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Protecting Brand Image or Gaming the System? Consumer “Gag” Contracts in an Age of Crowdsourced Ratings and Reviews

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PROTECTING BRAND IMAGE OR GAMING
THE SYSTEM? CONSUMER “GAG” CONTRACTS
IN AN AGE OF CROWDSOURCED RATINGS
AND REVIEWS

LUCILLE M. PONTE*

Traditionally, businesses developed and controlled brand image through company-sponsored advertising and marketing campaigns. With the rise of social media, brand communications have become more interactive, especially on crowdsourced review sites. This increased interactivity helps companies to gain valuable insight into the consumer experience and to improve their brand image and customer engagement. Businesses soon learned that positive consumer ratings and reviews often translated into enhanced brand reputation and increased revenues. Some merchants and professionals seek to burnish their brand image by paying for positive reviews while others try to silence disgruntled customers through adhesive nondisparagement clauses. These gag clauses may rely upon dubious intellectual property claims, monetary penalty clauses, and other financial threats in order to prevent unhappy consumers from posting negative reviews. Certain businesses justify these provisions as legitimate actions needed to protect their brand image and goodwill in a social media environment fraught with fake negative reviews from unscrupulous competitors and libelous consumers. This Article examines the rise of consumer nondisparagement clauses and considers the legality of such agreements under contract, free speech, and intellectual property principles. Issues of freedom of contract and concerns about deceptive advertising, fair use, and copyright misuse are also addressed. This Article concludes with

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a review of self-regulatory proposals that balance freedom of contract and legitimate branding concerns with customer speech interests and issues of good faith and fair dealing.

TABLE OF CONTENTS

INTRODUCTION.....	62
I. CONTRACTS OF SILENCE AND THE RISE OF NONDISPARAGEMENT CLAUSES	71
II. KEY MOTIVATORS FOR UTILIZATION OF NONDISPARAGEMENT CLAUSES	88
III. AVOIDING ENFORCEMENT UNDER CONTRACT PRINCIPLES ...	101
<i>A. Lack of Consideration</i>	102
<i>B. Unconscionability</i>	104
<i>C. Public Policy Concerns</i>	112
1. <i>First Amendment Issues</i>	114
2. <i>State Statutes Invalidating Nondisparagement Clauses</i>	115
3. <i>Anti-SLAPP Laws</i>	118
4. <i>Deceptive and Unfair Trade Practices</i>	120
5. <i>Fair Use and Copyright Misuse</i>	122
<i>D. Excessive Penalty Clauses and Privity Issues</i>	128
IV. FEDERAL OPTIONS ON NONDISPARAGEMENT CLAUSES	131
<i>A. Enact Proposed Consumer Review Freedom Act of 2014</i>	132
<i>B. Revise the Existing FTC Endorsement Guides</i>	134
<i>C. Amend Section 230 Immunity</i>	135
V. RECOMMENDATIONS FOR SELF-REGULATORY OPTIONS	140
<i>A. Revise Content Guidelines on Nondisparagement Issues</i> ...	141
<i>B. Improve Website Filtering and Communication Programs</i>	144
<i>C. Expressly Address Nondisparagement Clauses in Ethics Codes and Best Practices</i>	146
CONCLUSION.....	148

INTRODUCTION

Businesses invest a great deal of time, effort, and expense into developing their brand and building customer relationships.¹ Traditionally, businesses shaped their brand image through company-sponsored advertising and marketing campaigns.² With the rise of social media, brand communications have become much more complicated, with greater consumer interactivity³ through online and brick and mortar websites, social media platforms,⁴ as well as independent crowdsourced review sites, such as Yelp,⁵

¹ Billions of dollars are spent annually to promote positive consumer recognition of brands. Paul W. Garrity, *Advertising Regulation in the Web 2.0 World*, METRO. CORP. COUNSEL, Nov. 2, 2010, <http://www.metrocorpcounsel.com/articles/13197/advertising-regulation-web-20-world> [<http://perma.cc/SF5Q-6QBH>]. It is estimated that U.S. consumers engage in approximately 100 million discussions about brands every hour, and about three billion brand conversations each day. JONAH BERGER, *CONTAGIOUS: WHY THINGS CATCH ON* 7, 64 (2013). Overall, word of mouth between ordinary consumers is ten times more successful than traditional advertising. *Id.* at 8.

² Garrity, *supra* note 1. See Sonia K. Katyal, *Stealth Marketing and Anti-branding: The Love that Dare Not Speak Its Name*, 58 *BUFF. L. REV.* 795, 795–96, 803–04 (2010). Professor Katyal states that “branding strategies make up a significant portion of general corporate strategy; financial analysts claim that brand equity makes up a tremendous amount of company value. At times, a company’s brand equity has been more important than the book value ascribed to a particular product.” *Id.* at 804. See generally JENNIFER GILLAN, *TELEVISION BRANDCASTING: THE RETURN OF THE CONTENT-PROMOTION HYBRID* 245–62 (2015) (discussing the historical role of television as brand “recommendation machine” and content-promotion hybrids on digital platforms as vehicles for generating a new wave of online brand recommendations).

³ Kaitlin A. Dohse, Note, *Fabricating Feedback: Blurring The Line Between Brand Management and Bogus Reviews*, 13 *U. ILL. J.L. TECH. & POL’Y* 363, 365 (2013); Kendall L. Short, Note, *Buy My Vote: Online Reviews for Sale*, 15 *VAND. J. ENT. & TECH. L.* 441, 442–43 (2013). About 87 percent of Americans use new media technologies, with about 86 percent preferring to interact with brands online. *2010 Cone Consumer New Media Study 2*, CONE COMM’NS, INC., http://www.conecomm.com/stuff/contentmgr/files/0/61d7fb20ef6d001b5b77a4308eeb986b/files/consumer_new_media_fact_sheet_final.pdf [<http://perma.cc/79NU-9NXJ>] [hereinafter *New Media Study*].

⁴ Andrew Bluebond, *When the Customer Is Wrong: Defamation, Interactive Websites, and Immunity*, 33 *REV. LITIG.* 679, 682–83 (2014).

⁵ California-based Yelp states that it has about 83 million monthly unique visitors, with over 83 million customer reviews of local businesses. *About Yelp*, YELP, <http://www.yelp.com/about> [<http://perma.cc/PD7M-2ENR>].

TripAdvisor,⁶ and Angie’s List.⁷ The one-way push of brand marketing campaigns has given way to a diverse, lively consumer dialogue in a variety of online sites outside the control of brand owners,⁸ with increased consumer reliance on online sources of product and service information—especially customer reviews—both domestically⁹ and internationally.¹⁰ This reliance

⁶ Massachusetts-based TripAdvisor hosts more than 200 million reviews and opinions of more than 5.2 million hospitality businesses and tourist attractions in 45 countries. *About TripAdvisor*, TRIPADVISOR, http://www.tripadvisor.com/PressCenter-c6-About_Us.html [<http://perma.cc/A8QY-QURB>]. Its site indicates that it receives about 375 million unique monthly visitors, excluding visitors to its Chinese travel review site, daodao.com. *Id.*

⁷ Subscription-based Angie’s List has more than three million subscribers with customer ratings on over 720 different local services. *About Us*, ANGIE’S LIST, <http://www.angieslist.com/aboutus.htm> [<http://perma.cc/EW9J-Q9AM>]. Members pen about sixty thousand reviews per month on the site. *Id.*

⁸ Despite formal branding efforts, consumers are more often turning to crowdsourced consumer reviews and ratings sites to inform their purchasing decisions, and not brand advertising. *Consumers Turn to Online Ratings and Reviews, as Sites Respond to Concerns*, PRWEB (Feb. 28, 2008), <http://www.prweb.com/releases/2008-02-28/ratings/prweb729043.htm> [<http://perma.cc/PF4C-8D3F>]. In 2011, approximately 64 percent of consumers searched for consumer reviews before making a purchasing decision, up from 55 percent in 2010. *Game Changer: Cone Survey Finds 4-out-of-5 Consumers Reverse Purchase Decisions Based on Negative Online Reviews*, CONE COMM’NS, INC. (Aug. 30, 2011), http://www.conecomm.com/stuff/contentmgr/files/0/286c351989671ae74994fec139863bb2/files/2011_cone_online_influence_trend_tracker_release_and_fact_sheet.pdf [<http://perma.cc/VA8H-4GMM>] [hereinafter Cone 2011 Survey]. About 20 to 50 percent of all purchasing decisions arose out of word-of-mouth referrals. BERGER, *supra* note 1, at 7. Yet overall word of mouth occurs most often in the offline world, with online word of mouth accounting for only about 7 percent. *Id.* at 11. Online word-of-mouth marketing may seem ubiquitous, but Berger asserts that

[w]e ... tend to overestimate[] online word of mouth because it’s easier to see. Social media sites provide a handy record of all the clips, comments, and other content we share online. So when we look at it, it seems like a lot. But we don’t think as much about all the offline conversations we had over that same time period because we can’t easily see them.

Id. at 11.

⁹ About 89 percent of consumers find online reviews to be trustworthy channels for assessing products and services, an increase from 67 percent in 2010. Cone 2011 Survey, *supra* note 8; see Dohse, *supra* note 3, at 364; Short, *supra* note 3, at 444. A recent study found that consumers flock to online research

may be misplaced, as about one-third of reviews are thought to be fake,¹¹ including customer assessments of nonexistent or yet-to-open businesses.¹² Consumers may easily be able to spot duplicative or irrelevant postings as opinion spam, but it is becoming

over in-store interactions with sales associates because it is faster than in-person efforts, bolsters consumer confidence in buying decisions, and offers more credible information to consumers. Justin Malbon, *Taking Fake Online Consumers Seriously*, 36 J. CONSUM. POL'Y 139, 140, 143–44 (2013); Short, *supra* note 3, at 445–46; Press Release, PowerReviews, Consumers Prefer to Conduct Research Online vs. Speak to Store Associates: Few and Lack of Negative Reviews Degrade Consumer Trust (May 3, 2010), <http://www.e-tailing.com/content/?p=1193> [<http://perma.cc/U6UM-UJSM>]. Further, consumers may not trust companies that have scant numbers of online reviews or have few or no negative reviews to consider. Malbon, *supra*, at 149; PowerReviews, *supra*.

¹⁰ Press Release, The Nielsen Co., Personal Recommendations and Consumer Opinions Posted Online are the Most Trusted Forms of Advertising Globally (July 7, 2009), http://www.nielsen.com/content/dam/corporate/us/en/newswire/uploads/2009/07/pr_global-study_07709.pdf [<http://perma.cc/7GHC-UVDW>]. A 2009 survey of 25,000 online consumers from fifty countries indicates that 70 percent of online shoppers trust consumer reviews in making their buying decisions. *Id.* The highest levels of trust in online reviews were found in Vietnam (81 percent), Italy (80 percent), China and France (77 percent). *Id.* Online consumers were the most skeptical about customer reviews in Argentina and Finland. *Id.* U.S. trust levels were also relatively high at 72 percent, ranked twelfth out of the fifty surveyed countries. *Id.* See Malbon, *supra* note 9, at 142–43 (reviewing Nielsen study and discussing Australian focus group research on consumer trust of online reviews). Consumer reviews are particularly helpful when a consumer is buying online from a remote location, as they can help balance the information asymmetry between online consumers and sellers. Malbon, *supra* note 9, at 139–40, 149.

¹¹ Dohse, *supra* note 3, at 385; David Streitfeld, *The Best Book Reviews Money Can Buy*, N.Y. TIMES, Aug. 26, 2012, at B1. One study estimated that 10–15 percent of Yelp reviews were bogus. L. David Russell, Christopher C. Chiou & Zain A. Shirazi, *Fake It Until You Make it? Battling Fake Online Reviews*, LAW360 (June 9, 2014, 12:17 PM), <http://www.law360.com/articles/545366/fake-it-until-you-make-it-battling-fake-online-reviews> [<http://perma.cc/9XT5-P72J>].

¹² See generally Grant Martin, *Fake Nautical Restaurant on TripAdvisor Gets Glowing Reviews*, FORBES (July 29, 2013, 11:16 AM), [http://www.forbes.com/sites/grantmartin/2013/07/29/fake-restaurant-on-tripadvisor-gets-glowing-reviews/?utm_campaign=techtwitter&utm_source=twitter&\)%3B](http://www.forbes.com/sites/grantmartin/2013/07/29/fake-restaurant-on-tripadvisor-gets-glowing-reviews/?utm_campaign=techtwitter&utm_source=twitter&)%3B) [<http://perma.cc/M9ZX-CCBR>]; Raphael Brion, *Graham Elliot's Unopened Resto Gets a Negative Yelp Review*, EATER (Sept. 1, 2010, 4:55 AM), <http://eater.com/archives/2010/09/01/graham-elliots-grahamwich-gets-negative-yelp-review.php> [<http://perma.cc/RVB2-U7HZ>].

challenging to decipher more sophisticated forms of fake online reviews.¹³ Yet the desire to share information online about our experiences and viewpoints continues to grow.¹⁴

This increased interactivity has helped some businesses to gain valuable insight into the consumer experience, to improve their brand image, to strengthen customer engagement and long-term relationships,¹⁵ and to learn about product quality issues.¹⁶ Others have viewed social media and crowdsourced reviews as another perilous obstacle to their brand image and business or professional success.¹⁷ Research studies show that positive consumer

¹³ Nitin Jindal & Bing Liu, *Opinion Spam and Analysis*, WSDM PROC. (Feb. 2008), <http://184pc128.csie.ntnu.edu.tw/presentation/09-04-06/Opinion%20Spam%20and%20Analysis.pdf> [<http://perma.cc/SP2K-MQ87>]; Malbon, *supra* note 9, at 149; Myle Ott, Yejin Choi, Claire Cardie & Jeffrey T. Hancock, *Finding Deceptive Opinion Spam by Any Stretch of the Imagination*, 49 ASS'N FOR COMPUTATIONAL LINGUISTICS 309, 309–10 (2011). Professors Jindal and Liu studied millions of reviews on Amazon.com and concluded that determining real from bogus reviews “by simply reading the reviews is very hard, if not impossible, because a spammer can carefully craft a spam review to promote a target product or to damage the reputation of another product that is just like any other innocent review.” Jindal & Liu, *supra*.

¹⁴ See BERGER, *supra* note 1, at 33–34. Neurological research indicates that “self-sharing” activates the same pleasure sensors in our brain associated with food and money, so it may be difficult to dial back this desire in our social media age. *Id.* About 87 percent of Americans use new media technologies, with about 86 percent preferring to interact with brands online. New Media Study, *supra* note 3, at 1–2.

¹⁵ Dohse, *supra* note 3, at 387; Ann Marie Marciarille, “How’s My Doctoring?” *Patient Feedback’s Role In Assessing Physician Quality*, 14 DEPAUL J. HEALTH CARE L. 361, 390, 401–02 (2012). Research shows that unhappy customers may amend or remove a negative post if a company acts quickly to resolve a problem. Short, *supra* note 3, at 451. About 40 percent of consumers would think about patronizing businesses that respond promptly to negative reviews. Short, *supra* note 3, at 451.

¹⁶ Dohse, *supra* note 3, at 364; Marciarille, *supra* note 15, at 390.

¹⁷ Pares Dave, *Small businesses struggle to manage online image*, L.A. TIMES (Aug. 9, 2013), <http://www.latimes.com/business/la-fi-tech-savvy-online-reviews-20130810-story.html> [<http://perma.cc/7SJQ-6WD7>]; Dani Girl, *Why Yelp sucks—Yelp survival guide*, BOSSHAWAII (Jan. 6, 2013), <http://www.bosshi.com/why-yelp-sucks/> [<http://perma.cc/S27B-SECD>]; Brad Tuttle, *Guess Who’s Getting Some Pretty Awful Reviews: User Review Sites*, TIME (Sept. 21, 2013), <http://business.time.com/2013/09/21/guess-whos-getting-some-pretty-awful-reviews-user-review-sites/> [<http://perma.cc/R9YA-P8X3>]. See also Stefan Rutzel, *Snitching for the Common Good: In Search of a Response to the Legal Problems*

ratings and reviews often translate into enhanced brand reputation and increased revenues,¹⁸ while bad ratings and reviews could devastate one's reputation and financial future.¹⁹ These research findings, coupled with anecdotal business experiences, have led to a rush for positive consumer commentaries.²⁰ In light of these pressures, some businesses have tried to burnish their brand image by paying for positive reviews,²¹ or for negative reviews

Posed by Environmental Whistleblowing, 14 TEMP. ENVTL. L. & TECH. J. 1, 36 (1995) (remarking that “[r]eputation and image are fragile commodities”).

¹⁸ BERGER, *supra* note 1, at 18; Cone 2011 Survey, *supra* note 8, at 1, 3. This survey found that 87 percent of consumers indicated that positive online information helped to confirm a decision to buy a product or service. See Dohse, *supra* note 3, at 370; Short, *supra* note 3, at 453; Russell et al., *supra* note 11.

¹⁹ About 80 percent of customers stated that negative online information changed the consumer's mind about buying that product or service. Cone 2011 Survey, *supra* note 8, at 1, 3. Branding experts have suggested that even one negative review can result in a 25 percent decline in revenues. Dave, *supra* note 17. Other researchers have also found that online reviews “can make or break both new and established companies.” Short, *supra* note 3, at 443.

²⁰ TrustYou, a hospitality reputation management company, indicated that a business's ratings largely remain static after the initial twelve reviews, so early positive reviews are critical. Dave, *supra* note 17.

²¹ Katyal, *supra* note 2, at 833–34; Short, *supra* note 3, at 443, 447; Robert Sprague & Mary Ellen Wells, *Regulating Online Buzz Marketing: Untangling a Web of Deceit*, 47 AM. BUS. L.J. 415, 420–24 (2010); *Insurance Coverage Implications of Internet, Technology and Social Media*, 7, 11, LEXISNEXIS EMERGING ISSUES ANALYSIS, Sept. 29, 2011, available at 2011 Emerging Issues 5928. The scramble for positive reviews only worsens a cycle known as the “feedback loop.”

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.

Short, *supra* note 3, at 444 (footnotes omitted).

aimed at trashing their competitors,²² in violation of state and federal laws.²³

Others have tried to silence disgruntled customers via legal actions under a variety of legal theories²⁴ or by instituting adhesive speech suppression contracts or “gag” contracts.²⁵ These kinds of agreements are typically not purely contracts of silence that prohibit all speech,²⁶ as positive reviews and comments are not only desirable but good for a business’s customer relationships and bottom line. Rather, a nondisparagement clause prevents consumers from making or posting any negative remarks, criticisms, or ridicule about a business, its goods, and/or its services.²⁷ These clauses usually do not prevent all speech—only negative views that might harm or reflect poorly on a brand’s image—even if the statements are legally protected true or opinion speech about the consumer’s experience.²⁸

²² Short, *supra* note 3, at 443, 447.

²³ See *infra* notes 361–78 and accompanying text; see generally Lucille M. Ponte, *Mad Men Posing as Ordinary Consumers: The Essential Role of Self-Regulation and Industry Ethics in Decreasing Deceptive Online Consumer Ratings and Reviews*, 12 J. MARSHALL REV. OF INTELL. PROP. L. 462, 468–71 (2013) (discussing issues of stealth marketing and “astroturfing” in social media).

²⁴ See *infra* notes 162–69, 185–94, 202–09 and accompanying text. See generally Eric Goldman, *Doctor Lawsuits over Online Reviews by Patients (or their family members)*, SANTA CLARA L. DIGITAL COMMONS (May 21, 2014), <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1736&context=historical> [<http://perma.cc/S3ED-YY8J>]; Matt Kellogg & Simon Frankel, *Trends in Defamation Cases Involving Online Reviews*, LAW360 (Nov. 27, 2013, 5:55 PM), <http://www.law360.com/articles/490334/trends-in-defamation-cases-involving-online-reviews> [<http://perma.cc/6BCE-57TW>].

²⁵ Dohse, *supra* note 3, at 385.

²⁶ *Can Nondisparagement Clauses Silence Negative Online Reviews?*, THE LEGAL INTELLIGENCER (June 26, 2014), <http://www.blankrome.com/index.cfm?contentID=37&itemID=3352> [<http://perma.cc/3KLG-9LWE>] [hereinafter LEGAL INTELLIGENCER].

²⁷ *Id.* See *infra* notes 82–91 and accompanying text.

²⁸ See Dohse, *supra* note 3, at 386; Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855, 903–04, 919–20, 945–46 (2000) (proposing broader application of opinion privilege to protect online speech by ordinary people). It is important to note that this Article focuses on nondisparagement clauses that silence protected forms of online speech, but not illegal ones, such as false or defamatory speech. Terms of service and other contract clauses that forbid false or defamatory speech are not gag contracts, as they only prohibit speech that is already illegal. In addition, such clauses

Nondisparagement terms often rest upon dubious intellectual property claims, broad confidentiality clauses, excessive monetary penalties, and other financial threats in order to prevent unhappy consumers from posting negative reviews.²⁹ Certain businesses justify these gag contracts as legitimate actions needed to protect their brand and goodwill in a social media environment fraught with fake negative reviews from unscrupulous competitors, libelous postings, threats of libelous postings by consumers seeking to extract unfair advantages, and deeply flawed filtering and rating systems on crowdsourced review sites.³⁰

Despite the sheer number of consumer reviews, research indicates that these ratings do little to inform consumers contemplating purchases about applicable contract terms, or to better balance these adhesive terms between consumers and merchants.³¹ Although consumers and public interest groups may

help to promote protected truthful or opinion speech while avoiding faked or untrue speech that harms both businesses and consumers. *See infra* notes 324–28 and 374–78 (discussing endorsement guides on honest opinions needed to retain clauses forbidding false or defamatory speech).

²⁹ *See infra* notes 82–91 and accompanying text.

³⁰ *See infra* Part II and accompanying text.

³¹ Nishanth V. Chari, Note, *Disciplining Standard Form Contract Terms through Online Information Flows: An Empirical Study*, 85 N.Y.U. L. REV. 1618, 1621–22, 1645–50 (2010). Law and economics legal theorists contend that contract terms are part and parcel of the consumer's bargain with the merchant, along with price and product quality. *Id.* at 1625–26. Yet the consumer's failure to read or to understand the terms of standard form contracts creates a market failure. *Id.* at 1626–28. In the author's analysis of software product ratings on Amazon.com and Epinions.com, she found scant support that these online reviews would impact the pro-seller terms and conditions in adhesive end user licensing agreements (EULAs). *Id.* at 1645–50. Her empirical analysis challenged arguments from law and economics experts that the marketplace alone will effectively discipline sellers whose adhesive contract terms are too harsh and one-sided.

Online product rating websites do little to guide consumers regarding the contract terms that accompany the products they purchase. Thus, to the extent that online information flows may discipline sellers, online product ratings are unlikely to serve this role in shaping EULA terms. Absent other sources of market pressure to discipline sellers, online product ratings do not alone support the argument that it is unnecessary for courts and legislatures to intervene to protect consumers.

Id. at 1646–47; 1619–22; *see infra* notes 285–315 and accompanying text. She concluded that legislatures and courts need to protect consumers from one-sided

decry nondisparagement clauses, it is not clear whether such provisions in private party contracts are actually illegal.³² Because contract law is a creature of state statutes and case law, each state will need to grapple with its view of the legality of these nondisparagement clauses in private agreements.³³ Well-established notions of freedom of contract, the parties’ duty to read before signing contracts, and respect for the integrity of written agreements³⁴ are coming into conflict with concerns about consumer

online agreements, as product reviews did little to improve more balanced terms between buyers and sellers. *Id.*

³² Carol Bast, *At What Price Silence: Are Confidentiality Agreements Enforceable?*, 25 WM. MITCHELL L. REV. 627, 639 (1999); Alan E. Garfield, *Promises of Silence: Contract Law and Freedom of Speech*, 83 CORNELL L. REV. 261, 263–64 (1998). Professors Bast and Garfield posited concerns about contracts of silence when considering the censorship of a CBS episode with Jeffrey Wigand, a whistleblower on the tobacco industry, who had signed a confidentiality agreement with his employer, Brown & Williamson Tobacco Company. Prof. Garfield stated that

[s]ince parties are generally free under contract law to strike whatever bargain they please—there is “freedom of contract”—the central conundrum contracts of silence pose is whether their suppression of speech makes a difference. Is there something inherently troubling about a promise to suppress one’s speech that warrants regulation, or should one be able to commit to keeping silent as readily as one commits to selling cotton or playing football? Are promises of silence different because they implicate the First Amendment or violate a public policy favoring freedom of speech, or are these constitutional and policy concerns irrelevant when a private party agrees to silence himself?

Recent events suggest that the answers to these questions are not solely a matter of academic concern. Contracts of silence are being used effectively to keep relevant and possibly important information out of the public domain.

Garfield, *supra*, at 264 (footnotes omitted).

³³ See *infra* Parts II and III and accompanying text.

³⁴ See Omri Ben-Shahar, *The Myth of the “Opportunity to Read” in Contract Law*, 27 EUR. REV. CONT. L. 1, 2–3 (2009); Richard E. Speidel, *Unconscionability, Assent and Consumer Protection*, 31 U. PITT. L. REV. 359, 364, 375 (1970). Prof. Ben-Shahar states that

[c]ontract law is obsessively engaged with this problem of enhanced opportunity to read, in the name of principles of autonomy and individual power, but ironically ... the solutions currently offered do nothing to promote competition and robust assent. Opportunity to read fine print is sterile ammunition against the power and sophistication of contract drafters.

protection, unconscionability, and public policy issues,³⁵ such as the protection of truthful and opinion speech and the chilling effect of such clauses in the online and offline marketplace of consumer ideas.³⁶

Ben-Shahar, *supra*, at 27. Efforts at more disclosures have seldom aided average individuals in understanding the added information. Daniel E. Ho, *Fudging the Nudge: Information Disclosure and Restaurant Grading*, 122 YALE L.J. 574, 578–79 (2012). In most instances, more simplified disclosures are more effective in aiding party decision-making. *Id.* at 578–79, 580–81. *See generally* Lucille M. Ponte, *Getting a Bad Rap? Unconscionability in Clickwrap Dispute Resolution Clauses and a Proposal for Improving the Quality of These Online Consumer “Products”*, 26 OHIO ST. J. ON DISP. RESOL. 119, 159–67 (2011) (proposing a variety of methods for simplified disclosures in online contracts of adhesion).

³⁵ RESTATEMENT (SECOND) OF CONTRACTS § 211, cmt. c (1981). Comments on this section on standardized agreements recognize the challenges of balancing the interests of both contract drafters and consumers. The comment considers both regulatory and judicial limits on overreaching by drafters of form contracts:

c. Review of unfair terms. Standardized agreements are commonly prepared by one party. The customer assents to a few terms, typically inserted in blanks on the printed form, and gives blanket assent to the type of transaction embodied in the standard form. He is commonly not represented in the drafting, and the draftsman may be tempted to overdraw The obvious danger of overreaching has resulted in government regulation of insurance policies, bills of lading, retail installment sales, small loans, and other particular types of contracts Apart from such regulation, standard terms imposed by one party are enforced. But standard terms may be superseded by ... the overriding obligation of good faith (§ 205) and to the power of the court to refuse to enforce an unconscionable contract or term (§ 208). Moreover, various contracts and terms are against public policy and unenforceable.

Id.

³⁶ It is important to recognize that while substantial truth is an absolute defense to defamation, opinion is not viewed as an absolute privilege. The Supreme Court stated that past precedent did not

create a wholesale defamation exemption for anything that might be labeled “opinion.” ... Not only would such an interpretation be contrary to the tenor and context of the passage, but it would also ignore the fact that expressions of “opinion” may often imply an assertion of objective fact.

If a speaker says, “In my opinion John Jones is a liar,” he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect

In Part I, this Article provides an overview of the rise of non-disparagement clauses in private contracts. This section examines efforts to import nondisparagement provisions from other types of agreements into consumer contracts in the realm of crowdsourced consumer review sites.³⁷ Part II addresses some of the multifaceted underlying factors that may be contributing to the reliance on these clauses by some businesses and professionals.³⁸ Part III addresses the legality of these consumer gag clauses in light of basic principles of contract formation, unconscionability, and public policy, and differentiates them from other forms of legally protected nondisparagement clauses.³⁹ Proposed federal options for a uniform response to deal with the issue of nondisparagement clauses are considered in Part IV.⁴⁰ In Part V, this Article will conclude with proposals for both regulatory options and self-regulatory best practices that seek to balance the protection of customer speech interests with the legitimate branding concerns of businesses and professionals.⁴¹

I. CONTRACTS OF SILENCE AND THE RISE OF NONDISPARAGEMENT CLAUSES

In a society that so highly prizes free expression, it may seem paradoxical that our legal system tolerates a wide range of contracts of silence between private parties.⁴² Courts have long upheld

or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. Simply couching such statements in terms of opinion does not dispel these implications; and the statement, “In my opinion Jones is a liar,” can cause as much damage to reputation as the statement, “Jones is a liar.” As Judge Friendly aptly stated: “[It] would be destructive of the law of libel if a writer could escape liability for accusations of [defamatory conduct] simply by using, explicitly or implicitly, the words ‘I think.’”

Milkovich v. Lorain Journal Co., 497 U.S. 1, 18–19 (1990). See Lidsky, *supra* note 28, at 919–30 (discussing opinion privilege and concerns that *Milkovich* created further confusion about this privilege).

³⁷ See *infra* Part I and accompanying text.

³⁸ See *infra* Part II and accompanying text.

³⁹ See *infra* Part III and accompanying text.

⁴⁰ See *infra* Part IV and accompanying text.

⁴¹ See *infra* Part V and accompanying text.

⁴² Terry Morehead Dworkin & Elletta Sangrey Callahan, *Buying Silence*, 36 AM. BUS. L.J. 151, 152 (1998); Garfield, *supra* note 32, at 265–66.

the validity of speech suppression agreements in employment, settlement, franchise, and personal relationship situations.⁴³ In part, this judicial acceptance reflects a reliance on the traditional principles of freedom of contract, the duty to read a contract before signing it,⁴⁴ and deference to the integrity of written agreements.⁴⁵ These contracts of silence may also be viewed as permissible in order to vindicate some other legally recognized right or duty, such as the protection of trade secrets and other intellectual property,⁴⁶ the confidentiality of employer-employee and other fiduciary relationships,⁴⁷ the preservation of individual privacy,⁴⁸ or the nondisclosure of national security concerns.⁴⁹ In addition, in the settlement context, the contract of silence may serve as an incentive to settle and to reduce the strain on limited judicial resources.⁵⁰

Clearly, contracts of silence may be invalidated in certain circumstances to avoid illegal or undesirable public ends, such as a

⁴³ Garfield, *supra* note 32, at 268–74. See LEGAL INTELLIGENCER, *supra* note 26.

⁴⁴ See *supra* note 34 and accompanying text. It is well-recognized that most consumers do not read adhesive contracts and those that do may lack the ability to understand them, creating a market failure in preventing unfair seller terms. Chari, *supra* note 31, at 1622–23. But such form agreements are a daily staple in consumer dealings to promote efficiency and to reduce transactional costs. Chari, *supra* note 31, at 1624. Professor Leff argued that adhesive contracts are not contracts at all, but “products” that should be properly regulated to avoid falling below minimum standards of quality. Arthur Allen Leff, *Unconscionability and the Crowd—Consumers and the Common Law Tradition*, 31 U. PITT. L. REV. 349, 352, n.18 (1970); Arthur Allen Leff, *Contract as Thing*, 18 AM. U. L. REV. 131, 157 (1970); but see William J. Condon, Jr., *Electronic Assent to Online Contracts: Do Courts Consistently Enforce Clickwrap Agreements?*, 16 REGENT U. L. REV. 433, 454–57 (2004) (asserting that contracts of adhesion in the online world are prima facie valid once a user clicks “I Agree”). See *infra* note 295 and accompanying text.

⁴⁵ See *supra* note 34 and accompanying text.

⁴⁶ Bast, *supra* note 32, at 636–41; Dworkin & Callahan, *supra* note 42, at 153–55; Garfield, *supra* note 32, at 268–72, 300–01; Anthony G. Read, *DeWitt Clauses: Can We Protect Purchasers Without Hurting Microsoft?*, 25 REV. LITIG. 387, 396–97 (2006).

⁴⁷ See Bast, *supra* note 32, at 633–36; Dworkin & Callahan, *supra* note 42, at 151–52, 161; Garfield, *supra* note 32, at 265, 270, 301–02, 305, 308, 336–38.

⁴⁸ See Garfield, *supra* note 32, at 272–74, 339–42.

⁴⁹ See Dworkin & Callahan, *supra* note 42, at 162 & n.67; Garfield, *supra* note 32, at 274.

⁵⁰ See Garfield, *supra* note 32, at 266, 332–34.

contract of silence to conceal a crime⁵¹ or other tortious or legal wrongdoing,⁵² such as deceptive trade practices.⁵³ In *People v. Network Associates*,⁵⁴ a software company included restrictive clauses that prohibited users from publishing benchmark tests or any product reviews without the firm’s permission.⁵⁵ The disputed terms were located on the software diskettes and the company’s website.⁵⁶ An online magazine requested permission to publish a review as part of a comparison with other similar products.⁵⁷ Network Associates denied its approval, and the magazine published their review anyway, which contained unsatisfactory ratings.⁵⁸ Network Associates sent a letter to the magazine communicating its concerns and referencing the restrictive language in its licensing agreement, which prompted the state’s attorney general to investigate the matter.⁵⁹

⁵¹ See Bast, *supra* note 32, at 649; Garfield, *supra* note 32, at 306–09.

⁵² See Bast, *supra* note 32, at 645–46, 648–49; Dworkin & Callahan, *supra* note 42, at 176–79; Garfield, *supra* note 32, at 325–26.

⁵³ See Center for Democracy & Technology Complaint & Request for Investigation, Injunction and Other Relief before the Federal Trade Commission, *In the Matter of Medical Justice Corp.* 1, 9 (Nov. 9, 2011) [hereinafter CDT Complaint].

⁵⁴ 758 N.Y.S.2d 466 (N.Y. Sup. Ct. 2003).

⁵⁵ *Id.* at 467. The disputed provision stated:

Installing this software constitutes acceptance of the terms and conditions of the license agreement in the box. Please read the license agreement before installation. Other rules and regulations of installing the software are:

- a. The product cannot be rented, loaned, or leased—you are the sole owner of this product.
- b. The customer shall not disclose the result of any benchmark test to any third party without Network Associates’ prior written approval.
- c. The customer will not publish reviews of this product without prior consent from Network Associates, Inc.

Id. See Genelle I. Belmas & Brian N. Larson, *Clicking Away Your Speech Rights: The Enforceability of Gagwrap Licenses*, 12 COMM. L. & POL’Y 37, 39–45 (2007) (warning of growing use of gagwrap clauses in software industry to chill consumer and journalist speech on product comparisons); Read, *supra* note 46, at 400–02 (discussing the use of “DeWitt clauses” to prevent publication of bench-marking test results for database software).

⁵⁶ *Network Associates*, 758 N.Y.S.2d at 467.

⁵⁷ *Id.* at 467.

⁵⁸ *Id.*

⁵⁹ *Id.*

The court determined that the “rules and regulations” language improperly suggested that posting reviews without permission violated state or federal laws—which was not accurate—and that “consumers may be deceived into abandoning their right to publish reviews and results of benchmark tests.”⁶⁰ The New York Superior Court ultimately held that a confidentiality clause that prevented any customer commentary on the antivirus and firewall software program was a deceptive trade practice.⁶¹ However, the decision did not invalidate all confidentiality clauses preventing consumer speech—only deceptive ones.⁶²

The desirability of contracts of silence is still hotly contested, especially when these agreements pose risks to other non-contracting parties, such as the general public.⁶³ For example, public safety may be endangered when the risks of a defective product are concealed in tort settlement agreements or when whistleblowers are prevented from speaking out against employer wrongdoing.⁶⁴ Courts and legal scholars have long wrestled with different legal tests and proposed approaches to setting the proper balance in evaluating the validity and desirability of contracts of silence.⁶⁵

Unlike many contracts of silence, nondisparagement clauses may allow for a certain amount or type of speech. Usually, positive speech is permissible, while negative expressions, critiques, or remarks harmful to another party’s image and interests are forbidden.⁶⁶ These provisions are commonly found in cases where mutual trust and confidentiality are key features of an existing or prior legal relationship, and continued communications may

⁶⁰ *Id.* at 469.

⁶¹ *Id.* at 470.

⁶² *Id.* at 470. The court indicated that the company would be required to provide thirty days advance notice to the Attorney General of any future language seeking to restrict consumers’ rights to publish their assessments. *Id.* at 470–71.

⁶³ See Garfield, *supra* note 32, at 333–34.

⁶⁴ See Bast, *supra* note 32, at 644–46, 649, 652–53; Garfield, *supra* note 32, at 334, 344, 361.

⁶⁵ See generally Garfield, *supra* note 32, at 266, 315–18 (calling for stronger judicial regulation through balancing test of contracts of silence with refusal to uphold contracts of silence when public interest in disclosure outweighs any legitimate private interests in contract enforcement).

⁶⁶ See Belmas & Larson, *supra* note 55, at 45.

be necessary in the relationship. For example, in a separation agreement, ex-spouses may agree not to disparage one another to protect the interests of their children and to promote family harmony. Similarly, in the context of the employer-employee relationship, a nondisparagement clause may be seen as an effort to support the duty of confidentiality and loyalty already owed by the employee to the employer.⁶⁷ A nondisparagement clause in an employee severance agreement may also extend existing fiduciary duties after the termination of the prior relationship.⁶⁸

These contractual curbs on speech may also be considered part of the bargained-for exchange between the parties, with the muzzled party being financially compensated in some way for its silence. An ex-spouse may agree not to criticize a co-parent as part of a broader exchange aimed at finalizing a distribution of assets and other property rights between the divorcing couple. Further, an employee who is currently being paid by an employer or seeking compensation from a former employer under a severance agreement may agree not to criticize that employer.⁶⁹ However, such nondisparagement clauses may be limited by other existing laws or regulations, such as the recent crackdown by the National Labor Relations Board (NLRB) on overly broad nondisparagement clauses in employer social media policies.⁷⁰ The NLRB

⁶⁷ See Bast, *supra* note 32, at 661–62; Dworkin & Callahan, *supra* note 42, at 153.

⁶⁸ See Garfield, *supra* note 32, at 265; see *infra* notes 290–302 and accompanying text.

⁶⁹ See Alison Frankel, *Congress, whistleblower lawyers urge SEC to police ‘de facto gag clauses’*, REUTERS (Oct. 29, 2014), <http://blogs.reuters.com/alison-frankel/2014/10/29/congress-whistleblower-lawyers-urge-sec-to-police-de-facto-gag-clauses/> [<http://perma.cc/A7QJ-TZLK>]; Yin Wilczek, *SEC Officials Warn Against Contracts to Discourage Employee Whistle-Blowing*, BNA BLOOMBERG (Mar. 14, 2013). The Securities and Exchange Commission (SEC) recently indicated concerns about severance agreements that may include gag clauses that may prevent former employees from reporting financial misconduct to SEC whistleblowing programs and may violate the False Claims Act. In addition, the SEC may file actions against attorneys to censure or bar them from practicing before it for drafting “egregious” confidentiality clauses in severance agreements. See Wilczek, *supra*.

⁷⁰ Report of the Acting General Counsel Concerning Social Media Cases, N.L.R.B. Memorandum OM 12-59 (May 30, 2012); Report of the Acting General Counsel Concerning Social Media Cases, N.L.R.B. Memorandum OM 12-31

has invalidated a number of expansive nondisparagement clauses that infringe upon an employee's right to concerted action with co-workers to address workplace terms and conditions.⁷¹

Nondisparagement clauses have also been litigated in contexts where the silenced party is not receiving any compensation for their suppressed speech, and may even be paying the business for a product or service while censoring their own speech. In the software realm, there have been frequent battles over the right of software companies to silence criticisms of their products in database vendor contracts and beta testing agreements negotiated between commercial parties.⁷² In the database context, speech suppression provisions have been justified as protecting a company's brand and product reputation from the user's inadequate or poor testing environments.⁷³ Further, in the beta testing situation, software companies have argued that confidentiality is needed to elicit proprietary feedback and avoid unfair product criticisms about product bugs and other defects that may be corrected during the third party testing phase.⁷⁴ This approach has also spread to non-negotiated consumer contracts of adhesion or end user licensing agreements (EULAs).⁷⁵ Many EULAs broadly

(Jan. 24, 2012); Report of the Acting General Counsel Concerning Social Media Cases, N.L.R.B. Memorandum OM 11-74 (Aug. 18, 2011).

⁷¹ See Belmas & Larson, *supra* note 55, at 38, 40–41; Read, *supra* note 46, at 395–97.

⁷² See Belmas & Larson, *supra* note 55, at 38, 40–41; Read, *supra* note 46, at 395–97.

⁷³ See Belmas & Larson, *supra* note 55, at 38; Read, *supra* note 46, at 396–97.

⁷⁴ See Read, *supra* note 46, at 396–97.

⁷⁵ See Belmas & Larson, *supra* note 55, at 44–45; Read, *supra* note 46, at 389, 400–02; Annalee Newitz, *Dangerous Terms: A User's Guide to EULAs*, ELEC. FRONTIER FOUND., <http://www.eff.org/wp/dangerous-terms-users-guide-eulas> [<http://perma.cc/XSE6-FB9W>] [hereinafter EFF GUIDE]. Professors Belmas and Larson raised early alarms about nondisparagement clauses in EULAs for consumer-oriented software:

“Disparage” can be read in both its common meaning of “speak[ing] of in a slighting or disrespectful way; belittle[ing],” which could include truthful statements, or in its legal sense of making “false and injurious statement[s] that discredit or detract from the reputation of another’s property, product, or business.” Imposing restrictions on disparagement, in the former sense, of the FrontPage product may seem alarming enough; the clause goes further, extending the ban on disparagement of Microsoft and its business partners. It is hard to imagine a

prohibit any criticisms of software products even after they have been marketed and distributed to the general public, undermining assertions about safeguarding proprietary interests and avoiding unfair criticisms over pre-release products.⁷⁶

Outside of the software context, confidentiality clauses were not typically found in the consumer realm. In part, businesses did not want to lose out on valuable word-of-mouth marketing between customers.⁷⁷ In addition, some business owners want to know about customer issues in order to resolve them and improve customer experiences and relationships longer-term.⁷⁸ Other businesses and professionals may have originally sought to bring defamation actions against online reviewers to silence criticisms, but this approach is both expensive and difficult to prove.⁷⁹ With the surge in consumer review and rating websites, confidentiality and nondisparagement clauses have become an inexpensive alternative to litigation. Although these clauses may impact both offline and online dialogue, their primary target is to squelch criticism on a growing number of crowdsourced rating and review sites.⁸⁰ The average customer may have little or no awareness that they have limited their speech rights or waived opportunities to

justification for Microsoft to exact such a promise from its customers, and yet it has been doing so for at least three years.

Considering the power, pervasive influence, and financial resources of these software companies, and the danger that they may be able to suppress truthful speech about their products and even about subjects totally unrelated to their products, it is essential that gagwrap clauses be evaluated critically. In at least some cases, they should be held unenforceable.

Belmas & Larson, *supra* note 55, at 45 (footnotes omitted).

⁷⁶ See Belmas & Larson, *supra* note 55, at 75; Read, *supra* note 46, at 389, 400–02; EFF GUIDE, *supra* note 75.

⁷⁷ See Russell et al., *supra* note 11.

⁷⁸ *Id.*

⁷⁹ The Restatement defines defamation as:

a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher [with respect to the act of publication]; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.

RESTATEMENT (SECOND) OF TORTS § 558.

⁸⁰ See *infra* Part II and accompanying text.

report on negative experiences. Recent legal actions and news articles about business-consumer skirmishes have highlighted some of the key features of these types of nondisparagement clauses.⁸¹

Some of these consumer contracts include adhesive confidentiality provisions that warn consumers up front that they must seek prior approval—potentially in writing—before discussing their consumer experiences.⁸² In these situations, the business serves as the gatekeeper of its brand image, granting speech rights to consumers who will sing their praises and rejecting requests from those who may post negative critiques. If the consumer posts anyway without consent, then the customer may be sued for breach of contract. However, it is unlikely that a business will sue a consumer making positive remarks for violating a confidentiality provision,⁸³ leaving only those consumers who make derogatory remarks to face potential litigation. Yet, in general, businesses desire the positive buzz of consumer word of mouth both online and offline, so broad confidentiality clauses may not suit their marketing needs. It is also administratively difficult and costly for a business to review every request to comment on a consumer experience.

In light of these concerns, nondisparagement clauses have become a quick, cost-effective way to handle this gatekeeping function by broadly allowing positive speech and only suppressing negative commentary. Nondisparagement provisions are popping up in a wide range of adhesive consumer contracts, from online shopping venues to hotels and rentals⁸⁴ to wedding photographers and medical professionals.⁸⁵ In some instances, an initial

⁸¹ See *infra* notes 92–171 and accompanying text; see generally Marciarille, *supra* note 15, at 390, 395, 401–02 (discussing terms of earlier Medical Justice Corporation contract forms utilized by some medical professionals); CDT Complaint, *supra* note 53, at 5–8 (reviewing various forms of nondisparagement clauses in the medical context).

⁸² See CDT Complaint, *supra* note 53, at 6–7.

⁸³ See *infra* Part II and accompanying text.

⁸⁴ Christopher Elliott, *New confidentiality clauses can influence vacation rental reviews* (Apr. 14, 2012), <http://elliott.org/blog/new-confidentiality-clauses-can-influence-vacation-rental-reviews/> [<http://perma.cc/GNS9-HBCW>].

⁸⁵ Eric Goldman, *Fining Customers For Negative Online Reviews Isn't New... Or Smart*, FORBES TECH (Aug. 8, 2014, 10:47 AM), <http://www.forbes.com/sites/ericgoldman/2014/08/07/fining-customers-for-negative-online-reviews-isnt-new-or-smart/> [<http://perma.cc/C5MG-DZEL>].

consumer contract may not include a nondisparagement clause, but an unhappy customer may later be required to agree to such a clause to obtain a refund on products and services.⁸⁶ These clauses are usually broadly worded to prevent only negative commentary, while laudatory speech is allowed.⁸⁷

Often, nondisparagement provisions are framed in a manner that keeps the primary focus on the business investment in the brand’s development and establishment of its goodwill in the marketplace, while obscuring the effort to limit consumer speech.⁸⁸ Negative critiques are framed as causing tangible losses in revenues and damaging brand reputation.⁸⁹ Many consumers may not recognize that even their honestly held opinions or factually true statements about their experiences are being relinquished under these provisions. These clauses may also indicate that they bind not only the consumer, but also members of the consumer’s family who are not signatories to the agreement.⁹⁰

In some of these agreements, consumers are further threatened with liquidated damages clauses that set out daily penalties for posting a critical review until the posting is removed.⁹¹ For example, in *Palmer v. KlearGear.com*,⁹² plaintiff John Palmer ordered small-dollar Christmas gifts from KlearGear.com.⁹³ When

⁸⁶ See *FTC v. Ivy Capital, Inc.*, 2013 U.S. Dist. LEXIS 42369 (D. Nev. Mar. 26, 2013) (ruling that conditioning refund of business coaching program on subsequent nondisparagement clause is a deceptive practice when not disclosed at outset to consumer).

⁸⁷ Elliott, *supra* note 84; see also Goldman, *supra* note 85.

⁸⁸ Goldman, *supra* note 85; CDT Complaint, *supra* note 53, at 6–7.

⁸⁹ CDT Complaint, *supra* note 53, at 6–7.

⁹⁰ CDT Complaint, *supra* note 53, at 6–7, 11.

⁹¹ See *supra* notes 84–85 and accompanying text; LEGAL INTELLIGENCER, *supra* note 26; Songmee L. Connolly, *Don’t Disregard Calif.’s Non-Disparagement Clause Ban*, LAW360 (Oct. 8, 2014, 10:44 AM), <http://www.law360.com/articles/585252/don-t-disregard-calif-s-non-disparagement-clause-ban> [<http://perma.cc/LK8F-7QXC>]; Tim Cushing, *Online Retailer Says If You Give It A Negative Review It Can Fine You \$3,500*, TECHDIRT (Nov. 14, 2013, 8:58 AM), <http://www.techdirt.com/articles/20131113/06112425228/online-retailer-slaps-unhappy-customers-with-3500-fee-violating-non-disparagement-clause.shtml> [<http://perma.cc/SNM3-HZ9R>].

⁹² Order Entering Default Judgment, *Palmer v. KlearGear.com*, No. 1:13-cv-00175 (D. Utah July 1, 2014).

⁹³ Connolly, *supra* note 91; Cushing, *supra* note 91; LEGAL INTELLIGENCER, *supra* note 26.

the items never arrived, he tried to contact the online merchant, but was unsuccessful.⁹⁴ His spouse, Jennifer Kulas, posted a negative review of KlearGear.com on RipoffReport.com.⁹⁵ About three years later, Palmer received a bill of \$3,500 from KlearGear.com claiming violation of its nondisparagement clause.⁹⁶ When Palmer refused to pay, KlearGear.com reported their refusal as an unpaid debt to credit reporting agencies.⁹⁷ The couple disputed the claimed delinquency, but were unsuccessful in removing it from their credit report.⁹⁸ The unresolved debt harmed the couple's ability to obtain credit for a car loan and furnace repair.⁹⁹ Public Citizen, on behalf of the plaintiffs, filed an action seeking a declaratory judgment that the clause was invalid¹⁰⁰ as unconscionable and in violation of First Amendment rights.¹⁰¹ In a default judgment, the Utah District Court ultimately invalidated the clause,¹⁰² declaring that Palmer and Kulas owed no debt to

⁹⁴ Cushing, *supra* note 91; LEGAL INTELLIGENCER, *supra* note 26.

⁹⁵ Cushing, *supra* note 91.

⁹⁶ *Id.* The reported contract clause stated the following:

Non-Disparagement Clause

In an effort to ensure fair and honest public feedback, and to prevent the publishing of libelous content in any form, your acceptance of this sales contract prohibits you from taking any action that negatively impacts KlearGear.com, its reputation, products, services, management or employees.

Should you violate this clause, as determined by KlearGear.com in its sole discretion, you will be provided a seventy-two (72) hour opportunity to retract the content in question. If the content remains, in whole or in part, you will immediately be billed \$3,500.00 USD for legal fees and court costs until such complete costs are determined in litigation. Should these charges remain unpaid for 30 calendar days from the billing date, your unpaid invoice will be forwarded to our third party collection firm and will be reported to consumer credit reporting agencies until paid.

Id.

⁹⁷ Connolly, *supra* note 91; Cushing, *supra* note 91; LEGAL INTELLIGENCER, *supra* note 26.

⁹⁸ LEGAL INTELLIGENCER, *supra* note 26.

⁹⁹ Connolly, *supra* note 91; Cushing *supra* note 91; LEGAL INTELLIGENCER, *supra* note 26.

¹⁰⁰ LEGAL INTELLIGENCER, *supra* note 26.

¹⁰¹ Connolly, *supra* note 91.

¹⁰² Order Entering Default Judgment, *Palmer v. KlearGear.com*, No. 1:13-cv-00175) (D. Utah July 1, 2014). See Connolly, *supra* note 91; Cushing, *supra* note 91; LEGAL INTELLIGENCER, *supra* note 26.

KlearGear.com¹⁰³ and awarding them over \$300,000 in compensatory and punitive damages, along with costs and attorney fees.¹⁰⁴ In other instances, the language may suggest to a consumer that the clause is required under law or is necessary to protect an important legal right, as in *Network Associates*.¹⁰⁵ The average individual may decide not to critique a business out of a desire to comply with laws outside of the private ordering of the contract, including trademark, copyright, and privacy laws.¹⁰⁶

In addition, some businesses have tried to assert dubious intellectual property claims to avoid criticism of their business activities.¹⁰⁷ Copyright assignment clauses may be features of certain nondisparagement provisions.¹⁰⁸ Under these types of clauses, consumers agree to assign their copyrights to their remarks to the business.¹⁰⁹ If the consumer posts something that the business does not like or agree with, the business may contact the consumer to remove a posting or else face litigation for breach of contract and the specific copyright assignment clause.¹¹⁰ A consumer may delete their posting to avoid litigation without recognizing their fair use rights under copyright.¹¹¹ In addition, customers who refuse to eliminate their reviews risk litigation or may see their postings expunged in response to a Digital Millennium Copyright Act (DMCA) takedown notice.¹¹² This takedown notice may violate both ethical duties and legal obligations by disclosing

¹⁰³ LEGAL INTELLIGENCER, *supra* note 26. The court determined that KlearGear.com was liable to Palmer and Kulas for violations of the Fair Credit Reporting Act, as well as for defamation, intentional interference with prospective contractual relations, and intentional infliction of emotional distress. *Id.*

¹⁰⁴ Connolly, *supra* note 91; LEGAL INTELLIGENCER, *supra* note 26.

¹⁰⁵ *Network Associates*, 758 N.Y.S.2d at 468–470.

¹⁰⁶ *See supra* notes 52–59 and accompanying text.

¹⁰⁷ Marciarille, *supra* note 15, at 395–98; CDT Complaint, *supra* note 53, at 7–8.

¹⁰⁸ Marciarille, *supra* note 15, at 395–98; CDT Complaint, *supra* note 53, at 7–8.

¹⁰⁹ Marciarille, *supra* note 15, at 395.

¹¹⁰ *Id.*; *see, e.g.*, Connolly, *supra* note 91.

¹¹¹ Marciarille, *supra* note 15, at 395.

¹¹² Sean D. Lee, “*I Hate My Doctor*”: *Reputation, Defamation, and Physician-Review Websites*, 23 HEALTH MATRIX 574, 593–95 (2013); Marciarille, *supra* note 15, at 395; CDT Complaint, *supra* note 53, at 11–13, 17. About one-third of DMCA takedown notices are legally suspect. Marciarille, *supra* note 15, at 395.

the existence of a confidential association, such as the doctor-patient relationship.¹¹³

At times, a gag clause may also look to trademark law to shield a business from criticism.¹¹⁴ A business may assert ownership of a trademark in the name of its business, products, or services. As the trademark holder, the clause may indicate that the consumer is not permitted to use a business's name or marks without prior approval. It would be impossible to report effectively on a consumer interaction with a merchant or other professional if the name of the business, product, or service cannot be mentioned. A consumer may be reluctant to post a negative review out of concern about possible trademark infringement or dilution actions. However, these clauses do not indicate that a consumer retains a right of fair use for a business's trademarks.¹¹⁵

Similarly, in health care situations, some medical professionals have utilized so-called "mutual privacy" agreements to deter patient criticisms.¹¹⁶ Medical professionals already have both legal duties and professional ethics that require them to maintain patient confidentiality.¹¹⁷ These contracts have initiated further debate about the contours of privacy for both patients and doctors in this intimate relationship.¹¹⁸ Under these privacy contracts,

¹¹³ See Marciarille, *supra* note 15, at 391–92. By sending out a takedown notice or suing a patient for violating these clauses, a medical professional may be in violation of HIPAA by taking an action perceived as retaliatory or intimidating against a patient. See 45 C.F.R. § 164.530(g) (2013).

¹¹⁴ Belmas & Larson, *supra* note 55.

¹¹⁵ See 15 U.S.C. § 1115(b)(4) (2014). See, e.g., *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 799–800 (9th Cir. 2003) (use of Barbie trademark as nominative fair use as point of reference for artistic parody and critique); *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 903 (9th Cir. 2002) (parody of Barbie trademark in song as fair use); *Sunmark, Inc. v. Ocean Spray Cranberries, Inc.*, 64 F.3d 1055, 1056, 1058–59, 1061 (7th Cir. 1995) (use of ordinary words in trademark permissible as descriptive terms); *August Storck K.G. v. Nabisco, Inc.*, 59 F.3d 616, 618–20 (7th Cir. 1995) (use of trademark for product comparison as nominative fair use).

¹¹⁶ Marciarille, *supra* note 15, at 362–63; CDT Complaint, *supra* note 53, at 3–8 (discussing terms of earlier Medical Justice Corporation contract forms utilized by some medical professionals).

¹¹⁷ Marciarille, *supra* note 15, at 391–92; Lee, *supra* note 112, at 579–80; CDT Complaint, *supra* note 53, at 11–13, 17.

¹¹⁸ Marciarille, *supra* note 15, at 392–93.

the doctor or dentist promises to provide additional privacy protections to patient records, such as not selling or sharing patient information with third party marketers, in exchange for the patient not posting critical remarks anywhere on the Web.¹¹⁹ This type of disclosure is a violation of the privacy and security rules of the Health Insurance Portability and Accountability Act (HIPAA),¹²⁰ so only the medical professional, not the patient, is gaining any added privacy protections.¹²¹ These speech suppression efforts may also contravene aspects of the Affordable Care Act (ACA) and data collection by health care insurers in which surveys of patient experiences play an important role in determining medical services, quality, and cost reimbursements.¹²²

¹¹⁹ *Id.* at 362–63; CDT Complaint, *supra* note 53, at 3–8.

¹²⁰ The Office of Civil Rights (OCR) of the U.S. Department of Health and Human Services previously determined that these types of mutual privacy agreements violate HIPAA. The OCR report stated that

[a] physician practice requested that patients sign an agreement entitled “Consent and Mutual Agreement to Maintain Privacy.” The agreement prohibited the patient from directly or indirectly publishing or airing commentary about the physician, his expertise, and/or treatment in exchange for the physician’s compliance with the Privacy Rule. A patient’s rights under the Privacy Rule are not contingent on the patient’s agreement with a covered entity. A covered entity’s obligation to comply with all requirements of the Privacy Rule cannot be conditioned on the patient’s silence. OCR required the covered entity to cease using the patient agreement that conditioned the entity’s compliance with the Privacy Rule. Additionally, OCR required the covered entity to revise its Notice of Privacy Practices.

U.S. DEP’T OF HEALTH AND HUMAN SERV., OFFICE FOR CIVIL RIGHTS ANNUAL REPORT TO CONGRESS ON HIPAA PRIVACY RULE AND SECURITY RULE COMPLIANCE FOR CALENDAR YEARS 2009 AND 2010 15 (2010), <http://www.hhs.gov/ocr/privacy/hipaa/enforcement/compliancerept.pdf> [<http://perma.cc/YE9E-PSZH>]. See 45 C.F.R. § 164.530(h) (2015) (individuals may not be required to waive their rights as a condition of treatment, payment, health plan enrollment or benefits eligibility). See also Marciarille, *supra* note 15, at 393–94, 402–03; Lee, *supra* note 112, at 579–80; CDT Complaint, *supra* note 53, at 13.

¹²¹ Marciarille, *supra* note 15, at 363, 391.

¹²² *Id.* at 364–65, 379–83. Despite current efforts to improve the collection and access to patient experience data, some medical professionals utilize a combination of speech suppression efforts to thwart negative patient online reviews. *Id.* at 364–65. Prof. Marciarille states that

[t]he mechanisms of threatened control—copyright law, defamation law, and HIPAA—are interesting. But the timing is even

The class action of *Lee v. Makhnevich*¹²³ brings together different threads of these questionable nondisparagement clauses in a billing dispute between a patient and a dentist.¹²⁴ The lead plaintiff, Lee, sought emergency dental care from Dr. Makhnevich.¹²⁵ Her office required Lee to sign a mutual privacy agreement that promised the above-noted additional privacy protections in exchange for her continued protection of his patient information from third party marketing firms.¹²⁶ The agreement also contained a copyright assignment clause and a liquidated damages provision to help enforce the gag clause.¹²⁷ Lee paid about \$4,800

more so. Just as an industry arises to police online physician reviews, the federal government pushes its own largest government funded insurance programs to begin to collect patient satisfaction and patient experience data and to make it available online—thus setting up a collision between the irresistible force pushing for increased transparency on patient satisfaction data and the immovable object of physicians closing the examination room door ever more tightly against a society-wide trend toward online information sharing.

Id. at 364–65 (footnotes omitted). *See also* CDT Complaint, *supra* note 53, at 18 (discussing Department of Health and Human Services efforts to promote “patient engagement and patient-centered care”).

¹²³ 2013 U.S. Dist. LEXIS 43760 (S.D.N.Y. Mar. 27, 2013). *See* Complaint, *Lee v. Makhnevich*, 2013 U.S. Dist. LEXIS 43760 (S.D.N.Y. Mar. 28, 2013) (No. 11-civ-8665), <http://www.citizen.org/documents/Lee-v-Makhnevich-complaint.pdf> [<http://perma.cc/D4ZU-58H6>] [hereinafter *Lee Complaint*].

¹²⁴ *See* Gergana Koleva, *Dentist to the Stars Sued for Suppressing Bad Reviews Online*, FORBES (Dec. 8, 2011, 1:10 PM) <http://www.forbes.com/sites/gerganakoleva/2011/12/08/dentist-to-the-stars-sued-for-suppressing-bad-reviews-online/>; Dina ElBoghdady, *Some doctors try to squelch online reviews*, WASH. POST (Jan. 28, 2012), http://www.washingtonpost.com/business/economy/some-doctors-try-to-squelch-online-reviews/2011/11/29/gIQA2KQhYQ_story.html [<http://perma.cc/DG4R-J87V>]; Eric Goldman, *You Shouldn't Need a Copyright Lawyer to Pick a Dentist*, FORBES (Apr. 17, 2013, 1:14 PM), <http://www.forbes.com/sites/ericgoldman/2013/04/17/you-shouldnt-need-a-copyright-lawyer-to-pick-a-dentist/>.

¹²⁵ *Lee Complaint*, *supra* note 123, at 2.

¹²⁶ *Id.* at 2, 5–6. The complaint contended that the promises of additional privacy falsely stated protections from loopholes in the privacy provisions of HIPAA. *Lee Complaint*, *supra* note 123, at 5. Medical Justice had provided these forms, which the firm indicated have now been retired. ElBoghdady, *supra* note 124; Koleva, *supra* note 124. However, these contracts may still be in effect for patients prior to the change in these forms. *See* CDT Complaint, *supra* note 53, at 3–5.

¹²⁷ *Lee Complaint*, *supra* note 123, at 2, 8. The clause in dispute stated, in part:

directly to the dentist for his dental care and had to seek reimbursement from his dental insurance program.¹²⁸ Months later, Lee contended that he was unable to receive reimbursement under his dental insurance because Makhnevich’s office had failed to provide the insurer with the needed paperwork.¹²⁹ Lee posted criticisms of Makhnevich on DoctorBase, Yelp, and other crowd-sourced rating sites.¹³⁰ Makhnevich sent Lee a warning letter about breaching the terms of their mutual privacy agreement¹³¹ and began assessing him \$100 per day under the liquidated damages clause for infringing her copyright.¹³² In addition, the complaint alleged that she sent takedown notices to these sites demanding the removal of Lee’s posts and disclosing personal information in violation of HIPAA.¹³³

The consumer rights organization Public Citizen took on the class action because of its concerns about the impact of such gag

In consideration for treatment[,] ... [p]atient agrees to refrain from directly or indirectly publishing ... commentary upon Dentist and his practice, expertise and/or treatment [sic] If Patient does prepare commentary for publication about Dentist, the Patient exclusively assigns all Intellectual Property rights, including copyrights, to Dentist for any written, pictorial, and/or electronic commentary.... This agreement shall be operative and effective at the time of creation (prior to publication) of the commentary.... In addition, Patient will not denigrate, defame, disparage, or cast aspersions upon the Dentist; and ... will use all reasonable efforts to prevent any member of their immediate family or acquaintance from engaging in any such activity.

Lee, 2013 U.S. Dist. LEXIS at *3–4 (quoting Lee Complaint Ex. A ¶ 3).

¹²⁸ Lee, 2013 U.S. Dist. LEXIS at *4. The complaint asserts that the services should only have cost the patient \$200. Lee Complaint, *supra* note 123, at 2. See Koleva, *supra* note 124; ElBoghdady, *supra* note 124.

¹²⁹ Lee, 2013 U.S. Dist. LEXIS at *4. See ElBoghdady, *supra* note 124.

¹³⁰ Lee, 2013 U.S. Dist. LEXIS at *5–6. See Lee Complaint, *supra* note 123, at 7–8; Koleva, *supra* note 124.

¹³¹ Koleva, *supra* note 124. See Lee Complaint, *supra* note 123, at 7–8.

¹³² Lee, 2013 U.S. Dist. LEXIS at *5. See Lee Complaint, *supra* note 123, at 8; Koleva, *supra* note 124.

¹³³ Lee, 2013 U.S. Dist. LEXIS at *6. See Lee Complaint, *supra* note 123, at 8. The complaint indicated that takedown notices sent to Yelp and DoctorBase disclosed the plaintiff’s personal information, including date of birth, height, weight, address, and photo, in violation of HIPAA. Lee Complaint, *supra* note 123, at 8.

clauses on patients' free speech and privacy rights, along with the potential misuse of intellectual property law.¹³⁴ Makhnevich sought to dismiss Lee's case, but the court refused, allowing Lee's claims of contract invalidity based on a lack of consideration and his assertion of fair use for the copyright assignment to move forward.¹³⁵ Eventually, Makhnevich seems to have closed her dental practice, and she became unavailable for the continuation of the class action against her.¹³⁶

It is important to note that these recent consumer victories come largely through defaulting businesses, rather than a full-throated defense of these clauses, so it is unclear if other courts will continue to follow this nascent path. Further, contract law is a state-by-state endeavor and other states may not embrace this consumer-friendly approach.¹³⁷

A business's use of these adhesive gag provisions presents a number of serious issues for both consumers and competitors. First, these clauses squelch all forms of negative commentary, including truthful and opinion speech. Courts have consistently recognized that these forms of speech, both positive and negative, are legally protected.¹³⁸ In addition, substantial truth¹³⁹ and opinion speech¹⁴⁰ are defenses to claims of defamation. These clauses prohibit critiques, regardless of veracity.¹⁴¹

Second, these provisions chill further consumer speech, resulting in concerns about consumer deception. Along with attacking

¹³⁴ Koleva, *supra* note 124. The complaint also indicated that Lee's critiques of his dental care experience fell under fair use. Lee Complaint, *supra* note 123, at 3.

¹³⁵ Lee, 2013 U.S. Dist. LEXIS at *2, *8, *16–17.

¹³⁶ Koleva, *supra* note 124.

¹³⁷ See *supra* notes 64–87 and accompanying text.

¹³⁸ See, e.g., Jefferson Cty. Sch. Dist. No. R-1 v. Moody's Inv'r Servs., 175 F.3d 848, 852–56 (10th Cir. 1999) (discussing First Amendment protections of opinion speech and upholding dismissal of defamation claim based on opinions in Moody's article on school bonds evaluation); Kellogg & Frankel, *supra* note 24, at 1.

¹³⁹ See, e.g., N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964). See *supra* notes 28, 36, 72–87 and accompanying text.

¹⁴⁰ See *supra* notes 28, 38, 72–87 and accompanying text.

¹⁴¹ David Farren, *What is a "Non-Disparagement" Clause and Why You May Not Want to Sign One*, JABURG WILK, <http://www.jaburgwilk.com/news-publications/what-is-a-non-disparagement-clause-and-why-you-may-not-want-to-sign-one> [http://perma.cc/F45T-S3BD].

protected categories of speech, other consumers’ speech will be discouraged over concerns about aggressive business tactics in enforcing these gag contracts against negative reviews and ratings and fear of litigation based in defamation for expressing one’s views.¹⁴² Overall, consumer speech will be lessened and available information reduced about product and service quality, which harms informed decision making by other customers.¹⁴³ Consumers will also be deceived because these clauses will skew ratings and reviews toward positive feedback with little or no criticism available for consumer consideration.¹⁴⁴

Third, not only do consumers suffer harm, but other competitors are also unfairly disadvantaged on crowdsourced review sites.¹⁴⁵ Many businesses invite consumer dialogue, positive and negative, as a way to learn about the customer experience and to determine areas for needed improvement.¹⁴⁶ Merchants and professionals who utilize nondisparagement clauses falsely inflate their rankings and reviews over businesses seeking candid

¹⁴² Shauna L. Spinosa, Note, *Yelp! Libel or Free Speech: The Future of Internet Defamation Litigation in Massachusetts in the Wake of Noonan v. Staples*, 44 SUFFOLK U. L. REV. 747, 748, 754 (2011). Spinosa warned that

[t]he threat of litigation to bloggers and online reviewers chills free speech by exposing internet users to liability for posting any critical opinions or experiences on the internet, whether true or not. Increased accessibility to customer reviews or information on an individual or their services via internet search engines makes critical blogs or messages a permanent reputation blight, thereby affecting employment possibilities or customer-based business. Defamed individuals and businesses often threaten litigation against critical posters, which sometimes results in host sites taking down negative posts, or bloggers not posting any negative opinions at all.

Id. at 748 (footnotes omitted). See *DMCA Notices*, CHILLING EFFECTS, <http://www.chillingeffects.org/topics/29> [<http://perma.cc/44PF-YB78>] (providing DMCA notices to inform public about aggressive copyright holders); *Trademark*, CHILLING EFFECTS, <http://www.chillingeffects.org/topics/6> [<http://perma.cc/EN8S-Y6RU>] (providing online access to aggressive cease and desist letters from trademark holders).

¹⁴³ Belmas & Larson, *supra* note 55, at 38; Spinosa, *supra* note 142, at 754–55.

¹⁴⁴ CDT Complaint, *supra* note 53, at 15–16.

¹⁴⁵ See Short, *supra* note 3, at 444, 447.

¹⁴⁶ Dohse, *supra* note 3, at 387.

consumer feedback.¹⁴⁷ This approach provides an unfair advantage for businesses trying to squelch consumer speech.

II. KEY MOTIVATORS FOR UTILIZATION OF NONDISPARAGEMENT CLAUSES

On the surface, businesses instituting nondisparagement clauses seem to view any negative critiques as serious threats to brand image and value, rather than constructive feedback on the customer experience. Although important speech ramifications are at stake, this contentious debate may be more complicated than it initially appears on its face. The underlying reasons for the development and use of these kinds of clauses go beyond a desire to suppress negative speech and raise a number of concerns about crowdsourced review sites. As disputes over nondisparagement clauses continue to arise, there is a need to address a more complete picture of the driving forces behind such clauses in order to effectively deal with these issues.

Many small businesses and professionals feel they are being victimized by participants in and owners of crowdsourced rating sites.¹⁴⁸ With the demands of running one's own enterprise, many business owners may focus their efforts and dollars on marketing through more traditional outlets, such as postcards, neighborhood shopping guides, coupon books, and local newspapers. The switch from the one-way marketing of traditional channels to the multi-sided consumer dialogue of social media has been a difficult challenge for small businesses.¹⁴⁹ Unlike large corporations, mom-and-pop businesses may lack the time, ability, and resources to grapple with the growing presence of online social media.¹⁵⁰ This lack of control over brand presentation on crowdsourcing review sites may overwhelm small businesses that often cannot afford

¹⁴⁷ See CDT Complaint, *supra* note 53, at 19 (nondisparagement clauses permit “doctors to falsely curate their online reputations,” which is harmful to patients and competitors).

¹⁴⁸ See Andrea Chang, *Tempers flare at Yelp’s town hall for small business owners in L.A.*, L.A. TIMES (Aug. 21, 2013), <http://articles.latimes.com/2013/aug/21/business/la-fi-tn-yelp-town-hall-reviews-20130820> [<http://perma.cc/A73P-HT8D>]; Dave, *supra* note 17.

¹⁴⁹ Dave, *supra* note 17.

¹⁵⁰ *Id.*

the assistance of professional marketing agencies or reputation management firms.¹⁵¹

This confusion over social media interactions is further exacerbated by concerns about the rampant flow of fraudulent reviews from libelous consumers and unscrupulous competitors. Crowdsourced review sites have become unregulated warehouses of reputational information.¹⁵² Research indicates that about one-third of online consumer reviews are fake evaluations, and pay-per-post services generate mountains of bogus reviews.¹⁵³ Some crowdsourced review sites may make efforts to filter out fake reviews, sometimes by removing legitimate praises, or missing inaccurate or libelous jeers.¹⁵⁴ Spotty enforcement efforts by state attorneys general under consumer protection laws and the Federal Trade Commission under its Endorsement Guidelines provide little assistance to small businesses being unfairly attacked. Recently, a Virginia carpet cleaning company, Hadeed Carpet Cleaning, became suspicious of a rash of anonymous negative reviews on Yelp and tried to match them up with current customer information and service dates.¹⁵⁵ Unable to make the service connections, Hadeed successfully sued to learn the identities of the allegedly unhappy customers in support of its defamation claims, despite Yelp’s promise of anonymity.¹⁵⁶

Although disclosure through subpoenas may aid businesses bringing defamation claims, this approach raises constitutional concerns about the protection of anonymous speakers.¹⁵⁷ In addition,

¹⁵¹ *Id.*; Dohse, *supra* note 3, at 372–73; Short, *supra* note 3, at 452.

¹⁵² Marciarille, *supra* note 15, at 376.

¹⁵³ See *supra* note 1 and accompanying text.

¹⁵⁴ See *infra* notes 107–33 and accompanying text.

¹⁵⁵ *Yelp, Inc. v. Hadeed Carpet Cleaning, Inc.*, 752 S.E.2d 554, 557 (Va. Ct. App. 2014).

¹⁵⁶ See, e.g., *Doe v. Individuals*, 561 F. Supp. 2d 249, 253–56 (D. Conn. 2008) (denying motion to quash subpoena to unmask anonymous posters, as plaintiffs made the prima facie case of libel and First Amendment rights to anonymity not absolute).

¹⁵⁷ Lidsky, *supra* note 28, at 889–90; Shaun B. Spencer, *CyberSLAPP Suits and John Doe Subpoenas: Balancing Anonymity And Accountability In Cyberspace*, 19 J. MARSHALL J. COMPUTER & INFO. L. 493, 495–96 (2001). Professor Spencer recommended amending the Electronic Communications Privacy Act (ECPA) to provide a thirty-day notice period to anonymous speakers to provide them an opportunity to challenge a subpoena in court in order to protect

some defamation plaintiffs may not want damages, but they may seek a humiliating online apology aimed at vindicating their legal action and chastening others who might dare criticize a business or professional.¹⁵⁸ Stripping away anonymity may chill candid online speech and may influence consumer willingness to post reviews for fear of a business or community backlash.¹⁵⁹ It is important to note that the burden of proof for granting a subpoena is relatively low in the Commonwealth of Virginia, which does not have an anti-SLAPP statute.¹⁶⁰ However, in other states, such as California, New Jersey, and Pennsylvania, it may be quite difficult to succeed in unmasking an anonymous reviewer without clear evidence to support a prima facie case of defamation.¹⁶¹

Legal experts suggest that defamation lawsuits are the way to handle false or defamatory customer reviews.¹⁶² But many small businesses already lack the ability to access and pay for legal services. Furthermore, defamation can be a difficult tort to pursue successfully, and damages may be hard to prove or to collect from average individuals to remedy the harm suffered.¹⁶³ In some

their right to speak anonymously. Spencer, *supra*, at 509–12. He warned that a failure to protect anonymous speakers online may drive many Internet users to seek out anonymizing services, which would only further hamper legitimate defamation claims. Spencer, *supra*, at 519.

¹⁵⁸ Lidsky, *supra* note 28, at 876, 881–83; Spencer, *supra* note 157, at 498.

¹⁵⁹ Lidsky, *supra* note 28, at 889–90; Spencer, *supra* note 157, at 498–99.

¹⁶⁰ Russell et al., *supra* note 11.

¹⁶¹ *Id.* Some review sites, like Angie's List, do not allow anonymous reviews. Marciarille, *supra* note 15, at 376.

¹⁶² See Dohse, *supra* note 3, at 381–82; LEGAL INTELLIGENCER, *supra* note 26, at 10, 11. Some businesses have utilized cease and desist letters and take-down notices as alternatives to more expensive litigation. LEGAL INTELLIGENCER, *supra* note 26, at 10, 11. See, e.g., *Fireworks Restoration Co. v. Hosto*, 371 S.W.3d 83 (Mo. Ct. App. 2012) (finding that former co-founder's posting of three fake derogatory online reviews was defamation resulting in \$1 in actual damages and \$150,000 in punitive damages).

¹⁶³ Kellogg & Frankel, *supra* note 24, at 2; Lee, *supra* note 112, at 583; Lidsky, *supra* note 28, at 872–76; DANIEL J. SOLOVE, *THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET* 118 (2007); Joanna Schorr, Note, *Malicious Content On The Internet: Narrowing Immunity under the Communications Decency Act*, 87 ST. JOHN'S L. REV. 733, 737–38, 751–52 (2013). See Goldman, *supra* note 24; but see *Wong v. Jing*, 189 Cal. App. 4th 1354, 1370–75 (Cal. Ct. App. 2010) (permitting dentist's action to proceed against patient who posted Yelp review after prima facie showing of libel). See RESTATEMENT (SECOND) OF TORTS § 588 (1977) (elements of defamation).

instances, businesses have suffered a public relations debacle for bringing a defamation claim against a customer when their court complaints went viral online.¹⁶⁴

For example, in *Dietz Dev., LLC v. Perez*,¹⁶⁵ a Virginia contractor brought a defamation claim against a customer, Jane Perez, who posted negative remarks about his services.¹⁶⁶ In her criticism, she indicated that Dietz had billed her for work that was never completed, that he had trespassed on her property, and she suggested that he had stolen jewelry from her home.¹⁶⁷ In responding to her critique, Dietz made a number of claims against Perez, including contending that she had stolen from him by not paying for his goods and services on that project.¹⁶⁸ Dietz filed a defamation action against Perez claiming \$300,000 in business losses and seeking \$750,000 in damages.¹⁶⁹ Ultimately, a jury found that both the plaintiff and the defendant had defamed each other in their fiery online posts, and no damages were awarded to either party.¹⁷⁰ Both parties expended considerable effort and resources in taking the matter to court.¹⁷¹ But the cost, time, and uncertainties of a defamation lawsuit make it problematic to rely upon a tort action to effectively address false or defamatory postings.

¹⁶⁴ Russell et al., *supra* note 11.

¹⁶⁵ No. 2012-16249 (Fairfax Co., Va. Cir. Ct. filed Dec. 7, 2012).

¹⁶⁶ Justin Jouvenal, *Fairfax jury declares a draw in closely watched case over ‘Yelp’ reviews*, WASH. POST, Feb. 1, 2014, http://www.washingtonpost.com/local/in-closely-watched-yelp-case-jury-finds-dual-victory/2014/01/31/2d174580-8ae5-11e3-a5bd-844629433ba3_story.html [<http://perma.cc/W4PV-RGXK>] [hereinafter Jouvenal 1]; Justin Jouvenal, *In Yelp suit, free speech on Web vs. reputations*, WASH. POST, Dec. 4, 2012, http://www.washingtonpost.com/local/crime/2012/12/04/1cdfa582-3978-11e2-a263-f0ebffed2f15_story.html [<http://perma.cc/X8AF-3PVV>] [hereinafter Jouvenal 2]; Aditi Mukherji, *Yelp Defamation Lawsuit Ends in a Draw*, FINDLAW (Feb. 3, 2014 11:54 AM), http://blogs.findlaw.com/free_enterprise/2014/02/yelp-defamation-lawsuit-ends-in-a-draw.html [<http://perma.cc/5CW2-W4G3>].

¹⁶⁷ Jouvenal 1, *supra* note 166; Jouvenal 2, *supra* note 166; Mukherji, *supra* note 166.

¹⁶⁸ Jouvenal 1, *supra* note 166; Jouvenal 2, *supra* note 166; Mukherji, *supra* note 166.

¹⁶⁹ Jouvenal, *supra* note 166.

¹⁷⁰ *Id.*

¹⁷¹ *See supra* note 166 and accompanying text.

Even if they are not victims of fake or defamatory postings, business owners are likely aware that reviews and ratings can have a substantial impact on their current and future revenues. A 2011 Harvard Business School study found that independent restaurants reaped a 5 to 9 percent increase in their revenues when their Yelp ratings rose about one star higher.¹⁷² Conversely, the posting of a single negative review online could cause business revenues to plummet about 25 percent or more.¹⁷³ Because consumers tend to give greater weight to negative commentary and retain it better in their memories, businesses are concerned that even a few fake or real negative reviews will doom their future.¹⁷⁴

It is often difficult, expensive, or impossible to have a false review removed from a website.¹⁷⁵ In addition, some customers may use the threat of negative reviews to gain unfair concessions from a merchant.¹⁷⁶ For example, a vacation renter may trash a rental and then demand back a damage deposit with threats of negative online reviews.¹⁷⁷ In some instances, a business or professional may use a nondisparagement clause as an informal sorting method to help determine who is a trustworthy patron.¹⁷⁸ If you sign the agreement, then you are someone they can engage

¹⁷² Dave, *supra* note 17. Similarly, a Berkeley study showed that a half-star improvement led to decreased reservation availability of 19 percent during peak dining periods. *Id.* Additionally, San Francisco restaurants were 50 percent more likely to be booked up with reservations after a half-star increase on Yelp. Russell et al., *supra* note 11. Seattle restaurants saw a 10 percent jump in their revenues with a one-star increase on Yelp. Russell et al., *supra* note 11.

¹⁷³ Russell et al., *supra* note 11. TrustYou, a hospitality reputation management company, indicated that a business's ratings largely remain static after the initial twelve reviews, so early reviews are critical. *Id.*

¹⁷⁴ Malbon, *supra* note 9, at 144; Marciarille, *supra* note 15, at 382–83, 393–94; Short, *supra* note 3, at 450–51. For psychological reasons, angry online rants about products and services are more likely to tap into underlying hostilities and go viral more often than other shared emotions, such as sorrow or disappointment. BERGER, *supra* note 1, at 120.

¹⁷⁵ Kathleen Richards, *Yelp and the Business of Extortion 2.0*, E. BAY EXPRESS (Feb. 18, 2009), <http://www.eastbayexpress.com/oakland/yelp-and-the-business-of-extortion-20/Content?oid=1176635&showFullText=true> [<http://perma.cc/97JY-VLL3>]; Tuttle, *supra* note 17.

¹⁷⁶ Elliott, *supra* note 84.

¹⁷⁷ *Id.*

¹⁷⁸ Marciarille, *supra* note 15, at 375–76.

with if disagreements arise, and will work with that business to iron out difficulties rather than airing disputes online.¹⁷⁹

This fear of negative reviews may have created a panicked survival response among some businesses that may turn to non-disparagement clauses to defend themselves against both real and fake reviews online. Yet concerns about negative ratings may be overblown, as most website postings are positive reviews.¹⁸⁰ However, unlike traditional word of mouth, online rants and raves have an immediacy and permanency not found in the off-line world.¹⁸¹ With the rise of mobile devices, an ordinary consumer possesses an instant megaphone that reaches a much wider audience than word of mouth.¹⁸² Even if only a few users see an initial post, it may be republished repeatedly and could go viral, becoming accessible to millions of users in a brief period of time.¹⁸³ A business may find that it has been criticized before it has the opportunity to learn about or try to resolve a consumer complaint. In addition, online postings have a permanency that

¹⁷⁹ *Id.*

¹⁸⁰ Lee, *supra* note 112, at 574.

¹⁸¹ *Id.*; Lidsky, *supra* note 28, at 862–63; Marciarille, *supra* note 15 at 371, 377, 394. As to the informality and immediacy of online communications, Professor Lidsky notes that

[b]ecause communication can occur almost instantaneously, participants in online discussions place a premium on speed. Indeed, in many fora, speed takes precedence over all other values, including not just accuracy but even grammar, spelling, and punctuation. Hyperbole and exaggeration are common, and “venting” is at least as common as careful and considered argumentation. The fact that many Internet speakers employ online pseudonyms tends to heighten this sense that “anything goes,” and some commentators have likened cyberspace to a frontier society free from the conventions and constraints that limit discourse in the real world. While this view is undoubtedly overstated, certainly the immediacy and informality of Internet communications may be central to its widespread appeal.

Lidsky, *supra* note 28, at 862–63.

¹⁸² Dave, *supra* note 17; Lee, *supra* note 112 at 574; Lidsky, *supra* note 28, 862–63; Marciarille, *supra* note 15, at 371. The relative ease and inexpensive access of online communications provides an opportunity to rebalance unequal power dynamics in the real world. Lidsky, *supra* note 28, at 894–97.

¹⁸³ BERGER, *supra* note 1, at 119–20, 206–07; Lidsky, *supra* note 28, at 863–64.

tends to view businesses as fixed and unchanging entities.¹⁸⁴ Efforts to improve operations or to respond to customer concerns may be buried in website postings and not readily accessible to consumers hoping to learn current information about a business's additional or improved practices.

Some businesses have challenged website rating and review systems as seriously flawed, either in terms of how ratings are determined or in how reviews are filtered and presented. For example, in *Seaton v. TripAdvisor LLC*,¹⁸⁵ Seaton was the owner of the Grand Resort Hotel and Convention Center in Pigeon Forge, Tennessee, which ended up on TripAdvisor's "2011 Dirtiest Hotels" list.¹⁸⁶ Seaton brought an action for defamation, tortious interference with business relationships, and false-light invasion of privacy against TripAdvisor.¹⁸⁷ The travel website moved to dismiss Seaton's complaint as protected speech under the First Amendment.¹⁸⁸ Seaton asserted that the travel website's list of the dirtiest hotels was inaccurately determined based on "unsubstantiated rumors and grossly distorted ratings and misleading statements to be used by consumers."¹⁸⁹ He added that TripAdvisor could quantitatively determine the dirtiest hotels through a statistical analysis of negative hotel reviews.¹⁹⁰ He further contended that this ranking on TripAdvisor's website and its republication by a host of media outlets caused irreparable harm to his business and its goodwill.¹⁹¹

In reviewing the case, the Sixth Circuit decided that the term "dirtiest" was not an assertion of fact, but hyperbolic figurative speech derived from the subjective evaluations of customers.¹⁹²

¹⁸⁴ Lee, *supra* note 112, at 574; Marciarille, *supra* note 15, at 382–83, 394. Prof. Marciarille notes that for medical professionals, "[w]hat may be most challenging about the never-forgotten negative reviews is how inhuman and impersonal they are. A posting in internet perpetuity implies that the physician is static—incapable of growth or development." Marciarille, *supra* note 15, at 394. Some observers have suggested that online reviews should have some type of expiration date. Marciarille, *supra* note 15, at 394.

¹⁸⁵ 728 F.3d 592, 594 (6th Cir. 2013).

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 594–96.

¹⁸⁹ *Id.* at 594–95.

¹⁹⁰ *Id.* at 595.

¹⁹¹ *Id.* at 594.

¹⁹² *Id.* at 596–98.

The court stated that TripAdvisor’s methodology in ranking hotels was inherently subjective because it was based upon individual assessments that could not be considered provable statements of fact.¹⁹³ With the explosion of top ten lists online, the Sixth Circuit concluded that such listings are not factual information but protected opinion speech, and thus are not actionable under libel or other tort claims.¹⁹⁴

Proprietary filtering programs on review sites have also stirred controversy with business owners.¹⁹⁵ Some businesses have complained that these filtering programs push negative reviews to the top, while positive ones are suppressed or moved to seldom-viewed secondary web pages.¹⁹⁶ For its part, Yelp did state that its filtering system does not treat all postings identically, but denied any effort to manipulate reviews intentionally.¹⁹⁷ Under its filtering program, the postings of so-called “elite” reviewers (some of whom are staff members, while others are unpaid volunteers)¹⁹⁸ are highlighted or moved to the top of that site.¹⁹⁹ Among other undisclosed factors, such reviewers achieve “elite” status by contributing substantial content to Yelp and garnering positive remarks from other site visitors.²⁰⁰ However, Yelp and other sites may not disclose the details of their algorithms out of concern

¹⁹³ *Id.* at 598–600.

¹⁹⁴ *Id.* at 600.

¹⁹⁵ Sandy Banks, *Turning a critical eye on Yelp*, L.A. TIMES (Apr. 20, 2013), <http://articles.latimes.com/2013/apr/20/local/la-me-banks-yelp-20130420> [<http://perma.cc/65WW-H2B2>]; Richards, *supra* note 175; *see also* Ho, *supra* note 34, at 587 (in review of restaurant grading, arguing for simplification not only in how information is disclosed, but also in how such grading data is aggregated and analyzed).

¹⁹⁶ Banks, *supra* note 195; Richards, *supra* note 175.

¹⁹⁷ Banks, *supra* note 195; Richards, *supra* note 175. *See infra* notes 226–32 and accompanying text.

¹⁹⁸ Banks, *supra* note 195; Richards, *supra* note 175. Recently, some “elite” volunteers brought a class action against Yelp claiming violations of the Fair Labor Standards Act (FLSA), alleging that they should be classified as employees who should have received pay and benefits instead of non-cash awards and social events. *See* Class Action Complaint, *Panzer v. Yelp, Inc.*, CV 13-07805 (C.D. Calif. filed Oct. 10, 2013), <http://skift.com/wp-content/uploads/2013/10/180014238-Panzer-v-Yelp.pdf> [<http://perma.cc/LEP8-EEFZ>].

¹⁹⁹ Banks, *supra* note 195; Richards, *supra* note 175.

²⁰⁰ Banks, *supra* note 195; Richards, *supra* note 175.

that some businesses will use that information to try to game rating systems to falsely inflate their rankings.²⁰¹

In *Demetriades v. Yelp*,²⁰² a restaurateur challenged Yelp's advertising claims about its filtering program, rather than its proprietary algorithm, in an unfair competition and false advertising action.²⁰³ The business accused Yelp of improperly manipulating reviews, failing to remove inaccurate or false reviews, and making wrongful claims about the reliability and accuracy of its reviews and filtering program.²⁰⁴ The trial court granted Yelp's motion to strike down the lawsuit under the state's anti-SLAPP statute and found that any of the claimed Yelp misrepresentations were unactionable puffery and opinion.²⁰⁵

However, a three-judge appellate panel reversed on the issue of the anti-SLAPP motion.²⁰⁶ The appeals court recognized Yelp's battle with fake reviews and efforts to establish a proprietary filtering system aimed at deterring fake reviews,²⁰⁷ and discussed the fact that Yelp does not disclose its algorithm in order to prevent users and businesses from trying to avoid its filtering process.²⁰⁸ The decision ultimately stated that Yelp is a public forum with its customer reviews being matters of public concern, but not its own advertising assertions about its filtering system.²⁰⁹

In contrast to its consumer postings, Yelp's statements about the reliability and trustworthiness about its filtering program²¹⁰

²⁰¹ Banks, *supra* note 195; Richards, *supra* note 175. See Jindal & Liu, *supra* note 13 (computer science researchers proposed automated models for detecting high probability of opinion spam in evaluating customer reviews); Ott et al., *supra* note 13, at 309–10, 316–17 (proposing a mixed model of psychological and computational linguistics to detect well-crafted opinion spam). See *infra* notes 518–21 and accompanying text.

²⁰² 228 Cal. App. 4th 294 (2014). See Eric Goldman, *Yelp Defeats Legal Challenge to Its User Review Filter*, FORBES (Feb. 6, 2013, 9:10 AM), <http://www.forbes.com/sites/ericgoldman/2013/02/06/yelp-defeats-legal-challenge-to-its-user-review-filter/> [<http://perma.cc/NT2X-DJJS>].

²⁰³ *Demetriades*, 228 Cal. App. 4th at 298.

²⁰⁴ *Id.* at 298, 300–02.

²⁰⁵ *Id.* at 298, 304.

²⁰⁶ *Id.* at 299, 313.

²⁰⁷ *Id.* at 299–300.

²⁰⁸ *Id.* at 300.

²⁰⁹ *Id.* at 310.

²¹⁰ *Id.* at 300–01.

were not sales puffery, but statements of quantifiable fact that were made in the course of its business services and intended to induce consumers to use and businesses to advertise on its site.²¹¹ Yelp’s representations about its filtering regime were viewed as commercial speech exempt from protection under the state’s anti-SLAPP statute.²¹² The appellate court also eschewed Yelp’s contention of federal CDA (Communications Decency Act) immunity because its own words, not those of third party reviewers, were being questioned.²¹³ Subsequently, Yelp appealed the action to the California Supreme Court, which has not yet ruled on the dispute.²¹⁴

Others have brought legal actions claiming that website staff are penning negative reviews and then following up with sales calls offering to ameliorate the reviews if the business owner advertises with the site.²¹⁵ Some businesses believe that negative posts written by Yelp employees are being used to create sales leads for that site’s advertising staff.²¹⁶ In *Levitt v. Yelp*,²¹⁷ a class action was brought based on allegations of unfair business practices and civil extortion.²¹⁸ The plaintiffs contended that Yelp extorted or attempted to extort advertising dollars through the

²¹¹ *Id.* at 311–12. See Malbon, *supra* note 9, at 146 (discussing UK Advertising Standards Authority ruling that TripAdvisor’s “trusted advice from real travelers” was misleading due to persistence of fake, unverified reviews).

²¹² *Demetriades*, 228 Cal. App. 4th at 312.

²¹³ *Id.* at 313. With regard to Yelp’s assertion of Section 230 immunity, the court decided that “Yelp’s argument is misplaced. Nowhere does plaintiff seek to enjoin or hold Yelp liable for the statements of third parties (i.e., reviewers) on its Web site. Rather, plaintiff seeks to hold Yelp liable for its own statements regarding the accuracy of its filter.” *Id.*

²¹⁴ Def. and Resp’t’s Pet. for Review, *Demetriades v. Yelp Inc.* (No. S220885) (Cal. filed Aug. 28, 2014). See Melissa J. Sachs, *Yelp asks California high court to slap down restaurateur’s suit over review filter*, WESTLAW J. (Sept. 10, 2014), <http://blog.thomsonreuters.com/index.php/yelp-asks-california-high-court-to-slap-down-restaurateurs-suit-over-review-filter/> [<http://perma.cc/9FKF-BBTU>].

²¹⁵ Richards, *supra* note 175.

²¹⁶ *Id.*

²¹⁷ *Levitt v. Yelp*, 765 F.3d 1123 (9th Cir. 2014). See Richards, *supra* note 175; Stephen L. Carter, *Give This Column Five Stars on Yelp, Please*, BLOOMBERG TECH (Sept. 4, 2014, 12:56 PM), <http://www.bloombergview.com/articles/2014-09-04/give-this-column-five-stars-on-yelp-please> [<http://perma.cc/B3NM-UZCG>].

²¹⁸ *Levitt*, 765 F.3d at 1126; see Carter, *supra* note 217.

manipulation of user reviews and by creating negative reviews of their businesses.²¹⁹ The trial court also determined that the parties had failed to provide sufficient facts to support their claims and that Section 230 immunity prevented legal action for extortion against Yelp for not removing certain negative reviews.²²⁰ The district court dismissed the lawsuit and the business owners appealed.²²¹

The appellate court determined that Yelp's solicitation of advertising was not wrongful conduct required for the narrow legal requirements for civil extortion.²²² Further, Yelp's actions did not amount to either the anticompetitive or antitrust violations needed to support claims of unfair business practices.²²³ The court added that the plaintiffs had also failed to show that Yelp staffers had created the negative posts about their businesses.²²⁴ However, the court left open the option that other legal actions, if properly pled, might be sustainable against Yelp.²²⁵

Similarly, in *Reit v. Yelp!*,²²⁶ a dentist challenged negative reviews on Yelp, asserting that Yelp not only kept up the negative review, but removed all the positive postings.²²⁷ Based on language in Yelp's guide to business owners, the dentist contended that Yelp's filtering program deceived consumers because it was subject to human bias through Yelp's manipulation of consumer reviews.²²⁸ He also argued "that this procedure of removing positive reviews and highlighting negative ones is part of Yelp's business model, used as leverage to coerce businesses and professionals into paying for advertising on Yelp.com."²²⁹ However, the court determined that the statements in the business guide did not materially mislead consumers because the guide was

²¹⁹ *Levitt*, 765 F.3d at 1127–29; see Carter, *supra* note 217.

²²⁰ *Levitt*, 765 F.3d at 1126, 1135–36.

²²¹ *Id.* at 1126, 1129.

²²² *Id.* at 1130–33. The court added that the businesses had not proven that Yelp authored any of the negative reviews at issue. *Id.* at 1135–36. See Carter, *supra* note 217.

²²³ *Levitt*, 765 F.3d at 1136–37.

²²⁴ *Id.* at 1134–36.

²²⁵ *Id.* at 1137.

²²⁶ 907 N.Y.S.2d 411 (N.Y. Sup. Ct. 2010).

²²⁷ *Id.* at 412.

²²⁸ *Id.* at 412, 414.

²²⁹ *Id.* at 412–13.

geared toward merchants, not consumers.²³⁰ Even if the plaintiffs could prove their claim that Yelp had manipulated consumer reviews to generate advertising revenues, this claimed conduct was not a deceptive practice because it was business-oriented, not consumer-oriented.²³¹ Therefore, the court concluded that Yelp’s filtering regime for reviews was not likely to deceive reasonable consumers.²³²

Certain licensed professionals also chafe against customer ratings as inappropriate challenges to their professional autonomy, especially doctors and dentists.²³³ The medical profession is centered primarily on peer evaluations and referrals as the basis for professional reputation, not patient evaluations.²³⁴ Research studies indicate that medical professionals often think that patients lack the expertise to fairly and accurately assess the quality of medical services.²³⁵ In general, survey analyses indicate

²³⁰ *Id.* at 415.

²³¹ *Id.*

²³² *Id.*

²³³ Lee, *supra* note 112, at 577–80; Marciarille, *supra* note 15, at 384–85. Prof. Marciarille’s research found that

[t]here is a sense that reporting on direct observation of physician and physician staff quality by patients is inherently demeaning. It is also an inescapable undercurrent here, even spilling over into the popular press. Inviting direct observer or consumer comment on provider behavior implies that the observations of ordinary untrained people are valuable to patients, providers, and payors alike.

Some of this relates to a vision of professional autonomy, where the very meaning of “professional” conjures up an image of individual judgment exercised with little process-based feedback. The culture of medicine has been described as one that is “deeply rooted, both by custom and by training, in high standards of autonomous individual performance and a commitment to progress through research.” Alternatively, some of this relates to a vision of health care that focuses on the inherently collaborative nature of the provision of health care services. Under this vision, placing quality observation solely at the feet of the physician seems to negate the mutual task of creating a successful or unsuccessful physician-patient relationship.

Id.

²³⁴ Marciarille, *supra* note 15, at 362–63, 370–71.

²³⁵ Lee, *supra* note 112, at 580–81; Marciarille, *supra* note 15, at 362–63. Marciarille believes that it is odd that doctors should be so dismissive of patient reviews of their services:

that doctors and dentists do not want to be judged by the overall patient experience, such as waiting times in reception areas, respectful patient interactions with the doctor and staff, physician attentiveness to patients, and medical information and education provided to the patient.²³⁶ Many doctors and dentists prefer an emphasis on technical medical outcomes rather than softer patient experiences as a reflection of their professional training and autonomy.²³⁷ Nevertheless, such layperson reviews can also provide a window into ways to improve the patient experience.²³⁸

However, this resistance to patient review is coming into direct conflict with important changes in the medical field. More and more patients are seeking to arm themselves proactively with medical information before consulting a doctor.²³⁹ About 80 percent of Americans search for medical information about health conditions on the Internet,²⁴⁰ as well as patient reviews of medical professionals.²⁴¹ The rise in patient consumerism is thus pushing back against the tradition of a passive, compliant role in

It is ironic that physicians—champions of the validity of individualized approaches to practice and the validity of anecdotal evidence—are the fiercest opponents of patient-generated anecdotal evidence on physician performance. This is particularly surprising in light of the fact that most graduates of U.S. medical schools are first trained in clinical skills through the use of anecdotal patient feedback gained from practicing on each other and through the use of standardized patients. Patient feedback from physician or physician-in-training patients and from professional patients is, apparently, less suspect than feedback from real patients.

Marciarille, *supra* note 15, at 389.

²³⁶ Lee, *supra* note 112, at 581; Marciarille, *supra* note 15, at 368–69, 381–82.

²³⁷ Lee, *supra* note 112, at 580–81; Marciarille, *supra* note 15, at 363, 368–69, 385.

²³⁸ Lee, *supra* note 112, at 582.

²³⁹ Marciarille, *supra* note 15, at 365–67.

²⁴⁰ *Id.* at 366.

²⁴¹ Patients can now access crowdsourced review sites, such as RateMDs.com, Angie's List, and Yelp, to gain insight into patient opinions about a particular physician or dentist. Lee, *supra* note 112, at 574, 576–77; Marciarille, *supra* note 15, at 362, 366–67, 372–73. Dentists, in particular, have been in the firing line of consumer ratings because many patients do not have dental insurance and have to pay out-of-pocket for their dental services. Marciarille, *supra* note 15, at 372–73. Dentists also have been involved in a number of defamation and nondisparagement clause lawsuits regarding patient online reviews.

the physician-patient relationship.²⁴² In addition, the provisions of the ACA²⁴³ and efforts by provider insurers²⁴⁴ promote data collection on the patient experience to evaluate physician quality and performance metrics, such as medical outcomes, office efficiencies, and patient evaluations of their interactions.²⁴⁵ Some medical professionals also fear that negative patient reviews will affect overall pay and reimbursement rates²⁴⁶ or their continued participation in certain health insurance programs.²⁴⁷ Oddly enough, most patient reviews of doctors on crowdsourced sites are overwhelmingly positive.²⁴⁸

III. AVOIDING ENFORCEMENT UNDER CONTRACT PRINCIPLES

Clearly, the reasons behind the use of nondisparagement clauses may vary depending upon the nature and concerns of the individual business. Even though one might disapprove of these clauses as inherently unfair or practically misguided, it remains

²⁴² Marciarille, *supra* note 15, at 365–66.

²⁴³ *Id.* at 363, 381.

²⁴⁴ *Id.* at 377–79.

²⁴⁵ *Id.* at 363. Unlike other types of services, medical care is a private activity with enormous public consequences. *Id.* at 369; CDT Complaint, *supra* note 53, at 15. Under the ACA, the Centers for Medicare and Medicaid Services (CMS) sponsors the Physician Compare website, which collects patient reviews on the patient experience for future public access. Marciarille, *supra* note 15, at 363. Concerned about the quality and veracity of patient assessments, the American Medical Association advocates that CMS permit doctors to review any assessments before any posting is published. Marciarille, *supra* note 15, at 363–64, 388. Hospitals are also worried that they will be evaluated like hotels, with expectations of “hotel-like amenities.” Marciarille, *supra* note 15, at 382.

²⁴⁶ Marciarille, *supra* note 15, at 380–82.

²⁴⁷ Insurers have long sought to collect data on the patient experience, sometimes referred to as the “patient voice,” to determine the quality of care and whether to retain physicians under their health plans. *Id.* at 378–79. Insurers utilize surveys to help determine whether to disenroll medical practices from their insurance programs, leading to litigation about the methodology and accuracy of these internal analyses. *Id.* at 378–79. One would expect that insurers might consider text and data mining on crowdsourced review sites to help quantify patient voice metrics on medical professionals. *Id.*

²⁴⁸ Lee, *supra* note 112, at 577–78; Marciarille, *supra* note 15, at 394; ElBoghdady, *supra* note 124. A 2009 review of thirty-three crowdsourced rating sites of about 300 doctors and specialists in the Boston area determined that positive reviews made up 88 percent of the posted commentaries. ElBoghdady, *supra* note 124.

unclear as to whether these clauses are invalid under existing contract law. One could posit a number of arguments to defeat nondisparagement clauses, including ones grounded in issues of consideration, unconscionability, public policy, excessive penalties, and privity.

A. Lack of Consideration

Consideration is a bedrock element of any valid contract.²⁴⁹ It requires a bargained-for exchange of something of legally recognized value between contracting parties.²⁵⁰ Among other things, consideration may consist of an exchange of promises or a promise in return for another's forbearance. In many contracts of silence or nondisparagement clauses, one party receives compensation²⁵¹ through settlement funds or severance pay in exchange for not speaking or for suppressing negative critiques. The typical consumer contract involves an exchange of promises between the merchant and the customer, such as the provision of products and services in return for payment.²⁵² The utilization of nondisparagement clauses adds the requirement that consumers not post any negative comments or ridicule. Focusing on the bargained-for exchange, courts typically will not analyze the adequacy or value of the consideration.²⁵³ The fact that consumers are waiving or limiting their speech rights without compensation does not invalidate the contract.²⁵⁴ Consumers' speech rights are bundled with their exchange of other promises in purchasing goods and/or services.

However, in certain circumstances, consumers may be able to claim a lack of consideration when a party has a pre-existing legal duty as to the bargained-for benefit.²⁵⁵ For example, in *Lee*, the

²⁴⁹ RESTATEMENT (SECOND) OF CONTRACTS § 71 (1981); see JOHN E. MURRAY, JR., MURRAY ON CONTRACTS § 56 (4th ed. 2001).

²⁵⁰ MURRAY, *supra* note 249.

²⁵¹ Garfield, *supra* note 32, at 278.

²⁵² MURRAY, *supra* note 249.

²⁵³ RESTATEMENT (SECOND) OF CONTRACTS § 79 (1981).

²⁵⁴ *But see* Belmas & Larson, *supra* note 55, at 75–76 (arguing that there is a lack of mutuality of obligation as software company does not give up anything in exchange for consumer's promise of silence).

²⁵⁵ See CDT Complaint, *supra* note 53, at 11–13.

dentist’s mutual privacy contract required her patient to refrain from posting negative reviews in exchange for safeguarding the patient’s information from third party marketing firms.²⁵⁶ However, this kind of disclosure of patient information is already forbidden under HIPAA without patient consent²⁵⁷ and transgresses the conflict of interest provisions of medical ethics codes.²⁵⁸ Therefore, the patient could challenge the validity of the privacy provisions as lacking consideration because medical professionals already have a pre-existing legal duty to protect patient privacy.

In *Lee*, the dentist’s promises could also be viewed as illusory²⁵⁹ and not in line with the requirement of consideration. The dentist’s privacy commitment is meaningless in light of her existing legal and ethical obligations. The dentist would be offering empty promises of privacy while the patient is substantively bound to suppress his speech rights and to hand over his copyright to his dentist. In response to the dentist’s motion to dismiss, the trial court refused to dismiss *Lee*’s claims seeking to invalidate the nondisparagement provisions of her contract as lacking in consideration.²⁶⁰

Furthermore, doctors and dentists typically enter into provider agreements with insurers for which the covered patient is

²⁵⁶ See *supra* note 128, at 1–2; *Lee* Complaint, *supra* note 123, at 2.

²⁵⁷ See CDT Complaint, *supra* note 53, at 11–13.

²⁵⁸ See AM. MED. ASS’N, AMA ETHICS CODE OPINION 8.03—CONFLICTS OF INTEREST: GUIDELINES, <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion803.page?> [<http://perma.cc/CRF7-V4N6>] (stating that “[u]nder no circumstances may physicians place their own financial interests above the welfare of their patients If a conflict develops between the physician’s financial interest and the physician’s responsibilities to the patient, the conflict must be resolved to the patient’s benefit.”); see CDT Complaint, *supra* note 53, at 17.

²⁵⁹ RESTATEMENT (SECOND) OF CONTRACTS § 77 (1981):

A promise or apparent promise is not consideration if by its terms the promisor or purported promisor reserves a choice of alternative performances unless (a) each of the alternative performances would have been consideration if it alone had been bargained for; or (b) one of the alternative performances would have been consideration and there is or appears to the parties to be a substantial possibility that before the promisor exercises his choice events may eliminate the alternatives which would not have been consideration.

See MURRAY, *supra* note 249, § 57.

²⁶⁰ See *Lee v. Makhnevich*, 2013 U.S. Dist. LEXIS 43760 (S.D.N.Y. Mar. 27, 2013), at *1, *4.

a third party beneficiary.²⁶¹ Under these agreements, medical professionals are required to provide particular services at certain fee schedules to premium-paying participants.²⁶² One could view the refusal to provide the requested medical services as a breach of contract. Therefore, these professionals already have a pre-existing legal duty to comply with their insurer contracts and to provide the agreed-upon medical services, regardless of the patient's agreement to a nondisparagement clause. In this context, a plaintiff customer will likely argue that there is a lack of consideration, depending upon the circumstances.

B. Unconscionability

Grounded in good faith and fair dealing,²⁶³ courts determine unconscionability as a matter of law,²⁶⁴ reviewing issues of procedural

²⁶¹ See RESTATEMENT (SECOND) OF CONTRACTS § 302 (1981).

²⁶² D. Ward Kallstrom, *Health Care Cost Control by Third Party Payors: Free Schedules and the Sherman Act*, 27 DUKE L.J. 646 (1978).

²⁶³ RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. a (1981). See generally CHARLES L. KNAPP, NATHAN M. CRYSTAL & HARRY G. PRINCE, PROBLEMS IN CONTRACT LAW, CASES AND MATERIALS 599–601 (7th ed. Wolters Kluwer 2010) (discussing evolution of unconscionability under civil law and common law legal systems); Susan Landrum, *Much Ado About Nothing? What the Numbers Tell Us about How State Courts Apply the Unconscionability Doctrine to Arbitration Agreements*, 97 MARQ. L. REV. 751, 781–87 (2014) (providing historical and statutory overview of unconscionability doctrine); Larry A. Dimatteo & Bruce Louis Rich, *A Consent Theory of Unconscionability: An Empirical Study of Law in Action*, 33 FLA. ST. L. REV. 1068, 1071–75 (2006) (reviewing development of unconscionability and its bifurcation into procedural and substantive forms).

²⁶⁴ U.C.C. § 2-302 cmt. 1 (2000); RESTATEMENT (SECOND) OF CONTRACTS § 208 cmts. b, f (1981). Some legal scholars have questioned the appropriate role of the judiciary in applying unconscionability to invalidate provisions of adhesive consumer contracts. See KNAPP ET AL., *supra* note 263, at 610–12 (discussing scholarly concerns about judicial application of unconscionability and importance of consumer protection laws to police unfair contracts); Leff, *supra* note 44, at 356–58 (questioning reliance on judicial determinations of unconscionable contracts that are better left up to legislative bodies to address); Speidel, *supra* note 34, at 363–65 (calling for greater emphasis on consumer protection laws to promote more fair consumer contracts rather than wasting judicial resources on unconscionability). *But see* Landrum, *supra* note 263, at 781–85 (2014) (where the author's empirical research suggests that unconscionability

and substantive unconscionability.²⁶⁵ The equitable principle of unconscionability²⁶⁶ considers flaws in the contract formation process (procedural flaws) and examines the substance of clauses to

is applied sparingly overall by most courts with only small number of states invalidating arbitration clauses under unconscionability); John E. Murray, Jr., *Unconscionability: Unconscionability*, 31 U. PITT. L. REV. 40–43, 80 (1969) (calling for courts to recognize the value of judicial interpretations of unconscionability to determine its parameters under the U.C.C.).

²⁶⁵ See JOHN M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS 332, 338 (West 6th ed. 2009); Dimatteo & Rich, *supra* note 263, at 1072–75; Garfield, *supra* note 32, at 285–86; Leff, *supra* note 44, at 486–88; Debra Pogrun Stark, Jessica M. Choplin & Eileen Linnabery, *Dysfunctional Contracts and the Laws and Practices That Enable Them: An Empirical Analysis*, 46 IND. L. REV. 797, 798–99 (2013). See generally Arthur Allen Leff, *Unconscionability and The Code—The Emperor’s New Clause*, 115 U. PA. L. REV. 485, 487–88, 558–89 (1967) (criticizing the U.C.C. for failing to clearly define unconscionability and to create express procedural-substantive bifurcation analysis).

²⁶⁶ KNAPP ET AL., *supra* note 263, at 584–85; PERILLO ET AL., *supra* note 265, at 332–33; Leff, *supra* note 44, at 528–29. An unconscionable contract is “such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other.” RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. b (1981) (citing *Hume v. United States*, 132 U.S. 406 (1889) (quoting *Earl of Chesterfield v. Janssen*, 2 Ves. Sen. 125, 155, 28 Eng. Rep. 82, 100 (Ch. 1750))). Both the Restatement (Second) of Contracts and the U.C.C. recognize the concept of unconscionability. The relevant Restatement provision states that

[i]f a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.

RESTATEMENT (SECOND) OF CONTRACTS § 208. The Uniform Commercial Code indicates the following regarding unconscionability:

(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

U.C.C. § 2-302 (2000).

see if they are too harsh or one-sided (substantive flaws).²⁶⁷ Courts utilize a variety of approaches to unconscionability,²⁶⁸ but most require a party seeking to rescind an agreement to bear the burden of showing both forms of unconscionability.²⁶⁹ If a court makes a finding of unconscionability, it may reject enforcement of an entire contract, sever solely the harsh clauses, or restrict how these offending provisions will apply.²⁷⁰

Procedural unconscionability focuses on unfair surprise and the absence of meaningful choice in contract formation.²⁷¹ Courts may consider a number of issues, including the lack of party education or sophistication, unequal bargaining power between the parties, unfair surprises in terms buried in fine print or obscured by font or extensive legal jargon, or the lack of an opportunity to review and negotiate contract terms.²⁷² A court will need to assess

²⁶⁷ U.C.C. § 2-302 cmt. 1 (Am. Law Inst. & Unif. Law Comm'n 2000); RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. b (1981); KNAPP ET AL., *supra* note 263, at 605–07; PERILLO ET AL., *supra* note 265, at 332, 338; Garfield, *supra* note 32, at 285–86; Leff, *supra* note 44, at 530; Stark, *supra* note 265, at 824.

²⁶⁸ KNAPP ET AL., *supra* note 263, at 605–07; PERILLO ET AL., *supra* note 265, at 332, 338; Dimatteo & Rich, *supra* note 263, at 1072–75; Landrum, *supra* note 263, at 767–69. State court analyses of unconscionability claims are further complicated by existing state and federal consumer protection laws.

²⁶⁹ KNAPP ET AL., *supra* note 263, at 605; Dimatteo & Rich, *supra* note 263, at 1074; Landrum, *supra* note 263, at 767. *See* Williams v. Walker-Thomas Furniture, 350 F.2d 445 (D.C. Cir. 1965) (seminal case requiring showing of both procedural and substantive unconscionability in consumer installment contract of adhesion for goods transaction). *But see* David Gilo & Ariel Porat, *Viewing Unconscionability through a Market Lens* (John M. Olin Law & Econ. Working Paper No. 489, 2009), <http://www.law.uchicago.edu/Lawecon/index.html> [<http://perma.cc/KA9F-FYXE>] (reviewing various forms of oppressive contract terms, but arguing that courts should not examine parties or nature of transactions for contract fairness but should instead consider whether market competition over contract terms exists).

²⁷⁰ U.C.C. § 2-302(1); RESTATEMENT (SECOND) OF CONTRACTS § 208. *See* Landrum, *supra* note 263, at 764.

²⁷¹ U.C.C. § 2-302(1) cmt. 1; RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. d.

²⁷² *See* Ben-Shahar, *supra* note 34, at 8; Landrum, *supra* note 263, at 768–69; Marciarille, *supra* note 15, at 365; Stark et al., *supra* note 265, at 825. In the medical field, there may be a clearly unequal balance of power between doctors and patients, which can factor into procedural unconscionability. Professor Marciarille stated that

how the contract provisions are presented, the availability of product and service alternatives in the consumer marketplace, and traditional principles of freedom of contract, which may militate against a finding of procedural unconscionability. Because these nondisparagement clauses are found in consumer contracts of adhesion, one might easily argue procedural unconscionability based upon the lack of meaningful choice because consumers often lack bargaining power, business savvy, and an opportunity to negotiate contract terms.²⁷³ In addition, few consumers actually read

[p]atient-physician relationships have been framed by many metaphors: parent-child relations; seller-purchaser transactions; teacher-student learning; relations among friends; or parties entering into contractual relations. It is not necessary to align an understanding of physician-patient relationships with only one of these models to understand that there are aspects of a service contract relationship to modern physician-patient relations. It has been observed that contract principles govern the inception of the physician-patient relationship but that bargaining power is almost entirely removed from the patient once the relationship is formed, leaving tort law to govern the terms of the relationship. The lack of equitable bargaining power within the physician-patient relationship is attributable to information asymmetry and the curious intimacy of the relationship.

Marciarille, *supra* note 15, at 365.

²⁷³ Ben-Shahar, *supra* note 34, at 1–2; Read, *supra* note 46, at 392–94; Stark et al., *supra* note 265, at 825. Professor Ben-Shahar correctly stated that [r]eal people don't read standard form contracts. Reading is boring, incomprehensible, alienating, time consuming, but most of all pointless. We want the product, not the contract. Besides, lots of people bought the product or the service along with the same contract and seem happy enough, so we presume that there must be nothing particularly important buried in the contract terms. And what if they did read? Surely, there is nothing they can do about the bad stuff they know they will find. Are they going to cross out the unfavorable term? Are they going to call some semi-automatic 'customer service agent' and negotiate? Other than lose the excitement about the deal and maybe walk away from it (to what? A better contract?), there is not much individuals can do. Dedicated readers can expect only heartache, which is a very poor reward for engaging in such time-consuming endeavor. Apart from an exotic individual here or there, nobody reads.

Ben-Shahar, *supra* note 34, at 2.

adhesive contracts, and even if they did read the contract, most do not understand fully what these terms mean.²⁷⁴

Yet consumer contracts of adhesion are not automatically procedurally unconscionable, and are routinely enforced.²⁷⁵ The Restatement (Second) of Contracts provision on standardized agreements accepts the inherent value of adhesive consumer contracts in a world of mass distribution of goods and services.²⁷⁶ Enormous savings in time, cost, and effort occur when individually negotiated contracts give way to standard form agreements.²⁷⁷ The Restatement provision also recognizes that the drafter of standard contract forms knows that few will read or understand the terms of a standardized contract and must rely upon the good faith of its drafters.²⁷⁸

²⁷⁴ See Ben-Shahar, *supra* note 34, at 2–3; Read, *supra* note 46, at 392–94; Stark et al., *supra* note 265, at 828–29. Professor Stark and her co-authors also lamented that courts often fail to address the basic reality that most consumers do not read contracts of adhesion. They stated that

[c]ourts need to engage in this fiction because buyers could otherwise argue that they failed to read or understand any term of the contract that they later regret, thus, eroding the goal of certainty of contract. Although courts may need, in the typical case, to engage in this fiction, they should be aware that it is, in fact, a fiction; in cases where the terms are very unreasonable and one-sided, courts should keep this fiction in mind.

Stark et al., *supra* note 265, at 828 (footnote omitted). See *supra* notes 34, 44 and accompanying text.

²⁷⁵ Landrum, *supra* note 263, at 769.

²⁷⁶ RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. a (1981):

a. *Utility of standardization.* Standardization of agreements serves many of the same functions as standardization of goods and services; both are essential to a system of mass production and distribution. Scarce and costly time and skill can be devoted to a class of transactions rather than to details of individual transactions.

See MURRAY, *supra* note 249, at § 97; Read, *supra* note 46, at 392–94.

²⁷⁷ RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. a–b. The Restatement provision also recognizes that the drafter of standard contract forms knows that few will read or understand the terms of a standardized contract. *Id.* at cmt. b.

²⁷⁸ *Id.* at cmt. b. Comment b states:

b. *Assent to unknown terms.* A party who makes regular use of a standardized form of agreement does not ordinarily expect his customers to understand or even to read the standard terms.

But government regulation and judicial review may prohibit or overturn unfair contract terms that fall outside of the reasonable expectations of the non-drafting party.²⁷⁹ Under substantive unconscionability, the disputed contract terms may be evaluated to decide if they are too oppressively harsh or one-sided in favor of the contract drafter.²⁸⁰ Some examples of such terms are excessive price provisions, exculpatory clauses on damages, unusual warranty disclaimers, unreasonable forum or venue choices,²⁸¹ and the lack of mutuality in contract remedies.²⁸² In some instances, liquidated damages clauses associated with nondisparagement clauses that are disproportionate penalties may be deemed unenforceable. In *Palmer*, the plaintiffs argued that KlearGear.com obscured these clauses from view on a second page of the site’s terms of use and went beyond the reasonable expectations of consumers.²⁸³ Without explicitly mentioning unconscionability,

One of the purposes of standardization is to eliminate bargaining over details of individual transactions, and that purpose would not be served if a substantial number of customers retained counsel and reviewed the standard terms. Employees regularly using a form often have only a limited understanding of its terms and limited authority to vary them. Customers do not in fact ordinarily understand or even read the standard terms. They trust to the good faith of the party using the form and to the tacit representation that like terms are being accepted regularly by others similarly situated. But they understand that they are assenting to the terms not read or not understood, subject to such limitations as the law may impose.

Id. See MURRAY, *supra* note 249, at § 97; see also *supra* note 35 and accompanying text.

²⁷⁹ Section 211 specifically states that, as to form contracts, a provision will not be enforced when the drafter “has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement.” RESTATEMENT (SECOND) OF CONTRACTS § 211(3) & cmt. c.

²⁸⁰ See Stark et al., *supra* note 265, at 828–29.

²⁸¹ PERILLO ET AL., *supra* note 265, at 339–40. See Dimatteo & Rich, *supra* note 263, at 1107 (describing empirical study finding that successful unconscionability claims involved unsophisticated consumers with agreements containing one-sided clauses, often excessive in price or exculpatory clauses favoring merchant).

²⁸² See Bragg v. Linden Research, Inc., 487 F. Supp. 2d 593, 607–08 (E.D. Pa. 2007); Comb v. PayPal, Inc., 218 F. Supp. 2d 1165, 1173–74 (N.D. Cal. 2002).

²⁸³ *Palmer v. KlearGear.com*, No. 1:13-cv-00175 (D. Utah filed July 1, 2014).

the court determined that the nondisparagement clause and associated liquidated damages remedies were invalid.²⁸⁴

Only Arizona has directly addressed a consumer nondisparagement clause under unconscionability in a contract of adhesion, in *FreeLife Int'l v. Am. Educ. Music Publ'ns, Inc.*²⁸⁵ In that case, David Lucas Burges established a website with articles and postings that criticized FreeLife, its best-selling product Himalayan GojiJuice, and its marketing and compensation strategies.²⁸⁶ On its own website, FreeLife wrote an open letter disputing Burges's commentaries without mentioning him by name.²⁸⁷ At about the same time of his website launch, Burges completed an online application to become a marketing executive for FreeLife to sell its products.²⁸⁸ In the application process, he consented to an adhesive clickwrap agreement²⁸⁹ that included a nondisparagement clause.²⁹⁰ Burges never took on that role, but continued to criticize FreeLife, and the company sued Burges for defamation, intentional interference with contractual relations, and breach of contract.²⁹¹ He counter-claimed in defamation regarding the open response letter on FreeLife's website.²⁹²

Burges asserted that FreeLife's clickwrap contract was invalid, and the standardized clause was unenforceable if the drafter had reason to know or believe that the other party would not have agreed to that term if he had been aware of it.²⁹³ Initially, the court stated that Arizona precedent upholds standardized agreements unless the terms are outside of the parties' reasonable expectations.²⁹⁴ The court found that Burges had voluntarily assented to FreeLife's terms when he clicked "I Accept."²⁹⁵ Furthermore, the court determined that Burges provided no evidence

²⁸⁴ *Id.*

²⁸⁵ No. CV07-2210-PHX-DGC, 2009 U.S. Dist. LEXIS 97680 (D. Ariz. Oct. 1, 2009).

²⁸⁶ *Id.* at 3–4.

²⁸⁷ *Id.* at 3.

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ *Id.* at 3–6.

²⁹¹ *Id.* at 3–5.

²⁹² *Id.* at 3.

²⁹³ *Id.* at 5–6.

²⁹⁴ *Id.* at 5.

²⁹⁵ *Id.* at 5, 7.

that FreeLife knew or had any reason to know that Burges would have objected to this term.²⁹⁶ Looking to traditional contract principles, the Arizona district court determined that a valid contract existed and that Burges had assented to the terms of the clickwrap agreement.²⁹⁷

Burges also claimed the contract was procedurally unconscionable because it was a contract of adhesion, he lacked the opportunity to negotiate its terms, and he did not possess the legal expertise to understand the agreement.²⁹⁸ Recognizing these factors, the court determined that clickwrap agreements are routinely enforced in Arizona and other jurisdictions.²⁹⁹ In reviewing the document’s presentation, the court found that the agreement was clearly displayed before Burges assented to its terms.³⁰⁰ In addition, the nondisparagement clause was written in plain language, so it was not procedurally unconscionable.³⁰¹

In addition, Burges contended that the adhesive nature of the agreement and the fact that he might be exposed to millions of dollars in damages for making truthful statements supported his assertion of substantive unconscionability.³⁰² However, the appeals court decided that the terms of the agreement were not too one-sided or oppressive.³⁰³ Analogizing to employment severance agreements, the court indicated that it was reasonable for FreeLife to protect its business image from its own marketing representatives.³⁰⁴ The court added that Burges had voluntarily agreed to the terms and could not now claim they were unfair because it might make him liable for damages.³⁰⁵

The court then stated that the clause must be interpreted based upon the plain meaning of the term “disparage.”³⁰⁶ The plain meaning would suggest that even true statements might

²⁹⁶ *Id.* at 6.

²⁹⁷ *Id.* at 5.

²⁹⁸ *Id.* at 6.

²⁹⁹ *Id.* at 5–6.

³⁰⁰ *Id.* at 6–7.

³⁰¹ *Id.* at 6.

³⁰² *Id.* at 6–7.

³⁰³ *Id.*

³⁰⁴ *Id.* at 6.

³⁰⁵ *Id.* at 7.

³⁰⁶ *Id.* at 7, 13.

be disparaging, subjecting Burges to potential liability for breach of contract.³⁰⁷ The appellate court left it up to future jury determinations as to whether Burges defamed FreeLife³⁰⁸ or if the company suffered any damages from Burges's assertions.³⁰⁹ Lastly, the appeals court quickly dispatched any First Amendment claims, contending a lack of the requisite state action to invoke that constitutional right in a private contract suit.³¹⁰

With varied state approaches to unconscionability, it is uncertain how nondisparagement clauses in consumer contracts will fare in the future. In some ways, the application of unconscionability to nondisparagement clauses may follow a similar path to court reviews of arbitration clauses under this concept, with state determinations all across the spectrum.³¹¹ If unconscionability is the legal doctrine applied, then consensus is unlikely to be found on the validity of such clauses.

C. Public Policy Concerns

Under contract law, an agreement is void and unenforceable if it violates a well-established or clear public policy.³¹² Public policy

³⁰⁷ *Id.* at 7. The court looked to the dictionary for the plain meaning of the term:

Disparage means “[t]o bring discredit or reproach upon; to dishonour, discredit; to lower in credit or esteem.” Oxford English Dictionary (2d ed. 1989). As the Court previously said, the ordinary meaning of this term does not require that the disparaging statement be false (citation omitted). Summary adjudication as to the interpretation of “disparage” will be granted.

Id.

³⁰⁸ *Id.* at 10.

³⁰⁹ *Id.* at 11.

³¹⁰ *Id.* at 7. The court stated that “[t]he First Amendment protects individuals from government infringement on speech, not private infringement. *George v. Pacific-CSC Work Furlough*, 91 F.3d 1227, 1229 (9th Cir. 1996). There is no unconstitutional restriction of First Amendment rights in this case.”

³¹¹ Landrum, *supra* note 263, at 755–57.

³¹² RESTATEMENT (SECOND) OF CONTRACTS § 178 (1981):

When A Term Is Unenforceable On Grounds Of Public Policy:
 (1) A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed

may be derived from such sources as constitutional provisions, statutory law, and/or judicial precedent.³¹³ In voiding a contract, courts will consider if the public policy concerns outweigh the interests in enforcing the agreement.³¹⁴ In certain instances, a

in the circumstances by a public policy against the enforcement of such terms.

(2) In weighing the interest in the enforcement of a term, account is taken of

- (a) the parties' justified expectations,
- (b) any forfeiture that would result if enforcement were denied, and
- (c) any special public interest in the enforcement of the particular term.

(3) In weighing a public policy against enforcement of a term, account is taken of

- (a) the strength of that policy as manifested by legislation or judicial decisions,
- (b) the likelihood that a refusal to enforce the term will further that policy,
- (c) the seriousness of any misconduct involved and the extent to which it was deliberate, and
- (d) the directness of the connection between that misconduct and the term.

A balancing test is inherent in the Restatement view of public policy, which inevitably leads to varying outcomes on a state-by-state basis. Belmas & Larson, *supra* note 55, at 52–56.

³¹³ RESTATEMENT (SECOND) OF CONTRACTS § 178(3) cmt. a (1981). See Bast, *supra* note 32, at 674–75, 678; Garfield, *supra* note 32, at 296–97. Professor Garfield notes that “[w]hile freedom of contract might exist, there is no freedom to use contracts to undermine important societal values.” Garfield, *supra* note 32, at 294.

³¹⁴ RESTATEMENT (SECOND) OF CONTRACTS § 178(1), (3) (1981). See Belmas & Larson, *supra* note 55, at 73–80; Garfield, *supra* note 32, at 294–96. In evaluating public policy, Professor Garfield indicated that

The Restatement does not list the public policies that courts can consider in this balance. Rather, a court can consider relevant legislation, case law, and its own perception of the public welfare. An oft-quoted passage from a nineteenth-century English decision best captures the open-ended nature of this public policy analysis, characterizing public policy as “a very unruly horse, and when once you get astride it you never know where it will carry you.” In fact, the public policy analysis is not only open-ended, but it can also lead to different conclusions over time.

Garfield, *supra* note 32, at 297–98 (footnotes omitted). See also Dworkin & Callahan, *supra* note 42, at 172–73, 179–82 (discussing balancing public policy

court may decide to sever the offending clause if the remaining contract provisions do not offend notions of public policy.³¹⁵

1. *First Amendment Issues*

From a constitutional perspective, legal experts dispute whether these types of contracts and clauses violate an individual's First Amendment free speech rights.³¹⁶ These restrictive clauses not only impact one's right of free expression, but also the rights of others to hear alternative views.³¹⁷ In addition, both true speech and opinion speech are protected under the First Amendment.³¹⁸ Substantial truth and opinion speech can be asserted in defamation actions, as a plaintiff can only prevail if it can be shown that there were false statements of fact that damaged an individual's or business's reputation.³¹⁹ Substantial truth disposes of claims of falsity, and opinion speech obviates a showing of objective facts required in defamation situations.³²⁰

Some case law and legal commentators contend that because private contracts are involved, there is no state action necessary to invoke First Amendment free speech claims.³²¹ Other precedent and legal scholars suggest a more expansive approach in which state action is invoked when courts are called upon to enforce private contracts of silence and nondisparagement clauses,³²² especially if the government's coercive power is used to deny recognized rights.³²³

concerns between confidentiality of employment relationship and whistleblower statutes aimed at preventing wrongdoing and protecting public good).

³¹⁵ Dworkin & Callahan, *supra* note 42, at 190.

³¹⁶ Belmas & Larson, *supra* note 55, at 57; Garfield, *supra* note 32, at 318–19.

³¹⁷ Belmas & Larson, *supra* note 55, at 57–62, 64–66.

³¹⁸ See *supra* notes 28, 36 and accompanying text.

³¹⁹ Belmas & Larson, *supra* note 55, at 76.

³²⁰ See *supra* notes 28, 36 and accompanying text.

³²¹ Garfield, *supra* note 32, at 348–49; see *supra* note 315 and accompanying text.

³²² Belmas & Larson, *supra* note 55, at 67–69; Garfield, *supra* note 32, at 319, 347–48, 362.

³²³ See Belmas & Larson, *supra* note 55, at 68 (asserting court's unwillingness to enforce restrictive property covenants based on race or color as impermissible use of state action).

However, this broader approach may be undermined by notions of freedom of contract in which parties often waive well-established rights in order to gain something of value in return.³²⁴ Traditional contract law allows parties to fashion their bargained-for exchange under freedom of contract, including waiving one’s legal rights of speech as part of that bargain.³²⁵ Contract case law also imposes the duty to read upon all contracting parties, including those entering into adhesive consumer contracts.³²⁶ From existing precedent, consumers unwilling to enter into such nondisparagement clauses may reject them and take their business elsewhere.³²⁷ Therefore, it may be problematic to assert state action in instances of private contracting.³²⁸ That said, free expression rights may be effectively protected through the application of other public policy grounds to strip away nondisparagement clauses.

2. State Statutes Invalidating Nondisparagement Clauses

There are a number of other public policy issues that could be successfully raised to challenge these consumer nondisparagement clauses as violative of a number of statutory laws. California is the first state to outlaw nondisparagement clauses in consumer

³²⁴ See Belmas & Larson, *supra* note 55, at 67.

³²⁵ *Id.*

³²⁶ Ben-Shahar, *supra* note 34, at 7.

³²⁷ *Id.* at 12.

³²⁸ See Garfield, *supra* note 32, at 348–49. Professor Garfield recognized that contracts of silence can only have power if courts are willing to enforce them as a possible form of state action. *Id.* at 349. However, he noted that

[t]he consensual nature of contract law potentially affects its constitutional significance in a number of ways. One can argue that the enforcement of a contract of silence involves no state action, because a contract is the creation of private parties acting independently of the state. Likewise, even if state action is present, one can argue that any party who agrees to a contract of silence has implicitly waived his First Amendment rights. Lastly, even if there is state action and no waiver of First Amendment rights, one can argue that state enforcement of a contract of silence is legitimate content-neutral regulation of speech because the state did not select the speech being regulated.

Id. at 348–49.

contracts by statute under its recent so-called “Yelp Law.”³²⁹ This statute makes it unlawful to offer contracts for products or services that require a consumer to waive their rights to make any statement about the customer experience.³³⁰ A business that threatens to enforce a waiver or tries to penalize a consumer posting an online review is subject to civil fines.³³¹ The fines range

³²⁹ CAL. CIV. CODE § 1670.8 (2014). The statute states as follows:

1670.8(a)

(1) A contract or proposed contract for the sale or lease of consumer goods or services may not include a provision waiving the consumer’s right to make any statement regarding the seller or lessor or its employees or agents, or concerning the goods or services.

(2) It shall be unlawful to threaten or to seek to enforce a provision made unlawful under this section, or to otherwise penalize a consumer for making any statement protected under this section.

(b) Any waiver of the provisions of this section is contrary to public policy, and is void and unenforceable.

(c) Any person who violates this section shall be subject to a civil penalty not to exceed two thousand five hundred dollars (\$2,500) for the first violation, and five thousand dollars (\$5,000) for the second and for each subsequent violation, to be assessed and collected in a civil action brought by the consumer, by the Attorney General, or by the district attorney or city attorney of the county or city in which the violation occurred. When collected, the civil penalty shall be payable, as appropriate, to the consumer or to the general fund of whichever governmental entity brought the action to assess the civil penalty.

(d) In addition, for a willful, intentional, or reckless violation of this section, a consumer or public prosecutor may recover a civil penalty not to exceed ten thousand dollars (\$10,000).

(e) The penalty provided by this section is not an exclusive remedy, and does not affect any other relief or remedy provided by law. This section shall not be construed to prohibit or limit a person or business that hosts online consumer reviews or comments from removing a statement that is otherwise lawful to remove.

Id. See Songmee L. Connolly, *Don’t Disregard Calif.’s Non-Disparagement Clause Ban*, LAW360 (Oct. 8, 2014, 10:44 AM), <http://www.law360.com/articles/585252/don-t-disregard-calif-s-non-disparagement-clause-ban> [<http://perma.cc/3Q5C-UGK9>].

³³⁰ CAL. CIV. CODE § 1670.8(a)(1), (2)(b) (West 2014).

³³¹ *Id.* § 1670.8(2)(c).

from \$2,500 for the first violation to \$5,000 for each subsequent violation, compounded by a \$10,000 fine for willful, intentional, or reckless violations of the law.³³² These penalties are not exclusive remedies and do not prevent other forms of relief or remedy.³³³ The statute also expressly permits private causes of action, as well as enforcement actions by the state attorney general, district, or city attorney.³³⁴

The law does allow review sites to remove postings that are otherwise lawful to redact,³³⁵ which may include unprotected obscene and defamatory speech³³⁶ or consumer postings that do not comply with the FTC’s Endorsement Guidelines.³³⁷ Under this statute, nondisparagement and confidentiality clauses in consumer agreements would be illegal and could be voided as against public policy in California.³³⁸ Currently, several other states are considering enacting their own statutes voiding adhesive consumer nondisparagement clauses.³³⁹

However, as written, this newly enacted law protects *any* consumer statement from being waived by contract.³⁴⁰ But a consumer does not have a legal right to post anything they wish about a business, so the law may need further judicial interpretation to address the provision’s conflicts with existing tort actions in fraud, misrepresentation, privacy, defamation, and unfair competition, as well as compliance with the FTC’s Endorsement Guidelines.³⁴¹ In addition, the broad language would also invalidate portions of Yelp’s contract with site users. Its terms of service incorporate content rules that do not allow consumers to post any statement they wish regarding products and services.³⁴² Contrary to the new statute, Yelp’s own agreement with users forbids and permits the removal of certain offensive but otherwise legal forms of

³³² *Id.* § 1670.8(2)(c–d).

³³³ *Id.* § 1670.8(e).

³³⁴ *Id.* § 1670.8(c).

³³⁵ *Id.* § 1670.8(e).

³³⁶ *See infra* notes 153–56 and accompanying text.

³³⁷ *See infra* notes 367–78 and accompanying text.

³³⁸ CAL. CIV. CODE § 1670.8(a), (2)(b).

³³⁹ *See Connolly, supra* note 91.

³⁴⁰ *Id.*

³⁴¹ *Id.*

³⁴² *Terms of Service* ¶ 4 (B), 5(A), 6(A), YELP (Nov. 27, 2012), <http://www.yelp.com/static?p=tos> [<http://perma.cc/39GM-9XPY>].

speech, such as lewdness, discriminatory or bigoted language, and pornography.³⁴³

The law will mostly affect California-based businesses or those doing business in California. However, many of the small businesses and professionals reviewed on crowdsourcing sites are locally owned and operated.³⁴⁴ Other states will have to weigh in on the issue of whether or not consumer nondisparagement clauses are legal. As discussed earlier, an Arizona court in *FreeLife* rejected Burges's public policy claim that FreeLife's contract violated Burges's First Amendment right of free speech.³⁴⁵ The decision indicated that First Amendment rights applied to government actors and did not apply to private restrictions on speech,³⁴⁶ and concluded that the nondisparagement clause did not violate Burges's First Amendment rights.³⁴⁷ In sum, the *FreeLife* court upheld a nondisparagement clause in a clickwrap agreement under traditional notions of freedom of contract.³⁴⁸ However, the court refused summary judgment on the issue of whether Burges disparaged FreeLife, contending that reasonable jurors might differ on assessing these facts about his speech on his website.³⁴⁹ Because contract law is state-specific, it is unclear if California's approach will be followed in other states, so challenges will likely follow on a state-by-state basis.³⁵⁰

3. Anti-SLAPP Laws

State anti-SLAPP laws may also play a role in invalidating defamation claims based upon nondisparagement clauses.³⁵¹ These laws are intended to allow the dismissal of litigation filed with the aim of halting participation in a public forum.³⁵² Some

³⁴³ *Id.* ¶ 6(A).

³⁴⁴ *See supra* notes 5–7.

³⁴⁵ *FreeLife Int'l, Inc. v. Am. Educ. Music Publ'ns, Inc.*, No. CV07-2210-PHX-DGC, 2009 WL 3241795, at *6 (D. Ariz. Oct. 1, 2009).

³⁴⁶ *Id.*

³⁴⁷ *Id.*

³⁴⁸ *Id.* at *4–5.

³⁴⁹ *Id.* at *6.

³⁵⁰ *See* LEGAL INTELLIGENCER, *supra* note 26.

³⁵¹ Dohse, *supra* note 3, at 386; Kellogg & Frankel, *supra* note 24, at 1.

³⁵² Marciarille, *supra* note 15, at 377; Spencer, *supra* note 157, at 500–01; Spinosa, *supra* note 142, at 758–59; Russell et al., *supra* note 11.

anti-SLAPP statutes are limited to forms of political speech, such as petitioning the government or communicating with public officials.³⁵³ Other state anti-SLAPP statutes consider a wide range of matters of public concern and are not limited to governmental interactions or political speech.³⁵⁴ Each state statute may address specific elements that a defendant must meet in order to prevail on a motion to dismiss a lawsuit on anti-SLAPP grounds.³⁵⁵ In addition, some anti-SLAPP laws permit defendants to seek the recovery of costs and attorney’s fees³⁵⁶ or to sue plaintiffs for abusing legal process under so-called “SLAPP back” sections.³⁵⁷

Regarding nondisparagement provisions, one could argue under a broad anti-SLAPP rationale that the sharing of consumer information, online and offline, is a matter of public concern. Consumers may need information about the quality and value of certain products and services before making purchasing decisions. Online crowdsourced review sites are common vehicles for discussing this important information with a wide range of potential customers.³⁵⁸ Such clauses prevent public discourse on the issues that matter to consumers. In *Demetriades*, the trial court determined that efforts to squelch negative online reviews violated California’s anti-SLAPP laws, and dismissed the case.³⁵⁹ That decision was later overturned under the commercial speech exception to that law.³⁶⁰ More state-by-state challenges are needed to determine if anti-SLAPP statutes will provide adequate bases for striking down these adhesive consumer provisions.

³⁵³ Spencer, *supra* note 157, at 500–01; Spinosa, *supra* note 142, at 758–59; LEGAL INTELLIGENCER, *supra* note 26. Some states may amend their anti-SLAPP laws to capture other matters of public concern, which could lead to invalidation of certain consumer nondisparagement clauses. LEGAL INTELLIGENCER, *supra* note 26.

³⁵⁴ Kellogg & Frankel, *supra* note 24, at 2; Spencer, *supra* note 157, at 501; Spinosa, *supra* note 142, at 758–59.

³⁵⁵ See Spinosa, *supra* note 142, at 758–59. See *supra* notes 160–61, 206–14 and accompanying text.

³⁵⁶ Spencer, *supra* note 157, at 501.

³⁵⁷ Spinosa, *supra* note 142, at 758.

³⁵⁸ Dohse, *supra* note 3, at 367–68.

³⁵⁹ *Demetriades v. Yelp, Inc.*, 75 Cal. Rptr. 3d 131, 133–34 (Cal. Ct. App. 2014).

³⁶⁰ See *supra* notes 165–66, 202–21 and accompanying text.

4. Deceptive and Unfair Trade Practices

Aside from anti-SLAPP statutes, strong arguments can be made that these adhesive consumer nondisparagement clauses are deceptive and unfair trade practices perpetrated on consumers and business competitors alike.³⁶¹ Both federal and state laws address issues of deceptive advertising and unfair competition, which may arise through either intentional speech or nondisclosure of material facts. At the federal level, the Federal Trade Commission (FTC) possesses the legal authority to safeguard consumers under Section 5 of the Federal Trade Commission Act³⁶² and to address competitors' concerns under the Lanham Act.³⁶³ These acts authorize the FTC to adopt regulations and institute enforcement actions in order to protect consumers from unfair or deceptive trade practices,³⁶⁴ such as deceptive advertising. Deceptive advertising is a form of illegal, unprotected speech, which includes faked endorsements, and related jurisprudence dates back to the early twentieth century.³⁶⁵ Similarly, since its earliest years, the FTC

³⁶¹ The FTC has determined that issues of unfairness and deception in business conduct are independent legal bases for enforcement actions, and conduct may be challenged as unfair, deceptive, or both. FED. RESERVE, FEDERAL TRADE COMMISSION ACT, SECTION 5: UNFAIR OR DECEPTIVE ACTS OR PRACTICES 1 (June 2008), <http://www.federalreserve.gov/boarddocs/supmanual/cch/ftca.pdf> [<http://perma.cc/NDU5-ZYYL>]. See Short, *supra* note 3, at 444, 447.

³⁶² 16 C.F.R. § 255.0(a) (2013); Guides Concerning the Use of Endorsement and Testimonials in Advertising, 74 Fed. Reg. 53,124, 53,126 (Oct. 15, 2009) (to be codified at 16 C.F.R. pt. 255). See Jessica Godell, *Consumer-Generated Media and Advertising—Are They One and the Same? An Analysis of the Amended FTC Guides Concerning the Use of Endorsements and Testimonials in Advertising*, 10 J. MARSHALL REV. INTELLECTUAL PROP. L. 205, 207–09 (2010).

³⁶³ 15 U.S.C. § 1051 (2012). See Godell, *supra* note 362, at 209–10.

³⁶⁴ Traditionally, the courts defer to the FTC's administrative expertise on issues of unfair and/or deceptive practices, and certain states have patterned their laws based on the FTC Act and FTC rulings. Brian D. Wright, *Social Media and Marketing: Exploring the Legal Pitfalls of User-Generated Content*, 36 DAYTON L. REV. 67, 69, 71 (2010).

³⁶⁵ Federal Trade Commission Act, ch. 311, § 5, 38 Stat. 717, 719–21 (1914) (codified as amended at 15 U.S.C. § 45(a)). See, e.g., *FTC v. Standard Educ. Soc'y*, 302 U.S. 112 (1937) (faked customer testimonials on encyclopedia service is deceptive advertising). Traditionally, in reviewing FTC actions, courts have also upheld opinion speech grounded in an individual's honestly held beliefs, even if a party is being compensated for its speech or even if the speech is inaccurate, but not motivated by financial gain. See *Northam Warren Corp.*

has aided businesses suffering economic damage from a competitor’s unfair or deceptive trade practices under the Lanham Act.³⁶⁶

In 2009, the FTC revised its Endorsement Guides to address online advertising messages and endorsements in social media, including disclosure requirements for compensated online ratings and reviews.³⁶⁷ In part, the Endorsement Guides support and safeguard the individual right to discuss honestly held beliefs or opinions about actual use or experience with a product or service.³⁶⁸ These revised guides require disclosure of any material connections between the consumer and any sponsoring parties, with the goal of promoting transparency and avoiding deceiving consumers about whether a review is a sponsored advertisement or unsponsored consumer opinion.³⁶⁹ Initially, the FTC brought actions against a public relations firm,³⁷⁰ a sponsoring

v. FTC, 59 F.2d 196, 198 (2d Cir. 1932) (failure to disclose compensation to celebrity endorsers of toiletries is not unfair practice if based on honestly held opinions); *Sci. Mfg. Co. v. FTC*, 124 F.2d 640, 644 (3d Cir. 1941) (upholding distribution falsely characterizing health risks from aluminum utensils if honestly held opinions by persons with no financial interest in commerce or trade); *see also* Godell, *supra* note 362, at 210–12; Short, *supra* note 3, at 457–58.

³⁶⁶ *See* Lanham Act, ch. 540, 60 Stat. 427 (1946) (codified at 15 U.S.C. §§ 1051–72, 1091–96, 1111–29, 1141–41n (2012)); *see, e.g.*, *E. B. Muller & Co. v. FTC*, 142 F.2d 511 (6th Cir. 1944) (upholding FTC finding that company’s false disparagement of competitor’s coffee as containing chicory as form of unfair competition); *contra* *Philip Carey Mfg. Co. v. FTC*, 29 F.2d 49, 51–52 (6th Cir. 1928) (setting aside FTC enforcement actions for espionage and disparagement which were viewed as not amounting to unfair competition). *See* Godell, *supra* note 362, at 210–11; Short, *supra* note 3, at 456–57.

³⁶⁷ 16 C.F.R. § 255 (2013). *See* *FTC Publishes Final Guide Governing Endorsements, Testimonials*, FED. TRADE COMM’N (Oct. 5, 2009), <http://www.ftc.gov/opa/2009/10/endortest.shtm> [<http://perma.cc/5GUC-5L4J>]. *See generally* Godell, *supra* note 362, at 207; Jason Goldstein, *How New FTC Guidelines on Endorsement and Testimonials Will Affect Traditional and New Media*, 28 CARDOZO ARTS & ENT. L. J. 609, 612–13 (2011); Ponte, *supra* note 34, at 472–86; Short, *supra* note 3, at 458–60.

³⁶⁸ 16 C.F.R. § 255.1(a) (2013). *See* CDT Complaint, *supra* note 53, at 1–2.

³⁶⁹ 16 C.F.R. § 255. *See generally* Malbon, *supra* note 9, at 147–48 (summarizing UK and Australian rules regarding fake online reviews as misleading and deceptive practices).

³⁷⁰ *In re Reverb Commc’ns, Inc.* (No. C-4310) (F.T.C. Nov. 22, 2010), 2010 FTC LEXIS 89, at *1. *See* *Public Relations Firm to Settle FTC Charges that It Advertised Clients’ Gaming Apps Through Misleading Online Endorsements*, FED. TRADE COMM’N (Aug. 26, 2010), <http://www.ftc.gov/opa/2010/08/reverb.shtm> [<http://perma.cc/UC36-33DK>].

company,³⁷¹ and an employment screening agency³⁷² that failed to comply with these revised guidelines, and warned others about their inadequacies in their policies and supervision efforts.³⁷³

Although the Endorsement Guides do not expressly deal with nondisparagement clauses,³⁷⁴ the exclusion of honest feedback on consumer experiences seems, at a minimum, to violate the spirit of these interpretive rules. Nondisparagement clauses also tend to skew consumer ratings toward positive reviews, presenting a form of deceptive advertising.³⁷⁵ These clauses intentionally filter out negative customer experiences, thereby preventing informed consumer decision making.³⁷⁶ Similarly, these clauses harm competitors who do not use them and are transparent in their dialogue about consumer concerns.³⁷⁷ These businesses may receive mixed reviews on crowdsourced review sites, while other businesses that employ these clauses may unfairly achieve high overall ratings and falsely appear to do no wrong in the eyes of consumers.³⁷⁸

5. *Fair Use and Copyright Misuse*

As discussed above, nondisparagement clauses may be grounded in questionable intellectual property claims. Copyright assignment clauses transfer ownership of review postings from the authoring customer to the merchant or licensed professional.³⁷⁹ Upon receiving a communication from a business or its legal representative, many consumers might quickly delete reviews or rankings out of

³⁷¹ *In re* Legacy Learning Sys., Inc., No. C-4323, 2011 FTC LEXIS 112 at *2–3 (F.T.C. June 10, 2011).

³⁷² *United States v. Spokeo*, No. 2:12-cv-05001-MMM-SH (C.D. Cal. June 7, 2012). *See Spokeo to Pay \$800,000 to Settle FTC Charges Company Allegedly Marketed Information to Employers and Recruiters in Violation of FCRA*, FED. TRADE COMM'N (June 12, 2012), <http://www.ftc.gov/opa/2012/06/spokeo.shtm> [<http://perma.cc/WEF9-R4W8>].

³⁷³ *See* Ponte, *supra* note 34, at 468–69, 486–90.

³⁷⁴ The definition of endorsement might be interpreted to include negative commentary about a competitor's products or services. However, the guide's examples all suggest positive reviews in exchange for some material benefit. 16 C.F.R. § 255.2 (2013). *See* Ponte, *supra* note 34, at 493–94.

³⁷⁵ *See* Ponte, *supra* note 34, at 493–94.

³⁷⁶ *See* Belmas & Larson, *supra* note 55, at 38.

³⁷⁷ *See* Ponte, *supra* note 34, at 493–94; Short, *supra* note 3, at 444.

³⁷⁸ Short, *supra* note 3, at 444, 447.

³⁷⁹ *See* Marciarille, *supra* note 15, at 395.

fear of an expensive, time-consuming legal battle.³⁸⁰ If a customer refuses to remove his or her postings, then the business may send a DMCA takedown notice to the relevant website owner.³⁸¹ Some social media sites have refused to honor these letters and risk losing their immunity from copyright liability under the safe harbor provisions of the DMCA.³⁸² Other sites may simply take down the consumer postings for fear of running afoul of their duties under these safe harbor provisions.³⁸³

Similarly, clauses referencing trademark rights may prevent customers from naming a provider’s business, goods, and services if they wish to avoid litigation.³⁸⁴ As with DMCA takedown notices, customers and crowdsourced websites may eliminate postings in response to heavy-handed cease and desist letters and threatened trademark infringement litigation. Therefore, consumer speech is effectively prevented or chilled due to concerns about copyright infringement and trademark infringement or dilution.³⁸⁵

Consumers and ratings websites may not be aware that they possess fair use rights under copyright law, regardless of these speech suppression clauses.³⁸⁶ Under copyright law, fair use³⁸⁷

³⁸⁰ See *supra* notes 142–44 and accompanying text.

³⁸¹ Marciarille, *supra* note 15, at 395–97.

³⁸² *Id.* at 395–96.

³⁸³ *Id.* at 395, 397; CDT Complaint, *supra* note 53, at 15; see *supra* notes 142–44 and accompanying text.

³⁸⁴ Spinosa, *supra* note 142, at 748.

³⁸⁵ See *supra* note 147 and accompanying text.

³⁸⁶ *Video Pipeline, Inc. v. Buena Vista Home Entm’t, Inc.*, 342 F.3d 191, 206 (3d Cir. 2003) (suggesting that fair use opportunities for criticism and comment exist despite terms of restrictive nondisparagement clauses); *Ty, Inc. v. Publ’ns Int’l Ltd.*, 292 F.3d 512, 520 (7th Cir. 2002) (indicating that fair use may prohibit trademark holder’s effort to control content of Beanie Babies guides under its copyright licenses). See CDT Complaint, *supra* note 53, at 10–11; EFF GUIDE, *supra* note 75; Read, *supra* note 46, at 406.

³⁸⁷ 17 U.S.C. § 107 (2014):

Limitations on exclusive rights: Fair use
Notwithstanding the provisions of sections 106 and 106A [17 USCS §§ 106 and 106A], the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is

permits the use of copyrighted material for criticism or comment.³⁸⁸ The Register of Copyrights also previously indicated that “quotation of excerpts in a review or criticism for purposes of illustration or comment” is protected fair use.³⁸⁹ In such instances, one’s use of the copyrighted postings or reviews without a license or consent from a copyright holder is not an infringement of copyright.³⁹⁰ In addition, a person may make a fair use of another’s trademark in commentaries or critiques without infringing or diluting that mark.³⁹¹

As a companion to fair use, some federal circuits have also recognized the equitable principle of copyright misuse to curb the excesses of the terms and conditions of contemporary copyright licenses.³⁹² While fair use addresses a purported infringer’s

not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

Id. See Pamela Samuelson, *Copyright, Commodification, and Censorship: Past As Prologue—But To What Future?*, U.C. BERKELEY SCH. OF INFO. 6, 9, http://people.ischool.berkeley.edu/~pam/papers/haifa_priv_cens.pdf [<http://perma.cc/J8L2-XGZN>] (raising concerns about future demise of fair use due to treaty obligations and private contracting schemes).

³⁸⁸ See Samuelson, *supra* note 387; CDT Complaint, *supra* note 53, at 10–11.

³⁸⁹ U.S. COPYRIGHT OFFICE, FAIR USE (Nov. 2015), <http://www.copyright.gov/fls/fl102.html> [<http://perma.cc/KDN9-ZVC8>] (quoting STAFF OF HOUSE COMM. ON THE JUDICIARY, 87TH CONG., COPYRIGHT LAW REVISION 24 (Comm. Print 1961)).

³⁹⁰ Read, *supra* note 46, at 406–10.

³⁹¹ See *supra* note 115 and accompanying text.

³⁹² Read, *supra* note 46, at 402–06; Jennifer R. Knight, Comment, *Copyright Misuse v. Freedom of Contract: and the Winner Is...*, 73 TENN. L. REV. 237, 237–38, 246 (2006); Brett Frischmann & Dan Moylan, *The Evolving Common Law Doctrine of Copyright Misuse: A Unified Theory and Its Application to Software*, 15 BERKELEY TECH. L.J. 865, 893–941 (2000). See Samuelson, *supra*

conduct, copyright misuse, which is imported from patent law,³⁹³ focuses on overreaching by a copyright holder that results in a diminishment of public access to creative expressions and knowledge.³⁹⁴ Differing interpretations of copyright misuse have created several distinct doctrinal strains. In some instances, a court may require a showing of antitrust violations before applying copyright misuse.³⁹⁵ Other courts do not require a nexus between copyright misuse and antitrust violations.³⁹⁶

In some of these cases, courts address whether a copyright’s statutory rights are being utilized to subvert the underlying public policy of copyright law.³⁹⁷ Under this public policy approach, the rights holders may try to extend their statutory protections or copyright monopoly beyond the intended objectives and parameters of copyright law.³⁹⁸ A court may refuse to apply copyright

note 387, at 9. *Contra* Dore v. New Sensations, Inc., 2013 U.S. Dist. LEXIS 144701, *9 & n.2 (D. Mass. Oct. 4, 2013) (stating that federal law does not recognize doctrines of “copyright trolling” or “copyright abuse”).

³⁹³ Morton Salt Co. v. G. S. Suppiger, 314 U.S. 488 (1942) (seminal case on modern application of patent misuse doctrine in antitrust context). *See* Belmas & Larson, *supra* note 55, at 85; Frischmann & Moylan, *supra* note 392, at 868–69; Knight, *supra* note 392, at 240.

³⁹⁴ Frischmann & Moylan, *supra* note 392, at 819–20, 893–94; Knight, *supra* note 392, at 239–40.

³⁹⁵ *See, e.g.*, Broadcast Music, Inc. v. CBS, 441 U.S. 1, 6 & n. 9, 24 (1979); United States v. Paramount Pictures, Inc., 334 U.S. 131, 144 (1948); Saturday Evening Post Co. v. Rumbleseat Press, Inc., 816 F.2d 1191, 1200 (7th Cir. 1987); Mitchell Bros. Film Grp. v. Cinema Adult Theater, 604 F.2d 852, 865 & n.27 (5th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980); Syncsort Inc. v. Sequential Software, Inc., 50 F. Supp. 2d 318, 336–37 (D.N.J. 1999).

³⁹⁶ *See, e.g.*, Practice Mgmt. Info. Corp. v. Am. Med. Ass’n, 121 F.3d 516, 521 (9th Cir. 1997); Ass’n of Am. Med. Colleges v. Princeton Review, Inc., 332 F. Supp. 2d 11, 22 (D.D.C. 2004); Microsoft Corp. v. Lutian, 2011 U.S. Dist. Lexis 109918 (N.D. Ohio Sept. 27, 2011); *see infra* note 402 and accompanying text.

³⁹⁷ *See, e.g.*, Altmayer-Pizzorno v. L-Soft Int’l, Inc., 302 Fed. App’x 148, 156–57 (4th Cir. 2008); Video Pipeline, Inc. v. Buena Vista Home Entm’t, Inc., 342 F.3d 191, 203–06 (3d Cir. 2003); Alcatel USA, Inc. v. DGI Techs., Inc., 166 F.3d 772, 793–94 (5th Cir. 1999); *In re* Napster, Inc. Copyright Litig., 2004 U.S. Dist. LEXIS 7236, *39–*41 (N.D. Cal. 2004); Lexmark Int’l, Inc. v. Static Control Components, Inc., 253 F. Supp. 2d 943, 966 (E.D. Ky. 2003); Lasercomb America, Inc. v. Reynolds, 911 F.2d 970, 975–76 (4th Cir. 1990). *See* Belmas & Larson, *supra* note 55, at 85.

³⁹⁸ *See supra* note 397 and accompanying text.

misuse when a party with unclean hands seeks to invoke this equitable principle.³⁹⁹

Courts have adopted the copyright misuse doctrine in instances where plaintiffs tried to deter the legitimate exercise of fair use rights through overly restrictive licensing agreements.⁴⁰⁰ For example, in *WIREDATA*, copyright misuse was invoked to invalidate licensing agreements in which copyright holders were seen as abusing process with unsupportable threats of copyright infringement.⁴⁰¹ Applying the doctrine of copyright misuse, Judge Posner admonished copyright holders who might seek to overreach on their statutory grant. He stated that “hoping to force a settlement or even achieve an outright victory over an opponent that may lack the resources or the legal sophistication to resist effectively, is an abuse of process.”⁴⁰²

The Third Circuit’s copyright misuse analysis in *Video Pipeline*⁴⁰³ is likely the most instructive case on the validity of non-disparagement clauses when applying copyright misuse within the public policy context. The case involved a website that streamed film trailers for movies in order to market video rentals.⁴⁰⁴ The website became embroiled in a licensing dispute with Disney over its legal right to stream Disney trailers online and to copy materials from Disney movies to create its own online movie trailers for streaming.⁴⁰⁵ The website claimed fair use of the Disney materials and asserted copyright misuse regarding restrictive terms in Disney licensing agreements that sought to suppress negative critiques of Disney films or the entertainment industry,⁴⁰⁶ similar to adhesive consumer nondisparagement clauses.

Initially, the court determined that Video Pipeline’s use of the movie and trailer, both copyrighted materials, did not meet

³⁹⁹ See, e.g., *Int’l Motor Contest Ass’n v. Staley*, 434 F. Supp. 2d 650, 668–69 (N.D. Iowa 2006); *Atari Games Corp. v. Nintendo of America, Inc.*, 975 F.2d 832, 846 (Fed. Cir. 1992).

⁴⁰⁰ *Assessment Tech. of Wis., LLC v. WIREDATA, Inc.*, 350 F.3d 640, 645–47 (7th Cir. 2003); *Video Pipeline*, 342 F.3d at 203; see *Knight*, *supra* note 392, at 243–44.

⁴⁰¹ *WIREDATA, Inc.*, 350 F.3d at 647.

⁴⁰² *Id.*

⁴⁰³ See generally *Video Pipeline*, 342 F.3d. 640.

⁴⁰⁴ *Id.* at 194–95.

⁴⁰⁵ *Id.* at 194–96.

⁴⁰⁶ *Id.* at 197, 203.

three out of the four requirements for fair use.⁴⁰⁷ The court then addressed Video Pipeline’s claim that Disney’s nondisparagement clause triggered a copyright misuse defense because of its harmful impact on fair use critiques and commentaries.⁴⁰⁸ The Third Circuit upheld the Disney licensing terms, reasoning that these terms were not anticompetitive⁴⁰⁹ and did not negatively affect a party’s right to criticize Disney on other sites.⁴¹⁰ The court also determined that Disney might further limit access to its creative trailers if the company was not permitted to protect itself from derogatory licensees.⁴¹¹ In this case, the nondisparagement

⁴⁰⁷ *Id.* at 198–203.

⁴⁰⁸ *Id.* at 203–06.

⁴⁰⁹ *Id.* at 204–06.

⁴¹⁰ *Id.* at 206. Unlike other blanket nondisparagement clauses, licensees were able to criticize Disney on the Internet, but not on their sites showing Disney trailers:

The licensing agreements in this case do seek to restrict expression by licensing the Disney trailers for use on the internet only so long as the web sites on which the trailers will appear do not derogate Disney, the entertainment industry, *etc.* But we nonetheless cannot conclude on this record that the agreements are likely to interfere with creative expression to such a degree that they affect in any significant way the policy interest in increasing the public store of creative activity. The licensing agreements do not, for instance, interfere with the licensee’s opportunity to express such criticism on other web sites or elsewhere. There is no evidence that the public will find it any more difficult to obtain criticism of Disney and its interests, or even that the public is considerably less likely to come across this criticism, if it is not displayed on the same site as the trailers. Moreover, if a critic wishes to comment on Disney’s works, the fair use doctrine may be implicated regardless of the existence of the licensing agreements.

Id.

⁴¹¹ *Id.* at 206. In this instance, the nondisparagement terms allowed for greater public access to copyrighted materials:

Finally, copyright law, and the misuse doctrine in particular, should not be interpreted to require Disney, if it licenses its trailers for display on any web sites but its own, to do so willy-nilly regardless of the content displayed with its copyrighted works. Indeed such an application of the misuse doctrine would likely decrease the public’s access to Disney’s works because it might as a result refuse to license at all online display of its works.

Id.

clause helped to ensure greater distribution of copyrighted creative works and improve public access to these copyrighted materials, so copyright misuse was not effectively proven.⁴¹²

Conversely, the Third Circuit's emphasis on increasing creative production and improving public access to copyrighted works favors consumers, not businesses, in typical adhesive nondisparagement clauses. Under the Third Circuit's public policy approach to copyright misuse, copyright law seeks to expand the number and diversity of creative works, while nondisparagement clauses using copyright assignment schemes strive for the opposite outcome. These clauses seek to reduce the overall amount and variety of authored reviews and ratings. Unlike the Disney trailer licenses, these clauses do not try to maximize public access to copyrighted works, but seek to prevent public distribution of and access to copyrighted reviews and ratings. These consumer provisions pervert copyright principles in order to censor key product and services information and provide unfair commercial advantages over both consumers and competitors, outside the reasonable bounds of copyright protections. Furthermore, these clauses undermine congressional public policy favoring and promoting the free flow of ideas in the online world, illustrated by the broad immunity afforded to websites hosting user-generated content under the CDA.

Despite this analysis, other courts have upheld party waivers of their fair use rights by contract without applying copyright misuse or other contract excuses or defenses.⁴¹³ These decisions point toward an emphasis on freedom of contract and private ordering of intellectual property rights.⁴¹⁴ Therefore, the tension between copyright misuse and freedom of contract and respect for the integrity of contracts continues on a state-by-state basis.

D. Excessive Penalty Clauses and Privity Issues

A number of these nondisparagement clauses include liquidated damages provisions, the meaning and impact of which few

⁴¹² *Id.*

⁴¹³ *Davidson & Assocs. v. Jung*, 422 F.3d 630, 639 (8th Cir. 2005); *Bowers v. Baystate Techs., Inc.*, 320 F.3d 1317, 1325 (Fed. Cir. 2003). *See Knight, supra* note 392, at 259–60.

⁴¹⁴ *See Knight, supra* note 392, at 260–61.

consumers understand.⁴¹⁵ At the time of contract formation, liquidated damages must be reasonable based upon the likely or actual losses suffered from a breach and the challenges of proving damages.⁴¹⁶ Public policy is violated if a liquidated damages clause is viewed as a penalty, or if excessive amounts are involved, rather than an effort to reasonably compensate for losses resulting from a breach.⁴¹⁷ In *Palmer*, the consumers purchased Christmas gifts that were not delivered, and were penalized more than \$3,500 for posting a negative review.⁴¹⁸ Ultimately, a Utah court invalidated the liquidated damages provision and asserted that the plaintiffs never owed any money to KlearGear.com under that clause.⁴¹⁹

⁴¹⁵ See Stark et al., *supra* note 265, at 809, 845. In their Consumer Remedies Experiment, the authors suggest that the legislature should outlaw unfair terms, such as harsh remedies provisions, that few consumers comprehend. *Id.* In showing both fair and unfair remedies clauses to non-lawyers, the study showed that

[b]ased on other results from the Consumer Remedies Experiment, it appears that the clearly worded *fair* remedies clause was “somewhat difficult” for them to understand because they did not precisely know what “legal remedies” were available to them “at law or in equity,” legal terminology that any lawyer or judge who has taken a contracts course in law school should readily understand but apparently not understandable to laypersons. Similarly, the clearly worded *unfair* remedy clause was also “somewhat difficult” for them to understand, perhaps because many were not precisely sure what words like “sole remedy” meant. Their admitted difficulties in understanding the clauses most likely accounts for their difficulties identifying the portions of the remedies clause that would prevent them from recovering damages.

Id. at 809.

⁴¹⁶ RESTATEMENT (SECOND) OF CONTRACTS § 356(1) (1981). The provision states that

[d]amages for breach by either party may be liquidated in the agreement but only at an amount that is reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss. A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty.

Id. See MURRAY, *supra* note 249, at 812–19.

⁴¹⁷ RESTATEMENT (SECOND) OF CONTRACTS § 356, Ill. 1.

⁴¹⁸ Complaint at 1–3, *Palmer v. Kleargear*, No. 1:13-cv-00175 (N.D. Utah 2014).

⁴¹⁹ Order Entering Default Judgment at 1, *Palmer v. Kleargear*, No. 1:13-cv-00175 (N.D. Utah 2014).

Similarly, couples planning weddings at the Union Street Guest House in the Catskills were required to sign an agreement that prevented them or any person in their wedding party from posting a negative review online.⁴²⁰ The agreement stated that a five hundred dollar fine would be deducted from the couple's deposit for every negative review posted by them or any member of their party staying at the inn.⁴²¹ The couple would only receive a refund of their deposit once the reviews were taken down.⁴²² This damages clause may also be viewed as a penalty, as in *Palmer*. These types of clauses will likely fail if they are viewed as unreasonable penalties in light of the breach and are being misused to deter true or protected opinion speech about the customer experience.

Penalty clauses may also raise issues of privity of contract. Privity of contract exists between parties who have bargained for and agreed upon the terms of a contract.⁴²³ Traditionally, parties were required to be in privity of contract in order to bring a legal action for breach of that agreement.⁴²⁴ Certain nondisparagement clauses try to reach beyond the contracting parties to curtail the speech of third parties, including other family or household members and friends who are not parties to the initial agreement.⁴²⁵ These contracts penalize a contracting party for the actions of third parties who are not in privity of contract.⁴²⁶ In addition, these third parties are not agents of the contracting parties, nor are they third party beneficiaries of the underlying agreement.⁴²⁷ The Union Street Guest House agreement makes it clear that the

⁴²⁰ Goldman, *supra* note 85; Mara Siegler, *Hotel Fines \$500 for every bad review posted online*, N.Y. POST (Aug. 4, 2014, 1:03 a.m.), <http://pagesix.com/2014/08/04/hotel-charges-500-for-every-bad-review-posted-online> [<http://perma.cc/Q7LS-UKFU>]. See Roger R. Quiles, Esq., *Why Fines for Negative Online Reviews Are Not Legally Sound*, RRQ LAW BLOG (Aug. 6, 2014), <http://www.rrqlaw.com/blog/why-fines-for-negative-online-reviews-are-not-legally-sound> [<http://perma.cc/7NJC-LGG2>].

⁴²¹ Siegler, *supra* note 420.

⁴²² *Id.*

⁴²³ MURRAY, *supra* note 249, at 870.

⁴²⁴ *Id.*

⁴²⁵ See, e.g., Complaint at 2–3, *Palmer v. Kleargear*, No. 1:13-cv-00175 (N.D. Utah 2014).

⁴²⁶ *Id.*

⁴²⁷ *Id.*

signing couple becomes liable for the conduct of third parties who have not entered into the contract.⁴²⁸ It is doubtful that a party to a contract can forbid or waive the speech rights of nonsignatories due to the lack of privity of contract between the parties.

Although not expressly stated in the *KlearGear.com* contract, John Palmer ordered the goods from KlearGear.com, but his spouse, Jen Kulas, subsequently posted a negative review on Ripoff Report.⁴²⁹ KlearGear sought to collect on its clause for her posting even though she had not agreed to KlearGear.com’s terms of service.⁴³⁰ KlearGear.com’s interpretation of its nondisparagement clause tried to bind not only the parties who entered into the contract, but also third parties, such as family, household members, and friends who were not contracting parties.⁴³¹ One may argue that KlearGear.com or the Union Street Guest House has a contractual right to enforce its nondisparagement clause against the specific party in privity of contract who agreed not to post a negative review. Yet it is unlikely that these merchants can suppress the speech of individuals who are not parties to the agreement, nor can they penalize a signatory for a noncontracting party’s exercise of legal rights due to a lack of privity of contract.

IV. FEDERAL OPTIONS ON NONDISPARAGEMENT CLAUSES

Traditionally, contract law is state-based, and efforts to deal with nondisparagement clauses face an extended state-by-state evaluation. This piecemeal approach creates uncertainty for both consumers and businesses about the validity of these adhesive nondisparagement clauses. In order to provide a uniform approach to this issue, it may be more appropriate for federal regulation to protect consumers as well as competitors from these unfair business practices. Several options have been put forward to address these provisions, including a proposed federal statute outlawing consumer nondisparagement clauses, further revisions to the FTC’s Endorsement Guides, and amendments to website immunity under the CDA.⁴³²

⁴²⁸ Siegler, *supra* note 420.

⁴²⁹ Complaint at 2–3, *Palmer*, No. 1:13-cv-00175.

⁴³⁰ *Id.*

⁴³¹ *Id.*

⁴³² Consumer Review Freedom Act (CRFA) of 2014, H.R. 5499, 113th Cong. (Sept. 15, 2014).

A. Enact Proposed Consumer Review Freedom Act of 2014

A federal law addressing adhesive consumer nondisparagement clauses is already under consideration, and would avoid a more piecemeal or state-by-state approach to these issues. In September of 2014, California Congressman Eric Swalwell introduced the proposed Consumer Review Freedom Act of 2014 (CRFA).⁴³³ Much like California's state law, the proposed federal law voids any adhesive contract that a business offers or enters into that restricts or forbids a contracting party from posting a "covered communication."⁴³⁴ Covered communications include written, oral, or pictorial assessments of business products, services, or interactions provided by electronic means.⁴³⁵ Penalty clauses for covered communications in these nondisparagement clauses would also be void under this proposed statute.⁴³⁶ As written, the law does not address contracts that try to limit or prevent such communications in the offline world.⁴³⁷ The language could be broadened to include both offline and online communications under its terms.

Furthermore, this legislation indicates that any violations of its provisions should be viewed as unfair or deceptive practices under the FTC Act, which focuses on consumer protection.⁴³⁸ Its terms could be further broadened to protect competitors from the harm of such clauses under the Lanham Act. Both the FTC and state attorneys general are permitted to enforce the law,⁴³⁹ but private actions are not allowed under the federal law.⁴⁴⁰ Yet the CRFA would not preempt any existing state laws on these types of contract clauses.⁴⁴¹ Therefore, states could also determine whether to permit private actions under their state statutes, as is allowed under California's statute.

⁴³³ *Id.*; see Eric Goldman, *Congress May Crack Down On Businesses' Efforts To Ban Consumer Reviews*, FORBES (Sept. 24, 2014, 1:05 PM), <http://www.forbes.com/sites/ericgoldman/2014/09/24/congress-may-crack-down-on-businesses-efforts-to-ban-consumer-reviews/>.

⁴³⁴ H.R. 5499, §§ 1–2(a).

⁴³⁵ *Id.* § 2(g)(4).

⁴³⁶ *Id.* § 2(a)(2).

⁴³⁷ *Id.*

⁴³⁸ *Id.* § 2(e)(2).

⁴³⁹ *Id.* §§ 2(e)(2)–2(f).

⁴⁴⁰ *Id.* §§ 2(e)–2(f).

⁴⁴¹ *Id.* § 3.

Unlike California’s Yelp law, the federal law deals with the questionable use of copyright or trademark rights in nondisparagement clauses. The proposed law invalidates any adhesive clause that assigns or creates an exclusive license to another contracting party’s intellectual property rights in one’s own online communications.⁴⁴² Although fair use rights are not explicitly stated, one can infer that the new law would protect those rights as part of a party’s existing intellectual property rights. However, the law does not invalidate contracts that prohibit the disclosure of trade secrets, proprietary commercial or financial information, human resources and medical files, or law enforcement records.⁴⁴³

The proposed CRFA also excludes from its protections any contract that creates an employer-employee or independent contractor relationship.⁴⁴⁴ This exception would not prevent businesses from continuing to include broad nondisparagement clauses in their workplace policies and contracts with employees and independent contractors. Therefore, the NLRB, SEC, and other regulatory agencies would still need to carve out rules to safeguard whistleblowing and other forms of protected communications.⁴⁴⁵ The CRFA could be improved by defining covered communications to include forms of legal speech, such as true or opinion speech, as well as speech otherwise protected under law, such as concerted action under the NLRB or whistleblower statutes.⁴⁴⁶

In addition, the CRFA language seems to protect consumer speech that is not legal, such as false or defamatory statements, similar to the California law.⁴⁴⁷ This law would also imperil websites that offer adhesive terms of service that limit or forbid speech that is illegal, such as false or defamatory speech, as well as legal speech, such as offensive speech under community content standards. At a minimum, the wording should be revised to expressly exclude illegal speech, such as false or defamatory statements, from the definition of covered communications.⁴⁴⁸

At this early stage, it is difficult to determine how likely it is that this proposed legislation will be enacted. In today’s highly

⁴⁴² *Id.* §§ 2(a)(1), 2(a)(3).

⁴⁴³ *Id.* §§ 2(b)–2(c).

⁴⁴⁴ *Id.* § 2(g)(3).

⁴⁴⁵ See *supra* notes 69–71 and accompanying text.

⁴⁴⁶ See CRFA, *supra* note 432.

⁴⁴⁷ See generally H.R. 5499.

⁴⁴⁸ See *supra* notes 340–43 and accompanying text.

politicized environment, it may be difficult to pass any new laws that might be viewed as burdensome to businesses, or more properly handled on a state level. With the current intransigence on so many issues facing Congress, a regulatory approach may be faster and more effective in addressing nondisparagement clauses.

B. Revise the Existing FTC Endorsement Guides

Under the terms of the 2009 Endorsement Guides, the FTC sought to clarify the line between consumer dialogue and sponsored advertising in social media. The Guides defined an endorsement as any advertising message that a reasonable consumer would think reflected the opinions, beliefs, findings, or experiences of the online reviewer.⁴⁴⁹ The Endorsement Guides mandate that an endorser's statements must illustrate one's honest beliefs or opinions about one's actual use or experience with products or services.⁴⁵⁰ To avoid pay-to-post manipulations, the 2009 revisions required disclosure of any material connections between the online reviewer and the sponsoring business.⁴⁵¹ A material connection or relationship encompasses any form of compensation not offered to the public at large, such as special discounts, free samples, money, and sales commissions.⁴⁵² These types of rewards may affect a reviewer's assessment, skewing it towards positive in order to continue to receive further benefits.⁴⁵³ Disclosures are required to be clear and conspicuous to

⁴⁴⁹ Revised Guides, 16 C.F.R. § 255(b) (2009). Endorsement is defined as follows:

[A]ny advertising message (including verbal statements, demonstrations, or depictions of the name, signature, likeness or other identifying personal characteristics of an individual or the name or seal of an organization) that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser, even if the views expressed by that party are identical to those of the sponsoring advertiser. The party whose opinions, beliefs, findings, or experience the message appears to reflect will be called the endorser and may be an individual, group, or institution.

Id.

⁴⁵⁰ *Id.* § 255.1.

⁴⁵¹ *Id.* § 255.5.

⁴⁵² *Id.*

⁴⁵³ *Id.*

promote transparency between ordinary consumer reviews and sponsored speech.⁴⁵⁴ By revealing these connections when posting a review, consumers are made aware of the relationship and can determine what impact, if any, it has upon the credibility of the ranking or evaluation.⁴⁵⁵ The business that sponsored the review, as well as its agents, such as advertising agencies and reputation management firms, may be liable for failing to educate and monitor compensated reviewers for compliance with these regulatory interpretations.⁴⁵⁶

Although many legal experts were critical of these interpretive rules, the 2009 Endorsement Guides provide a federal vehicle for addressing nondisparagement clauses that encroach upon or forbid protected true or opinion speech. Similar to the proposed federal legislation, these guides could be revised to assert that adhesive consumer nondisparagement clauses are unfair and deceptive trade practices. In prohibiting their use, the guides could further explain why such provisions negatively impact both consumers and competitors in the marketplace. In addition, the FTC could expressly state that sponsoring negative reviews is also an unfair and deceptive trade practice to further assuage business concerns about fake, negative reviews. As a result, the FTC could more quickly respond to this emerging issue without the possible lengthy delays in awaiting congressional action on the proposed CRFA.

C. Amend Section 230 Immunity

Under Section 230 of the CDA,⁴⁵⁷ Congress sought to promote the robust development of online discussions and to support

⁴⁵⁴ *Id.*

⁴⁵⁵ FTC Policy Statement on Deception, Letter to The Honorable John D. Dingell, Chairman, Committee on Commerce and Energy (Oct. 14, 1983), *appended to Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 174–75 (1984), <http://www.ftc.gov/bcp/policystmt/ad-decept.htm> [<http://perma.cc/M432-7B7W>]; see Rebecca Tushnet, *Attention Must Be Paid: Commercial Speech, User-Generated Ads, and the Challenge of Regulation*, 58 BUFF. L. REV. 721, 750–51, 757 (2010).

⁴⁵⁶ See *supra* notes 369–73 and accompanying text.

⁴⁵⁷ 47 U.S.C.S. § 230(f)(2) (LexisNexis 2013). Section 230 states that “no cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.” See generally Jeff Kosseff, *Defending Section 230: The Value of Intermediary Immunity*, 15 J.

self-regulation by online spaces without the risk of legal liability for user-generated content.⁴⁵⁸ Under this provision, Congress provided broad immunity for websites that host user-generated content.⁴⁵⁹ Potential liability for online postings hinges upon whether

TECH. L. & POL'Y 123, 151 (2010) (discussing how CDA immunity effectively balances free expression under First Amendment and ability of user-generated websites to create content standards reflecting community standards).

⁴⁵⁸ 47 U.S.C.S. § 230. In its findings of fact, Congress stated its reasons for permitting broad immunity for ICPs.

(a) Findings. The Congress finds the following:

- (1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.
- (2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.
- (3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.
- (4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.
- (5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

(b) Policy. It is the policy of the United States—

- (1) to promote the continued development of the Internet and other interactive computer services and other interactive media;
- (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;
- (3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;
- (4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and
- (5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

47 U.S.C.S. § 230 (a–b).

⁴⁵⁹ See 47 U.S.C.S. § 230(f)(2).

the website is classified as an “interactive computer service” (ICS)⁴⁶⁰ or an “information content provider” (ICP).⁴⁶¹ As ICPs, users who create and upload online content, such as consumers posting reviews or ratings, may be held liable for their own speech.⁴⁶² Courts have broadly interpreted CDA immunity, even if ICSs do not undertake content filtering or monitoring.⁴⁶³ User-generated content sites, like crowdsourced review websites, are typically categorized as ICSs and have been found immune from liability for third party postings.⁴⁶⁴

For example, in *Reit*, a dentist challenged negative reviews on Yelp that he alleged defamed and harmed his business.⁴⁶⁵ Reit objected to an allegedly defamatory review that asserted that Reit’s office was “small,” “old,” and “smelly,” and that “the equipment is old and dirty.”⁴⁶⁶ Reit contended that several patients canceled their appointments and his daily schedule of ten to fifteen appointments per day fell to four to five per day after this negative review.⁴⁶⁷ Reit tried to have Yelp remove the negative post, but it refused to do so.⁴⁶⁸ The court determined that Yelp was an interactive computer service, and immune from defamation liability for these third party posts.⁴⁶⁹

⁴⁶⁰ 47 U.S.C.S. § 230(f)(3). An “interactive computer service” is defined as “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.”

⁴⁶¹ 47 U.S.C.S. § 230(f)(3). Under the CDA, “an ‘information content provider’ means 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.”

⁴⁶² See 47 U.S.C.S. § 230 (a–b); see *supra* text accompanying note 457.

⁴⁶³ See, e.g., *Chi. Lawyers’ Comm. For Civil Rights Under Law, Inc., v. Craigslist, Inc.*, 519 F.3d 666, 671–72 (7th Cir. 2008); *Carafano v. Metro-splash.com, Inc.*, 339 F.3d 1119, 1123–24 (9th Cir. 2003); *Zeran v. America Online*, 129 F.3d 327, 330–31 (4th Cir. 1997); *Blumenthal v. Drudge*, 992 F. Supp. 44, 50–51 (D.D.C. 1998).

⁴⁶⁴ See *Reit v. Yelp!, Inc.*, 907 N.Y.S.2d at 412–14; see *infra* text accompanying notes 477–81; see, e.g., cases cited *supra* note 463.

⁴⁶⁵ *Reit*, 907 N.Y.S.2d at 412.

⁴⁶⁶ *Id.*

⁴⁶⁷ *Id.*

⁴⁶⁸ *Id.*

⁴⁶⁹ *Id.* at 413–14.

However, some courts have determined that a website can be both an ICP and an ICS and can be held liable for materials developed and posted as an ICP.⁴⁷⁰ For example, in *Roommate.com*, the Ninth Circuit determined that the defendant website operated a subscription service website designed to match people renting out spare rooms with people looking for a place to live.⁴⁷¹ Using drop-down menus, subscribers were required to develop profiles including basic contact information, and to disclose preferences of gender, sexual orientation, and interest in allowing children into a household.⁴⁷² The site also allowed subscribers to submit additional comments about themselves and desired characteristics of potential roommates in an open-ended essay.⁴⁷³ Further, Roommate.com established an e-mail alert and search engine that facilitated alerts and searches based on discriminatory criteria.⁴⁷⁴ The Fair Housing Councils of the San Fernando Valley and San Diego (“Councils”) sued Roommate.com in federal court, alleging that Roommate.com’s business violated federal and state fair housing requirements.⁴⁷⁵ Applying Section 230 immunity, the district court dismissed the case against Roommate.com as an ICP because the subscribers created their own profile content.⁴⁷⁶

On appeal, the Ninth Circuit decided that a website operator can be both an ICS and an ICP.⁴⁷⁷ The court determined that if an ICS passively displays content created entirely by others, then it maintains ICS immunity with respect to that content.⁴⁷⁸ For example, Roommate.com was not liable for user content posted in the free-form essay section of that site.⁴⁷⁹ However, if the ICS created the challenged content or is found to be “responsible, in

⁴⁷⁰ See, e.g., *Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC*, 521 F.3d 1157, 1166, 1175 (9th Cir. 2008); *Doctor’s Assocs., Inc. v. QIP Holders LLC*, 2010 U.S. Dist. LEXIS 14687, *66, *68–69 (D. Conn. Feb. 19, 2010); *MCW, Inc. v. Badbusinessbureau.com, LLC*, No. 3:02-CV-2727-G, 2004 U.S. Dist. LEXIS 6678, at *28–36 (N.D. Tex. Apr. 19, 2004).

⁴⁷¹ *Roommate.com*, 521 F.3d at 1161–62.

⁴⁷² *Id.* at 1165–66.

⁴⁷³ *Id.* at 1173–74.

⁴⁷⁴ *Id.* at 1162, 1167.

⁴⁷⁵ *Id.* at 1164–65.

⁴⁷⁶ *Id.* at 1162.

⁴⁷⁷ *Id.* at 1162–63.

⁴⁷⁸ *Id.* at 1162–63.

⁴⁷⁹ *Id.* at 1174.

whole or in part” for the content, then the site is acting as an ICP and may be held legally liable for that content.⁴⁸⁰ In this instance, Roommate.com could be held liable for its discriminatory profile questions, drop down menus, and search and alert vehicles that aided in the creation of website content.⁴⁸¹

Applying this approach could spell trouble for sites, like Yelp, that rely upon broad immunity. Some crowdsourced review sites may direct employees to create reviews⁴⁸² and may encourage and compensate specific users who are popular influencers to post their assessments, creating a mixed picture of liability and immunity for such sites.⁴⁸³ Aside from certain judicial decisions that limit ICS immunity, Section 230 is under pressure due to legitimate concerns about cyberbullying, hate speech, defamatory gossip sites, and revenge porn on web sites that encourage and/or financially profit from these types of online speech.⁴⁸⁴ Some legal commentators have criticized courts for applying immunity too broadly and for not requiring websites to undertake substantive monitoring efforts in order to merit the retention of Section 230 immunity.⁴⁸⁵

⁴⁸⁰ *Id.* at 1162–63.

⁴⁸¹ *Id.* at 1165–67.

⁴⁸² *See supra* notes 216–19 and accompanying text.

⁴⁸³ *See supra* note 198 and accompanying text.

⁴⁸⁴ Schorr, *supra* note 163, at 737–38; *see Jones v. Dirty World Entm’t Recordings, LLC*, 2013 WL 4068780 (E.D. Ky. Aug. 12, 2013) (finding website liable for third party content as it encouraged the submission of salacious gossip and made rude remarks about content); *but see* Eric Goldman, *Should the Dirty Website Be Liable for Encouraging Users to Gossip?*, FORBES (Nov. 25, 2013, 2:07 PM), <http://www.forbes.com/sites/ericgoldman/2013/11/25/should-the-dirty-website-be-liable-for-encouraging-users-to-gossip/>.

⁴⁸⁵ SOLOVE, *supra* note 163, at 152–54; Schorr, *supra* note 163, at 756–57; Short, *supra* note 3, at 466–67, 470. On the issue of self-monitoring, Ms. Schorr addresses instances of campus gossip websites actively soliciting material that is likely defamatory of ordinary individuals. She states:

When websites engage in intentional solicitation, they are undermining one of the two reasons for enacting § 230: encouraging self-policing. In fact, providing immunity to those who solicit salacious content does the exact opposite. The current policy suggests that there is no difference between those who make a good faith effort to self-police, thereby working to maintain a high quality standard as to the information they disperse, and those who refuse to remove objectionable content because they like stirring up controversy. As a result, the

Proposals are being discussed to revise Section 230 to further limit ICS immunity, and to hold websites legally liable for encouraging postings that are defamatory, offensive, or illegal speech⁴⁸⁶ or for failing to remove such illegal third party material after notice.⁴⁸⁷ Other experts are pushing back against proposed Section 230 changes, arguing that expansive immunity best comports with First Amendment values and the democratization of speech through online platforms.⁴⁸⁸ Some commentators are looking to self-regulation as the best way to deal with concerns about website content, and to encourage services to adopt their own content standards in response to community concerns.⁴⁸⁹

V. RECOMMENDATIONS FOR SELF-REGULATORY OPTIONS

While the debate rages on about the value and scope of Section 230 immunity, an emphasis on self-regulation may be the best way to deal with online content issues.⁴⁹⁰ Furthermore, it would be very difficult for regulators, individuals, and businesses to balance the concerns of all stakeholders with regard to adhesive consumer nondisparagement clauses, and to police the expansive consumer blogosphere. Considering the explosive growth of social media, a better approach to adhesive consumer nondisparagement clauses may be to focus on website and business self-regulation, rather than amending Section 230 immunity and relying too heavily on regulatory authorities.⁴⁹¹

Internet has become a safe-harbor for those who wish to promote content that would be unacceptable if broadcast through a different medium. At this point in time, unlike when § 230 was enacted, the Internet is an expansive and thriving network. Therefore, it is more important to reestablish the policy encouraging self-policing and to establish a policy discouraging development of malicious websites.

Schorr, *supra* note 163, at 756–57.

⁴⁸⁶ See *supra* note 483; Bluebond, *supra* note 4, at 684–85; Schorr, *supra* note 163, at 748–49, 755–58.

⁴⁸⁷ SOLOVE, *supra* note 163, at 152–54; Bluebond, *supra* note 4, at 689; Schorr, *supra* note 163, at 756–57.

⁴⁸⁸ See Kosseff, *supra* note 457, at 127–28, 134–35.

⁴⁸⁹ Malbon, *supra* note 9, at 150–51; see Ponte, *supra* note 23, at 495–508.

⁴⁹⁰ See Godell, *supra* note 362, at 217.

⁴⁹¹ Malbon, *supra* note 9, at 150–51; Ponte, *supra* note 23, at 495–508.

There are a number of self-regulatory options for dealing with adhesive nondisparagement clauses. Some options may focus primarily on crowdsourced review sites, while others may emphasize changing business conduct.⁴⁹² A number of the recommendations require cooperation between these sites and impacted businesses to help reduce unnecessary tensions and festering mistrust between businesses and these websites.⁴⁹³ In turn, these ideas can help decrease lawsuits over ratings and reviews, saving wasted time, effort, and expenses for all parties. These self-regulatory proposals may also help to improve the customer experience.

A. Revise Content Guidelines on Nondisparagement Issues

Crowdsourced review sites may help blunt the negative effects of nondisparagement clauses by addressing them directly in their site policies and ratings content. As some already do, crowdsourced websites can clearly flag or identify businesses and professionals who utilize adhesive nondisparagement clauses.⁴⁹⁴ This notification could occur in a number of ways, including color-coding, special notation, or symbols. In this way, consumers will be educated about a merchant’s policy and determine how they might view or even devalue consumer assessments in light of this policy. The site could adopt and implement a formal policy of uniform reduction in an overall rating of a business or professional that uses such clauses.

In addition, sites can make it clear to businesses and professionals that they will refuse to honor takedown notices and cease and desist letters grounded in adhesive consumer clauses. These provisions could be placed in the terms of use for all website users, as well as in advertising agreements with their own sponsors, who are often businesses being rated on their sites. Similarly, credit rating bureaus may also refuse to post debt entries in consumer credit history based on clauses penalizing consumer speech.

To complement these business-centric policies, it is important for content guidelines to address consumer and competitor abuses, as well.⁴⁹⁵ Many crowdsourced review sites forbid users from

⁴⁹² Ponte, *supra* note 23, at 503–07.

⁴⁹³ Malbon, *supra* note 9, at 151.

⁴⁹⁴ Dohse, *supra* note 3, at 364, 390–91.

⁴⁹⁵ *Id.* at 389–90.

posting fake, false, or defamatory reviews.⁴⁹⁶ Despite these provisions, it is unclear how many of these sites make meaningful, consistent efforts to enforce these provisions.⁴⁹⁷ Some sites, such as Yelp and Edmunds.com, have begun to bring legal actions against companies that post fake reviews.⁴⁹⁸ Other sites may wish to do the same to tamp down on fake review campaigns.

Outside of litigation, review sites should enforce their terms of use as to false or defamatory reviews against individual users who meet some threshold amount of improper reviews.⁴⁹⁹ Similar to safe harbor policies for copyrighted materials, review sites may determine that a user can no longer post due to repeated violations of their content guidelines. Alternatively, some crowd-sourced review sites only allow users who actually purchased a product or service to post their reviews on the site.⁵⁰⁰ Other sites may allow any user to post, but highlight reviews from verified purchasers to let consumers decide what weight to give to non-verified reviews.⁵⁰¹ A verification process helps to reduce faked reviews, both positive and negative, which benefits both consumers and businesses.⁵⁰² To limit suspicious or repetitive ratings, website terms of use can limit the number of reviews a customer may create regarding a given business⁵⁰³ and establish waiting periods between reviews and updates of postings.⁵⁰⁴

⁴⁹⁶ *Id.* at 389.

⁴⁹⁷ Short, *supra* note 3, at 452–53.

⁴⁹⁸ Dave, *supra* note 17.

⁴⁹⁹ Dohse, *supra* note 3, at 377–78; Short, *supra* note 3, at 467.

⁵⁰⁰ Dohse, *supra* note 3, at 389; Short, *supra* note 3, at 467, 470–71. Some retailers may link purchases to an individual's ability to post on their websites or could link one's purchase history to one's online accounts. Short, *supra* note 3, at 470. See, e.g., *Verified Purchase Reviews*, AMAZON.COM [http://perma.cc/87WQ-PVU3] (online retailer with verified purchaser reviews noted); Press Release, Expedia.com, Expedia Overhauls Hotel Reviews, Consumers Can Now Sort Verified Reviews by Shared Interest (Mar. 8, 2012), <http://viewfinder.expedia.com/news/expedia-overhauls-hotel-reviews-consumers-can-now-sort-verified-reviews-by-shared-interest> [http://perma.cc/E7CZ-BP3R]; REEVOO.COM (UK-based aggregator of consumer reviews from verified purchasers of products and/or services which are neither manipulated nor edited), <http://www.reevoo.com/our-difference/> [http://perma.cc/7SPU-2BRR].

⁵⁰¹ See Ponte, *supra* note 23, at 504–05; Tushnet, *supra* note 455, at 722, 754–56, 760.

⁵⁰² Short, *supra* note 3, at 467.

⁵⁰³ Dohse, *supra* note 3, at 389–90.

⁵⁰⁴ *Id.* at 379.

These crowdsourced sites should also educate consumers about their content guidelines. Many users do not read a site’s terms of use, so few may abide by its content rules.⁵⁰⁵ It is up to the site to provide simple FAQs and video tutorials when a user is setting up a profile to give them a basic understanding of that site’s content guidelines and notions of truthful and/or protected opinion speech.⁵⁰⁶ The tutorials should also advise consumers about their potential legal liability for false or defamatory statements. If a site decides to remove a posting or shift it to a secondary page, the consumer should be advised and given an opportunity to dispute this change, similar to what is done for posted copyrighted materials on other user-generated sites. Sites may also want to establish a policy to deny access to the site for repeat offenders of their content guidelines.

With such policies in place, many businesses may be more willing to abandon such clauses as counterproductive in improving their ratings and harmful to their business reputations. Some businesses may also come to recognize that the negative viral impact of heavy-handed nondisparagement clauses is causing extensive damage to their brand image and hurting their customer relationships. Further, firms may want to avoid services promising to remove negative postings⁵⁰⁷ or write positive ones that may violate the FTC’s Endorsement Guidelines. Besides, most consumer reviews are positive, and users tend to be distrustful of business ratings with too many positive business reviews.⁵⁰⁸ Allowing a more balanced picture to emerge and engaging in post-transaction dialogue with consumers may increase customer loyalty and brand value in the longer term.⁵⁰⁹

⁵⁰⁵ *Id.* at 390.

⁵⁰⁶ *See id.* at 389–90.

⁵⁰⁷ *Id.* at 387. Dohse noted that businesses should be wary about online reputation managers who promise to make all negative reviews disappear. These firms might silence the voices of genuine consumers who can provide helpful feedback or valuable warnings about product problems. *Id.*

⁵⁰⁸ Malbon, *supra* note 9, at 144–45. Although some consumers believe they can easily detect fake reviews, it has become very challenging to decipher real from fake reviews. *Id.* at 145.

⁵⁰⁹ Dohse, *supra* note 3, at 387. Dohse indicates the importance of continuing consumer dialogue:

Beyond technology tricks to displace negative reviews, reputation managers can help businesses play defense by monitoring

B. Improve Website Filtering and Communication Programs

Businesses have often challenged filtering systems for dismissing truthful positive reviews and highlighting negative postings.⁵¹⁰ Improved technological filters and statistical analyses can help sites to recognize an influx of suspicious positive or negative reviews.⁵¹¹ Sites can also provide adequate staffing to help quickly review and remove evaluations that they discover or that businesses show are false, defamatory, or inaccurate.⁵¹² In addition, businesses should not have to pay excessive fees to have such materials promptly taken down.⁵¹³

Concerns about prioritized assessments have also been raised with regard to the influence of so-called “elite” reviewers who have established a community following, as well as the practice of highlighting reviews written by site employees.⁵¹⁴ It may make sense for sites to allow postings to flow naturally, perhaps by date of review, rather than manipulating the review rankings through other artificial methods. This new methodology allows customers

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

Id.

⁵¹⁰ Malbon, *supra* note 9, at 144; Dohse, *supra* note 3, at 387.

⁵¹¹ Dohse, *supra* note 3, at 388–89; Marciarille, *supra* note 15, at 389–90; Ponte, *supra* note 23, at 503–04. One study determined that filtering algorithms could be successful 90 percent of the time in weeding out fake reviews. Ott et al., *supra* note 13, at 309, 316. See CDT Complaint, *supra* note 53, at 8 (discussing discovery of repeated use of IP addresses as way to sort out fake reviews).

⁵¹² Russell et al., *supra* note 11.

⁵¹³ See Dohse, *supra* note 3, at 374–75; Short, *supra* note 3, at 470.

⁵¹⁴ See, e.g., Michael Luca, *Reviews, Reputation, and Revenue: The Case of Yelp.com* (Harvard Business School Working Paper No. 12-016, 2011), <http://www.hbs.edu/faculty/Pages/item.aspx?num=41233> [<http://perma.cc/76HM-NSLW>].

to consider the most recent assessments, allowing users to feel that their views are treated equally, rather than being subjugated to what is essentially a popularity contest.

It may also be helpful to all stakeholders for sites to allow businesses to highlight recent improvements made in response to customer reviews. Most merchants and professionals do not wish to remain static⁵¹⁵ and should have a no or low-cost way of advising customers that their feedback has been heard and effectively responded to through business improvements or site policy changes. Many sites already allow businesses to respond directly to consumers, and others should offer similar options.⁵¹⁶ Businesses should take advantage of opportunities to create dialogue and build relationships with their customer base on ratings sites.⁵¹⁷

Crowdsourced review sites may also wish to partner with mobile application developers who are creating new avenues for direct customer-to-business contact prior to a posted review. With this approach, businesses may have a chance to handle customer problems before they result in a deluge of negative postings.⁵¹⁸ For example, *Chatback* is an app that facilitates mobile communications between businesses and consumers before reviews are posted.⁵¹⁹ The app allows users to vent their concerns through an anonymous texting process with merchants and professionals.⁵²⁰ These businesses can learn about and try to resolve customer experience issues before angry posts appear online.⁵²¹

Lastly, sites need to be mindful that they address internal conflicts of interest by linking advertising to preferential treatment of reviews and ratings. For example, a number of businesses accused Yelp of highlighting negative ratings and subordinating positive ones in an effort to extort advertising dollars out of small businesses.⁵²² Business owners further alleged that advertising staff made promises about removing negative reviews, some written by Yelp employees and “elite” reviewers, in exchange for

⁵¹⁵ Marciarille, *supra* note 15, at 394.

⁵¹⁶ See, e.g., Chang, *supra* note 148; Dohse, *supra* note 3, at 391.

⁵¹⁷ LEGAL INTELLIGENCER, *supra* note 26.

⁵¹⁸ *Id.*

⁵¹⁹ Dave, *supra* note 17.

⁵²⁰ *Id.*

⁵²¹ *Id.*

⁵²² Chang, *supra* note 148.

purchasing advertising from the site.⁵²³ Yelp denies these allegations, but the perception persists among some merchants and professionals.⁵²⁴ Any crowdsourced review site needs to be mindful that its consumer reviews should not be utilized as leverage to promote site advertising sales.⁵²⁵ Crowdsourced sites need to adopt clear conflict of interest policies and provide appropriate employee training and supervision to avoid the kinds of damaging perceptions that only increase business mistrust of review sites.

C. Expressly Address Nondisparagement Clauses in Ethics Codes and Best Practices

Much like the enactment of laws, ethics codes for licensed professionals may often seem slow to react to changing circumstances. Professional organizations have been somewhat hesitant to recognize the impact of social media on their ethical duties and standards.⁵²⁶ Attorneys,⁵²⁷ doctors, dentists, and other licensed professionals⁵²⁸ must often await case-by-case determinations by licensing bodies about their ethical obligations to newly emerging issues.⁵²⁹ Some organizations may try to stretch existing rules on conflicts of interest to social media issues.⁵³⁰ However, it may

⁵²³ *Id.*

⁵²⁴ *Id.*

⁵²⁵ Banks, *supra* note 195; Richards, *supra* note 175.

⁵²⁶ Marciarille, *supra* note 15, at 366–67, 371–72.

⁵²⁷ Tushnet, *supra* note 455, at 740–42; Stephanie Francis Ward, *Grade Anxiety*, A.B.A. J. (Feb. 1, 2010, 5:29 AM), http://www.abajournal.com/magazine/article/grade_anxiety/ [<http://perma.cc/R73M-B97U>]; Reginald F. Davis & Joe Dysart, *Brag Busters: Discipline is on the way for social media mal-efactors, panel says*, 97 A.B.A. J. 28 (2011).

⁵²⁸ Michelle Andrews, *Consumer Reports Extends Its Ratings to Doctors*, NPR: SHOTS (July 3, 2012, 10:30 AM), <http://www.npr.org/blogs/health/2012/07/02/156136361/consumer-reports-expands-its-ratings-to-doctors> [<http://perma.cc/PH6L-BUE5>].

⁵²⁹ *See* Tushnet, *supra* note 455, at 741 (South Carolina bar requires attorneys who use online directories to monitor postings to ensure compliance with ethics rules on lawyer advertising and FTC disclosure rules); Joan C. Rogers, *Truthfully Bashing Other Lawyers in Blogs Doesn't Count as Conduct Harmful to Justice*, 80 U.S.L.W. 1532 (2012) (New York bar association determined that lawyer's truthful, public criticisms in blog of opposing counsel not violation of ethics).

⁵³⁰ Marciarille, *supra* note 15, at 402.

be more appropriate to offer explicit guidance to licensed professionals by amending existing ethics codes to address nondisparagement clauses, in addition to other speech suppression efforts, like problematic lawsuits against ratings web sites or unfounded defamation claims against consumers.⁵³¹ While lawyers are already ethically obligated to forego frivolous lawsuits,⁵³² other licensed professional codes need to make clear that such conduct is unethical and may result in formal sanctions. Industry organizations may also offer best practices to their members that address these concerns in businesses without a formal licensing scheme.

Professionals and industry members may also wish to consider ways to collaborate with ratings and review sites to discover emerging issues in consumer experiences, and to more effectively monitor issues with their membership. For example, *Consumer Reports* participated with primary care and pediatric care providers in a joint program in which patients reviewed their medical experiences on a scale of one (low) to four (high).⁵³³ These surveys examined a variety of factors, including effective and useful information, respectful and courteous interactions, and timely appointments.⁵³⁴ The report was made publicly available online to inform patients and doctors.⁵³⁵ Some medical professionals used this survey data to assess the quality of their practices and to make appropriate improvements based on these ratings.⁵³⁶ Businesses and professionals may want to consider ways to improve their consumer experiences by working with, rather than fighting against, crowdsourced review sites.

⁵³¹ See Ponte, *supra* note 23, at 502–03.

⁵³² *Id.* Under the ABA Model Code of Professional Responsibility, attorneys are to avoid undertaking frivolous actions under both the ethical canons and the disciplinary rules. See MODEL CODE OF PROF'L RESPONSIBILITY EC 7-4, DR 7-102(A)(1) (1980).

⁵³³ See MASS. HEALTH QUALITY PARTNERS, HOW DOES YOUR DOCTOR COMPARE?, CONSUMER REPORTS/MHQP HEALTH INSERT 2 (July 2012), <http://consumerhealthchoices.org/wp-content/uploads/2012/08/MHQP2012.pdf> [<http://perma.cc/8EWS-YR9B>] [hereinafter MASS. HEALTH].

⁵³⁴ Andrews, *supra* note 528; Ponte, *supra* note 23, at 503; MASS. HEALTH, *supra* note 533, at 2.

⁵³⁵ MASS. HEALTH, *supra* note 533, at 2.

⁵³⁶ See *id.* at 5 (discussing a doctor who disputed negative survey outcomes, but improved his practice after his own survey showed similar results); Marciarille, *supra* note 15, at 380–82 (discussing doctor concerns about negative reviews, some of which may lead to practice improvements).

CONCLUSION

In the free-wheeling world of crowdsourced reviews and ratings, every consumer may express their candid perspectives on business interactions, service offerings, or product experiences. Customer reviews have become an essential information resource for consumers seeking advice on selecting goods and services. Businesses have recognized that positive reviews translate into increased revenues, while poor ratings can hurt the bottom line and potentially doom new or small businesses. Some businesses have resorted to censoring consumer speech with nondisparagement or “gag” clauses that squelch bad or negative reviews by relying on dubious intellectual property claims, threatening liquidated damages clauses, and other onerous financial penalties.

Certain merchants and professionals, especially start-ups and small businesses, justify these gag clauses as legitimate actions needed to protect their brand and goodwill in a social media environment permeated with bogus reviews from unfair competitors and devious consumers. Often battling for brand image and business survival, these companies may lack the resources and expertise of sophisticated marketing strategies to deal with negative consumer reviews. In addition, some small businesses contend that review sites employ faulty systems and are shaking them down for expensive advertising to bury negative—and sometimes fraudulent—reviews. In this contentious environment, it is no wonder that silencing any negative messages seems like the most cost-effective and expedient approach to some businesses.

Yet nondisparagement clauses may be challenged under a host of contract principles, including lack of consideration, the doctrine of unconscionability, violation of public policy, overreach on privity of contract, or exceeding the bounds of reasonableness in their remedies. Judicial supervision of these clauses will generate a slow case-by-case and state-by-state process that may yield further uncertainty about the legality of these provisions. Proposed federal options under existing or new federal laws may provide a more uniform way to handle nondisparagement clauses in consumer contracts of adhesion. It is unclear whether and how quickly federal authorities would be willing to address this issue. In addition, considering the expansive growth of crowdsourced review sites and other forms of social media, it may be difficult for

regulators to effectively safeguard both robust consumer speech online and the legitimate concerns of brand owners.

A number of self-regulatory options may provide faster and more effective alternatives for the future. Content guidelines can be revised to increase awareness about online obligations and to deal with the abuse of both businesses and consumers on crowdsourced review sites. Technological filters and expanded customer-business communication options can help sift out fake reviews and promote greater fairness in online interactions. In addition, ethics codes can directly address concerns about the propriety of non-disparagement clauses in order to help guide professionals and improve their confidential relationships. Although it may be virtually impossible to prevent all fake reviews or unfair evaluations, efforts to develop and apply self-regulatory options may improve the overall quality, fairness, and informational value of crowdsourced reviews for consumers and businesses alike.

