Buy My Vote: Online Reviews for Sale

ABSTRACT

The Internet has granted consumers access to a wealth of information to use in researching products and services. A substantial portion of this information consists of online consumer reviews, which hold great influence over consumers' purchasing decisions due to their perceived honesty and independence from the company. The problem with relying on these reviews, however, is that real consumers may not be the authors; instead, companies often hire writers to fabricate reviews, known as “opinion spam,” which can either be positive for the hiring company or negative toward an innocent competitor. Because these fake reviews are difficult to detect, both consumers and competing businesses suffer harm. Parties looking to sue for this harm must overcome the writers’ First Amendment-protected anonymity, making it a challenge to bring private actions for defamation or complaints to the Federal Trade Commission (FTC). Moreover, while the FTC has the authority to pursue its own claims against the writers and the hiring companies under its revised guidelines, it has failed to pursue many cases, in part because of the struggle to identify the perpetrators. And those groups with the most power to block such reviews from the Internet—the hosting websites—are immune from suit under the Federal Communications Decency Act (FCDA). This Note advocates for greater involvement by the FTC, urges Congress to amend the FCDA to eliminate website immunity, and encourages the websites to establish greater measures to bar suspicious reviews and gather more information to assist in identifying the purveyors of opinion spam.

TABLE OF CONTENTS

I. DISCOVERING OPINION SPAM ................................................. 445
   A. Prevalence of Consumer Reviews .................................... 445
   B. How Companies Create Opinion Spam ............................. 447
   C. Why Opinion Spam Is Harmful ................................. 448
      1. Harm to Consumers .............................................. 448
      2. Harm to Businesses ............................................. 450
   D. The Legal Loopholes ................................................. 454
      1. First Amendment of the US Constitution ........... 454
      2. Federal Trade Commission Act ............................ 456

441
There is no doubt that the Internet has made shopping for most products and services faster and more convenient than going to a store in person.1 The Internet provides consumers with a vast amount of product information, enabling them to conduct more research before purchasing, which in theory leads them to better-quality products and more satisfactory services for their needs.2 This product information can come from a company’s website or through other forms of direct advertising, but it may also come from allegedly more independent and reliable sources—online reviews.3

Online reviews are ubiquitous. Professional research groups, like Consumer Reports, conduct studies to compare products and provide reviews.4 Retailers, including Amazon and traditional box stores,5 provide customer feedback for products on their websites.6 And many independent websites, like Yelp and TripAdvisor, solicit

---


5. A “box store” is a physical retail store where a consumer can shop in person (but which may also have an associated website), which contrasts with online-only stores, such as Amazon.

consumer reviews of local businesses. The growing popularity of these latter two categories—both based on the customer’s opinion of products and services—has proven to be highly influential. Such reviews can make or break both new and established companies.

This influence comes from the fact that new customers, who are researching products or services they might buy, are more likely to trust other customers’ reviews (based on actual experience) over their own evaluations of the seller’s direct advertising. In fact, studies show consumers trust these personal customer reviews second only to recommendations from family and friends.

The problem with relying on consumer reviews is that real consumers are often not the authors; instead, the company has paid someone to fabricate reviews. These reviews, known as “opinion spam,” either positively review the company’s own product to increase its customer base, or negatively review a competitor’s product to deter potential customers. The people writing the reviews, however, have never used the product; thus, their comments can be inaccurate and misleading.

Opinion spam is problematic because unsuspecting consumers trust the fabricated reviews when making decisions about how to spend their money. Some consumers claim to be able to spot fake reviews and have published tips on how to identify them. But many

---


14. See Meyer, supra note 11.

15. See id.

reviews still slip through the cracks and go unidentified, even by people aware of possible deception. These unidentified fake reviews then go on to achieve their purpose of increasing the sponsoring company’s business or harming the competition.

The review “feedback loop” exacerbates the problem. The feedback loop is the phenomenon in which people are more likely to select businesses or products that have many positive reviews and avoid those that have neutral or negative reviews, or even those that only have a few positive reviews. The companies or products that have more positive reviews garner more real customers, who then post real reviews, thereby drawing in even more customers. Therefore, it benefits companies to pay for initial reviews—either very good reviews for themselves or very bad reviews for their competitors. Those companies that act ethically, however, and refrain from participating in this practice, suffer. They either become the target of a malicious campaign of negative reviews, which can drive away customers from even established businesses, or they lack enough exposure to receive legitimate positive reviews from a feedback loop.

Currently, the law does not adequately address the growing problem of opinion spam. Those getting paid to write the reviews can maintain anonymity by claiming First Amendment free-speech protection. The Federal Trade Commission Act (FTCA) grants the Federal Trade Commission (FTC) the authority to prevent the use of “unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce.” Thus far, however, the FTC has pursued only the most egregious abusers. Moreover, the FTCA conflicts with the Federal Communications Decency Act (FCDA), which grants websites immunity from what others post. Finally, the Lanham Act (the federal trademark act) provides some protection for the target companies through liability, but it is effective only for violations of the companies’ trademark rights, which do not often occur in opinion spam.

17. See Ott et al., supra note 12, at 310; see also Streitfeld, supra note 13.
19. See id.
20. See id.
21. See id.
22. See id.
23. See U.S. CONST. amend. I.
This Note examines the problem of opinion spam. Part I explores the history and prevalence of opinion spam and the governing laws. Part II analyzes the various legal doctrines these paid-for reviews implicate and the potential rights of the writers. Part III advocates for a three-pronged solution: (1) increasing FTC claims and penalties against firms that pay for reviews, (2) amending the FCDA to eliminate immunity for the hosting websites, and (3) encouraging market-based cooperative efforts by the website hosts to identify and block fake reviewers. Part IV concludes by encouraging private actors and regulatory agencies to work together to tackle this pervasive problem.

I. DISCOVERING OPINION SPAM

Online reviews continue to grow in number and importance among consumers. But fake reviews, otherwise known as opinion spam, taint the pool of reviews and make the honest reviews less credible. This abuse of the review system is detrimental for both duped consumers and businesses targeted by competitors.

A. Prevalence of Consumer Reviews

The ability to research and make purchases online has continued to grow and supplant in-store customer benefits, such as consultation with sales staff and physical examination of a product. PowerReviews’ and the e-tailing group’s “2010 Social Shopping Study” found that consumers preferred online research to in-store research for three main reasons: (1) it takes less time (according to 79 percent of participants), (2) it makes consumers feel more confident in their purchase decisions (83 percent), and (3) it provides credible information (82 percent). Lauren Freedman, president of the e-tailing group, noted: “Whereas once online product research was left to the technology savvy looking to make a major purchase, it is now part of the mainstream shopping experience for all product categories.

28. See discussion infra Part I.A.
29. See discussion infra Part I.B.
30. See discussion infra Part I.C.1.
31. See discussion infra Part I.C.2.
32. See Shoppers Would Rather Research Products Online: Study, supra note 1 (conducting a survey of over one thousand consumers who shop at least four times annually and spend $250 or more each year through online shopping); see also Pregont, supra note 1.
33. Pregont, supra note 1.
as consumers have taken control powering their own product research.”

Online review websites have quickly become both popular and powerful. For example, Yelp, which provides consumer reviews of local businesses, found that its traffic quadrupled in 2008. In just the month of October 2008, it had five million unique visitors. Only four years later, in the second quarter of 2012, the website averaged 78 million visitors monthly, and contained more than 30 million reviews. The company—which is privately held—does not post its earnings, but it does not make money from the reviews; it makes money only from selling ad space to local businesses. Its primary model is more “labor-intensive” than other ad-based companies, as it requires an old-fashioned sales force, which can be expensive. This method of ad generation has allegedly led the company to also seek other ways of increasing its ad revenue by taking advantage of the opinion spam problem; some listed businesses have complained that Yelp has refused to remove suspicious negative reviews from its website unless the businesses agree to pay for advertising.

Another website, TripAdvisor, which offers consumer reviews of travel-related businesses, including hotels and restaurants, also enjoys wide popularity. It boasts more than 60 million unique visitors monthly with over 75 million reviews and opinions. This publicly-traded company claimed $486 million in revenue in 2010. Therefore, these review websites not only serve an altruistic motive to assist consumer shopping; they also represent a profitable industry with growing financial clout.

Online consumer reviews have increased not only in prevalence but also in perceived importance. A recent survey found that 76
percent of consumers read online customer reviews before trying an unfamiliar company. For services that visit a person’s home, that number rose to 81 percent. Thus, in general, customers rely heavily on online reviews.

B. How Companies Create Opinion Spam

A company creates opinion spam by paying third parties for reviews of products or services in an effort to increase the company’s customer base while reducing the customer base of the company’s competitors. Opinion spam takes two forms: either positive reviews for the company’s own product or service, or negative reviews of a competitor’s product or service. The former aims to increase the company’s customer base, while the latter aims to drive customers away from a competitor—and toward the sponsoring company.

Companies hire small workforces of individuals to write these reviews, rather than hiring a separate company to do the work. For example, in 2009, a blogger accused Belkin, a networking and peripheral manufacturer that sells its products on Amazon, of soliciting reviews through Amazon’s Mechanical Turk workforce. The Mechanical Turk website allows individuals to hire themselves out for small tasks that computers cannot do. Belkin claimed that a single employee was responsible for soliciting the reviews and that it was “an isolated incident.” The employee allegedly asked “turkers” to write positive reviews of Belkin products at the rate of 65 cents per review. It appears that there were no legal ramifications from the
incident; it was not until later in 2009 that the FTC promulgated its updated guidelines that enable it to take action against such reviews.\textsuperscript{57}

The blogger found the ad on the Mechanical Turk website while looking for small jobs to do himself.\textsuperscript{58} An investigative journalist for the New York Times found additional ads either soliciting review writers or offering such services on websites including Fiverr, Digital Point, and Craigslist.\textsuperscript{59} These uncovered incidents show how such solicitations for opinion-spam writers may be hiding in plain sight. Unless someone happens to spot such an ad and brings it to light, these companies can easily continue to use such websites to find writers to create opinion spam.

\textbf{C. Why Opinion Spam Is Harmful}

Opinion spam harms both consumers and businesses.\textsuperscript{60} Consumers rely on the independence of online reviews to make purchasing decisions, but they are often unaware that many reviews are fake.\textsuperscript{61} Those who are aware still have a difficult time sorting the real from the fabricated.\textsuperscript{62} Businesses suffer because they are the subjects of targeted attacks by competitors who hire writers to post negative reviews of their products.\textsuperscript{63} Further, they lose business when their competitors engage in unethical practices and dishonestly promote their own products.\textsuperscript{64}

\textbf{1. Harm to Consumers}

Many consumers are unaware that opinion spam exists.\textsuperscript{65} As noted by journalist Abid Rahman, “Consumers are only just becoming aware of the ‘sock puppet’ phenomenon, where businesses and individuals assume an online identity which appears as a normal and independent consumer, and then seek to praise their own products or

\textsuperscript{58} Meyer, supra note 11.
\textsuperscript{59} Streitfeld, supra note 13.
\textsuperscript{60} See discussion infra Part I.C.1-2.
\textsuperscript{61} See discussion infra Part I.C.1.
\textsuperscript{62} See discussion infra Part I.C.1.
\textsuperscript{63} See discussion infra Part I.C.2.
\textsuperscript{64} See discussion infra Part I.C.2.
Some consumers, however, have grown leery of online reviews. The “2010 Social Shopping Study” found the top factors reducing trust were: not enough reviews, doubt that real customers wrote the reviews, and limited or no availability of negative reviews. Some critics have advanced tips for consumers to use in trying to discern fake reviews. Recommendations include reading many reviews for a product and then eliminating the “most glowing and most angry postings,” or ones that appear to have been written by a public relations person of the company because they are too detailed or ecstatic. Others advise consumers to look for detailed descriptions of the location as evidence the reviewer has actually visited the hotel, restaurant, or similar service, and to avoid reviews that include information extraneous to the review, such as whether the person supposedly traveled to a place on business, as evidence of a fake review.

Despite consumers’ increased awareness and the development of these tips, however, consumers still cannot easily identify fabricated reviews for myriad reasons. First, consumers suffer from “truth bias,” meaning they are more likely to classify an opinion as truthful than deceptive. Second, while computers can distinguish between truthful and fabricated reviews by running algorithms that analyze multiple technical factors of the review, the average consumer does not have access to these special algorithms. Third, the tips promulgated for identifying fabricated reviews are based on heuristics and are therefore unreliable. Finally, even when consumers study the most reliable tips, companies that create online spam can study those same tips. Those trying to game the system

68. Id.
69. See Cochran, supra note 16.
70. Id.
71. See Fisman, supra note 65.
72. See Ott et al., supra note 12, at 313, 316-17.
73. Id. at 313. Scholars dispute why people are more likely to believe a statement is true rather than false with such hypotheses as (a) it is a default to believe incoming information is truthful until additional evidence indicates otherwise, and (b) people usually tell the truth themselves and therefore are more likely to believe others also tell the truth. See Timothy R. Levine et al., Accuracy in Detecting Truths and Lies: Documenting the “Veracity Effect”, 66 COMM. MONOGRAPHS 125, 140-41 (1999).
74. See Ott et al., supra note 12, at 316-17 (combining a psycholinguistic approach with a standard text categorization approach to look for lack of sensorial and concrete language, lack of specificity about spatial configurations, increased focus on aspects external to the business, higher rate of positive emotion terms, and increased first person singular sentence structures).
75. See generally Cochran, supra note 16.
76. See Fisman, supra note 65.
are likely to use the recommendations for spotting fake reviews to hone their strategy and make their reviews harder to detect.\textsuperscript{77} All of these issues work against consumers’ ability to identify opinion spam with any consistency.\textsuperscript{78}

Without the ability to adequately distinguish truthful from fake reviews, consumers will unwittingly continue to rely on misleading and dishonest reviews when deciding what products to purchase online.\textsuperscript{79}

2. Harm to Businesses

Businesses also suffer from opinion spam.\textsuperscript{80} Even established businesses with many positive reviews can suffer from a few fake negative reviews because consumers give more credence to negative information, particularly when evaluating utilitarian products such as dishwashers and other durable consumer goods.\textsuperscript{81} Consumers view the negative information as more salient and accurate, even when surrounded by positive reviews.\textsuperscript{82} Thus, a competitor’s investment in even a few negative reviews can have a substantial impact on a company’s customer base.\textsuperscript{83}

For example, the Rees Hotel in Queenstown, Australia, discovered that commenters had inadvertently linked several negative reviews to its page rather than with the real subject of the unflattering commentary, a hotel in west Texas.\textsuperscript{84} The mistake cost the hotel profits from an estimated forty room rentals per month for two years.\textsuperscript{85} Fortunately, the hotel’s chief executive spotted the reviews and remedied the problem. The publicity has since attracted even more customers to the Rees.\textsuperscript{86} But other companies that either

\textsuperscript{77.}  \textit{Id.}
\textsuperscript{78.}  \textit{See Ott et al., supra note 12, at 313, 316-17.}
\textsuperscript{79.}  \textit{Id.}
\textsuperscript{80.}  \textit{See Sen & Lerman, supra note 8, at 77.}
\textsuperscript{81.}  \textit{Id.} at 77, 91. There appears to be no negativity bias when consumers research entertainment products in which choices are based more on subjective taste than actual usefulness, such as movies, music, and art. \textit{Id.} at 79, 91; cf. Wenjing Duan et al., \textit{Do Online Reviews Matter?—An Empirical Investigation of Panel Data}, 45 \textit{Decision Support Systems} 1007 (2008), available at home.gwu.edu/~wduan/Paper/DSS112008.pdf (examining impact of online reviews and word-of-mouth advertising on the film industry and finding that online reviews may have little persuasive impact but may have the effect of increasing awareness of popular films).
\textsuperscript{82.}  \textit{Sen & Lerman, supra note 8, at 90.}
\textsuperscript{83.}  \textit{Id.}
\textsuperscript{84.}  \textit{McFadden, supra note 9.}
\textsuperscript{85.}  \textit{Id.}
\textsuperscript{86.}  \textit{Id.}
do not notice negative reviews, or are unable to remove them, are not so fortunate.  

When a company spots a negative review, it has three options. First, the company can reach out to the disgruntled customer and offer to remedy the problem, prompting the customer to amend or remove his online complaint. This method—excellent customer service—is very effective. Indeed, Keith Cooper, CEO of RatePoint, Inc. stated, “Sometimes a negative review can turn off a customer, but our consumer behavior study shows a public response from the business can win back a customer who might have otherwise taken their business elsewhere.” The study found that 40 percent of people would consider using a local business that responds to a negative online review. Unlike real reviews, however, fake reviews provide no opportunity for business owners to respond and address problems raised by disgruntled customers, especially when reviewers post anonymously.

A second method for target companies to mitigate negative reviews is to hire a firm that manages businesses’ online reputations. This arrangement also financially disadvantages target companies. Smaller companies, in particular, suffer because they do not have the resources to investigate false reviews or to pay reputation-management firms. In addition, there is no guarantee that these reputation-management firms can get the false review

---

88. See Streitfeld, supra note 13 (illustrating how companies can reach out to disgruntled customers or hire a firm that manages small businesses’ reputations); see also Fost, supra note 35 (illustrating how companies can, albeit often unsuccessfully, ask websites to take down certain reviews).
89. See Streitfeld, supra note 13 (explaining how a courteous response to a negative review could prompt a customer to turn his negative review into a much more positive one).
90. Id.
92. Id.
95. See, e.g., Loten, supra note 94.
96. Id.
removed from the hosting website.\textsuperscript{97} Rather, they help the target company encourage real customers to post positive reviews to dilute the impact of the negative ones.\textsuperscript{98} Some have taken on the role of watchdog for their clients, like the company KwikChex.com, which complained to the British Advertising Standards Authority (ASA) about reviews on TripAdvisor.\textsuperscript{99} As a result of its investigation, the ASA ultimately forced TripAdvisor to remove its slogan “Reviews you can trust” from its website.\textsuperscript{100}

Third, a business can inform the hosting website that it believes the negative reviews are online spam and request that the website remove them. This tactic is often unsuccessful, because the website might be unwilling to remove what it believes is a legitimate negative review.\textsuperscript{101} In other instances, the website might try to exploit the business owner suffering from a negative review, even if it suspects the review is fake.\textsuperscript{102} For example, several business owners have claimed that Yelp refuses to take down negative comments unless the business pays for ads on the website, and sometimes Yelp outright rejects requests.\textsuperscript{103} Without the cooperation of the hosting website, therefore, it can be very difficult for companies to remove negative reviews.

The hosting websites should reconsider the long-term consequences and eschew opinion spam, lest they suffer their own harm from a tarnished reputation as a source for reliable reviews.\textsuperscript{104} Several websites have provisions in their terms of service that prohibit their users from posting fake reviews,\textsuperscript{105} yet it is unclear how many of

\begin{itemize}
  \item \textsuperscript{97} Id.
  \item \textsuperscript{98} Id.
  \item \textsuperscript{100} Rosie Baker, Retailers Join Forces to Rebuild Trust in Online Reviews, \textit{Marketing Week} (Sept. 27, 2011), http://www.marketingweek.co.uk/disciplines/digital/retailers-join-forces-to-rebuild-trust-in-online-reviews/3030472.article.
  \item \textsuperscript{101} See Rahman, \textit{supra} note 10.
  \item \textsuperscript{102} See Fost, \textit{supra} note 35.
  \item \textsuperscript{103} Id.
  \item \textsuperscript{105} See, e.g., \textit{Terms of Service}, \textit{Yelp}, http://www.yelp.com/static?country=US&p=tos (last visited Sept. 15, 2012) (prohibiting users from “writing a fake or defamatory review, trading reviews with other businesses, or compensating someone or being compensated to write or remove a review”); TripAdvisor Website Terms, Conditions and Notices, TripAdvisor, http://www.tripadvisor.com/pages/terms.html (last visited Sept. 15, 2012) (prohibiting users from posting content “that impersonates any person or entity or otherwise misrepresents your affiliation with a person or entity”).
\end{itemize}
them actually enforce these provisions. It is also uncertain how successful these efforts will be due to the difficulty in distinguishing real reviews from fake ones. Unless they cooperate with efforts to eliminate opinion spam, the hosting websites themselves could suffer from consumer distrust as the public becomes increasingly aware of the opinion spam problem.

On the other side of the equation, companies that pay for positive reviews of their own products or services ride the wave of a positive feedback loop. The more positive reviews a company garners, the more sales it is likely to enjoy, which then leads to a greater number of reviews from legitimate consumers, drawing yet more sales. A recent study of restaurants found that an extra star on Yelp is worth approximately 5 to 9 percent in revenue. Only when someone discovers that the company has been paying for positive reviews does the sponsoring company face any backlash. That backlash can be lethal, as seen by the downfall of Ferrit, an online-shopping company run by Telecom in New Zealand. Ferrit posted seven positive reviews for one of its products, a $500 toaster, which it then admitted had been written in-house as part of its advertising campaign. Telecom later shut down Ferrit for becoming unprofitable.

The line dividing acceptable and unacceptable behavior has become blurred, sowing uncertainty for companies trying to remain truthful. For example, an English hotel, The Cove, solicited “guests to post an ‘honest but positive review’ on TripAdvisor” and would in turn give them 10 percent off the cost of their next visit. Other companies offer free products or copies of books in exchange for a review. These businesses solicit real users but offer them free products as compensation, incentivizing the users who enjoyed the products to write a positive review. This gray area leaves sponsoring

---

106. See discussion supra Part I.C.1.
110. See McFadden, supra note 9.
111. See id.
114. Streitfeld, supra note 13.
115. See id.
companies unclear on what is permissible versus what exposes them to harm, should they cross the ethical boundary.

D. The Legal Loopholes

Litigants currently challenge opinion spam in only the clearest and most egregious instances due to the many obstacles they must overcome. The reviews posted online change quickly, and hired workers can post anonymously or use false information based on the requirements of the website. The writers may also try to claim First Amendment free-speech protection. From there, the plaintiff must investigate to find the hiring company that paid the authors for the reviews. Only when a party overcomes all of these hurdles will the FTC be able to step in and take action. Additionally, the easily identifiable parties, the websites themselves, have immunity under the FCDA, so naming them as defendants can be a waste of a plaintiff’s time and resources.

1. First Amendment of the US Constitution

If reviewers honestly express their beliefs in their reviews, then the First Amendment right to freedom of speech protects their statements against defamation challenges by targeted competitors. For example, in a case involving an investment-advisory firm’s negative review of a school district’s bond offerings, the US Court of Appeals for the Tenth Circuit stated: “[a] statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection from state defamation laws.” There, the review was too vague to be

---

117. See, e.g., Create Your Yelp Profile, YELP, http://www.yelp.com/signup (last visited Sept. 21, 2012) (requiring only name, email address, password, and zip code to sign up); Sign Up for TripAdvisor, TRIPADVISOR, www.tripadvisor.com (follow Register Now!) (last visited Sept. 15, 2012) (requiring only name, email address, password, and current city).
118. U.S. CONST. amend. I.
121. See Jefferson Cnty. Sch. Dist. No. R-1 v. Moody's Investor's Servs., Inc., 175 F.3d 848, 852 (10th Cir. 1999) (dismissing a school district's claim for an investment-advisory firm's article evaluating bonds issued by the school district, in part because the opinions expressed in the review were protected by the First Amendment).
122. Id.
proven false.\textsuperscript{123} The First Amendment thus protects authors who either state the truth or honestly believe their reviews are based on the truth, even if later proven false.

If, however, a plaintiff can show that the reviewer knowingly posted false information, then she may pursue a defamation claim under state libel laws because false claims forfeit First Amendment protection.\textsuperscript{124} For example, Georgia requires a libel plaintiff to show that there was false and malicious defamation of another, expressed in print, which harms the reputation of the person.\textsuperscript{125} Under the statute, "a libel is published as soon as it is communicated to any person other than the party libeled."\textsuperscript{126} In general, courts are split on whether a prospective plaintiff must demand a retraction before filing suit, a requirement that can pose another hurdle to taking action and bar the suit before the defendant even needs to assert a First Amendment defense.\textsuperscript{127}

Even if a defendant does not enjoy First Amendment protections, the First Amendment can still make it more difficult for a plaintiff to obtain the true name and identifying information about the author. In \textit{Krinsky v. Doe 6}, the president of a corporation sued ten unnamed defendants for allegedly defamatory statements made on websites.\textsuperscript{128} She served a subpoena on the Internet Service Provider (ISP) to get the identities of the anonymous posters. The court, after much discussion of the proper requirements, found that the plaintiff would first have to make a prima facie showing of the elements of her defamation claims, which she failed to do.\textsuperscript{129} The court required this showing both to protect the authors' First Amendment right to post material anonymously on the Internet and to prevent the plaintiff


\textsuperscript{125} GA. CODE ANN. § 51-5-1 (2012).

\textsuperscript{126} Michael A. Rataj, \textit{The Doctrine of Self Publication}, 1989 DETROIT C.L. REV. 197, 225 n.20 (citations omitted).

\textsuperscript{127} Compare Mathis v. Cannon, 573 S.E.2d 376 (Ga. 2002) (requiring a demand for retraction on an Internet bulletin board of the offending post prior to filing a defamation suit), with Zelinka v. Americare Healthscan, Inc., 763 So. 2d 1173 (Fla. Dist. Ct. App. 2000) (finding that no demand for retraction was necessary when a private individual posted a message on a computer service owned and operated by a third party).


\textsuperscript{129} \textit{Id.} at 244-45.
from stifling legitimate criticism. The plaintiff might have succeeded had she been able to satisfy the prima facie claim requirement, as the court noted, “When vigorous criticism descends into defamation, . . . constitutional protection is no longer available.” The First Amendment will thus protect those reviewers who either actually state the truth or honestly believe they state the truth. Even if it does not directly protect a dishonest defendant, the aura of the First Amendment can still hinder a plaintiff by requiring that the plaintiff demand a retraction before filing suit or demonstrate the prima facie elements of defamation to break through a defendant’s shield of anonymity.

2. Federal Trade Commission Act

The Federal Trade Commission Act (FTCA) grants power to and directs the Federal Trade Commission (FTC) to prevent the use of “unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.” The Seventh Circuit explained that the FTC strongly favors consumers because its “duty is to protect the casual, one might even say the negligent, reader, as well as the vigilant and more intelligent and discerning public” from unfair and deceptive practices. Just because an expert or a computer programmer might claim to be able to identify false reviews does not mean that the average consumer can, and it is the average reasonable consumer whom the FTC must protect.

Consistent with its duty, the FTC has brought claims for false disparagement of competitors, though not in the opinion spam context. For example, in the case of E.B. Muller & Company v. FTC, the FTC succeeded in its disparagement claim against a seller of chicory, a coffee substitute, because the company admitted that it had falsely represented the ingredients of a competitor’s product. The court held that “[f]alse disparagement of the competitor’s goods is an unfair

---

130. Id.
131. Id. at 238; see also Doe I v. Individuals, 561 F. Supp. 2d 249, 256 (D. Conn. 2008) (finding that similarly situated plaintiff satisfied the prima-facie-elements requirement sufficient to require ISP to produce identifying information of defamatory posters).
133. Parker Pen Co. v. FTC, 159 F.2d 509, 511 (7th Cir. 1946) (requiring company to make limitations on product guarantee clear to the public in its advertising to avoid deception).
134. See discussion supra Part I.C.1.
135. See FTC v. Pantron I Corp., 33 F.3d 1088, 1095 (9th Cir. 1994) (explaining that consumers just need to act “reasonably” under the circumstances); Parker Pen Co., 159 F.2d at 511.
136. E. B. Muller & Co. v. FTC, 142 F.2d 511, 516 (6th Cir. 1944).
method of competition” under the FTCA. The false disparagement, however, must originate either from the management or from enough members of the sales force based on relative size of the company to constitute an “unfair method of competition.” In Philip Carey Manufacturing Co. v. FTC, the court found that even though a few members of the sales staff had disparaged a competitor’s product by making the unfounded claim to potential customers that the product would not work in extreme temperatures, the company had not authorized such comments and had instead expressly instructed its employees not to say such things. Further, because only a small handful of the approximately six hundred salesmen made less than a dozen disparaging statements over the course of several years, the court determined the quantity of actors and statements was not enough to constitute a “method” of competition and therefore refused to hold the entire company liable.

On the other hand, it might be easier for the FTC to hold companies liable for hiring writers to post positive reviews about the companies’ own products and services, since these statements fall into the category of false paid-for testimonials. In FTC v. Standard Education Society, the Supreme Court upheld the FTC’s determination that using fake testimonials touting the benefits of an encyclopedia service constituted a “false, deceptive and misleading” practice because consumers might rely on the reviews, believing they were true. The company had used testimonials under the names of real customers, but the individuals stated they had neither written nor authorized such testimonials for the encyclopedia.

If the reviews contain what reviewers actually believe, courts are typically more willing to let companies use the reviews to promote their products and services. For example, in the 1932 case Northam Warren Corp. v. FTC, the court determined that the use of testimonials containing true statements was permissible, despite the fact that the company paid substantial sums of money to obtain the testimonials and did not disclose the fact of payment in the advertisements. The court stated: “It is doubtful if the public is

137. Id. (citing Perma-Maid Co. v. FTC, 121 F.2d 282 (6th Cir. 1941)).
139. Id.
140. Id.
143. Id.
144. Northam Warren Corp. v. FTC, 59 F.2d 196, 198 (2d Cir. 1932).
gullible enough to believe that such testimonials are given without compensation. But, if they are paid for, providing they are truthful, no one is deceived.”\textsuperscript{145} The court emphasized that the truthfulness of the information conveyed to the public indicated that no deception occurred.\textsuperscript{146}

Even if the reviewer honestly expresses opinions touting the false characteristics of a product, courts will protect the opinions because people have the right to express their beliefs.\textsuperscript{147} In \textit{Scientific Manufacturing Co. v. FTC}, the Third Circuit refused to enjoin publishers from distributing pamphlets about the supposed health risks of using aluminum cooking utensils because they were not financially involved in the sale of those kinds of products.\textsuperscript{148} The court held:

\textit{\textsuperscript{146}Id. at 197. \textsuperscript{147}Id. at 198. \textsuperscript{148}See \textit{Scientific Mfg. Co. v. FTC}, 124 F.2d 640, 644 (3d Cir. 1941).}

\[\textit{The publication, sale and distribution of matter concerning an article of trade by a person not engaged or financially interested in commerce in that trade is not an unfair or deceptive act or practice . . . if the published matter, even though unfounded or untrue, represents the publisher's honest opinion or belief.}\textsuperscript{149}

The FTC’s 2009 revised guidelines on endorsements and testimonials substantiate the notion that, however untrue, a reviewer’s honest opinions about a product or service are allowed.\textsuperscript{150} The new guidelines state: “Endorsements must reflect the honest opinions, findings, beliefs, or experience of the endorser.”\textsuperscript{151} Further, the hiring company must disclose a material relationship even with honest reviewers, reflecting a change since \textit{Northam Warren}.\textsuperscript{152} In its regulations, the FTC provided a set of examples that demand full disclosure of a material connection.\textsuperscript{153} Example eight, in particular, describes an online message board for digital-music enthusiasts to exchange information about new products.\textsuperscript{154} An employee of a music-device manufacturer posts messages promoting the company's
product without disclosing her employment connection. The example explains that “[k]nowledge of this poster’s employment likely would affect the weight or credibility of her endorsement. Therefore, the poster should clearly and conspicuously disclose her relationship to the manufacturer to members and readers of the message board.”

The FTC has recently enforced this disclosure requirement in two opinion spam cases, both of which settled. In one matter, various video-game developers had legitimately hired Reverb, a public-relations and marketing firm, to help market their video-game applications. Reverb often received a percentage of the games’ sales, so it instructed its employees to pose as ordinary customers and post reviews of the video games on the iTunes store, without disclosing that the developers had hired Reverb for marketing. It did not appear that the video-game developers were aware of, or authorized, Reverb’s tactics. Since Reverb did not disclose the financial connection, however, the FTC found the reviews to constitute a deceptive trade practice. Under the settlement agreement, Reverb agreed to remove any deceptive reviews its employees had posted and refrain from posting any more without the proper disclosure.

In the second matter, concerning Legacy Learning Systems, the FTC again brought claims alleging the company paid reviewers to endorse its product for learning how to play the guitar. The reviews on several different websites contained no disclosure that the reviewers were actually affiliates of Legacy. Legacy settled the case for $250,000, a comparatively small portion of the approximately $5 million in sales it earned for the instructional products from the false reviews. David Vladeck, the Director of the FTC’s Bureau of Consumer Protection, advised that: “Advertisers using affiliate marketers to promote their products would be wise to put in place a reasonable monitoring program to verify that those affiliates follow the principles of truth in advertising.” As part of the settlement

155. Id.
156. Id.
158. See Public Relations Firm to Settle FTC Charges, supra note 119.
160. Public Relations Firm to Settle FTC Charges, supra note 119.
161. See id.; Complaint, supra note 159.
162. See Public Relations Firm to Settle FTC Charges, supra note 119.
163. Id.
164. See Firm to Pay FTC $250,000 to Settle Charges, supra note 141.
165. Id.
166. Id.
167. Id.
agreement, Legacy agreed to monitor and submit monthly reports about its top fifty revenue-generating affiliate marketers, in addition to adding the appropriate disclosures about their financial connections.168 Thus, the FTC has the proper authority to pursue those violating its regulations. As discussed in Parts II.B and III.A below, however, its actions to date have been lackluster, tackling only the most obvious offenses with minimal consequences.

3. Federal Communications Decency Act

The Federal Communications Decency Act (FCDA) grants immunity to websites that host the postings that hired reviewers write.169 The statute contains a provision which reads, “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.”170 Yelp invoked this immunity in Reit v. Yelp!, Inc., where a dentist brought a defamation suit against the website for removing positive reviews and refusing to remove suspicious negative reviews from his listing unless the dentist purchased advertising space on the website.171 The court categorized Yelp as an “interactive computer service,” defined in the statute as “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server.”172 This category is different than an “information content provider,” which the statute defines as “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.”173 Only the former, the “interactive computer service,” is immune from liability under the FCDA for publishing false or defamatory reviews provided by third parties.174 By categorizing Yelp as an interactive computer service, the court granted Yelp—and thereby similar websites—immunity from suit for defamation contained in negative reviews.175 The court also rejected the plaintiff’s claim that Yelp’s manipulation of the reviews to boost advertising

168. Id.
170. Id. § 230(c)(1).
173. 47 U.S.C. § 230(b)(3); Reit, 907 N.Y.S.2d at 413.
174. Reit, 907 N.Y.S.2d at 413.
175. See id. at 413-14.
sales was a deceptive practice because Yelp directed its conduct at business owners and was therefore unlikely to deceive consumers.\footnote{176}

There is thus a distinction between what content the website produces itself and what content reviewers post. The Fourth Circuit found:

By its plain language, § 230 [of the FCDA] creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service. Specifically, § 230 precludes courts from entertaining claims that would place a computer service provider in a publisher’s role. Thus, lawsuits seeking to hold a service provider liable for its exercise of a publisher’s traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred.\footnote{177}

The court went on to tie immunity back to First Amendment rights: “Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium,” while at the same time wanting “to keep government interference in the medium to a minimum.”\footnote{178} Therefore, instead of allowing regulation, Congress granted outright immunity to the websites.

The court’s rationale for this immunity is visible in other areas apart from the FCDA. For example, in the recent case of \textit{Janus Capital Group, Inc. v. First Derivative Traders}, the Supreme Court discussed what it means to “make a statement” in the context of securities laws.\footnote{179} The Court found that, “One who prepares or publishes a statement on behalf of another is not its maker.”\footnote{180} The Court further noted, “Merely hosting a document on a Web site does not indicate that the hosting entity adopts the document as its own statement or exercises control over its content.”\footnote{181} Similarly, the Digital Millennium Copyright Act provides immunity for websites hosting third-party content that allegedly infringes a copyright.\footnote{182} So long as the website removes the content upon receiving notice from the copyright holder, it cannot be held liable.\footnote{183} Thus, it appears that both the Court and Congress desire to limit the liability of hosting

\footnotesize{176. }\textit{Id.} at 415.
\footnotesize{177. }\textit{Zeran v. Am. Online, Inc.,} 129 F.3d 327, 330 (4th Cir. 1997); \textit{see also} Rodney A. Smolla, \textit{Online Defamation and § 230 of the Communications Decency Act, in 3 SMOLLA \& NIMMER ON FREEDOM OF SPEECH § 23:12 (2012).}
\footnotesize{178. }\textit{Zeran,} 129 F.3d at 330.
\footnotesize{179. }\textit{Janus Capital Grp., Inc. v. First Derivative Traders,} 131 S. Ct. 2296, 2302 (2011) (describing what it means to “make” a statement with regard to false statements in marketing investment opportunities).
\footnotesize{180. }\textit{Id.}
\footnotesize{181. }\textit{Id.} at 2305 n.12.
\footnotesize{183. }\textit{Id.}
websites because those sites are simply the platform for a third party who actually crafts the content.

4. Lanham Act

Business owners who are the target of an opinion spam campaign might mistakenly bring a trademark claim under the Lanham Act for false advertising and for creating consumer confusion. Trademark law is primarily concerned with “passing off” and “reverse passing off,” where a company confuses consumers into believing that the goods of one company are actually the goods of another through the misappropriation of an identifying mark like a logo, slogan, or packaging. The elements of a false advertisement claim are:

1. The advertisements of the opposing party are false or misleading as to the party’s own product or another’s;
2. The advertisements actually deceived customers or had the tendency to deceive a substantial portion of the targeted audience;
3. The deception is material, meaning it is likely to influence purchasing decisions;
4. The defendant’s advertised products traveled in interstate commerce; and
5. The plaintiff has been or is likely to be injured as a result of the false or misleading advertisements by casually related declining sales or loss of goodwill.

Therefore, a victim of online spam may be tempted to bring a claim under the Lanham Act, as it is primarily concerned with consumer deception. The victim usually cannot, however, because the cause of action for false advertising under the Lanham Act must be related to the business owner’s trademark.

Typically, trademarks are not at issue in an opinion spam case because the marks are often used to correctly identify the business. Oftentimes, with negative opinion spam the harmful competitor wants to ensure an innocent company is appropriately distinct in consumers’ minds so that consumers pick the right company—that is, the competitor—when choosing where to spend their money. Therefore, the competitor correctly uses the innocent company’s trademarks. It would disserve the competitor to misuse the innocent company’s trademark on the chance that consumers would commingle the two companies in their minds and give their business to the innocent company instead. With positive opinion spam, a company’s reviews

---

185. See id.
188. See supra Part I.B.
praise only themselves, so there is no reason to introduce any mention of a competitor or its marks, again to avoid the risk of consumer confusion. Thus, unless their trademarks have legitimately been misappropriated, the Lanham Act is unlikely to provide relief to innocent companies in opinion-spam cases.

II. OPINION SPAM’S LEAP THROUGH THE LEGAL LOOHOLEs

This Part evaluates each of the legal loopholes discussed in Part I.D to show why the current laws are inadequate for addressing opinion spam. In addition, this Part examines various market-based approaches to dealing with opinion spam.

A. First Amendment of the US Constitution

As a general matter, genuine customers who post their honest opinions about a company’s product or service are entitled to the First Amendment’s freedom of speech protection and cannot be held liable for defamation, even if their information turns out to be false. This would also likely hold true for people who write reviews in response to a company’s obvious solicitation, for example, in return for a free sample or a discount, because the reviewers would still be writing honestly about their experience. Honest reviewers, therefore, do not fit within the definition of opinion spam because most opinion spammers have never tried the product and therefore do not have a factual basis for their reviews.

Should a harmed business owner discover that the information provided in a review is false and does not reflect the reviewer’s honest belief, she may pursue a defamation claim as a libel action. A libel claim typically consists of proving: (1) false and malicious defamation, (2) publication in print, and (3) harm to the target’s reputation. The latter two requirements are relatively easy to satisfy. A plaintiff may be able to show harm to the company’s reputation from a negative review, perhaps in terms of lost profits, as Queenstown Rees Hotel did. Additionally, the posting of the review on a public website

189. See supra Part I.B.
192. See discussion supra Parts I.B, I.C.2.
196. See discussion supra Part I.C.2.
should satisfy the publication requirement since that is an effective
means of communicating with third parties. The first requirement,
however, is more difficult to fulfill, as a plaintiff will likely find it hard
to show a review is both false and malicious given the opaque nature
of opinion spam, especially if the writer posted anonymously and there
is no obvious connection between the writer and a rival company.
Success on the claim will also depend on the actual content of the
review. If it is quite vague overall, consisting only of general negative
comments, then the plaintiff will not be able to show that it is
“provably false.”

Only after the plaintiff satisfies all elements of the prima facie
libel claim will the courts demand that the ISP turn over any
identifying information it has about the author. Thus, if a plaintiff
decides to sue the author of a review, the First Amendment’s free
speech protections may hinder her actions at multiple points along the
way.

B. Federal Trade Commission Act

Under the general auspices of the FTCA, the FTC could use its
power to bring claims against a competing company for disparaging
comments made against an innocent company in the online-review
context. Of course, this action assumes the innocent company knows
which competitor paid for the comments, that this competitor knows
the review is false, and the innocent company complains to the FTC.
The FTC, however, must have sufficient evidence that someone in
management authorized payment for the reviews. Otherwise, the
court may decide the opinion spam was the unauthorized action of
individual employees, rather than the company’s “method” of
competition, and not hold the company liable.

As stated in Part II.A, the First Amendment protects reviewers
for the substance of their reviews if they honestly believe the veracity
of what they write. The reviewer enjoys such protection regardless of
whether the information is in fact true, thereby prohibiting the FTC

197. See Rataj, supra note 126, at 199-200.
198. See Krinsky v. Doe 6, 72 Cal. Rptr. 3d 231, 239 (Ct. App. 2008); see also discussion
supra Parts I.B, I.C.2.
855 (10th Cir. 1999).
200. See Doe I, 561 F. Supp. 2d at 256; Krinsky, 72 Cal. Rptr. 3d at 245-46.
201. See Philip Carey Mfg. Co. v. FTC, 29 F.2d 49, 51 (6th Cir. 1928).
202. Id. For example, the company Belkin blamed the solicitation of paid reviewers on
one of its employees, disclaiming any knowledge or approval of the employee’s actions. See
Meyer, supra note 11.
from taking action against such reviewers. However, the FTC’s regulatory guidelines permit it to pursue even honest reviewers if they fail to disclose a material relationship with the hiring company. These guidelines mark a distinct change since Northam Warren, which held that no disclosure was necessary because customers would assume a company paid for its testimonials, perhaps recognizing the fact that most customers do not actually realize the material financial connections between companies and reviewers.

The FTC could also initiate actions against companies that hire writers to post positive reviews of their own products or services. The FTC may issue an administrative complaint “when it has ‘reason to believe’ that the law has been or is being violated, and it appears to the Commission that a proceeding is in the public interest.” The provision requiring endorsements to “reflect the honest opinions, findings, beliefs, or experience of the endorser” would seem to create an avenue for the FTC to bring suit against reviewers if they are not honest in their reviews. Additionally, as with the honest reviewers, the FTC could require the companies hiring the writers to disclose any material relationships. A court would likely uphold this requirement given the similarity between opinion spam and Example Eight of the guidelines. As mentioned in Part I.D.2, this example addresses individuals, compensated for their endorsements, who write positive reviews for a product on a message board, which other consumers assume contains independent opinions. The guidelines state that, in this situation, “the poster should clearly and conspicuously disclose her relationship to the manufacturer to members and readers of the message board.” This disclosure requirement would address one of the main problems with opinion spam: consumers are unaware of the financial connection between the reviewers and the companies they review. Therefore, the FTC’s regulations and guidelines already authorize the FTC to take action and require companies and posters to disclose their financial relationship in situations analogous to opinion spam.

Based on the Reverb and Legacy Learning cases, it may appear that the FTC can use its authority to sufficiently police opinion spam

203. See Scientific Mfg. Co. v. FTC, 124 F.2d 640, 644 (3d Cir. 1941); Northam Warren Corp. v. FTC, 59 F.2d 196, 196-97 (2d Cir. 1932).
204. Northam Warren Corp., 59 F.2d at 197.
205. See Firm to Pay FTC $250,000 to Settle Charges, supra note 141.
206. 16 C.F.R. § 255.1(a) (2012).
207. Id. § 255.1(d).
208. Id. § 255.5; see supra Part I.D.2.
209. 16 C.F.R. § 255.1(d).
by bringing a suit when necessary.\textsuperscript{211} As Christine Frietchen, the Editor-in-Chief of ConsumerSearch.com, noted, however, “Deceptive review sites are among the first things consumers searching for reviews on products . . . find, but they come and go so fast, it’s difficult for regulators to police them.”\textsuperscript{212} Mary Engle, the Director of the FTC’s Division of Advertising Practices, likewise observed, “The more egregious the claims are, the more likely they are to be targeted.”\textsuperscript{213}

And with only two complaints brought thus far, the FTC has been able to go after only the most obvious and egregious cases—the lowest hanging fruit—while still struggling with problems of detection and widespread abuse. Further, violation of a settlement agreement made with the FTC carries a civil penalty of up to only $16,000, which may not be sufficient to inspire companies to actually adhere to settlement provisions, lax as the settlement provisions might be.\textsuperscript{214} Therefore, while relying on the FTC may seem like a viable option, it is not enough on its own to adequately address the growing problem of opinion spam.

\textbf{C. Federal Communications Decency Act}

The FCDA prevents harmed business owners from bringing claims against hosting websites by insulating them from liability. For example, the plaintiff in \textit{Reit} faced this barrier of immunity and was unable to pursue claims against either Yelp or the anonymous authors of the negative reviews.\textsuperscript{215} Moreover, maintaining the distinction between the website and anonymous authors creates another level of protection for the company that hired the reviewer. If the FCDA had instead collapsed the categories and maintained liability for both the websites and the authors, the websites would have an incentive to help discover the identities of both the hiring company and the writers, in order to shift their own liability onto them.

While both Congress and the courts\textsuperscript{216} appear to believe that the host websites are a hands-off platform where third parties post information, providing immunity ignores the active role that websites can play in perpetuating opinion spam. With complete immunity in the realm of opinion spam, hosting websites are unaccountable to reviewed businesses and consumers and are able to manipulate

\begin{itemize}
\item \textsuperscript{211} See O’Donnell, \textit{supra} note 25.
\item \textsuperscript{212} \textit{Id}.
\item \textsuperscript{213} \textit{Id}.
\item \textsuperscript{214} See Firm to Pay FTC $250,000 to Settle Charges, \textit{supra} note 141.
\item \textsuperscript{215} \textit{Reit v. Yelp!}, Inc., 907 N.Y.S.2d 411, 413 (Sup. Ct. 2010).
\item \textsuperscript{216} See Janus Capital Grp., Inc. v. First Derivative Traders, 131 S. Ct. 2296, 2302 (2011).
\end{itemize}
reviews for their own profit by requiring business owners to purchase advertising space if they want the websites to remove negative reviews. These websites are not taking the passive role that Congress and the courts apparently imagined; some are instead actively exacerbating the problem for their own gain.

Congress should take guidance from the Digital Millennium Copyright Act (DMCA) and allow for a notice-and-takedown procedure similar to that used in allegations of copyright infringement. The DMCA limits websites’ potential liability for hosting material that infringes another’s copyright if “upon notification of claimed infringement...[it] responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.” Under this statute, an entity, believing that posted material violates its copyright, may notify the hosting website and demand it take down the infringing material. This notice-and-takedown procedure appropriately recognizes that websites can and should remove offending content.

D. Private Market-Based Approaches

As discussed in Part I.C.2, one approach to avoid negative reviews generally is to encourage customers to contact the company if they have a complaint before posting a harmful review online. While this might work for real reviews, for negative opinion spam, which the authors completely fabricate for payment by a competitor, such efforts would be fruitless. Another approach is to hire a public-relations firm, like Main Street Hub or KwickChex, to help manage an affected company’s online reputation. It is unclear whether these reputation-management firms are effective, and there is also the risk that they will fail to disclose a material relationship with any real customers whom they incentivize to write positive reviews. In addition, this approach financially burdens the client and is especially onerous for small companies with limited resources.

A group of retail-electronics companies that host reviews took a more top-level approach in their recent “Manifesto.” Recognizing the harm to their own reputations if someone discovers fake reviews

217. See Reit, 907 N.Y.S.2d at 415.
220. See id. § 512(c)(1)(C).
221. See Elliott, supra note 93; supra Part I.C.2.
222. See Streitfeld, supra note 13; Sweeney, supra note 99; supra Part I.C.2.
223. See Baker, supra note 100.
on their websites, they have agreed to try to eliminate opinion spam.\textsuperscript{224} Prompted by social-commerce company Reevoo, the group has created its own logo to reassure customers that the reviews on their websites are trustworthy.\textsuperscript{225} Reevoo claims that all of the reviews must come from people who have actually purchased the product,\textsuperscript{226} which is consistent with findings by Cornell researcher Jeff Hancock indicating that websites that limit posting ability to people who have actually purchased the product have fewer deceptive reviews.\textsuperscript{227} This effort could be expanded by including provisions in the websites’ terms of service that would enable the host to screen for and remove fake reviews. These terms could also prohibit use of the website to post fake reviews.\textsuperscript{228} Websites that already contain such provisions in their terms of service should enforce them to maintain their own reputational standards. This joint endeavor would help cut off fake reviews at the front end by blocking the spammers’ ability to post opinion spam.

\section*{III. Tripartite Solution}

In order to adequately address the problem of opinion spam, a multi-tiered approach is necessary. This Note advocates for a three-part solution. First, the FTC should step up efforts to bring complaints and penalties against those companies for which it can find clear evidence of review solicitation. Second, Congress should amend the FCDA to eliminate immunity for the hosting websites so that prospective plaintiffs can hold them accountable for maintaining false postings online. Third, the hosting websites should proactively bar and help identify spammers by utilizing some of the market-based approaches discussed in Part II.D.

\subsection*{A. Increase FTC Enforcement}

The FTC currently has the power to bring complaints against those accused of paying for opinion spam; however, so far it has gone after only the most egregious abuses and with minimal penalties. As seen in the Reverb and Legacy Learning cases, the FTC has used its

\begin{itemize}
\item \textsuperscript{224} See id.
\item \textsuperscript{225} See id.
\item \textsuperscript{226} Id.
\item \textsuperscript{227} O’Donnell, supra note 25.
\item \textsuperscript{228} See, e.g., TripAdvisor Website Terms, Conditions and Notices, supra note 105 (prohibiting users from posting content “that impersonates any person or entity or otherwise misrepresents your affiliation with a person or entity” in addition to reserving the right to remove any content for any reason).
\end{itemize}
authority under the FTCA to bring charges against sponsoring companies for deceptive trade practices. However, in the Reverb case, the FTC settled in return for a mere promise to remove the deceptive reviews and refrain from posting any more without a proper disclosure. No monetary damages were assessed. In the Legacy Learning case, the FTC settlement included a similar promise and payment of 5 percent of the sales allegedly resulting from the endorsements. These minimal penalties hardly seem likely to deter future abuses by either these same companies or others engaged in similar practices.

Instead, the FTC should increase its efforts to investigate submitted complaints and to identify opinion spam authors and the companies sponsoring them. It should at least require disclosure of monetary associations, even for honest reviewers who receive an incentive to provide a positive yet truthful review. If the FTC does settle with a company, it should require more than a simple promise not to break the rules. It should also impose stiff monetary damages to send a message that it will not tolerate these types of business practices, and it should utilize its ability to impose additional civil penalties for any violation of a settlement agreement. Perhaps then deterrence will be more effective.

B. Eliminate Immunity for Websites Under the FCDA

As a second step, Congress should amend the FCDA to eliminate immunity for websites that knowingly host fake reviews. The courts and Congress justify this immunity with a misguided belief that these websites are just platforms for third-party users, and those users alone should be liable for the content of the posts. These websites have full control over removing any reviews they want taken down. Additionally, at least some hosts are taking advantage of their immunity by forcing the targeted business owners to pay for advertising on the website if they want the negative reviews

229. See O’Donnell, supra note 25.
230. See Public Relations Firm to Settle FTC Charges, supra note 119.
231. Id.
232. See Firm to Pay FTC $250,000 to Settle Charges, supra note 141.
234. See discussion supra Part I.D.2.
235. See Firm to Pay FTC $250,000 to Settle Charges, supra note 141.
237. See discussion supra Part I.D.3.
removed.\textsuperscript{238} Far from being inactive participants, Congress needs to hold these websites accountable.

Moreover, the justification based on protecting free-speech rights is counterintuitive. Congress is indicating that the websites are inactive—and thus not exercising their free-speech rights—yet Congress still grants them immunity to help protect their supposed speech. Meanwhile, Congress has denied immunity for the authors of the posts, who are the ones most obviously speaking, but who still face liability since the First Amendment does not protect defamatory statements.\textsuperscript{239}

Reinstating liability would open the door to private litigation and FTC enforcement and appropriately recognize the websites’ substantial role in managing their own content. By exposing host websites to liability, Congress would incentivize the websites to help identify authors—who may otherwise remain anonymous—in order to shift the websites’ liability onto the source of the reviews.\textsuperscript{240} At the very least, this amendment would encourage websites to take a more proactive role in implementing measures to inhibit authors’ ability to post fake reviews.

\textit{C. Encourage Websites to Restrict Authors’ Ability to Post}

While some websites have voluntarily tried to combat opinion spam to protect their own reputations, others have done little or nothing to abate the problem. By reinstating liability under an amended FCDA, Congress would properly encourage all websites to inhibit authors’ ability to post opinion spam to limit their own liability. The websites should add provisions to their terms of service that prohibit users from posting fake reviews. They should then use their power to identify and remove suspicious posts (perhaps by using computer algorithms), deactivate accounts of abusive posters, and file complaints with the FTC for the FTC to investigate.

For those websites that sell products online, the websites should limit the ability to post reviews to only those people who have actually purchased the product through their website, rather than ones that claim to own the product but to have purchased it elsewhere. Box stores could create a system to link a customer’s in-store purchases to that person’s online account so they could still write reviews of the products. For those websites that deal with reviews of local services, the websites should also require authors to disclose

\textsuperscript{239} See discussion supra Parts I.D.1, II.A.
\textsuperscript{240} See discussion supra Part II.C.
more identifying information before signing up and posting reviews. While some websites currently require only a name, email address, and zip code, additional information could include a verifiable phone number and mailing address. Reviewers could still post anonymously, in accordance with their First Amendment protections, so normal website viewers would not know who they are, but the website could disclose the information to plaintiffs or to the FTC to help identify parties. The website could then remove reviews from accounts that are no longer active or that no longer have valid identification information. The websites would have some meaningful information to identify the user, should a court require disclosure.

IV. CONCLUSION

This Note has explored the pervasive and growing problem of opinion spam in online consumer reviews. These fake reviews cause problems not only for unsuspecting consumers, but also for competing businesses. Those reviewers who honestly believe what they write enjoy First Amendment protection. Even those who write falsely enjoy a limited right to anonymity unless a plaintiff can prove the prima facie elements of her defamation case. If the identities of the authors or sponsoring company are discoverable, however, then potential plaintiffs and the FTC may pursue action. The FTC should augment not only its efforts at filing complaints against known offenders, but also the penalties it demands in settlement or court proceedings. However, under the FCDA, the hosting websites currently enjoy immunity. Congress should amend the FCDA by eliminating website immunity to hold those accountable who might take advantage of the immunity for their own gain. Those websites that voluntarily undertake measures to weed out fake reviews to protect their own reputations and avoid liability should restrict reviews to those who have actually purchased the product, or should at least obtain more identifying information from the posters to assist in identifying them. Through these combined efforts, consumers would become more aware of opinion spam, and those who could curb it will have the proper power and incentives to do so.

Kendall L. Short*

241. See supra note 117.

* J.D. Candidate, Vanderbilt University Law School, 2013; B.A., University of North Carolina at Chapel Hill, 2009. The Author wishes to thank her family and friends for their endless love and support. The Author further wishes to thank all those who helped edit this Note for their invaluable contributions and the rest of the VANDERBILT JOURNAL OF ENTERTAINMENT AND TECHNOLOGY LAW Senior Editorial Board for their friendship.