Published on *The National Law Review* https://natlawreview.com

Website Marketing Statements: The Achilles' Heel to Communications Decency Act (CDA) Protection?

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It's no secret that **local directory/consumer review websites** are popular among consumers looking for recommendations before dining out, hiring a contractor, or even picking a dentist or day spa. Yelp reported around 138 million monthly unique visitors in the second quarter of 2014, searching among over 61 million local reviews. The bottom line is that solid reviews and multiple stars on local search sites can drive sales; on the other hand, and to the chagrin of business owners, low ratings and a spate of one-star rants displayed prominently at the top of a listing can drive customers away.

Review sites typically have to wrestle with the problem of unreliable or fictitious reviews, which are blurbs written by friends or employees of the listed business, paid reviews, and negative reviews written by business competitors. **Some sites use filtering software** to identify and remove unreliable reviews – of course, such software is not perfect, and businesses have complained that some sites have filtered out legitimate reviews, but left in other fake reviews to the detriment of the reviewed businesses.

A number of businesses have brought suit against consumer review sites claiming that they purposely remove positive reviews (but leave up defamatory complaints), arbitrarily reorder the appearance of reviews, or otherwise wrongfully tinker with the algorithms that are supposed to weed out "fake" reviews presumably to encourage or "extort" businesses to purchase advertising or pay for additional features.

Most suits that have sought to hold sites responsible for defamatory content created by third-party users have been rejected by courts based upon CDA Section 230, which immunizes "interactive computer services" – such as a consumer review websites – where liability hinges on content independently created or developed by third-party users.

To get around the broad immunity, some businesses have urged courts to interpret an intent-based exception into Section 230, whereby the same conduct that would otherwise be immune under the statute (e.g., editorial decisions such as whether to publish or de-publish a particular review) would be actionable when motivated by an improper reason, such as to pressure businesses to advertise. However, several courts have rejected this theory.

- Reit v. Yelp!, Inc., 29 Misc 3d 713 (N.Y. Sup. Ct. 2010) (Yelp's selection of the posts it maintains on its site can be considered the selection of material for publication, an action "quintessentially related to a publisher's role," and therefore protected by CDA immunity)

- Levitt v. Yelp! Inc., 2011 WL 5079526 (N.D. Cal. Oct. 26, 2011) (CDA Section 230 contains no explicit exception for impermissible editorial motive, particularly since traditional editorial functions often include subjective judgments that would be "problematic" to uncover, thereby creating a chilling effect on online speech that Congress sought to avoid). Note, on appeal, the Ninth Circuit affirmed the district court's dismissal of the plaintiffs' claims – though not on the basis of CDA Section 230 – alleging Yelp extorted advertising payments from them by purpotedly manipulating user reviews.

- Kimzey v. Yelp Inc., 2014 WL 1805551 (W.D. Wash. May 7, 2014) (mere fact that an interactive computer service "classifies" user characteristics and displays a "star rating system" that aggregates consumer reviews does not transform it into a developer of the underlying user-generated information)

However, in recent disputes, businesses have sought an end run around CDA Section 230, specifically by bringing claims that do not treat the websites as publishers or speakers of the defamatory or fictitious user reviews, but instead relate to the website's marketing representations about such content. At least two courts have allowed such claims to go forward, bypassing CDA immunity.

In one such case, Moving and Storage, Inc. v. Panayotov, 2014 WL 949830 (D. Mass. Mar. 12, 2014), the plaintiffs alleged that a moving company review website (that itself was operated by a moving company) intentionally deleted positive reviews of the plaintiffs' companies and deleted negative reviews that criticized its own company to gain market share, all the while representing that the site offered "the most accurate and up to date rating information." The court concluded that CDA Section 230 did not bar plaintiffs' false advertising and unfair competition claims because they were not based on information provided by "another information content provider," and did not arise from the content of the reviews.

Most recently, a California appellate court reversed a lower court's dismissal of an action against Yelp over alleged false advertising regarding its automated review filter. In Demetriades v. Yelp, Inc., 2014 WL 3661491 (Cal. App. July 24, 2014), the plaintiff brought state law claims for unfair competition and false advertising alleging that Yelp engaged in false advertising based upon marketing statements stating that user reviews passed through a filter that gave consumers "the most trusted reviews" and only "suppresse[d] a small portion of reviews."

The plaintiff alleged that Yelp's statements about its filtering practices were misleading because its filter suppressed a substantial portion of reviews that were trustworthy and favored posts of the "most entertaining" reviews, regardless of the source. The lower court had previously granted Yelp's motion to strike the plaintiff's complaint under California's anti-SLAPP provisions, which aim to curb "lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." Cal. Code Civ. Pro. §425.16 (a). The appellate court reversed, holding that false advertising-like claims involving commercial speech fell outside the reach of the anti-SLAPP statute and that Yelp's representations about its filtering software—as opposed to the content of the reviews themselves—were "commercial speech about the quality of its product."

Regarding the application of CDA Section 230, the court rejected Yelp's argument that plaintiff's claims should be dismissed because courts have widely held that claims based on a website's editorial decisions (publication, or failure to publish, certain third-party conduct) are barred by Section 230. In a brief paragraph, the appellate court stated that the CDA was inapplicable because the plaintiff was not seeking to hold Yelp liable for the statements of third-party reviewers, but rather for its own statements regarding the accuracy of its automated review filter.

Companies, frustrated with their portrayal on online review sites, have mostly struck out when seeking to hold website operators liable for managing and displaying user-generated reviews. However, this past year, some courts have offered companies another potential avenue at obtaining relief. While the courts merely allowed the claims related to marketing representations to survive dismissal at the early stages of litigation, it is uncertain how either court will rule on the merits.

With this in mind, sites that collect and manage user-generated content, or otherwise use automated filtering software to manage content, should examine marketing statements on their websites for any language that goes beyond mere puffery and might be construed as misleading.

National Law Review, Volume IV, Number 254