

**Legal challenges
over online
reviews seek
to separate fact
from fiction**

Stars and GRIPES

**By
Julianne Hill
Illustration by
Stephen Webster**



Robert Allen Lee desperately needed a dentist.

Dr. Stacy Makhnevich at Aster Dental in New York City was able to squeeze Lee in to treat his toothache. When Lee arrived, the dentist required he sign a “mutual agreement to maintain privacy”—a confidentiality agreement with a nondisparagement clause that waives patients’ rights to publicly comment on services and assigns copyright to the provider. Anxious for treatment, Lee signed and slid into the dentist’s chair.

Though Lee found relief from his toothache, dealing with his dentist over the bill—which totaled \$4,766 for the filling—became a pain. He complained about Makhnevich on Yelp and DoctorBase, another online site, claiming the dentist overcharged him and did not furnish the treatment records that would allow him to make an insurance claim and be reimbursed.

Makhnevich fought back. Armed with the privacy agreement Lee signed, she sent takedown notices to the websites hosting the complaints. She then threatened to sue Lee, sending him invoices of \$100 a day for copyright infringement.

Lee returned fire. He filed suit against the dentist in the U.S. District Court for the Southern District of New York, aiming to invalidate the copyright claim.

“She charged him a lot of money. It was outrageous,” says Paul Alan Levy, an attorney with the Public Citizen Litigation Group in Washington, D.C., who works on online free speech issues and handled Lee’s case. “What he wrote was true.”

More than four years after treatment, Lee won. The court, in its 2015 ruling, termed the privacy agreement null and void, calling the contract “a deceptive act or practice in violation of New York General Business Law,” which bars deceptive business practices. Lee was awarded \$4,766 in damages.

IMAGE MANICURING

Lee’s case is just one example of the legal issues that can stem from attempts to control and regulate online reviews. Recent months have brought a flurry of lawsuits, legislation and investigations aiming to keep online reviews—both positive and negative—fair, honest and within Federal Trade Commission guidelines.

Paul Alan Levy

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As online reviews grow in influence, a high-stakes cat-and-mouse game is evolving. Sellers of everything from dental services to books reach for those all-important five-star rankings—and sometimes cross legal boundaries to gain unfair competitive advantages and keep their online images sparkling.

While some, like the New York dentist, try to prohibit dissatisfied customers from posting negative yet authentic reviews, others pay writers for fake positive reviews—sometimes written without ever seeing the product. As a result, the legal community is sharpening its pencil as it serves notice on reviews and reviewers from all angles.

“Whether a company buys fake reviews or prohibits consumers from putting up complaints, they are trying to accomplish the same result—deceptively manicuring what their public ratings look like,” says Aaron Schur, Yelp’s senior director of litigation in San Francisco.

What’s behind all the attention on reviews? Money. Lots of money. Every day, millions of shoppers buy millions of items based on the hundreds of millions of online reviews. In 2015, Amazon rang up \$107 billion in revenues; Yelp, \$550 million.

In a 2015 survey by Mintel Group Ltd., a market research company, 54 percent of respondents said online reviews influenced their purchases. And a 2011 study by Harvard Business School showed that adding one star to a Yelp rating can increase a restaurant’s business between 5 percent and 9 percent.

Credibility of those reviews is vital to keep the marketplaces humming and consumers returning again and again. But too much of a good thing can raise eyebrows. The Mintel survey showed that 57 percent of consumers were suspicious of companies with only positive reviews.

Shoppers’ suspicions are not off base, and the giant online marketers are well aware of “astroturfing”—the practice of making paid-for messages appear to be genuine and unbiased. In fact, Yelp took down 7 percent of its reviews for service violations.

All this research underscores why sellers want to squash negative reviews—as the New York dentist did—and why they want as many favorable reviews as possible, even if they have to pay for them.

“Things that weaken and cheapen comments on purchases are undermining the credibility and service of reviews,” *Computerworld* columnist Evan Schuman says. “We don’t know who to believe.”

GETTING A ‘SLAPP’

While freedom of speech does not protect making false or damaging statements, offering opinions and making true statements of fact—like Lee’s—generally are protected. Other forms of gag clauses also are forbidden. For instance, if a mover breaks your furniture but says it will only refund your money if you don’t post about the negative experience, that could be considered a violation of the freedom of consumer speech, says Schur. While this might be considered bribery under certain circumstances, it is also considered deceptive trade, Schur adds.

To stop consumer gag clauses and other practices known as strategic lawsuits against public participation, or SLAPP suits, state and federal legislators are moving toward laws specifically spelling out consumers’ rights to post negative, fact-based reviews.

California is thought to have become one of the first states to specifically protect the right to review, passing Civil Code § 1670.8 in 2014. “Consumers have the right to post on Yelp if they had a bad experience. California’s code negates these attempts to muffle a consumer,” says John Basinger, a partner at Saul Ewing in Newark, New Jersey. His work emphasizes the online marketplace.

Congress is following California’s lead. In December, the U.S. Senate passed the Consumer Review Freedom Act; its companion, H.R. 2110, awaits action in the House of Representatives.

“I like these moves because they put power in the hands of consumers and let them fight back against lawsuits limiting their speech,” Schur says. “If you look at the consumers who have been hit by SLAPP cases, they spend a lot of money defending a lawsuit, and often there is no clear way of getting that money back. Anti-SLAPP regulations stopped that injustice.”

None of the legislation would change basic rights. Both of the federal proposals and the California code explicitly exempt posting libel and slander, trade secrets, personal financial information, medical files and law enforcement records, Basinger says.

Whether or not more laws are passed, the spirit of the anti-SLAPP movement is developing. “I think we’re going to see,” Basinger adds, “that the courts and FTC will continue to take a dim view of these non-disparagement provisions.”

FULL DISCLOSURE

The FTC’s endorsement guidelines make it clear that online review writers cannot receive payment of any sort without disclosure. “If there’s a connection between an endorser and the marketer that consumers would not expect and it would affect how consumers evaluate the endorsement, that connection should be disclosed,” the guidelines say. “If an endorser is acting on behalf of an advertiser, what she or he is saying is usually going to be commercial speech—and commercial speech violates the FTC act if it’s deceptive.”

Still, online companies such as Amazon and Yelp post their own guidelines. And typically those are even stricter, prohibiting all paid and fictional reviews. For example, Amazon prohibits any sort of payment in exchange for a review—and that includes discounts on future purchases, bonus content, gift cards and entry to a contest.

The company reportedly uses artificial intelligence to determine whether a review is legitimate and whether the poster and marketer have a connection. If Amazon suspects a

PHOTOGRAPH BY DAVID HILLS



payment of any sort, the reviews are rejected or taken down.

This complicates long-standing practices by authors who rely on Amazon for sales. Authors routinely send advance copies of their books to reviewers who, according to Amazon guidelines, now must disclose that they received the book for free in their posts.

Anne R. Allen, an author and blogger based in San Luis Obispo, California, says these policies are the talk of the book world, where Amazon is a major source of income for authors. “But they have been draconian in their decisions, and some perfectly legitimate reviews have been removed,” she says. “And there is no way to defend yourself.”

In addition, Amazon bans reviews from family members or close friends connected to the seller in any way. “The lady down the street might review your book; but according to Amazon, you might buy them a Starbucks as a thank-you,” Allen says. “So their review would be removed.”

In fact, anyone connected to an author on social media—even fans who do not personally know the author—is considered a connection and Amazon will take down the review.

Irish writer Gerry McCullough, author of 11 books, learned this the hard way. She had developed an online friendship with another writer she had never met in person whose publisher had shut down. “I suggested that she approach my own publisher and recommended her to him,” McCullough says. “The next thing I knew was that [the other author’s] review of my newest book had been refused.”

McCullough wrote to the company, but “Amazon ignored my emailed objections, except to copy me the criteria they use for rejecting reviews, which didn’t seem to me to be relevant,” she adds.

When the other author self-published a book, McCullough read it. “I bought the book, enjoyed it very much,” she says. But when she attempted to post a review for the book, Amazon rejected it. “I can see no reason for this,” McCullough says.

In 2015, Amazon stepped up its artificial intelligence involving reviews and reviewers, though the specifics of the process have not been released. “Publishers tell you to make Facebook friends with your readers to promote your books,” author Allen says. “So the very thing you’re doing to get readers gets you punished by Amazon.”

Allen no longer writes Amazon book reviews because she networks with many fellow authors, but she believes nonwriters should be able to write honest reviews of their favorite authors.

A Change.org petition calling for Amazon to “change the ‘You know this author’ policy” now has more than 17,000 signatures. Amazon did not respond to repeated requests for interviews to discuss its review policies or practices.

FAKE OUT

Still, Amazon, Yelp and others take infractions by paid-for reviewers seriously—as well as to court. Amazon’s October 2015 lawsuit names more than 1,100 John Doe users listed on Fiverr, a website where freelancers offer services such as proofreading, graphic design or translating documents for as little as five dollars.

The suit, filed in King County Superior Court in Washington state, marks one of the first times the Seattle-based giant has sued those who create the reviews directly, many of whom promise positive or five-star reviews for products they may—or may not—have used.

According to the suit, “In many cases, the reviews posted are

Amazon has been “draconian in their decisions, and some perfectly legitimate reviews have been removed.”



PHOTOGRAPH BY DAVID HILLS

entirely fake and the ‘reviewer’ has no knowledge whatsoever of the product or book being reviewed.”

Sometimes, writers requested that product marketers compose the reviews themselves, and the paid reviewer would merely post the copy. Some posted from multiple user names and IP addresses to outsmart Amazon’s internal checks, the suit states.

In an effort to stop this, Amazon monitors whether the product was bought through its site. A review with an “Amazon verified purchase” tag indicates the reviewer made the purchase there.

Yet some paid reviewers have found ways to skirt that requirement and create shipping records of products they never received. “A person who might not have received a product at all but is reviewing it as if they actually experienced it, well, that would be looked at as deceptive by the court,” says Basinger of Saul Ewing.

While the U.S. Constitution provides for freedom of speech, “you cannot trick people on the basis of the First Amendment,” says Martin Redish, a law professor at Northwestern University. “If the speech is falsely promoting a product, then that would be under the rubric of commercial speech and automatically be excluded.”

People do not have the right to pay for fake reviews to mislead consumers, Yelp’s Schur says. “If you are paying, you are drowning out free speech.”

These types of lawsuits are “not really a legal move,” says Ken Dreifach, a shareholder at ZwillGen in New York City whose work focuses on online advertising and practices. The Communications Decency Act holds that an internet service provider can’t be held liable for something published by a third party—like a reviewer. “I think [online marketers] are irritated by this practice of fake reviews and are acting on behalf of their customers and other merchants. They are protecting the integrity of their platform,” Dreifach says.

Amazon’s April 2015 case took a different approach, naming defendants’ web addresses, such as buyamazonreviews.com and buyreviewsnow.com, where marketers who sell products on Amazon could purchase phony four- and five-star reviews of their goods.

“Most of the sites have since closed, and Amazon has identified and taken action against sellers who used those sites to obtain fake reviews,” according to Amazon’s second suit in October 2015.

While the lawsuits aim to bring down paid-for reviews and scare off other potential for-hire reviewers, the practice continues.

On Fiverr you can find reviewers who offer positive reviews for sale. Fiverr responded to the *ABA*

Journal’s questions in an email concerning the FTC’s rules against these types of transactions.

Anne Allen

“Fiverr stands for creating economic opportunities for talented and passionate freelancers and

entrepreneurs. We respond promptly to any reports of inappropriate content. We facilitate close to a million transactions a month, across more than 100 categories of services, such as graphic design, copywriting, voiceover, multimedia editing and coding. These services are being consumed by businesses [that] depend on them to thrive.”

In 2013, Yelp moved to stop reviews for sale, suing Timothy Catron, who allegedly ran services called BuyYelpReview.com and AdBlaze.com. Yelp won by default when the defendant did not cooperate and failed to show up in court.

RED FLAGS

Despite all the legal moves, online marketplaces consider court battles the move of last resort. “Before taking legal action against an offender, we may reach out to demand that they stop their offending behavior,” says Yelp’s senior public relations manager, Rachel Walker. “We also work with third-party platforms used to sell reviews to educate them about the legal problems with paid reviews.”

When Yelp finds a suspicious review, it posts a consumer-alert banner over the potentially fraudulent review for 90 days unless evidence proves it is legitimate. If it’s not, Yelp then passes the information about the unsavory practices to regulators, Schur says.

Like Amazon, Yelp uses technology as an investigative tool to ferret out fake reviews. “It is a good investment,” Schur adds. “It works. Typically, when I learn about someone posting fake reviews, I see our software already has properly screened it.”

While Yelp officials will not divulge specific signals its software seeks, Schur says the software does showcase helpful reviews, based on a reviewer’s activity on its site. Additionally, Yelp’s user support team looks into each review, photo or contact that has been flagged by users to see whether it meets the site’s terms of service.

Another team leads investigations into larger attempts to plant fake reviews on Yelp and collects evidence for the Consumer Alert program, which educates users about attempts to artificially inflate ratings, Schur says.

However, in 2014, shareholders challenged Yelp and sued, saying company officials overstated the credibility of its reviews to bolster its share price. Last November, the suit was dismissed by U.S. District Judge Jon Tigar of the Northern District of California, who found no intent to defraud or manipulate reviews.

NEW YORK’S TACTIC

New York Attorney General Eric T. Schneiderman has battled the practice of astroturfing against four companies: Machinima Inc., Premier Retail Group, ESIOH Internet Marketing and Rani Spa.

A settlement in February requires each company to be honest and transparent in its online reviews

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Aaron Schur

and endorsements, as well as pay penalties ranging from \$20,000 to \$50,000. This follows Schneiderman’s 2013 Operation Clean Turf undercover investigation into online reputation management, which found many companies were flooding sites like Yelp and Google Local with fake reviews.

Yelp gave the attorney general leads on suspicious businesses based on a list of those with a disproportionate number of reviews that were flagged by its software, Schur says. A representative from the attorney general’s office posed as the owner of a Brooklyn yogurt shop and called search-engine-optimization companies looking for assistance. Some companies offered to write and post fake reviews as part of their services.

These companies often paid faraway freelance writers—from the Philippines to Eastern Europe—as little as \$1 to \$10 per fake review, a move that violated the state’s false advertising laws, among others. As a result, the state forced 19 businesses to stop writing the reviews and pay fines totaling more than \$350,000.

“This investigation continues my office’s historical work into astroturfing over the internet and signals to companies that consumers deserve honesty and transparency in their reviews, endorsements and related content,” Schneiderman said in a written statement.

“The New York attorney general’s settlement shows that there is significant interest in the states, as well as the FTC,” Basinger says, “in going after compensated reviews and endorsements that fail to disclose compensation as inherently deceptive.”

The assortment of legal moves not only serves as a warning to those trying to game the system but also positions the giant online marketers as the consumers’ champions, says

Computerworld’s Schuman. “Even if [Amazon’s] litigation goes nowhere, the fact

that Amazon was seen in the public square shouting for the heads of people who have the audacity to make these paid-for reviews will be a positive.” ■

Julianne Hill is a Chicago-based freelance writer.

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