Guides explain, knowing the employee's connection to the company would likely "affect the weight or credibility of [his] endorsement."¹³⁹ Thus, the employee should clearly state to the message board his connection to the company.¹⁴⁰ It follows that if he does not disclose his connection, he and his employer could both be held liable.¹⁴¹

It seems evident that the Guides would prohibit similar undercover conduct carried out in other online forums.¹⁴² For example, author Valerie X. Armstrong recently told the *New York Times* that her son's review of her book *The Survival of the Fattest* was deleted from Amazon during the site's latest consumer review removal.¹⁴³ When Armstrong's son attempted to re-post his five-star review, Amazon would not accept it.¹⁴⁴ Whether or not he posted it under his own name (and thus disclosed his connection to the author) is unclear; however, it is apparent that Amazon detected his connection to Armstrong and refused his review.¹⁴⁵

2. *Compliance Through Site-Specific Standards*

Websites that offer the opportunity for consumer comments and reviews typically have their own review guidelines or standards, aimed at curbing deceptive or fake reviews.¹⁴⁶ Reading the policies that exist on some of the websites with the most active consumer reviewers provides insight into how these online retailers try to foster a community of talkative consumers while promoting legal, ethical conduct. It also brings to light potential loopholes, which have allowed astroturfers to plant fake reviews without detection.¹⁴⁷

In the case of Internet retail giant Amazon, what surprises some consumers is that there is no requirement that the reviewer actually purchase, own, or consume the product she is reviewing.¹⁴⁸ In response to a large deletion of promotional content on its website,¹⁴⁹ Amazon recently clarified its

138. *Id.*

139. *Id.*

140. *Id.*

141. 16 C.F.R. § 255.1(d).

142. 16 C.F.R. § 255.5.

143. Streitfeld, *supra* note 57.

144. *Id.*

145. See *General Review Creation Guidelines*, AMAZON.COM, <http://www.amazon.com/gp/community-help/customer-reviews-guidelines> (last visited Sept. 17, 2013) [hereinafter *Review Creation*] ("[Amazon] reserve[s] the right to remove reviews that include . . . Sentiments by or on behalf of a person or company with a financial interest in the product . . ."); Streitfeld, *supra* note 57.

146. See, e.g., *Review Creation*, *supra* note 145.

147. See *supra* note 11 and accompanying text.

148. Some people think this Amazon policy is counter-productive. See, e.g., Streitfeld, *supra* note 57 ("Giving raves to family members is no longer acceptable. . . . But showering five stars on a book you admittedly have not read is fine.").

149. Damian Ghigliotty, *Amazon Deletes Thousands of Obviously Fake Book Reviews to the Anger of Several Authors*, MAIL ONLINE (Dec. 24, 2012, 5:07 AM), <http://www.dailymail.co.uk/news/article-2252738/Amazon-deleting-thousands-obviously-fake-book-reviews-anger-authors.html>; Streitfeld, *supra* note 57.

guidelines¹⁵⁰ regarding consumer reviews, citing specific examples of prohibited conduct.¹⁵¹ Some of the examples, which closely mirror examples the FTC provides,¹⁵² include posting a review in exchange for five dollars, product manufacturers posting reviews of their own products undercover, and sellers posting negative reviews of their rivals' products.¹⁵³ The TechCrunch blog summed up Amazon's recent enforcement efforts and asked, "Add it all up and what do you get? It seems like a pretty complicated and opaque system"¹⁵⁴ Yet Amazon reports that it has ramped up its detection of promotional content.¹⁵⁵

Barnes & Noble's Review Rules, on the other hand, do not provide clear definitions of which content is considered promotional or advertising.¹⁵⁶ They do note that all information in the review must be "original," and that advertisements are prohibited in the body of the review.¹⁵⁷ In the "Interactive Community" portion of the site's Terms and Conditions of Use, it prohibits the posting of "unlawful" material, advertisements, or material that would "give rise to civil liability;" however, there is no specific mention of manipulated reviews.¹⁵⁸ Like Amazon, Barnes & Noble has no requirement in its Terms and Conditions of Use that consumers must have read the book or used the product in order to post a review.¹⁵⁹

Consumer opinion aggregator Yelp, which has been known to have promotional review issues,¹⁶⁰ is much more upfront about what conduct it examines when determining if its users are "playing nice."¹⁶¹ It explicitly states some of the different types of undercover reviews.¹⁶² Although it does not state that this behavior is illegal, it notes the need for objectivity and a lack of "commercial noise" on the site.¹⁶³ Last October, Yelp also started to draw

150. *Review Creation*, *supra* note 145.

151. *E.g.*, *Customer Review Guidelines Frequently Asked Questions*, AMAZON.COM, http://www.amazon.com/gp/help/customer/display.html/ref=amb_link_47889982_2?ie=UTF8&nodeId=201077870&pop-up=1&pf_rd_m=ATVPDKIKX0DER&pf_rd_s=center-1&pf_rd_r=1Z8WRYB4JBP8XHCZQ9R9&pf_rd_t=7001&pf_rd_p=1422290442&pf_rd_i=customer-reviews-guidelines (last visited Sept. 17, 2013) [hereinafter *FAQ*] (prohibiting customers from posting reviews in exchange for five dollars, prohibiting product manufacturers posting reviews as normal consumers, etc.).

152. 16 C.F.R. § 255.5 (2012).

153. *FAQ*, *supra* note 151.

154. Anthony Ha, *Amazon Says Its Customer Review Guidelines Haven't Changed, but It Is Cracking Down on 'Promotional Content'*, TECHCRUNCH (Dec. 24, 2012), <http://techcrunch.com/2012/12/24/amazon-customer-reviews/>.

155. *FAQ*, *supra* note 151.

156. *Write Your Own Review*, BARNES & NOBLE, http://www.barnesandnoble.com/reviews/review_rules.asp (last visited Sept. 5, 2013).

157. *Id.*

158. *Terms and Conditions of Use*, BARNES & NOBLE, http://www.barnesandnoble.com/include/terms_of_use.asp (last visited Sept. 5, 2013).

159. *Id.*

160. *See generally* Kathleen Richards, *Yelp and the Business of Extortion 2.0*, EAST BAY EXPRESS (Feb. 18, 2009), <http://www.eastbayexpress.com/oakland/yelp-and-the-business-of-extortion-20/Content?oid=1176635> (detailing promises to remove negative reviews in exchange for advertising on Yelp).

161. *Content Guidelines*, YELP, <http://www.yelp.com/guidelines> (last visited Sept. 17, 2013).

162. *See id.* (singling out conflicts of interest and promotional content as two kinds of unauthorized conduct).

163. *Id.*

attention to its site users who failed to comply with this policy.¹⁶⁴ For more information on this enforcement tactic, see *infra* Part IV.B.3.

TripAdvisor.com's (TripAdvisor's) standards provide yet another example of how a website with so much consumer-generated content attempts to comply with the FTC Guides.¹⁶⁵ TripAdvisor specifically bans management or employees from posting about their own property, including former employees.¹⁶⁶ It also disallows management or employees of a property to post reviews of "properties of the same type (accommodation, restaurant, or attraction) within the same city or town, or within ten miles of that property."¹⁶⁷ Clearly this is meant to prevent posting fake negative reviews about rivals or biased information. Another notable difference in the TripAdvisor review standards versus other websites' review standards is the limit on number of reviews.¹⁶⁸ TripAdvisor only allows a consumer to post one review per accommodation, attraction, or restaurant.¹⁶⁹ If the user wishes to update the review based on a later experience, the site has specific protocols in place.¹⁷⁰ These restrictions put in place a waiting period of one month between restaurant reviews of the same place.¹⁷¹ If the user wishes to post a second review of the same accommodation or attraction, there is a three-month waiting period between the first and second review.¹⁷²

B. Companies Controlling the Conversation

There are several recent examples of fake reviews coming straight from the source—the business leaders or their employees. These individuals may write undercover promotional reviews to boost profits or negative comments to harm rivals. This Part will analyze recent legal proceedings that have combated the issue of manipulated online reviews, both in positive and negative forms.

1. Faking Flattery

"Astroturfing" is defined as company employees posting positive online reviews about their own company while posing as normal, unbiased consumers.¹⁷³ One of the earliest legal proceedings involving astroturfing

164. Eric Singley, *Consumer Alerts: Because You Might Like to Know...*, YELP WEB LOG (Oct. 18, 2012), <http://officialblog.yelp.com/2012/10/consumer-alerts-because-you-might-like-to-know.html>.

165. *Our Guidelines for Traveler Reviews*, TRIPADVISOR (June 25, 2013, 8:51 AM), http://tripadvisor.custhelp.com/app/answers/detail/a_id/534/kw/review%20guidelines.

166. *What Constitutes a First-Hand Traveler Review?*, TRIPADVISOR (June 24, 2013, 7:40 AM), http://tripadvisor.custhelp.com/app/answers/detail/a_id/1623.

167. *Id.*

168. *Our Guidelines for Traveler Reviews*, *supra* note 165.

169. *Id.*

170. *How Often Can I Write a Review?*, TRIPADVISOR (June 25, 2013, 2:04 PM), http://www.tripadvisor.com/help/how_often_can_i_write_a_review.

171. *Id.*

172. *Id.*

173. Glickman & Fingerhut, *supra* note 134, at 13–14.

occurred in the state of New York in 2009.¹⁷⁴ In that case, the Attorney General of New York reached a settlement with Lifestyle Lift, a cosmetic surgery company, after its employees posted fake consumer reviews online.¹⁷⁵

Lifestyle Lift ordered its employees to go undercover and post positive reviews about the company.¹⁷⁶ According to a press release from the Attorney General, one email to Lifestyle Lift employees said: “Friday is going to be a slow day—I need you to devote the day to doing more postings on the web as a satisfied client.”¹⁷⁷ Another internal email directed an employee to “[p]ut your wig and skirt on and tell them about the great experience you had.”¹⁷⁸ An archived version of one of its promotional websites illustrates the kind of conduct Lifestyle Lift employees would engage in online.¹⁷⁹ In one 2008 post, “Ann” is an undercover employee claiming that she underwent surgery with Lifestyle Lift.¹⁸⁰ Ann goes on to say she created MyFaceliftStory.com in order to share her experience with the company and to post reviews from other purportedly real consumers.¹⁸¹ She writes that any negative online comments about Lifestyle Lift are likely from “envious doctors and just made up” and she guarantees the reviews on the site “are true stories not made up by doctors or their staff.”¹⁸²

Not only did Lifestyle Lift employees deceive on their own promotional website, they took the deception one step further by attacking *genuine* consumer reviews.¹⁸³ Employees would scour the Internet and try to get those genuine criticisms removed from websites and message boards.¹⁸⁴

As part of the settlement with the state Attorney General, the company agreed to not have its management or employees pose as unbiased consumers.¹⁸⁵ A key portion of the settlement requires that Lifestyle Lift comply with the law by “clearly and conspicuously disclosing” any connection they have to promotional content online.¹⁸⁶ It also had to pay penalties of \$300,000 to the state of New York.¹⁸⁷

Astroturfing has also landed companies such as DeLonghi in ethical trouble.¹⁸⁸ In one case, DeLonghi Communications Manager Tara Carpenter

174. See Press Release, Plastic Surgery, *supra* note 13 (“The case is believed to be the first in the nation aimed at combating ‘astroturfing,’ a growing problem on the Internet.”).

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Lifestyle Lift—Is It a Scam?*, MYFACELIFTSTORY (Feb. 12, 2008), <http://www.myfaceliftstory.com/> (available through INTERNET ARCHIVE WAYBACK MACHINE, <http://web.archive.org/web/20080212021019/http://www.myfaceliftstory.com/> (last visited Mar. 13, 2013)).

180. *Id.*

181. *Id.*

182. *Id.*

183. Press Release, Plastic Surgery, *supra* note 13.

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. See Taylor, *supra* note 112 (explaining how a DeLonghi employee posted fake five-star reviews).

posted five-star reviews of twelve different DeLonghi products on Amazon.¹⁸⁹ Carpenter posted under the name “T. Carpenter”—an abbreviated version of her actual name—but did not disclose that she worked for DeLonghi.¹⁹⁰ Blogger Russ Taylor discovered Carpenter’s connection to DeLonghi when he did some of his own research.¹⁹¹ When Taylor saw she posted twelve glowing reviews of home products, he Googled “Carpenter” and “DeLonghi” and found out her connection.¹⁹² Carpenter and DeLonghi did not face legal action because the disclosure rules did not become effective until the end of 2009,¹⁹³ after the conduct at issue. However, if Carpenter engaged in the same behavior now—posting favorable reviews without disclosing her company ties—she would violate the disclosure rules.¹⁹⁴

2. *Negative Fake Reviews and Defamation Claims*

Negative fake reviews can also have serious legal consequences. These claims are often brought in the context of defamation lawsuits.¹⁹⁵ Recently, some defamatory postings led to the lawsuit of *Fireworks Restoration Co. v. Hosto*. In this case, the defendant co-founded the plaintiff business.¹⁹⁶ When the co-founders’ business relationship turned sour, the defendant posted three fake derogatory reviews about the business to ward off potential customers.¹⁹⁷ He also used the names of *real* customers in the postings without their permission.¹⁹⁸ Once the plaintiff learned about the postings and discovered the defendant was responsible for them, the plaintiff brought a defamation suit against him.¹⁹⁹ In its decision, the appellate court wrote about the “great importance a business places in its reputation and the significant role the internet plays in that regard.”²⁰⁰ After posting two critical reviews, the defendant logged online again “to post an additional fictitious review because he ‘felt something satisfying in’ posting the initial derogatory reviews.”²⁰¹ This testimony supported the court’s decision to affirm the \$1 actual damages

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *See* 16 C.F.R. § 255.5 (2012) (stating effective date as December 1, 2009).

194. *See id.* (“When there exists a connection between the endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorsement (i.e., the connection is not reasonably expected by the audience), such connection must be fully disclosed.”).

195. It is important to note that the Communications Decency Act of 1996 does not allow victims of online defamation to bring their defamation claims against the website operator. *See* 47 U.S.C. § 230(c) (2012) (“No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”). This means the victim of the fake negative online review—the defamatory material—needs to identify the actual individual who wrote the review in order to bring suit. A victim can identify the poster by filing a “John Doe” lawsuit. Travis Crabtree, *The Cost of Fake Online Reviews Goes Beyond Morality*, EMEDIA L. INSIDER (June 8, 2012), <http://www.emedialaw.com/the-cost-of-fake-online-reviews-goes-beyond-morality/>.

196. *Fireworks Restoration Co. v. Hosto*, 371 S.W.3d 83, 85 (Mo. Ct. App. 2012).

197. *Id.* at 86.

198. *Id.*

199. *Id.* at 87.

200. *Id.* at 92.

201. *Id.* at 93.

award and \$150,000 punitive damages award for the plaintiff.²⁰²

In December 2012, a Virginia court handled a similar, potentially defamatory statement in the form of a service review.²⁰³ In *Dietz Development, LLC v. Perez*, however, the court had to analyze online reviews written by a real customer.²⁰⁴ In that situation, contractor Christopher Dietz sued former client Jane Perez for \$750,000 for allegedly defaming him and his business over the Internet.²⁰⁵ Perez posted on Yelp and Angie's List, popular review websites, that Dietz damaged her home, stole jewelry, and billed her for work he never performed.²⁰⁶ Dietz's complaint requested a preliminary injunction barring Perez from writing similar reviews.²⁰⁷ Although the Circuit Court for Fairfax County granted the injunction,²⁰⁸ the Supreme Court of Virginia reversed, finding the preliminary injunction was "not justified."²⁰⁹ Public Citizen, a nonprofit consumer advocacy organization, and the American Civil Liberties Union argued the motion submitted to the Virginia Supreme Court and explained that the reversal is a "victory for free speech on the Internet."²¹⁰ The reversal means Perez does not have to alter her online reviews; however, the case is proceeding for a trial on damages.²¹¹

The medical community is also calling on courts to seek relief for allegedly defamatory posting by patients.²¹² In 2010, Chicago surgeon Jay Pensler sued three former patients because of their online reviews of his plastic surgeries.²¹³ The former patients wrote reviews calling their surgical results "disfiguring" and "just horrific," among other comments.²¹⁴ One poster, for instance, personally attacked Pensler, calling him "dangerous," "ruthless," and a "liar."²¹⁵ In regard to those descriptions, the court determined that "a reasonable person would understand these statements as pure opinions and not as stating actual facts" and therefore dismissed the claim regarding that

202. *Id.* at 85.

203. Elizabeth Hartfield, *Bad Yelp Review Results in Lawsuit for Virginia Woman*, ABC NEWS (Dec. 7, 2012), <http://abcnews.go.com/Business/woman-sued-giving-bad-online-reviews/story?id=17894367>; Justin Jouvenal, *Virginia Woman Is Sued over Her Yelp Review*, WASH. POST (Dec. 4, 2012), http://articles.washingtonpost.com/2012-12-04/local/35625084_1_yelp-online-reviews-defamation.

204. See Jouvenal, *supra* note 203 (writing Perez was a customer "[a]ngered by what she thought was shoddy work on her home . . .").

205. Hartfield, *supra* note 203.

206. Jouvenal, *supra* note 203.

207. *Id.*

208. Transcript of Hearing at 148, *Dietz Dev., LLC v. Perez*, No. CL2012-16249 (Va. Cir. Dec. 5, 2012).

209. *Perez v. Dietz Dev., LLC*, No. 122157, 2012 WL 6761997, at *1 (Va. Dec. 28, 2012).

210. Andrew Coutts, *Negative Yelp Review Will Not Be Censored, Virginia Court Rules*, DIGITAL TRENDS (Jan. 2, 2013), <http://www.digitaltrends.com/web/negative-yelp-review-will-not-be-censored-virginia-court-rules/>.

211. Cyrus Farivar, *Judge Can't Order Yelp User to Edit Negative Review*, ARS TECHNICA (Jan. 2, 2013, 4:45 PM), <http://arstechnica.com/tech-policy/2013/01/judge-cant-order-yelp-user-to-edit-negative-review/>.

212. Dina ElBoghady, *Some Doctors Try to Squelch Online Reviews*, WASH. POST (Jan. 28, 2012), http://articles.washingtonpost.com/2012-01-28/business/35441814_1_yelp-online-reviews-doctors; Ki Mae Heussner, *Plastic Surgeon Sues Clients Over Negative Reviews on Yelp, Citysearch*, ABC NEWS (Nov. 29, 2010), <http://abcnews.go.com/Technology/plastic-surgeon-sues-clients-negative-reviews-yelp-citysearch/story?id=12227753#UMDO4288CS0>.

213. Heussner, *supra* note 212.

214. *Id.*

215. *Id.*

review.²¹⁶ Even though the Court acknowledged Pensler could still suffer reputational harm, without any clear assertions of *fact*, it had to dismiss.²¹⁷

Other practitioners in the medical field have gone to greater extremes to try to prevent negative reviews online.²¹⁸ There are varying opinions about whether or not tactics like do-not-talk contracts are necessary, as some believe that the majority of reviews are positive.²¹⁹ Those that critique the physicians and their practices tend to focus on easy-to-address issues such as parking difficulties and wait times.²²⁰ This Note further explores do-not-talk contracts as a reputation management tool *infra* in Part III.D.

C. Reviewers for Hire

Unfortunately, companies across several industries have been caught hiring fake review writers. Although some of the following examples have encountered legal action, none has suffered *serious* legal consequences. As discussed *infra*, figuring out what constitutes adequate “disclosure” may be part of the problem.²²¹

In one example, Belkin’s Business Development Representative Mike Bayard got caught soliciting fake reviews for a Belkin router.²²² Bayard used his real name to request the fake reviews on Mechanical Turk, Buy.com, and Newegg, thus making the conduct traceable to him.²²³ The solicitation was a violation of the Guides because Bayard urged the writers to “write as if you own the product and are using it” and not disclose they are paid writers.²²⁴ It also requested the writers mark any negative reviews they spotted as “unhelpful,” likely in hopes they would prompt the elimination of genuine but unfavorable reviews.²²⁵ Belkin’s President apologized for the astroturfing and promised the company would “work earnestly to regain the trust we have lost.”²²⁶

More recently, the FTC has investigated Hewlett-Packard and its public

216. See *Pensler v. Cuevas*, No. 10 CH 35238 (Ill. Cir. Apr. 5, 2011) (“[T]he alleged defamatory statements . . . express a subjective opinion and interpretation that cannot be the basis of a defamation action; even though, the opinion may be derogatory and disparaging to Pensler.”).

217. *Id.*

218. *E.g.*, ElBoghady, *supra* note 212 (describing do-not-talk contracts designed to prevent negative reviews of physicians online).

219. See *id.* (finding eighty-eight percent of online reviews written about three hundred Boston doctors were positive).

220. *Id.*

221. Kyle-Beth Hilfer, *Influencer Marketing Programs: The FTC Is Watching*, KYLE-BETH HILFER, P.C. (Oct. 28, 2012), <http://kbhilferlaw.com/influencer-marketing-programs-the-ftc-is-watching/>; Letter from Mary K. Engle, FTC Assoc. Dir., to Kenneth A. Plevan (Apr. 20, 2010) [hereinafter Ann Taylor Letter], available at <http://www.ftc.gov/os/closings/100420anntaylorclosingletter.pdf> (discussing the small number of bloggers involved and the fact that some did disclose they received gifts from Ann Taylor).

222. Arlen Parsa, *Exclusive: Belkin’s Development Rep Is Hiring People to Write Fake Positive Amazon Reviews*, DAILY BACKGROUND (Jan. 16, 2009, 10:22 PM), <http://www.thedailybackground.com/2009/01/16/exclusive-belkins-development-rep-is-hiring-people-to-write-fake-positive-amazon-reviews/>.

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

relations firm Porter Novelli, Inc., as well as Ann Taylor, for potential violations of Section 5 of the FTC Act.²²⁷ In both cases, the companies provided bloggers with gifts, and asked them to write blog posts regarding the gifts or special preview events.²²⁸ The issue in both cases was whether or not there was disclosure of the relationship between the blogger and the company (i.e., did the blogger explain she got the product she blogged about as a gift).²²⁹ The same disclosure rules apply to compensated or otherwise manipulated online reviews.²³⁰ One factor that weighed against bringing enforcement actions in these cases was the “relatively small number of bloggers” posting the content.²³¹ For ideas on how the Commission can overcome the obstacle of detecting a small number of potential infringers, see *infra* Part IV.

The book publishing industry is an industry in which fake reviews run rampant, and can help make or break an author’s career. In 2010, Todd Rutherford, a marketer for self-publishers, came up with a different way to ensure there were enough reviewers to critique his clients’ books—he would write them himself.²³² Soon enough, Rutherford was running a business, GettingBookReviews.com, and making \$28,000 per month.²³³ He then hired numerous freelancers to help him write the reviews.²³⁴ Although Rutherford knew the websites the reviews were posted on had policies against manipulated reviews, he admits he didn’t pay attention because he “was just a pure capitalist.”²³⁵ In 2011, Google suspended Rutherford’s account because it didn’t approve of the purchased reviews.²³⁶ Again, there was no legal action taken against Rutherford, even though he controlled an operation that manipulated reviews and deceived consumers. Unfortunately, the problem of fake book reviews persists.²³⁷

It is clear astroturfers are finding creative ways to amass manipulated reviews, whether it is by writing them on their own or by hiring others to do the dirty work at a low cost.²³⁸ And with legal enforcement down for fake

227. Hilfer, *supra* note 221; Letter from Mary K. Engle, FTC Assoc. Dir., to John D. Graubert & Amanda P. Reeves (Sept. 27, 2012) [hereinafter HP Letter], available at <http://www.ftc.gov/os/closings/staff/120927hpinkologycltr.pdf>; Ann Taylor Letter, *supra* note 221.

228. See Hilfer *supra* note 221 (explaining the gifts provided by each company).

229. Ann Taylor Letter, *supra* note 221; HP Letter, *supra* note 227.

230. See 16 C.F.R. § 255.5 (2012) (explaining that it would be inappropriate for an employee of a device manufacturer to pose as a consumer and review the manufacturer’s product online).

231. Ann Taylor Letter, *supra* note 221; HP Letter, *supra* note 227.

232. See Streitfeld, *supra* note 20 (“Instead of trying to cajole others to review a client’s work, why not cut out the middleman and write the review himself? Then it would say exactly what the client wanted—that it was a terrific book. A shattering novel. A classic memoir. Will change your life. Lyrical and gripping. Stunning and compelling. Or words to that effect.”).

233. *Id.*

234. *Id.* Brittany Walters-Bearden, a reviewer hired by Rutherford, said she did little-to-no reading before writing the reviews: “There were books I wished I could have gone back and actually read . . . But I had to produce 70 pieces of content a week to pay my bills.” *Id.*

235. *Id.*

236. *Id.*

237. Husna Haq, *Are We Awash in a Sea of Fabricated Reviews?*, CHRISTIAN SCI. MONITOR (Aug. 23, 2011), <http://www.csmonitor.com/Books/chapter-and-verse/2011/0823/Are-we-awash-in-a-sea-of-fabricated-reviews>.

238. *E.g.*, Streitfeld, *supra* note 20 (noting the large numbers of freelancers willing to write fake reviews

reviews, the writers and employers appear to have few incentives to stop, even if they completely disregard FTC guidelines.²³⁹

D. *How the Law Affects Online Reputation Management*

Fake reviews harm online reputation management because they make it difficult for business owners to locate and respond to *genuine* criticism. If business owners need to spend time analyzing whether a review is fake or not, that takes time away from serving customers and improving their product. But how do these reviewing restrictions impact the way businesses control the conversation about their products and services?

For one, by now it is clear that businesses do not have the final say about what gets published about them or their products online, rather consumers often do.²⁴⁰ In fact, trying to hush *genuine* consumer opinions and exercise ultimate control will likely result in public attention—but not the good kind. Some business owners, afraid of what their customers or clients will say about them, have tried to regulate their online reputations by employing do-not-talk contracts, for example.²⁴¹ These are essentially contracts clients sign before receiving service, promising to not rate or review the business online or elsewhere.²⁴²

They have caused a lot of backlash, particularly in the medical industry.²⁴³ Public Citizen filed a class action lawsuit against a dentist in New York for using one in her practice.²⁴⁴ The lead plaintiff in the lawsuit, Robert Allen Lee, signed one while under pain, got treatment, and then posted comments online about a billing dispute with the dentist.²⁴⁵ The dental practice sent him a letter one day later, reminding him about the contract and threatening a \$100,000 lawsuit for “defamation, slander and libel.”²⁴⁶ Medical Justice Services, Inc., the firm that supplied do-not-talk contracts to the dental

for a small paycheck).

239. For instance, see *Earn Money Blogging with SponsoredReviews.com*, SPONSOREDREVIEWS.COM, <http://www.sponsoredreviews.com/bloggers.asp> (last visited Sept. 17, 2013), which specifically tells writers to “not write that you are associated with the company/product you are writing for.” In other words, to not disclose their material connection to the company who bought their “review.” *But see Ethics*, PAYPERPOST, <https://payperpost.com/ethics/> (last visited Sept. 17, 2013) (explaining that this site requires disclosure and compliance with FTC guidelines for all PayPerPost reviews).

240. See Pinch & Kesler, *supra* note 21, for early examples of consumer-generated ratings and reviews. As noted earlier, defamatory statements differ, and there is a remedy at law for defamation victims.

241. See ElBoghdady, *supra* note 212 (investigating the use of do-not-talk contracts to suppress consumers’ comments about their doctors).

242. *Id.*

243. See Conrad Saam, *Gag Orders for Patients—Silencing Online Patient Reviews*, TECHNORATI (May 9, 2011, 5:31 PM), <http://technorati.com/technology/article/gag-orders-for-patientssilencing-online-patient/> (“We shouldn’t stand for legal contracts that silence the public’s right to voice dissatisfaction with the bottom of the medical barrel. That’s bad for patients and bad for doctors.”). See also Rainey Reitman, *Medical Justice: Stifling Speech of Patients with a Touch of “Privacy Blackmail,”* ELECTRONIC FRONTIER FOUND. (May 4, 2011), <https://www.eff.org/deeplinks/2011/05/medical-justice-stifling-speech-patients-touch> (“[S]peech you disagree with should be fought with more speech, not censorship.”).

244. ElBoghdady, *supra* note 212.

245. *Id.*

246. *Id.*

practice, has now abandoned production and distribution of them.²⁴⁷

Websites like RateMDs.com, Angie's List, and Yelp also devised their own response tactics to the do-not-talk contracts.²⁴⁸ Angie's List informs users when doctors use one of these contracts by placing a notice on the doctor's profile.²⁴⁹ Yelp alerts consumers when doctors request that the website remove negative reviews.²⁵⁰ Critics of the contracts argue they try to halt free speech rights, which are protected under the First Amendment to the United States Constitution.²⁵¹ As long as consumers are expressing *truthful* personal opinions about a product or service, they are protected, and even reputation management firms cannot *delete* the reviews.²⁵² Many states and the District of Columbia have also passed Anti-Strategic Lawsuits Against Public Participation (anti-SLAPP) legislation, which deter frivolous defamation lawsuits brought on by social media comments.²⁵³

Of course, if the law prohibits undisclosed compensated reviews²⁵⁴ and ensures free speech under the First Amendment, just what actions can reputation management services take to protect their clients? They certainly cannot write reviews posing as consumers.²⁵⁵ They also cannot lawfully wipe out all authentic negative reviews about their clients—but that does not stop them from trying.²⁵⁶ Most reputation management firms appeal to clients by offering services to displace or conceal the genuine reviews.²⁵⁷ After all, with

247. *Id.*; see also Debra Beaulieu, *Medical 'Gag Order' Company Sued Over Mutual Privacy Agreements*, FIERCEPRACTICEMANAGEMENT (Dec. 7, 2011), <http://www.fiercepracticemanagement.com/story/medical-gag-order-company-sued-over-mutual-privacy-agreements/2011-12-07> (explaining why "gag order" contracts are unlawful and unethical).

248. ElBoghdady, *supra* note 212.

249. *Id.*

250. *Id.*

251. U.S. CONST. amend. I.

252. See *Hustler Magazine v. Falwell*, 485 U.S. 46, 51–52 (1988) (discussing the difference between the First Amendment right to critique and defamation); see also *Frequently Asked Questions*, YELP, <http://www.yelp.com/faq> (last visited Sept. 3, 2013) (noting that reviews are only removed if they violate Yelp's Terms of Service or Content Guidelines).

253. *E.g.*, Travis Crabtree, *Conclusion of Online Defamation Series—Anti-SLAPP*, JDSUPRA LAW NEWS (July 26, 2012), <http://www.jdsupra.com/legalnews/conclusion-of-online-defamation-series-92421/> (explaining how anti-SLAPP statutes defend against infringements on the constitutional right to petition, associate freely, and speak freely). If the defendant properly defends using an anti-SLAPP statute, the business must pay legal costs incurred by the defendant. Patt Morrison et al., *The Yelp Wars: False Reviews, Slander, and Anti-SLAPP—What's Ethical in Online Reviewing?*, 89.3 KPCC (Aug. 25, 2011, 12:00 PM), <http://www.scp.org/programs/patt-morrison/2011/08/25/20426/yelpamazonfakereviewcitysearchtripadvisorantislappp/>.

254. 16 C.F.R. § 255.5 (2012).

255. However, some public relations firms have tried and failed. See, e.g., Miguel Helft, *Charges Settled Over Fake Reviews on iTunes*, N.Y. TIMES (Aug. 26, 2010), http://www.nytimes.com/2010/08/27/technology/27ftc.html?_r=1& (detailing the legal consequences Reverb Communications suffered for having its staff post undercover reviews).

256. Reputation management services typically employ search engine optimization (SEO) to remove negative mentions from top search results and bring to the forefront more favorable mentions. *E.g.*, *Reputation.com for Business*, REPUTATION.COM (last visited Sept. 17, 2013), <http://www.reputation.com/for-business> (noting how it uses SEO to deemphasize "[e]xaggerated reviews," "[o]utdated legal issues," and "[h]ostile forum comments").

257. *E.g.*, Collin Flatt, *"Reputation Management" Firm Will Get You Positive Reviews on Yelp for \$995 \$495*, EATER (Mar. 28, 2012), <http://philly.eater.com/archives/2012/03/28/reputation-management-firm-will-get-you-positive-reviews-on-yelp-for-1000.php> ("After we increase your ratings in the first several weeks, if

relatively little Internet know-how, business owners can respond to online comments and reviews, but having the ability to conceal them involves more advanced knowledge.²⁵⁸

Beyond technology tricks to displace negative reviews, reputation managers can help businesses play defense by monitoring consumer-generated content about them and counseling them on how to respond.²⁵⁹ Knowing how to communicate with customers online can help lessen the blow of negative reviews and develop sustainable social media policies for the business.²⁶⁰ This method may also prove smarter in the long run as opposed to flooding the Web with positive reviews or concealing negative reviews, which are usually “quick fixes”²⁶¹ rather than permanent solutions.²⁶² ReputationRanger.com encourages businesses to respond to both positive and negative criticism.²⁶³ ReviewPush also suggests making the review request a permanent feature of the business’s website or a link included in the business’s emails.²⁶⁴

There are still creative, positive ways to engage with consumers online and to use their reviews and opinions to make constructive company changes.²⁶⁵ Thus, businesses should be wary about online reputation managers who promise to make *all* negative reviews disappear—these firms might silence the voices of genuine consumers who can provide helpful feedback or valuable warnings about product problems.²⁶⁶

IV. RECOMMENDATION

As Sprague and Wells write, it is hard to adequately restrict and monitor fake online reviews because of the nature of blogger and Internet culture.²⁶⁷ Arguably, part of the appeal of online communication is the ability to use the Internet in new, creative ways to share messages. This Part of the Note will cover the current legal enforcement challenges and evaluate several potential

someone then posts a bad review on Yelp or any other review site, or your ratings drop for any reason, we will work diligently to get your rating back up again.”)

258. There is debate about the ethics and credibility of using SEO to boost the visibility of reviews placed by reputation management firms. See Ken Krogue, *The Death of SEO: The Rise of Social, PR, and Real Content*, FORBES (Jul. 20, 2012, 11:48 AM), <http://www.forbes.com/sites/kenkrogue/2012/07/20/the-death-of-seo-the-rise-of-social-pr-and-real-content/> (“If you generate content and place it all over the web promoting and linking to your specific content, it is obviously fake.”).

259. *Responding to Online Reviews*, REPUTATION RANGER, <http://reputationranger.com/orm-services/responding-to-online-reviews/> (last visited Sept. 17, 2013).

260. *Id.*

261. Travis Crabtree, *Protecting Yourself Online Doesn’t Have to Involve Legal*, JDSUPRA L. NEWS (July 11, 2012), <http://www.jdsupra.com/legalnews/protecting-yourself-online-doesnt-have-17461/>.

262. See Jeffrey Rosen, *The Web Means the End of Forgetting*, N.Y. TIMES MAG. (July 21, 2010), www.nytimes.com/2010/07/25/magazine/25privacy-t2.html?_r=0&pagewanted=print (describing the challenges of living “in a world where the Internet records everything and forgets nothing”).

263. *Responding to Online Reviews*, *supra* note 259.

264. *Four Ways to Encourage Customers to Leave Online Reviews*, REVIEWPUSH (Jan. 31, 2013), <http://www.reviewpush.com/blog/four-ways-to-encourage-customers-to-leave-online-reviews/>.

265. See TONY WILSON, *MANAGE YOUR ONLINE REPUTATION 117* (Self-Counsel Press, 2011) (“[U]se consumer information to make a better product for next time, while at the same time, ensuring the consumer is looked after in the here and now. Use commentary and criticism to be better at what you do.”).

266. *Id.*

267. Sprague & Wells, *supra* note 1, at 444 fn. 163.

solutions to the problem of fake online reviews.

A. *Current Enforcement Challenges*

One of the challenges of creating and enforcing laws prohibiting fake online reviews is the risk that the laws will be too broad or confusing.²⁶⁸ This could restrict bloggers and advertisers' ability to communicate effectively with the online community.²⁶⁹ This could also lead bloggers and reviewers to post helpful, genuine reviews less frequently.²⁷⁰ They could also quit entirely.²⁷¹

The potential issue of over-deterrence emerged in the fall of 2012 as online retailer Amazon underwent a large deletion of purportedly fake, or compensated, book reviews.²⁷² Mystery writer J. A. Konrath blogged about the purging of the reviews, fifty of which he authored.²⁷³ Konrath published on his blog a letter he wrote to Amazon about the incident, expressing what he thinks is the consequence of trying "to police the system, which is impossible and also very wrong."²⁷⁴ He explains to Amazon in the letter the over-deterrence issue he saw: "I'm sure a few sock puppet reviews were also deleted along with all the legit ones. So once again, congrats. You have killed an annoying mosquito using a nuclear weapon."²⁷⁵

B. *Detection and Deterrence*

Konrath's commentary brings up a good point—how can websites successfully detect and delete the fake reviews while sparing the authentic ones? It certainly is a challenge to determine whether or not a review is fake, who wrote it, and how many consumers it influenced.²⁷⁶ The FTC cannot take an enforcement action against a company or fake review writer if it doesn't realize there is a problem. Some of the most promising solutions to curb the problem of fake reviews include improving detection software, revamping website policies, and publicly calling out the wrongdoers.²⁷⁷

1. *Detecting Fake Reviews*

One of the most promising solutions has already been in the works for a

268. *Id.* at 435.

269. *See id.* at 448–49 (discussing how the possibility of being held liable may deter consumers from posting reviews).

270. *Id.*

271. *Id.*

272. Ghigliotty, *supra* note 149; Streitfeld, *supra* note 57.

273. Joe Konrath, *Amazon Removes Reviews*, NEWBIE'S GUIDE TO PUB. (Nov. 1, 2012, 1:47 PM), <http://jakonrath.blogspot.co.uk/2012/11/amazon-removes-reviews.html>.

274. *Id.*

275. *Id.*

276. Francis Bea, *Yelp Tries Public Shaming to Discourage Businesses from Gaming Reviews and Ratings*, DIGITAL TRENDS (Oct. 18, 2012), <http://www.digitaltrends.com/social-media/yelp-cracking-down-on-fake-reviews/> (discussing efforts and struggles researchers have encountered while trying to develop a successful algorithm).

277. *Id.*

while—detection research.²⁷⁸ Although many sites have their own versions of review filters²⁷⁹ and teams of employees checking content,²⁸⁰ more advanced technology and research into deceptive reviewing could help bolster detection. There are already some free beta detectors available online for consumers to try.²⁸¹ Statistical analysis may also help to show unusual patterns in ratings, which could tip off businesses and regulators to deceptive reviews.²⁸² Though these detection methods provide hope for more honest reviews in the future, a lot of improvements must take place before sites can start to truly rely on them. For instance, some of these tools work best for detecting deception in particular industries, such as the travel industry.²⁸³ Individual sites must also determine the best way for business owners to dispute a review removal, in case the detection software incorrectly flags and deletes a genuine review.

2. *Changing Site Policies*

Deterring fake reviews should start internally: with the websites that host the reviews. The sites want to be recognized as credible sources for consumers, so they all have an incentive to structure their internal procedures to prevent deception. There are several ways they can tackle fake reviews.

One way they can deter the deception is by requiring that the consumer purchase the product on their website. Bazaarvoice, which powers reviews for Macy's and other retailers, credits its low fake-review rate to post-transaction emails.²⁸⁴ It explains that eighty-five percent of its reviews are in response to a transaction email, meaning the reviewer really did buy an item or use the service.²⁸⁵ Other research indicates that the level of deceptive reviews stayed the same or decreased when sites made it more difficult to post a review.²⁸⁶

Another way to deter fake reviews is to limit the amount of posts by an

278. See LIU, *supra* note 10, at 114 (explaining early studies into “opinion spam” and fake reviews).

279. E.g., Lily Mihalik & Kathleen Miles, *Yelp Says Their Filter for Online Ratings Is Imperfect, but Successful*, 89.3 KPCC (Aug. 30, 2011, 12:00 PM), <http://www.scpr.org/programs/patt-morrison/2011/08/30/20486/yelpextortiononlinefakereviewsdefamationslander/> (explaining how Yelp's filter watches for several “red flags,” including spikes in popularity and reviews not written in first-person language).

280. See Brian J. Cantwell, *Inside TripAdvisor: When Did Blackmail and Intrigue Become Part of Vacation Planning?*, NORTHWEST TRAVELER (Mar. 7, 2013, 6:00 AM), <http://blogs.seattletimes.com/northwesttraveler/2013/03/07/inside-tripadvisor-when-did-blackmail-and-intrigue-become-part-of-vacation-planning/> (saying TripAdvisor “literally had rocket scientists” and investigators working to detect fake reviews).

281. See, e.g., *Find a Fake Online Review?*, REVIEW SKEPTIC, <http://reviewskeptical.com/> (last visited Mar. 13, 2013) (allowing users to paste in hotel reviews to get an estimate about their authenticity). Consumers can use similar detectors to find fake “likes” and “followers” on social media sites. *Fake Follower Check*, STATUS PEOPLE, <http://fakers.statuspeople.com/> (last visited Mar. 9, 2013).

282. Neil Savage, *Statistics Unmask Phony Online Reviews*, MIT TECH. REV. (June 18, 2012), <http://www.technologyreview.com/news/428222/statistics-unmask-phony-online-reviews/> (describing the technique as “a sort of forensic analysis that shows something funny is going on”).

283. E.g., *Find a Fake Online Review?*, *supra* note 281 (indicating a ninety-percent detection rate for fake hotel reviews).

284. Michael Learmonth, *As Fake Reviews Rise, Yelp, Others Crack Down on Fraudsters*, AD AGE (Oct. 30, 2012), <http://adage.com/article/digital/fake-reviews-rise-yelp-crack-fraudsters/237486/>.

285. *Id.*

286. *Spotting Suspicious Reviews Online*, N.Y. TIMES (Aug. 27, 2012, 8:00 AM), <http://bits.blogs.nytimes.com/2012/08/27/spotting-suspicious-reviews-online/>.

individual user. Trustpilot, an online review company, allows one review of a specific product per consumer.²⁸⁷ This has not seemed to deter consumers from sharing their opinions either—the site houses approximately seven million reviews on its site.²⁸⁸ Consumers may alter their review, but they may not post more than one.²⁸⁹ This aids in preventing companies and fake-review writers from flooding the Internet with false positive reviews.

Finally, sites need to be clearer about their online review policies and make these policies easier for users to find. On Barnes & Noble's site, for instance, there is not a mention of prohibiting fake or compensated reviews.²⁹⁰ Amazon's Review Creation Guidelines, by contrast, make it obvious that reviewers must disclose if they receive compensation or a free product in exchange for their writing.²⁹¹ Although having more noticeable policies might not deter all determined fraudsters, it can help put consumers and wrongdoers on notice that the site is monitoring their posts and paying attention to their content.

3. *Calling Out the Culprits*

One of the most interesting, practical solutions to the fake review predicament is public shaming of the faking company or individual.²⁹² The reasoning behind this idea, of course, is to embarrass the infringer into compliance. Yelp is one website that has started to use this tactic.²⁹³ It has begun to call out the review troublemakers by posting a "Consumer Alert" on the business's profile whenever a business attempts to buy positive reviews.²⁹⁴ Yelp's company blog explains the alert will remain on the business's Yelp page for ninety days, unless it discovers more attempts to purchase reviews.²⁹⁵ Yelp will also alert consumers if there are a lot of reviews submitted from the same IP address.²⁹⁶ This will help indicate which reviews are inauthentic or purchased.²⁹⁷ Although Yelp's review filter already takes the IP address into account for its analysis, this step will make it known to consumers so they can better decide whether or not to trust the review.²⁹⁸ Some other review websites have a similar consumer alert or "Wall of Shame" for individuals who have tried to game the review system.²⁹⁹ In order to further deter the posting of fake

287. *Frequently Asked Questions About Reviews*, TRUSTPILOT, <http://company.trustpilot.dk/about/about-reviews> (last visited Sept. 3, 2013) [hereinafter *About Reviews*].

288. *Id.*; Ingrid Lunden, *With Nearly 7M Reviews of 100K Sites, Trustpilot Raises \$13M from Index*, TECHCRUNCH (Dec. 11, 2012), <http://techcrunch.com/2012/12/11/with-nearly-7m-reviews-of-100k-sites-trustpilot-raises-13m-from-index-and-more-to-build-out-a-yelp-for-the-world-of-e-commerce/>.

289. *About Reviews*, *supra* note 287.

290. *Write Your Own Review*, *supra* note 156.

291. *Review Creation*, *supra* note 145.

292. Bea, *supra* note 276.

293. *Id.*

294. *Id.*

295. Singley, *supra* note 164.

296. *Id.*

297. *Id.*

298. *Id.*

299. ElBoghdady, *supra* note 212.

or compensated reviews, sites should up the ante by keeping these warnings up for an even longer period of time. This will inform more consumers of the wrongdoing as well.

TripAdvisor features another tool to report impermissible content.³⁰⁰ This tool is designed for the other side of the transaction—the business owner. The feature allows businesses to fight back against consumers who threaten their online reputations. It was specifically designed to help business owners combat “blackmail” written by consumers—threats to write a negative review if they do not get a desired upgrade, refund, etc.³⁰¹ The new feature allows businesses to dispute the threats in a more streamlined fashion.³⁰²

C. Legislative Action

Legislative action is yet another potential solution, given the money at stake and the increasing number of faked consumer reviews online.³⁰³ Even though the FTC has updated its Dot Com Disclosure Guide in an attempt to clarify disclosure in the Internet realm, the Guide fails to adequately speak to smaller businesses and their marketing teams.³⁰⁴ Legislative action could spark a national conversation about undercover promotion scams and spell out more clearly for consumers and businesses of all sizes what the penalties are for engaging in this kind of consumer deception. A legislative solution would also require designing a workable detection and enforcement plan, which is desperately needed and long overdue.

If more websites employ tactics such as consumer alerts and blackmail reporting, arguably, it will deter fake reviews and will make it easier for consumers to know which reviews to trust. Legislative action may also be necessary in order to raise awareness of this issue and halt it. Until detection, and in turn enforcement, improves, some consumers may wish to read reviews and opinions in traditional sources, such as newspapers. “Yes, there’s only one voice rather than the wisdom of the crowd, but these critics are convincing, independent, entertaining and trustworthy enough that, time and time again, they are paid to offer their opinion. And not . . . by the authors of the books themselves.”³⁰⁵

V. CONCLUSION

It is evident that fake online reviews are a problem for a number of industries, from healthcare to restaurants to travel. With the pressure to

300. trip4biz, *Reporting Potential Blackmail to TripAdvisor*, TRIPADVISOR FOR BUS. (Jan. 28, 2013), <http://tripadvisor4biz.wordpress.com/2013/01/28/reporting-potential-blackmail-to-tripadvisor/>.

301. *Id.*

302. *Id.*

303. Press Release, Gartner, *supra* note 16.

304. Hawkins, *supra* note 133.

305. Husna Haq, *Book Reviews: Too Nice and Maybe Also Too Fake?*, CHRISTIAN SCI. MONITOR (Aug. 30, 2012), <http://www.csmonitor.com/Books/chapter-and-verse/2012/0830/Book-reviews-too-nice-and-maybe-also-too-fake>.

maintain a respectable online reputation, many businesses are succumbing to the pressure to post fake reviews to bolster their reputations or to harm rivals' reputations. This deception to consumers is illegal and immoral, but it can be difficult to detect. However, by sparking legislative action, improving detection software, enhancing site review policies, and involving consumers in the policing, the federal and state agencies will increase detection, and hopefully increase enforcement of the law against wrongdoers.