

## REACHING FOR THE STARS: A PROPOSAL TO THE FTC TO HELP DETER ASTROTURFING AND FAKE REVIEWS<sup>♦</sup>

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### INTRODUCTION

Imagine shopping for a new Apple watch, but you are unsure if it is a good fit for your lifestyle or if its particular functionalities align with your needs. How does this product compare to the Samsung Gear S2 or the Fitbit Blaze? Will all of your current smart phone apps have the ability to fully integrate with the watch’s operating system? Will a fully-charged Apple watch really last eighteen hours as marketed by the

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company?<sup>1</sup> When answering these questions, the majority of American consumers seek out the advice of their peers before making a purchase.<sup>2</sup>

The advent of the Internet has sparked online retailers to target consumers using websites that provide their customers with copious amounts of information—necessary or not—to complete their purchases. But why are online retailers so accommodating? The answer lies in the fact that consumers are still one of the leading drivers for the U.S. economy and account for the vast majority of the country's economic productivity.<sup>3</sup> Specifically, reliance on the *online* consumer is even more important as Internet and catalog sales have grown at a faster rate than overall sales in the U.S., while conventional brick-and-mortar store sales have declined.<sup>4</sup>

In 2016, because of greater access to Internet and social media platforms such as Facebook and Instagram, consumers have largely shied away from walking into the store to purchase their favorite products.<sup>5</sup> Moreover, online review sites such as Yelp.com,<sup>6</sup> Angie's List,<sup>7</sup> and the behemoth referred to as "Amazon"<sup>8</sup> have made their platforms easily accessible to anyone willing to either read or post reviews of products or services before or after their purchases.<sup>9</sup> Not only have these online platforms made communication virtually instantaneous, they have substantially impacted *what* people communicate, as the lack of immediate consequences to expressing one's thoughts has promoted people to share opinions that they normally would not.<sup>10</sup>

As consumer participation remains vital to a business's profitability and the U.S. retail economy overall, businesses have welcomed the phenomena of customers posting personal reviews—or

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<sup>1</sup> See APPLE, <http://www.apple.com/watch/battery.html> (last visited Apr. 23).

<sup>2</sup> See Ashlee Kieler, *Nearly 70% Of Consumers Rely On Online Reviews Before Making a Purchase*, CONSUMERIST (June 3, 2015), <https://consumerist.com/2015/06/03/nearly-70-of-consumers-rely-on-online-reviews-before-making-a-purchase/>.

<sup>3</sup> See Eric Morath & Suzanne Kapner, *Retail Sales Gain Is Fueled by Web*, WALL STREET J. (last updated May 13, 2016), <http://www.wsj.com/articles/u-s-retail-sales-in-april-grow-at-best-pace-in-more-than-a-year-1463142745>.

<sup>4</sup> *Id.*

<sup>5</sup> See Betsy Morris, *More Consumers Prefer Online Shopping*, WALL STREET J. (June 3, 2013), <http://www.wsj.com/articles/SB10001424127887324063304578523112193480212>.

<sup>6</sup> See YELP, <https://www.yelp.com> (last visited Apr. 23, 2017).

<sup>7</sup> See ANGIE'S LIST, <https://www.angieslist.com> (last visited Apr. 23, 2017).

<sup>8</sup> See AMAZON, <https://www.amazon.com> (last visited Apr. 23, 2017).

<sup>9</sup> Yelp.com merely requires private consumers to enter a name, email address, password and zip code to register whereas a user's birthday is optional. In 2016, Angie's List became free to join, where prospective members are only required to enter their zip code, email address, and password for membership.

<sup>10</sup> See Carson Reider, *How is Social Media Affecting Our Communication?*, NR MEDIA GROUP (Nov. 24, 2014), <https://www.nrmedia.biz/blog/how-is-social-media-affecting-our-communication>.

testimonials—of their products or services on their websites.<sup>11</sup> Providing this forum is now an extremely important part of the online consumer business, in that customer reviews can help supplement the business's marketing efforts by providing what reasonable consumers believe to be a truthful peer review, as opposed to a statement made directly by the business that produces a particular product or service.<sup>12</sup> Consequently, as consumer reliance on customer reviews increases,<sup>13</sup> the deceptive practice of posting fake reviews has also become more problematic.<sup>14</sup> The practice of writing fake reviews is commonly referred to as “astroturfing,”<sup>15</sup> and is a modern form of false advertising. Astroturfing presents barriers for consumers who are looking to make informed decisions using opinions that are purported to be truthful, yet are intentionally written to influence one's decision, either in favor of a company's product or service or in disfavor of a competitor's.<sup>16</sup>

This deception presents an issue for a society that relies on making decisions to transact with others with a complete understanding of what the seller is providing and what the buyer is receiving.<sup>17</sup> Conversely, the regulations that have been adopted by state and federal governments are only as effective as the entities that set out to enforce these laws, and there are often too many barriers to those consumers wishing to bring private enforcement actions.<sup>18</sup>

This Note will explore the implications of the deceitful customer review—the phenomena known as astroturfing—and how companies and individuals use this practice, as well as its regulation and

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<sup>11</sup> See Yubo Chen & Jinhong Xie, *Online Consumer Review: Word-of-Mouth as a New Element of Marketing Communication Mix*, 54 MGMT. SCI. 477, 479 (2008).

<sup>12</sup> See David Streitfeld, *The Best Book Reviews Money Can Buy*, N.Y. TIMES (Aug. 25, 2012), <http://www.nytimes.com/2012/08/26/business/book-reviewers-for-hire-meet-a-demand-for-online-raves.html?pagewanted=all>.

<sup>13</sup> See Kieler, *supra* note 2; see also *Seven in 10 Americans Seek Out Opinions Before Making Purchases*, MINTEL (Jun. 3, 2015), <http://www.mintel.com/press-centre/social-and-lifestyle/seven-in-10-americans-seek-out-opinions-before-making-purchases>.

<sup>14</sup> See Jillian D'Onfro, *A Whopping 20% Of Yelp Reviews Are Fake*, BUS. INSIDER (Sep. 25, 2013), <http://www.businessinsider.com/20-percent-of-yelp-reviews-fake-2013-9> (citing a recent report from Harvard Business School that from 2006 to 2012, fake Yelp reviews increased from 5% to 20%).

<sup>15</sup> See, e.g., *Astroturfing*, OXFORD DICTIONARIES, <https://en.oxforddictionaries.com/definition/astroturfing>. Astroturfing is “[t]he deceptive practice of presenting an orchestrated marketing or public relations campaign in the guise of unsolicited comments from members of the public.” *Id.*

<sup>16</sup> See generally Kaitlin A. Dohse, *Fabricating Feedback: Blurring the Line Between Brand Management and Bogus Reviews*, U. ILL. J.L. TECH. & POL'Y 363, 365 (2013).

<sup>17</sup> IVAN L. PRESTON, *THE TANGLED WEB THEY WEAVE: TRUTH, FALSITY, & ADVERTISERS* 117 (1994).

<sup>18</sup> See Kathleen S. Morris, *Expanding Local Enforcement of State and Federal Consumer Protection Laws*, 40 FORDHAM URBAN L. J. 1903, 1910–914 (2013) (discussing the under-enforcement of the Federal Trade Commission Act at the federal level and the inability of state Attorney Generals, as well as consumers to bring suit against acts of corporate deception).

enforcement. Part I will discuss the importance of the online consumer review and the emergence of astroturfing. Part II will analyze how consumer protection laws promulgated by the Federal Trade Commission Act are being enforced, and, specifically, the lack of such enforcement. It will also highlight how the Federal Trade Commission (“FTC”) has attacked some of the largest, most well-known corporations in the U.S. today. Part III will illuminate how New York has taken a hard stance against astroturfing and the effort it takes to prosecute local businesses under state law. Part IV will assess whether or not fake reviews equate to false advertising under the Lanham Act and the exceptionally difficult standard one must meet. Finally, this Note will pose a recommendation and briefly conclude in Parts V and VI, respectively.

## I. BACKGROUND

### A. *Importance of the Online Consumer Review*

The online consumer review<sup>19</sup> plays an important role in the online marketing and advertising space. Researchers have found that consumer-generated information is likely more relevant to the individual consumer than information provided by the seller.<sup>20</sup> Chen and Xie describe that this is, in part, due to the fact that sellers often use more “product oriented” information, such as detailed product specifications, whereas the consumer-generated review brings the consumers’ perspectives into the marketing mix by describing their own personal situations when using the product or service.<sup>21</sup>

At the same time, consumers have long had a healthy skepticism of seller-generated advertisements of its products and services. As a result, the law has developed specific rules against “puffery,” the expression of an exaggerated opinion.<sup>22</sup> Puffery, in the context of sales and advertising, can be enforced under the Lanham Act of 1946.<sup>23</sup> Where

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<sup>19</sup> For the purposes of this Note, and in the context of reviews as we have come to know them today, the focus will be on the emergence of the *online* consumer review rather than the traditional customer review generated in print or non-electronic medium.

<sup>20</sup> See Chen & Xie, *supra* note 11, at 477–78.

<sup>21</sup> *Id.* at 479.

<sup>22</sup> See *Puffing*, BLACK’S LAW DICTIONARY (10th ed. 2014).

*Puffing* is “the expression of an exaggerated opinion — as opposed to a factual misrepresentation — with the intent to sell a good or service. Puffing involves expressing opinions, not asserting something as a fact. Although there is some leeway in puffing goods, a seller may not misrepresent them or say that they have attributes that they do not possess. — Also termed *puffery*; *sales puffery*; *dealer’s talk*; *sales talk*.

*Id.*

<sup>23</sup> See The Lanham Act of 1946, 15 U.S.C. § 1125 (2012).

[a]ny person who, or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or

modern advertising often portrays fanciful lifestyle images juxtaposed with their products or services, these laws help consumers understand what sellers can be held liable because of their advertisements—puffery having little or no liability, whereas false or misleading statements create such liability.<sup>24</sup>

Even in the face of liability, online forums where people can post their thoughts and ideas from their experiences using a product or service are virtually endless, ranging from books, movie reviews, online gaming websites, and the hottest trends and destinations in the culinary world.<sup>25</sup> Thus, online consumer reviews are a mere electronic translation of the traditional word-of-mouth advertising. These word-of-mouth (“WOM”) referrals or reviews remain extremely important to small businesses.<sup>26</sup> Two surveys conducted by Small Business Trends of small businesses in a metropolitan area found that eighty-five percent of the businesses claimed their customers learned about them through WOM marketing.<sup>27</sup> That number changed little from the same survey conducted almost a decade earlier which said that nearly eighty-three percent of small businesses said that business referrals came from WOM marketing through existing customers.<sup>28</sup> Given the importance of WOM marketing and referrals, it follows that by leveraging the Internet, a company can expand their customer base by reaching beyond the local community.<sup>29</sup> Consequently, companies have made the online consumer review an integral part of the customer experience, and in doing so, have brought astroturfers along for the ride.

### B. *The Emergence of the Online Review*

Many attribute the success of the online consumer review to Jeff Bezos, Amazon’s founder and CEO, after he started the internet retailer,

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false or misleading representation of fact, which-- (A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person’s goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

*Id.*; see *infra*, Part IV.

<sup>24</sup> IAIN RAMSAY, *ADVERTISING, CULTURE AND THE LAW: BEYOND LIES, IGNORANCE AND MANIPULATION* 14–15 (1996)

<sup>25</sup> See Chen & Xie, *supra* note 11, at 477.

<sup>26</sup> Anita Campbell, *85 Percent of Small Businesses Get Customers Through Word of Mouth*, SMALL BUS. TRENDS (last updated June 4, 2015), <http://smallbiztrends.com/2014/06/small-businesses-get-customers-through-word-of-mouth.html>.

<sup>27</sup> *Id.* See also Anita Campbell, *Valuable New Survey Data on Selling to Small Businesses*, SMALL BUS. TRENDS (last updated July 7, 2012), <http://smallbiztrends.com/2005/12/valuable-new-survey-data-on-selling-to-small-businesses.html>.

<sup>28</sup> See Campbell, *supra* note 26; see Campbell, *supra* note 27.

<sup>29</sup> See Chen & Xie, *supra* note 11, at 477.

which allowed consumers to post their book reviews to its website in 1995.<sup>30</sup> Bezos' innovative approach was aimed at building an online community where it was easy for Amazon's users to "hang out."<sup>31</sup> At that time, the idea of allowing consumers to post a review of a book, especially a negative review, was counterintuitive to some.<sup>32</sup> But now, the majority of consumers seek out purportedly unbiased information prior to making their purchases or traveling to that new restaurant.<sup>33</sup> In response to this demand, companies such as Yelp<sup>34</sup> have designed their business models to operate as dedicated review sites, where millions of consumers visit on a monthly basis to seek out the product and service information that they desire.<sup>35</sup>

The competitive nature of our free market economy creates rivalry between sellers to attract buyers.<sup>36</sup> In turn, buyers, or so-called market participants, are seeking to be fully-informed before transacting in commerce.<sup>37</sup> The condition of being fully-informed means that buyers should have complete information about the seller's goods or services and that the sellers fully understand the buyers' tastes and preferences.<sup>38</sup> This transparency helps markets operate efficiently and smoothly<sup>39</sup> and embodies the truth precepts set forth in advertising law, which is the fundamental purpose of the FTC's Guides.<sup>40</sup>

However, with the rise of the Internet in the digital era, "the free market becomes increasingly more plagued by a market pathogen known as 'astroturfing.'"<sup>41</sup> Astroturfing occurs when individuals or

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<sup>30</sup> See Dohse, *supra* note 16, at 366.

<sup>31</sup> See Jeff Bezos: The King of E-Commerce, ENTREPRENEUR (Oct. 10, 2008), <https://www.entrepreneur.com/article/197608>.

<sup>32</sup> See Interview with Jeff Bezos, CEO, Amazon.com, in Cambridge, Mass. (Jan. 3, 2013), <https://hbr.org/2013/01/jeff-bezos-on-leading-for-the>. Bezos recalled receiving a letter from a critic that questioned why anyone would allow consumers to post negative book reviews, claiming that "[y]ou make money when you sell things." Bezos stated that he disagreed, saying "[w]e make money when we help customers make purchase decisions." *Id.*

<sup>33</sup> See Kieler, *supra* note 2.

<sup>34</sup> See YELP, *supra* note 6.

<sup>35</sup> *Id.* In Q2 of 2016, Yelp had a monthly average of 23 million unique visitors who accessed their website via the Yelp app, 69 million unique visitors who accessed their site via the mobile web, and 73 million unique visitors who visited its site using a desktop computer. In Q3 of 2017, those numbers increased to 30 million, 74 million, and 84 million unique visitors, respectively. See Yelp Inc., Current Report (FORM 8-K) (Aug. 5, 2016); see *An Introduction to Yelp Metrics as of September 30, 2017*, YELP, <https://www.yelp.com/factsheet> (last visited Apr. 23, 2018).

<sup>36</sup> See Krystal N. Lyons, *Disinfecting Market Pathogens: Astroturfing and its Anticompetitive Impact*, 20 J.L. BUS. & ETHICS 121, 122 (2014).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> See *infra* Part II.2. (The "Dot Com Disclosures," established by the Federal Trade Commission, state that disclosures in online advertisements must be clear and conspicuous. When it comes to online ads, the basic principles of advertising law apply: (1) Advertising must be truthful and not misleading; (2) Advertisers must have evidence to back up their claims ("substantiation"); and (3) advertisements cannot be unfair). *Id.*

<sup>41</sup> See Lyons, *supra* note 36, at 121.

businesses attempt to create false or misleading customer reviews.<sup>42</sup> Some recall this practice as primarily originating in certain political organizations and movements.<sup>43</sup> Regardless of its origins, astroturfing has serious consequences in the marketplace because the reliance on the consumer review is so high.<sup>44</sup> This deceptive practice creates dishonesty in the marketplace and, when successful, drives honest sellers from participating in selling goods or services, which in turn inhibits consumers from making rational choices.<sup>45</sup>

Further, as honest sellers leave the marketplace, either in fear of negative reviews which will harm their business or because consumers have stopped purchasing products or services from them, it opens the door for more dishonest sellers who are looking to make a quick dollar to enter the marketplace.<sup>46</sup> The ultimate effects of these practices are that buyers are easily manipulated or “unfairly victimized” and that consumer confidence is weakened, i.e., consumers will lose faith in the review marketplace they have come to rely so heavily on.<sup>47</sup>

### C. *How Prevalent are Astroturfers?*

Although it is extremely difficult to quantify the presence of astroturfers or “opinion-spammers,” researchers have estimated that nearly thirty percent of online consumer reviews could be fake for certain products.<sup>48</sup> Researcher Bing Liu uses opinion mining as a method to detect fake reviews.<sup>49</sup> Liu has stated that opinion-spamming

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<sup>42</sup> *Id.* at 121–22; *see, e.g., Astroturfing Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/astroturfing> (last visited Apr. 23, 2018). Astroturfing is an “organized activity that is intended to create a false impression of a widespread, spontaneously arising, grassroots movement in support of or in opposition to something (such as a political policy) but that is in reality initiated and controlled by a concealed group or organization (such as a corporation).” *Id.*

<sup>43</sup> *See, e.g.,* Richard Raysman & Peter Brown, *Reviewing the Fight Against ‘Astroturfing’*, N.Y. L. J. (Mar. 8, 2016).

The concept of ‘astroturfing,’ which refers to the practice of ‘masking the sponsors of a message or organization,’ was in the past largely confined to political campaigns. For example, parties to the net neutrality debate currently raging in Washington, D.C. have been accused of astroturfing as a means of scuttling such proposals. Astroturfing has also been implicated in recent years in the failed ballot initiative in California to split the state into six independent states, as well as many other political causes. The practice, which takes its name from an ersatz alternative for grass that is in fact a synthetic carpeting, is and was employed by a myriad of figures involved in politics to create public participation in issues that is either heavily incentivized or false and fraudulent entirely.

*Id.*

<sup>44</sup> *See* Kieler, *supra* note 2.

<sup>45</sup> *See* Lyons, *supra* note 36, at 123.

<sup>46</sup> *Id.* at 124.

<sup>47</sup> *Id.*

<sup>48</sup> *See* Dohse, *supra* note 16, at 365; Karen Weise, *A Lie Detector Test For Online Reviewers*, BLOOMBERG BUSINESSWEEK MAG. (Sept. 29, 2011), <http://www.bloomberg.com/news/articles/2011-09-29/a-lie-detector-test-for-online-reviewers>.

<sup>49</sup> *See* Trinity Hartman, *Bing Liu: The Science of Detecting Fake Reviews*, CONTENT26 (May 18,

is widespread and exists on every website, yet is difficult to pinpoint because deceptive reviews are hard to recognize.<sup>50</sup> In response, Liu and other researchers have created models that incorporate certain meta-data, such as the review's star rating, the geo-location and certain linguistic features in order to detect whether or not a review is potentially fake.<sup>51</sup> By using this type of analysis, Liu can spot suspicious reviews for products. For example, a product that may flag suspicion is a product that might not be selling well, yet have a high number of positive reviews.<sup>52</sup> Liu believes that there is an incentive to "game the system by posting fake opinions or reviews to promote or discredit certain products" and that "positive opinions often mean profits and fame for businesses and individuals."<sup>53</sup> In particular, Liu speaks of the review's widespread application as one that influences consumers' behaviors because the review is an opinion that is central to their ability to make choices such as election decisions or a business's product's design.<sup>54</sup> This view has been supported by others, as studies have shown that eighty-seven percent of consumers rely on positive reviews before purchasing goods or services,<sup>55</sup> whereas a slightly smaller percentage (eighty percent) of consumers chose not to commence with a purchase after reading some form of a negative review.<sup>56</sup>

The emergence of astroturfing has sparked other researchers to conduct similar studies. Researchers Michael Luca and Georgios Zervas, in a report entitled *Fake It Till You Make It: Reputation, Competition, and Yelp Review Fraud*, found that 16% of Yelp restaurant reviews were filtered using Yelp's proprietary review filtering

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2012), <http://content26.com/blog/bing-liu-the-science-of-detecting-fake-reviews/>. In an interview with Liu, Liu states:

[o]pinion mining, also called sentiment analysis, is the field of study that analyzes people's opinions, sentiments, evaluations, attitudes, and emotions from written language. It is one of the most active research areas in natural language processing and is also widely studied in text mining, data mining, and web mining. In fact, this research has spread outside of computer science to the management sciences and social sciences due to its importance to business and society as a whole.

*Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* Liu expounds:

Detecting fake reviews is a sub-area of opinion mining. To detect fake reviews, researchers and companies have built detection models using linguistic features (or signals) from the review text content, and meta-data features such as the star rating, user ID of the reviewer, the time when the review was posted, the host IP address, MAC address of the reviewer's computer, the geo-location of the reviewer, etc.

*Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> See Dohse, *supra* note 16, at 367–68.

<sup>56</sup> *Id.* at 367.



algorithm.<sup>57</sup> Yelp's review filter helps flag suspicious reviews then removes them from its website.<sup>58</sup> Luca and Zervas note in their study that it is extremely difficult to observe whether the review itself is fake, and, because of this difficulty, they used Yelp's filtering algorithm as a proxy for identifying fake reviews.<sup>59</sup> Yelp, too, has acknowledged the difficulties of detecting fake reviews and that its algorithm is not perfect.<sup>60</sup> Vince Sollitto, Yelp's Senior Vice President of Communications and Affairs, has admitted that some well-intentioned content does get filtered and some dishonest content does pass through.<sup>61</sup> But, interestingly, Yelp posts their filtered reviews to enable its users to make their own determinations about the reviews' legitimacy.<sup>62</sup> In spite of these difficulties, Lucas & Zervas' research shows that Yelp's filtered reviews are more "extreme" than reviews that are published.<sup>63</sup>

Conversely, Yelp's efforts to incorporate its review filter into its online infrastructure is per se evidence that the company is concerned about ensuring that users post truthful and objective reviews. It has been reported that "[f]or every five new notices that are submitted, one is determined by internal filters to be so dubious – either highly favorable or highly critical – that it is banned to a secondary page" where users

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<sup>57</sup> See Michael Luca & Georgios Zervas, *Fake It Till You Make It: Reputation, Competition, and Yelp Review Fraud*, 62 MGMT. SCI. 3412 (2013). The research conducted by Luca and Zervas presented four main findings:

First, roughly 16 percent of restaurant reviews on Yelp are identified as fraudulent, and tend to be more extreme (favorable or unfavorable) than other reviews. Second, a restaurant is more likely to commit review fraud when its reputation is weak, *i.e.*, when it has few reviews, or it has recently received bad reviews. Third, chain restaurants - which benefit less from Yelp - are also less likely to commit review fraud. Fourth, when restaurants face increased competition, they become more likely to leave unfavorable reviews for competitors.

*Id.* at 3412.

<sup>58</sup> *Id.* at 3413–14.

<sup>59</sup> *Id.*

<sup>60</sup> See David Segal, *A Rave, A Pan, or Just a Fake?*, N.Y. TIMES (May 21, 2011), <http://www.nytimes.com/2011/05/22/your-money/22haggler.html>.

<sup>61</sup> *Id.* See also *Why Yelp has a Review Filter*, YELP (Oct. 5, 2009), <https://www.yelpblog.com/2009/10/why-yelp-has-a-review-filter>.

Is it a perfect system? No. Building a scalable, automated method to identify spurious reviews and protect the integrity of website content that includes more than 7 million reviews is difficult. Does legitimate review content sometimes get lost as a result? Yes. Our software takes a conservative approach and errs on the side of protecting the consumer, when necessary. Customer reviews directly solicited by a business can fall into this category at times, which is why we caution against the practice. It's unfortunate, but this is what is required to maximize trustworthy content and provide value to consumers and businesses alike. And while we work to improve our system every day, we'd argue it's one of the more effective systems out there (if not the only).

*Id.*

<sup>62</sup> See Segal, *supra* note 60.

<sup>63</sup> See Luca & Zervas, *supra* note 57, at 3414.

are less likely to give the review credence.<sup>64</sup> Yelp has also made efforts to post consumer alerts on certain business profile pages where users have been identified as posting a false or misleading review. Yelp would identify businesses on their profile page that were attempting to procure reviews for their respective businesses.<sup>65</sup> This is likely because there is a direct correlation between the number of review stars a company receives and the company's revenue.<sup>66</sup> Luca's report found that just a single star rating increase on Yelp's website increased a restaurant's revenue anywhere from five to nine percent.<sup>67</sup>

Yelp's attempts to combat this practice with countervailing actions plays an important role in the review industry. At the time of Lucas' findings, Yelp had nearly 10 million reviews and received approximately 40 million visitors (unique) per month.<sup>68</sup> In 2016, Yelp accumulated roughly 108 million reviews on its website and had tens of millions of unique visitors.<sup>69</sup> This exponential increase in the last several years is astounding and the statistics establish that Yelp's star review system (along with its associated review content) can dramatically impact demand in the marketplace by influencing the consumer's decision to buy, or not buy.<sup>70</sup> Further, because there is a causal link between positive reviews and profits, there are incentives for businesses—and individual sellers—to foster promotional buzz about the products and services that they offer.<sup>71</sup> These incentives are strong, and create greater demand for enforcement under existing state and federal laws as well as private enforcement by competitors in the marketplace.

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<sup>64</sup> See David Streitfeld, *Buy Reviews on Yelp, Get Black Mark*, N.Y. TIMES (Oct. 18, 2012), <http://www.nytimes.com/2012/10/18/technology/yelp-tries-to-halt-deceptive-reviews.html>.

<sup>65</sup> *Id.*

<sup>66</sup> See Michael Luca, *Reviews, Reputation, and Revenue: The Case of Yelp.com* 1–2 (Harvard Bus. School, Working Paper No. 12-016, 2011), [http://www.hbs.edu/faculty/Publication%20Files/12-016\\_a7e4a5a2-03f9-490d-b093-8f951238dba2.pdf](http://www.hbs.edu/faculty/Publication%20Files/12-016_a7e4a5a2-03f9-490d-b093-8f951238dba2.pdf) (distinguishing the fact that this increase and effect applies to independent restaurants, and does not affect chain-affiliated restaurants). Luca's Abstract states:

I investigate this question using a novel dataset combining reviews from the website Yelp.com and restaurant data from the Washington State Department of Revenue. Because Yelp prominently displays a restaurant's rounded average rating, I can identify the *causal* impact of Yelp ratings on demand with a regression discontinuity framework that exploits Yelp's rounding thresholds. I present three findings about the impact of consumer reviews on the restaurant industry: (1) a one-star increase in Yelp rating leads to a 5-9 percent increase in revenue, (2) this effect is driven by independent restaurants; ratings do not affect restaurants with chain affiliation, and (3) chain restaurants have declined in market share as Yelp penetration has increased.

*Id.*

<sup>67</sup> *Id.* at 2.

<sup>68</sup> *Id.* at 7.

<sup>69</sup> See YELP, *supra* note 35.

<sup>70</sup> See Dohse, *supra* 16, at 367. ("And the content of the review—or number of stars—will likely affect the potential customer's decision to buy."). *Id.*

<sup>71</sup> *Id.* at 370.

## II. THE FEDERAL TRADE COMMISSION

A. *The FTC and the Act*

The Federal Trade Commission (the “FTC” or the “Commission”) is a federal agency that was created in 1914 after President Woodrow Wilson signed the Federal Trade Commission Act (the “Act” or the “FTCA”) into law in an effort to help protect consumers and promote competition.<sup>72</sup> Wilson’s primary impetus for creating and signing the Act into law was to battle trusts during the Progressive Era.<sup>73</sup> The FTC’s current mission is to prevent anticompetitive, deceptive, or unfair business practices.<sup>74</sup> To enforce its mission, the FTCA’s operative language is codified in Section 5 of the Act and declares that unfair methods or unfair and deceptive acts or practices affecting commerce are unlawful.<sup>75</sup>

In order to assert a claim under Section 5, the FTC considers an alleged representation, omission, or practice to be deceptive when consumers are likely to be misled when acting reasonably under the circumstances and when the practice or omission is material.<sup>76</sup> Further, to be considered “unfair” under the Act’s standard of proof, the practice or act is not unlawful unless it: (1) causes or likely causes substantial injury to consumers; (2) is not reasonably avoidable by consumers; and (3) is not outweighed by countervailing benefits to consumers or competition.<sup>77</sup> The Act’s criteria for determining unfairness was amended by the Wheeler-Lea Act in 1938, which helped extend protection to consumers under the Act without actually needing to prove injury to competition or competitors.<sup>78</sup> Prior to this amendment, the

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<sup>72</sup> See *Our History*, F.T.C., <https://www.ftc.gov/about-ftc/our-history> (last visited Apr. 23, 2018).

<sup>73</sup> See Andrew Glass, *Woodrow Wilson creates Federal Trade Commission*, *Sept. 26, 1914*, POLITICO (Sept. 26, 2012), <http://www.politico.com/story/2012/09/this-day-in-politics-081672>.

<sup>74</sup> See *About the FTC*, F.T.C., <https://www.ftc.gov/about-ftc> (last visited Apr. 23, 2018).

<sup>75</sup> See Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) (2012) (“Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.”); see also Morris, *supra* note 18, at 1909.

<sup>76</sup> See LOUIS ALTMAN & MALLA POLLACK, CALLMANN ON UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES § 5:27 (4th ed. 2016); see Jason Goldstein, *How New FTC Guidelines on Endorsement and Testimonials Will Affect Traditional and New Media*, 28 CARDOZO ARTS & ENT. L. J. 609, 614 (2011).

<sup>77</sup> See 15 U.S.C. § 45(n).

The Commission shall have no authority under this section . . . to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. In determining whether an act or practice is unfair, the Commission may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination.

*Id.*; Goldstein, *supra* note 76, at 614.

<sup>78</sup> See Neil W. Averitt, *The Meaning of “Unfair Methods of Competition” in Section 5 of the Federal Trade Commission Act*, 21 B.C. L. REV. 227, 292–94 (1980); LOUIS ALTMAN & MALLA

language “unfair acts or practices” was not codified in the Act. Thus, its inclusion helped simplify the existing law for the consumer’s benefit and was a large shift in an effort to protect direct harm to the consumer resulting from false or misleading business practices.<sup>79</sup>

As part of the Commission’s ongoing commitment to protecting consumers from unfair business practices, it has also issued guidelines for businesses to adhere to when interacting with consumers.<sup>80</sup> Although these guidelines (the “Guides”) are intended to aid consumers and companies when transacting in business and how to comply with the Act’s restrictions, the Guides are not exhaustive and do not attempt to identify every scenario that businesses and consumers face. Conversely, the Guides are not necessarily binding law, but rather administrative interpretations of the Act.<sup>81</sup> Notwithstanding this potential limitation, the Guides are given substantial deference in a court of law, if the Commission is able to establish that the accused person or entity violated the Act by acting contrary to Guides.<sup>82</sup> Further, the Act provides neither private nor public rights of action to attempt to impose liability.<sup>83</sup> This essentially means that the exercise of the broad powers of the FTC, that Congress has authorized, is primarily dependent on its own decision-making and whether or not it chooses to enforce.<sup>84</sup> Despite the fact that it is the Commission’s primary responsibility to enforce the Act, some version of the Act has been adopted by each state.<sup>85</sup> The states’ “Little Acts,” as they are often called, vary in substance, as each state has tailored its version toward their state’s specific policy preferences.<sup>86</sup> Therefore, unless the respective state has adopted some version of the Act that incorporates standing for injured persons, in addition to the state’s Attorney General, to bring actions against astroturfers, incentives for deceitful astroturfing practices will remain prevalent.<sup>87</sup>

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POLLACK, CALLMANN ON UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES § 2:10 (4th ed. 2016).

<sup>79</sup> See Averitt, *supra* note 78, at 292.

<sup>80</sup> The FTC issues guidelines to help aid consumers and businesses with general principles to abide by and when interacting with each other and transacting in business. See *infra* Part II.1.

<sup>81</sup> See Dohse, *supra* note 16, at 375.

<sup>82</sup> *Id.*; see Goldstein, *supra* note 76, at 614.

<sup>83</sup> See Morris, *supra* note 18, at 1906, 1910. (“[O]nly the FTC has broad authority to enforce the Act. Unlike other federal statutes, the Act does not allow private rights of action, public rights of action by state attorneys general, or public rights of action by local public entities.”). *Id.* at 1910.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 1910.

<sup>86</sup> *Id.* at 1909.

<sup>87</sup> See, e.g., N.Y. Gen. Bus. Law § 349(h) (McKinney 2014) (“In addition to the right of action granted to the attorney general pursuant to this section, any person who has been injured by reason of any violation of this section may bring an action in his own name to enjoin such unlawful act or practice . . .”). *Id.*

### 1. The FTC's Guides

The FTC currently has two sets of guidelines that are used to address companies engaging in deceptive or unfair advertising.<sup>88</sup> The first is the FTC's Guides Concerning the Use of Endorsements and Testimonials in Advertising (the "Endorsement Guides")<sup>89</sup> which were amended from their predecessors in 1980.<sup>90</sup> The amended Endorsement Guides specifically addressed Section 5 of the Act and "the Use of Endorsements and Testimonials in Advertising."<sup>91</sup> The 2009 guides also established requirements that any "testimonial be truthful and not misleading" and required disclosures when a business has paid an individual to endorse a product on social media or if the paid individual has "any material connections to the advertiser of the product."<sup>92</sup> Additionally, online statements made in blogs and other social media outlets, for example, were now subject to the provisions of the Act, i.e., statements made on social media websites could be recognized as endorsements.<sup>93</sup> Because bloggers occupy a large and important part of the Internet community,<sup>94</sup> the amended guidelines were a pivotal step for the FTC to increase the scope of users and their respective liability when transacting and advertising via social media platforms and the Internet. Although the Endorsement Guides address the use of "endorsed" online statements, they fail to mention astroturfing or opinion-spamming in online review forums, leaving ambiguity in whether or not the Act or the Endorsement Guides make astroturfing unlawful. Regardless, perhaps in response to the increased use of deceptive review and endorsement practices,<sup>95</sup> the Commission releases

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<sup>88</sup> See *.com Disclosures: How to Make Effective Disclosures in Digital Advertising*, F.T.C. (Mar., 2013), <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf> [hereinafter *Dot Com Disclosures*]; *Guides Concerning the Use of Endorsements and Testimonials in Advertising*, 16 C.F.R. § 255, 74 FED. REG. 53124 (2009) [hereinafter *Endorsement Guides*].

<sup>89</sup> See Endorsement Guides, *supra* note 88.

<sup>90</sup> See Goldstein, *supra* note 76, at 610.

<sup>91</sup> *Id.* at 612.

[u]ndoubtedly, the 2009 Guides will highly impact the advertising community. In fact, unlike the 1980 Guides, they will also have an impact on the individuals that endorse the advertiser's products. Under the 2009 Guides, individual endorsers must disclose when they are being paid monetarily or through an 'in-kind' gift to endorse a product; in fact, endorsers may face an unlikely, but possible, \$11,000 fine.

*Id.*

<sup>92</sup> See Leslie C. Esposito & Heather Angelina Dunn, *FTC updates Q&A on Endorsement Guides – changes affect all types of media and endorsement: 5 takeaways*, DLA PIPER (June 3, 2015), <https://www.dlapiper.com/en/us/insights/publications/2015/06/ftc-updates-qa-on-endorsement/>.

<sup>93</sup> See *FTC's new guidelines could change how testimonials are used in social media*, DLA PIPER (Mar. 10, 2010), [https://www.dlapiper.com/en/us/insights/publications/2010/03/ftcs-new-guidelines-could-change-how-testimonial\\_](https://www.dlapiper.com/en/us/insights/publications/2010/03/ftcs-new-guidelines-could-change-how-testimonial_/).

<sup>94</sup> See Goldstein, *supra* note 76, at 611 (stating that there were approximately 22.6 million bloggers in 2007 and that 50% of all U.S. Internet users read blogs).

<sup>95</sup> See David Streitfeld, *supra* note 64; see Brad Tuttle, *9 Reasons Why You Shouldn't Trust Online Reviews*, TIME (Feb. 3, 2012), <http://business.time.com/2012/02/03/9-reasons-why-you->

notices, titled *The FTC's Endorsement Guides: What People Are Asking*.<sup>96</sup> These Q&As emphasize, using real life examples, that it is the advertiser's responsibility to clearly disclose any endorsements, whether made by paid individuals, including employees, or individuals who received some type of incentive.<sup>97</sup> Thus, it is evident that the FTC wanted to remind businesses and the general public that the Commission remained dedicated to policing advertising claims, particularly those raised from inadequate disclosures for either testimonials or endorsements.<sup>98</sup>

## 2. The FTC's Dot Com Disclosures

The second set of guidelines issued by the FTC were originally issued in 2000 and are commonly referred to as the "Dot Com Disclosures."<sup>99</sup> At that time, the Internet had less than twenty percent of the users that it had in 2016.<sup>100</sup> Thus, the original Dot Com Disclosures, like their Endorsement Guides counterparts,<sup>101</sup> were similarly released by the FTC to provide guidance for those seeking to comply with FTC rules in an effort to avoid making false and misleading advertisements.<sup>102</sup> Specifically, the Dot Com Disclosures addressed Internet advertising, marketing and sales, and discussed in depth the "clear and conspicuous" requirements for a company's advertisement and any respective endorsements.<sup>103</sup> These guides were essentially an exploratory primer for the new world of online advertising in the Dot Com era, as the FTC wanted to "make clear to advertisers that the

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shouldnt-trust-online-reviews/ (stating that nearly 30% of online reviews are fake). Six years had passed since the guidelines were last updated and, as of 2015, there were a reported 2.206 billion Internet users equating to roughly 30% of the global population. See Kadie Regan, *10 Amazing Social Media Growth Stats From 2015*, SOC. MEDIA TODAY (Aug. 10, 2015), <http://www.socialmediatoday.com/social-networks/kadie-regan/2015-08-10/10-amazing-social-media-growth-stats-2015>.

<sup>96</sup> *The FTC's Endorsement Guides: What People Are Asking*, F.T.C. (Sept., 2017), <https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking>.

<sup>97</sup> See Esposito & Dunn, *supra* note 92.

<sup>98</sup> *Id.*

<sup>99</sup> See Dot Com Disclosures, *supra* note 88; see also *Dot Com Disclosures: Information About Online Advertising*, F.T.C. (May, 2000), <http://www.ftc.gov/os/2000/05/0005dotcomstaffreport.pdf> [hereinafter *2000 Dot Com Disclosures*].

<sup>100</sup> See Tracy P. Marshall & Sheila A. Millar, *FTC Updates Dot Com Disclosures Guidance for Digital Ads*, KELLER & HECKMAN LLP (Mar. 18, 2013), <https://www.khlaw.com/6187>.

<sup>101</sup> See Endorsement Guides, *supra* note 88.

<sup>102</sup> See Dot Com Disclosures, *supra* note 88; Camille Calman, *The FTC's New .com Disclosures and What They Mean for Your Social Media Advertising Campaign*, BLOOMBERG BNA (June 26, 2013), <https://www.bna.com/the-ftcs-new-com-disclosures-and-what-they-mean-for-your-social-media-advertising-campaign/>; see Marshall & Millar, *supra* note 100.

<sup>103</sup> See Dot Com Disclosures, *supra* note 88, at 7. The FTC does not expressly define the "clear and conspicuous" requirement; rather, they list several factors that can be used to determine whether a particular disclosure is clear and conspicuous. *Id.*

agency's jurisdiction extended to the brave new world of banner ads, pop-ups, and hyperlinks."<sup>104</sup>

Ultimately, the Dot Com bubble burst in March of 2000, and the U.S. went into a recession.<sup>105</sup> The market eventually turned around with the next Internet phenomena known as "social media," and in turn the FTC would later respond with an updated version of the Dot Com Disclosures, subtitled "How to Make Effective Disclosures in Digital Advertising."<sup>106</sup> The FTC kept the underlying themes of proper disclosures but geared the guides to encompass the consumers' increased use of mobile devices as well as the fact that consumers were now viewing their friends' social media posts on websites such as Twitter<sup>107</sup> and Pinterest<sup>108</sup> with advertisements from businesses on the same handheld screen.<sup>109</sup> Similar to the Endorsement Guides, the Dot Com Disclosures primarily address disclosures for advertisers' claims, and do not squarely address astroturfing or opinion-spamming on consumer review websites.

### 3. Bridging the Gap Between the Online Consumer Review and the Guides' Focus on Online Advertising

Both the Endorsement Guides and the updated Dot Com Disclosures envelop the underlying principles of advertising law<sup>110</sup> and the Commission's prohibition of unfair or deceptive acts or practices broadly covers marketing and promotional activities, advertising claims, and sales practices, regardless of what medium is used to effectuate the act or practice.<sup>111</sup> Despite this coverage, the guides do not directly or expressly address fake online consumer reviews. However, there is evidence that the FTC does intend to preclude *similar* acts in the context of blogging and "endorsing" from its scope.<sup>112</sup>

With respect to blogging, § 255.1(d) uses the example of a woman who, at the request of a skin care company, has been asked to review one of the company's products and post a review of the product on her

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<sup>104</sup> See Calman, *supra* note 102.

<sup>105</sup> On March 11, 2000, the Nasdaq Composite lost 78% of its value. See Andrew Beattie, *Market Crashes: The Dotcom Crash (2000-2002)*, INVESTOPEDIA, <https://www.investopedia.com/features/crashes/crashes8.asp> (last visited Apr. 23, 2018).

<sup>106</sup> See Dot Com Disclosures, *supra* note 88.

<sup>107</sup> See TWITTER, <https://twitter.com> (last visited Apr. 23, 2018).

<sup>108</sup> See PINTEREST, <https://www.pinterest.com> (last visited Apr. 23, 2018).

<sup>109</sup> See Endorsement Guides, *supra* note 88, at 53125.

<sup>110</sup> The Dot Com Guides require that disclosures and endorsements must be clear and conspicuous in online advertisements and that the "basic principles of advertising law apply: (1) Advertising must be truthful and not misleading; (2) Advertisers must have evidence to back up their claims ("substantiation"); and (3) advertisements cannot be unfair." See Dot Com Disclosures, *supra* note 88, at 4.

<sup>111</sup> See Dot Com Disclosures, *supra* note 88.

<sup>112</sup> *Id.*

blog.<sup>113</sup> The Dot Com Disclosures make clear that the blogger, in addition to the retailer and advertiser, can be held individually liable if she makes misleading or unsubstantiated representations or if she fails to disclose clearly and conspicuously that she is being compensated for her review.<sup>114</sup>

With respect to an “endorser”—one whose opinions or experience the message appears to reflect—the FTC’s treatment is identical to that of the blogger, where the company is using the consumer to *promote* the performance of the advertised product, rather than just review it.<sup>115</sup> The classic example, also used by the FTC, is an advertisement for a men’s hair loss treatment that consists of testimonials from “satisfied” customers who had amazing hair growth results using the product.<sup>116</sup> The Endorsement Guides are clear: the advertiser or retailer must possess and rely upon adequate substantiation for the endorser’s representation, and that the endorser’s experience is “representative of what consumers will generally achieve.”<sup>117</sup>

The Guides further require that any material connection between the blogger or endorser must be fully disclosed by the advertiser, and any failure to do so would create potential liability for the retailer or advertiser.<sup>118</sup> Therefore, the inferential leap could be made that where consumers have posted fake online reviews, the reviews would be considered endorsements by the FTC, thereby empowering the Commission to use their rules and guides to regulate online *consumer*

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<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> The FTC defines endorsement as:

any 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. *See* Endorsement Guides, *supra* note 88, at 53124.

<sup>116</sup> *Id.* at 53140.

<sup>117</sup> *Id.* at 53129.

<sup>118</sup> *Id.*

When there exists a connection between the endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorsement (*i.e.*, the connection is not reasonably expected by the audience), such connection must be fully disclosed. For example, when an endorser who appears in a television commercial is neither represented in the advertisement as an expert nor is known to a significant portion of the viewing public, then the advertiser should clearly and conspicuously disclose either the payment or promise of compensation prior to and in exchange for the endorsement or the fact that the endorser knew or had reason to know or to believe that if the endorsement favored the advertised product some benefit, such as an appearance on television, would be extended to the endorser.

*Id.* at 53142.



reviews. Additionally, it is evident that the FTC has contemplated and incorporated language in its rules and guides that allow it to bring enforcement actions to help protect consumers from unfair business practices such as deceptive or misleading advertising, and the Act imputes to the Commission broad power to bring action against those individuals or companies that conduct business unlawfully. Thus, the Commission has great latitude in prosecuting wrongdoers, in addition to regulating businesses sales and marketing campaigns through digital advertising mediums.<sup>119</sup>

### III. OPERATION CLEAN TURF

#### A. *New York's Grassroots Approach*

In 2013, the Office of the Attorney General for New York State announced it had completed a year-long undercover investigation into the manipulation of consumer-review websites.<sup>120</sup> The investigation discovered that nineteen companies had inundated online review sites such as Yelp and CitySearch<sup>121</sup> with fake customer reviews and that, by doing so, violated several state laws that prohibit false advertising as well as deceptive business practices.<sup>122</sup> The success of “Operation Clean Turf” allowed the state of New York to impose penalties totaling more than \$350,000 on the accused businesses.<sup>123</sup> The depth of the operation provides a unique opportunity for the public to understand the extent at which businesses will engage in unlawful activity either to protect or enhance their reputation or perhaps tarnish the reputation of their competitors, all in an effort to gain market share. In many cases, the Office of the Attorney General found that businesses looking to combat

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<sup>119</sup> See Dohse, *supra* note 16, at 376–77.

<sup>120</sup> See Press Release, New York State Office of the Attorney General, A.G. Schneiderman Announces Agreement With 19 Companies To Stop Writing Fake Online Reviews And Pay More Than \$350,000 In Fines (Sept. 23, 2013), <http://www.ag.ny.gov/press-release/ag-schneiderman-announces-agreement-19-companies-stop-writing-fake-online-reviews-and>.

<sup>121</sup> See CITYSEARCH, [www.citysearch.com](http://www.citysearch.com) (Apr. 23, 2018).

<sup>122</sup> *Id.* See N.Y. Gen. Bus. Law. §§ 349, 350 (McKinney 2014). § 349(a) states that “[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful.” § 350-a explains:

‘[F]alse advertising’ means advertising, including labeling, of a commodity, or of the kind, character, terms or conditions of any employment opportunity if such advertising is misleading in a material respect. In determining whether any advertising is misleading, there shall be taken into account (among other things) not only representations made by statement, word, design, device, sound or any combination thereof, but also the extent to which the advertising fails to reveal facts material in the light of such representations with respect to the commodity or employment to which the advertising relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual . . . .

*Id.*

<sup>123</sup> See Press Release, *supra* note 120. (“The OAG has entered into Assurances of Discontinuance with 19 companies, with penalties ranging from \$2500 to just under \$100,000.”) *Id.*

negative reviews had procured the services of search engine optimization (“SEO”) companies that used sophisticated techniques to disguise their identities and internet IP addresses<sup>124</sup> in order to post fake reviews on consumer review websites such as Yelp.<sup>125</sup> Additionally, the SEOs had created hundreds of fake online user profiles and then posted false reviews as part of their efforts to manage the business’s reputation in the local community.<sup>126</sup> Other businesses had paid freelance writers in countries such as Bangladesh and the Philippines anywhere from \$1 to \$10 per review.<sup>127</sup>

These actions demonstrate that New York is targeting companies engaging in astroturfing, particularly in the context of the fake online review. Despite the fact the FTC has yet to directly address the issue of whether or not the Act or its Guides<sup>128</sup> apply to consumers generating fake reviews, New York state has established that “[b]y producing fake reviews . . . companies violated multiple state laws against false advertising and engaged in illegal and deceptive business practices.”<sup>129</sup> New York is sending an important message to its businesses: that fake reviews fall within the scope of false advertising and that these practices are considered unlawful.<sup>130</sup> Conversely, Schneiderman warns that consumers should be cautious when looking at online consumer reviews.<sup>131</sup>

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<sup>124</sup> This technique is commonly referred to as “spoofing,” which is a form of IP address forgery or hijacking where a “spoofed” will hijack another entity’s IP address to appear as that host while concealing the hijacker’s identity. See *IP Spoofing*, TECHTARGET, <http://searchsecurity.techtarget.com/definition/IP-spoofing> (last visited Apr. 23, 2018).

<sup>125</sup> See Press Release, *supra* note 120.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> See *supra* Part II.

<sup>129</sup> See Press Release, *supra* note 120.

<sup>130</sup> New York Executive Law § 63 confers power to the Office of the Attorney General to bring civil actions against people who commit fraudulent or illegal acts. § 63(12) states:

Whenever any person shall engage in repeated fraudulent or illegal acts or otherwise demonstrate persistent fraud or illegality in the carrying on, conducting or transaction of business, the attorney general may apply, in the name of the people of the state of New York, to the supreme court of the state of New York . . . and the court may award the relief applied for or so much thereof as it may deem proper. The word ‘fraud’ or ‘fraudulent’ as used herein shall include any device, scheme or artifice to defraud and any deception, misrepresentation, concealment, suppression, false pretense, false promise or unconscionable contractual provisions. The term “persistent fraud” or “illegality” as used herein shall include continuance or carrying on of any fraudulent or illegal act or conduct. The term “repeated” as used herein shall include repetition of any separate and distinct fraudulent or illegal act, or conduct which affects more than one person.

See N.Y. Exec. Law § 63(12) (McKinney 2014).

<sup>131</sup> See Press Release, *supra* note 120. Schneiderman states that “[c]onsumers rely on reviews from their peers to make daily purchasing decisions on anything from food and clothing to recreation and sightseeing” and “[t]his investigation into large-scale, intentional deceit across the Internet tells us that we should approach online reviews with caution. And companies that continue to engage in these practices should take note: ‘Astroturfing’ is the 21st century’s version

Subsequently, in 2016, the Office of the Attorney General reemphasized its commitment to protecting consumers when relying on reviews and endorsements after announcing settlements with several businesses that were found posting fraudulent content online.<sup>132</sup> The companies were found engaging in unlawful astroturfing practices and paid fines ranging from \$20,000 to \$50,000 which presumably, according to Schneiderman, acted as a strong signal to companies that “consumers deserve honesty and transparency in their reviews.”<sup>133</sup>

One of the companies, Machinima, Inc.,<sup>134</sup> is a digital entertainment network that disseminates video content relating to the video gaming industry on YouTube.<sup>135</sup> The Office of the Attorney General found that the company engaged in deceptive advertising using a group of “influencers” who posted videos on YouTube that endorsed Microsoft’s Xbox gaming system, as well as several games.<sup>136</sup> Their intention to utilize the influencers to promote the gaming console and video games was conspicuously ill-intended. This is supported by the fact that Machinima had a multi-phase marketing campaign where so-called influencers were given access to the new Xbox console and video games, so that they could make endorsement videos which were then uploaded to YouTube.<sup>137</sup> Some influencers were paid \$30,000 for

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of false advertising, and prosecutors have many tools at their disposal to put an end to it.” *Id.*

<sup>132</sup> See Press Release, New York State Office of the Attorney General, A.G. Schneiderman Announces Settlement With Machinima And Three Other Companies For False Endorsement (Feb. 11, 2016), <http://www.ag.ny.gov/press-release/ag-schneiderman-announces-settlement-machinima-and-three-other-companies-false>.

<sup>133</sup> *Id.*

<sup>134</sup> See MACHINIMA, <https://www.machinima.com/about-us/> (last visited Apr. 23, 2018). Machinima boasts that they are the “premier provider of digital content at the intersection of gamer entertainment and culture” and that they “create entertainment content for a community passionate about video games, animation, and endless forms of pop culture. With a focus on scripted, topical and gamer programming, and a talent network of thousands of influencers, Machinima reaches over 144M viewers each month.”

<sup>135</sup> *Id.*; YOUTUBE, <https://www.youtube.com/yt/about/> (last visited Apr. 23, 2018).

<sup>136</sup> See Press Release, *supra* note 132; John Hall, *The Influencer Marketing Gold Rush is Coming: Are you Prepared?*, FORBES (Apr. 17, 2016), <http://www.forbes.com/sites/johnhall/2016/04/17/the-influencer-marketing-gold-rush-is-coming-are-you-prepared/#74e6105a2964>. (Influencer marketing can be described as “[a] nonpromotional approach to marketing in which brands focus their efforts on opinion leaders, as opposed to direct target market touchpoints.”) *Id.* The company utilizes an influential person to provide context and expertise about the product. The FTC, in a related action, in its Agreement to Consent Order with Machinima states:

‘Influencer Campaign’ means any arrangement whereby, in connection with the advertising, promotion, offering for sale, sale, or distribution of any product or service, Respondent engages an Endorser (also known as an Influencer) to create, publish, or otherwise disseminate an online Endorsement for which the Influencer is to receive compensation from Respondent, the advertiser for whom Respondent conducts the campaign, or anyone else acting on their behalf.

See Machinima, Inc., F.T.C. Docket No. C-4569 (Decision and Order) [hereinafter *Machinima Consent Order*].

<sup>137</sup> See Press Release, *supra* note 132.

endorsement videos that had generated approximately 730,000 views on YouTube's website.<sup>138</sup>

It is no surprise that companies use so-called influencers to promote their products, as word-of-mouth marketing campaigns are powerful tools.<sup>139</sup> In total, the influencers produced roughly 300 videos in just one month, which generated a cumulative 35 million views.<sup>140</sup> Moreover, the influencers "gave the impression that their videos were independently produced and that their comments reflected the influencers' personal views."<sup>141</sup> The investigation addressed the fact that videos failed to disclose that Machinima had compensated the influencers for their endorsement videos, therefore violating the New York's statutes that prohibit deceptive acts or practices, in addition to § 255 of the FTC's Endorsement Guides which establish that material connections between the endorser and the advertiser must be disclosed to the viewer.<sup>142</sup> Consequently, the New York settlement agreement imposed a \$50,000 penalty for the company's actions.<sup>143</sup> The FTC also took enforcement action against Machinima, where the company, under similar allegations, signed a consent order with the Commission which stated that, in the event the company violated any provisions of the consent agreement, any such practice could result in civil penalties totaling up to \$16,000.<sup>144</sup>

Equally availing to the discussion of fake online reviews was the Office of the Attorney General's settlement with Premier Retail Group, Inc.,<sup>145</sup> which owns and operates a chain of beauty supply stores.

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<sup>138</sup> *Id.*

<sup>139</sup> See Misha Talavera, *10 Reasons Why Influencer Marketing is the Next Big Thing*, SOCIALTIMES (July 14, 2015), <http://www.adweek.com/socialtimes/10-reasons-why-influencer-marketing-is-the-next-big-thing/623407>.

There are few things that drive a sale more effectively than a warm word-of-mouth recommendation. A study by McKinsey found that 'marketing-induced consumer-to-consumer word of mouth generates more than twice the sales of paid advertising.' And of those that were acquired through word-of-mouth had a 37 percent higher retention rate. Influencer marketing presents a glaring opportunity for brands to leverage the power of word-of-mouth at scale through personalities that consumers already follow and admire.

*Id.*

<sup>140</sup> See Press Release, *supra* note 132.

<sup>141</sup> *Id.*

<sup>142</sup> See N.Y. Exec. Law §63(12), *supra* note 130; see Endorsement Guides, *supra* note 88.

<sup>143</sup> See Press Release, *supra* note 132.

<sup>144</sup> See Press Release, Federal Trade Commission, Xbox One Promoter Settles FTC Charges That it Deceived Consumers With Endorsement Videos Posted by Paid 'Influencers' (Sept. 2, 2015), <https://www.ftc.gov/news-events/press-releases/2015/09/xbox-one-promoter-settles-ftc-charges-it-deceived-consumers>; see generally Jake Muncy, *FTC Slaps Machinima on the Wrist for Its Paid Endorsements*, WIRED (Sept. 2, 2015), <https://www.wired.com/2015/09/ftc-machinima-microsoft-youtube/>.

<sup>145</sup> According to the New York State Attorney General's Press Office, Premier Retail Group, Inc. operates a chain of cosmetic and beauty supply stores under the name Infinite Beauty USA. See INFINITE BEAUTY USA, <http://www.infinitebeautyusa.com/about/>; see Press Release, *supra* note

Premier utilized Craigslist<sup>146</sup> in an effort to solicit reviewers that would write positive reviews in exchange for free beauty supplies as samples or vouchers for services.<sup>147</sup> The investigation revealed that Premier did not require that the reviewers visit its store locations or disclose that they were compensated for the reviews.<sup>148</sup> Even more alarming was Premier's disregard for the reviewer's objectivity and knowledge of the company's products and services. The investigation uncovered that the advertisements simply asked: "Have a strong Yelp account? Want to make money writing reviews?"<sup>149</sup> A Premier agent even responded to an undercover investigator from the Attorney General's officer saying "[o]nce a review is posted . . . I will send you \$25 via Paypal."<sup>150</sup> Premier offered to double that amount if the individual could craft their review in a way that Yelp's review filtering algorithm would not filter it from its website.<sup>151</sup> The agent gave additional instructions about what products and services the writer should mention.<sup>152</sup> The investigation ultimately found that Premier paid for 30 fraudulent reviews for stores that were located in the New York area and that Premier had paid some reviewers as much as \$250 for false and unsubstantiated reviews.<sup>153</sup> As a result of paying for favorable reviews of its products and services, Premier incurred a \$50,000 fine, yet \$30,000 was suspended pursuant to the company's compliance with the agreement.<sup>154</sup> These enforcement actions demonstrate that New York has taken a stance against businesses that are trying to "game" the system by enlisting the help of paid reviewers and influencers to promote their businesses.

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132.

<sup>146</sup> CRAIGSLIST, <https://www.craigslist.org/about/> (last visited Apr. 23, 2018).

<sup>147</sup> See Press Release, *supra* note 132.

<sup>148</sup> *Id.* Noting that under the FTC's Endorsement Guides, § 255.5 states:

When there exists a connection between the endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorsement (*i.e.*, the connection is not reasonably expected by the audience), such connection must be fully disclosed. For example, when an endorser who appears in a television commercial is neither represented in the advertisement as an expert nor is known to a significant portion of the viewing public, then the advertiser should clearly and conspicuously disclose either the payment or promise of compensation prior to and in exchange for the endorsement or the fact that the endorser knew or had reason to know or to believe that if the endorsement favored the advertised product some benefit . . . would be extended to the endorser.

See Endorsement Guides, *supra* note 88, at 53142.

<sup>149</sup> See Press Release, *supra* note 132.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

## IV. THE LANHAM ACT AND PRIVATE RIGHTS OF ACTION

Although the FTC does not provide private rights of action for businesses to impose liability on those who engage in unfair and deceptive acts or practices by posting false reviews, businesses are not left without any legal recourse.<sup>155</sup> Under federal law, § 1125(a) of the Lanham Act of 1940, commonly referred to as “Section 43,” allows for businesses or competitors to sue “another for unfair competition arising from false or misleading product descriptions.”<sup>156</sup> Section 1125(a) states that:

(1) [a]ny person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which--

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person’s goods, services, or commercial activities,

shall be liable in a civil action by any person who believes that he or she is likely to be damaged by such act.<sup>157</sup>

Thus, the act holds liable competitors who make false or misleading *descriptions* of fact as well as false or misleading *representations* of fact.<sup>158</sup> The Second Circuit has said, in *S.C. Johnson & Son, Inc. v. Clorox Co.*, that although the Lanham Act does not prohibit false statements in general, it does prohibit false or misleading descriptions, as well as false or misleading representations of fact that one makes about their own products or services or another’s.<sup>159</sup> The Lanham Act is central to this part of our discussion because it potentially empowers a business—one that that a competitor has targeted by making false or misleading representations of fact—to bring

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<sup>155</sup> See Morris, *supra* note 18.

<sup>156</sup> See POM Wonderful LLC v. Coca-Cola Co., 134 S. Ct. 2228 (2014) (holding that a private party is not precluded from bringing a Lanham Act claim challenging a misleading food label despite the label being regulated by the Food, Drug, and Cosmetic Act); see also 15 U.S.C. § 1125 (2012).

<sup>157</sup> See 15 U.S.C. § 1125(a).

<sup>158</sup> *Id.*

<sup>159</sup> See *Romeo & Juliette Laser Hair Removal, Inc. v. Assara I LLC*, 2016 WL 815205, at \*1 (S.D.N.Y. Feb. 29, 2016), appeal transferred (Apr. 18, 2016), appeal dismissed (July 12, 2016) citing *S.C. Johnson & Son, Inc. v. Clorox Co.*, 241 F.3d 232, 238 (2d. Cir. 2001).

suit against those that have engaged in deceptive astroturfing practices, rather than standing on the sidelines and waiting for their state's Attorney General's office or the Federal Trade Commission to bring their own enforcement actions.

Alternatively, it has been claimed that business owners in astroturfing or opinion-spam cases are unlikely to be given relief under Lanham Act claims unless their trademarks have been misappropriated.<sup>160</sup> Although traditionally Lanham Act claims were brought against competitors who utilized another's trademark or misled consumers about who owned the trademark, courts have stated that "simple claims of false representations in advertising are actionable under section 43(a) when brought by competitors of the wrongdoer, even though they do not involve misuse of a trademark."<sup>161</sup> Short's claim does logically follow where a harmful competitor seeks to utilize an innocent company's *trademark* for the purpose of misleading a consumer to patronize the harmful competitor's business, while believing they are supporting their beloved brand name, if Section 43 didn't encompass the "false or misleading" representations and descriptions prong.<sup>162</sup> Notwithstanding, Congress redefined the Act's scope to encompass false and misleading representations when they codified the Trademark Law Revision Act of 1988.<sup>163</sup> This enactment attempted to address trade libel and product disparagement with respect to false claims that were made about competitors.<sup>164</sup>

Indeed, the Lanham Act does protect consumers where companies have intentionally used deceptive and misleading tactics employing another's *trademark*. Congress codified its intention in an effort to regulate this misuse of another's mark when promulgating the Act.<sup>165</sup>

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<sup>160</sup> See Kendall L. Short, *Buy My Vote: Online Reviews for Sale*, 15 VAND. J. ENT. & TECH. L. 441, 462–63 (2013).

[A] victim of online spam may be tempted to bring a claim under the Lanham Act, as it is primarily concerned with consumer deception. The victim usually cannot, however, because the cause of action for false advertising under the Lanham Act must be related to the business owner's trademark . . . . Thus, unless their trademarks have legitimately been misappropriated, the Lanham Act is unlikely to provide relief to innocent companies in opinion-spam cases.

*Id.*

<sup>161</sup> See *Waits v. Frito-Lay, Inc.*, 978 F.2d. 1093, 1096 (9th Cir. 1992). There, Tom Waits was a singer who sued Frito-Lay, Inc. and its advertising agency after the defendants broadcasted a radio commercial for its "SalsRio" Doritos brand, which used a vocal performance that imitated Waits' distinct raspy singing voice. *Id.* at 1096.

<sup>162</sup> See *id.* at 1107, n. 7.

<sup>163</sup> See Trademark Law Revision Act of 1988, Pub. L. No. 100-667, §132, 102 Stat. 3935 (effective Nov. 16, 1989).

<sup>164</sup> See Ethan Horwitz & Benjamin Levi, *Fifty Years of the Lanham Act: A Retrospective of Section 43(a)*, 7 FORDHAM INTELL. PROP., MEDIA & ENT. L. J. 59, 69 (1996).

<sup>165</sup> See 15 U.S.C. § 1127 (2006).

The intent of this chapter is to regulate commerce within the control of Congress by making actionable the deceptive and misleading use of marks in such commerce; to

But even though the Lanham Act protects consumers as well as benefits them, “the cause of action is for competitors, not consumers.”<sup>166</sup> However, the Lanham Act additionally creates a federal legal remedy that coincides with trademark protection: it creates a cause of action for unfair competition through misleading advertising.<sup>167</sup> This premise is codified in the “false or misleading description of fact” prong of the Act<sup>168</sup> and is important because the Lanham Act does not merely address trademark infringement, it covers statements made by companies—i.e., competitors—that are false as well as statements made that, although true, create false impressions.<sup>169</sup> Several courts have squarely addressed false advertising claims by competitors since the act’s revision in 1988 and a few recent cases are illuminating with respect to the burden that one must meet. Section 43(a) is seemingly welcoming to businesses asserting unfair business practices under the Lanham Act, is not plead without its challenges.

#### A. *Recent Private Lanham Act Claims*

Although there have been few cases that exemplify liability for astroturfing practices brought by competitors under Lanham Act claims, a recently decided case in the Southern District of New York is illustrative of how federal courts are tackling false advertising in the context of the fake online review. In *Romeo & Juliette Laser Hair Removal, Inc. v. Assara I LLC*, the parties endured nearly eight years of contentious litigation involving a series of negative comments that were made on consumer forums such as Yelp.Com, HairTell.com, and CitySearch.com.<sup>170</sup> The plaintiff was a wholly-owned laser hair removal

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protect registered marks used in such commerce from interference by State, or territorial legislation; to protect persons engaged in such commerce against unfair competition; to prevent fraud and deception in such commerce by the use of reproductions, copies, counterfeits, or colorable imitations of registered marks; and to provide rights and remedies stipulated by treaties and conventions respecting trademarks, trade names, and unfair competition entered into between the United States and foreign nations.

*Id.*

<sup>166</sup> See *POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228, 2234 (2014) (Justice Kennedy clarified this proposition in dicta by stating that the petitioner asserted injury not as a general consumer, but as a competitor. “Competitors” may bring Lanham Act claims because they suffer “an injury to a commercial interest in sales or business reputation proximately caused by [a] defendant’s misrepresentations.”) *Id.*; see *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1395 (2014) (holding in part that alleged injuries from false advertising fell within the zone of interest protected by the Lanham Act and that the claimant satisfied the act’s proximate causation requirement).

<sup>167</sup> See *POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. at 2233.

<sup>168</sup> See 15 U.S.C. §§ 1125(a)(1), 1125(a)(1)(B).

<sup>169</sup> See Horwitz & Levi, *supra* note 164, at 69.

<sup>170</sup> See *Romeo & Juliette Laser Hair Removal, Inc. v. Assara I LLC*, 2016 WL 815205, at \*6 (S.D.N.Y. Feb. 29, 2016); see *supra* note 6, 121 for links to the referenced websites; see HAIRTELL, <https://www.hairtell.com> (last visited Apr. 23, 2018) (“HairTell is about consumer experiences with hair removal, which are often not possible to verify and are not scientific.”).



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business that operated in New York City.<sup>171</sup> The defendants, collectively (“Assara”), also ran a laser hair removal company in the New York area and worked for the company in various capacities.<sup>172</sup>

The crux of the claims rested on a series of negative reviews and comments about the plaintiff that appeared on several consumer internet forums.<sup>173</sup> These reviews consisted of anonymous posts under false identities that were made using an IP address that belonged to Assara, which was provided by the lessor who also provided internet service for them and other tenants.<sup>174</sup> An Assara office manager, Mark Bakkar, deceitfully posed as a 27 year-old female, who had a “black hair,” and a “light complexion” and made disparaging remarks about Romeo and Juliette, as well as promotional remarks about Assara’s services.<sup>175</sup> The disguised identity further discussed a “horror story” where a technician at Romeo and Juliette had over-applied a certain cream after which the client “suffered a heart attack” and came “very close” to dying.<sup>176</sup> Other comments made by Assara employees that had registered false usernames with Yelp and HairTell, included remarks about a test that the plaintiff had conducted on a client that resulted in “burned” skin.<sup>177</sup>

The plaintiff sought summary judgment on several claims, including unfair competition under § 1125(a) of the Lanham Act as well as New York state law.<sup>178</sup> The court’s analysis, although thorough and detailed, was surprisingly straight forward. The case law has determined four elements in order to establish a Lanham Act claim:

- (1) the plaintiff must demonstrate the advertisement is false, (2) the defendants misrepresented an inherent quality or characteristic of the product, (3) the statement was placed in interstate commerce, and (4) the plaintiff must show injury resulting from the misrepresentation, either by diversion of sales or by lessening of the businesses goodwill.<sup>179</sup>

The court, granting summary judgment for the plaintiff, found that Assara, through its employees and officers, “had made false statements

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<sup>171</sup> See *Romeo & Juliette Laser Hair Removal, Inc. v. Assara I LLC*, 2016 WL 815205 (S.D.N.Y. Feb. 29, 2016).

<sup>172</sup> *Id.* In addition to several legal vehicles and entities, the defendants and real parties in action were: Tayer, Assara’s first President and Chairman; Dr. Tayer, Assara’s first CFO and Secretary; and Jerome (“Jay”) Shuman, who was Assara’s first CEO and General Counsel.

<sup>173</sup> *Id.* at \*2. The consumer forums included HairTell.com, Yelp.com, CitySearch.com, and consumerbeware.com.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> See *Romeo & Juliette Laser Hair Removal, Inc. v. Assara I LLC*, 2016 WL 815205, at \*2 (S.D.N.Y. Feb. 29, 2016).

<sup>178</sup> *Id.* at \*6.

<sup>179</sup> *Id.* at \*7.

about the plaintiff by describing experiences that had not occurred.”<sup>180</sup> These experiences described fictitious customers and experiences under an online identity.<sup>181</sup> The court noted that these comments were not refuted by the defendants by proposing evidence to the contrary and that the posts concerned “essential characteristics of the plaintiff’s business.”<sup>182</sup> Alternatively, the plaintiff’s summary judgment was denied as to several other defendants who had made disparaging remarks with respect to the plaintiff’s business and laser hair treatments stating that the staff was slow and rude, because these comments reflected treatments that the defendants actually had.<sup>183</sup>

This case opens the door to those competitors who are injured from false and deceitful online review campaigns. But not all who plead such claims will be able to easily prove the misrepresentations of *fact* that Lanham Act claims require. Much of the evidence proffered in *Romeo and Juliette* relied on the fact that the majority of the fake reviews were made from profiles generated on review websites with the same IP address that connected the reviews to Assara’s business.<sup>184</sup> Furthermore, the testimony established that the fake occurrences at the plaintiff’s business simply never occurred, and the defendant’s burden establishing the existence of the alleged occurrences was not met.<sup>185</sup> Moreover, complications pleading Lanham Claims arise when defendants utilize IP spoofing practices to disguise those in fact engaging in false review practices.<sup>186</sup>

### B. *Barriers to Competitor and Consumer Claims*

Bringing unfair competition claims, either via the Lanham Act or state common law, has its challenges regardless of who the claimant is. One of the challenges that limits the scope of liability is the existence of the Federal Communications Decency Act (the “FCDA”).<sup>187</sup> The FCDA

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<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> See *Romeo & Juliette Laser Hair Removal, Inc.*, 2016 WL 815205 at \*8. (“These are largely matters of opinion and the plaintiff has not shown that they are actionable as false statements of fact.”) (citing *Groden v. Random House, Inc.*, 61 F.3d 1045, 1051–52 (2d Cir. 1995)) (“[S]tatements of opinion are generally not the basis for Lanham Act liability.”).

<sup>184</sup> See *Romeo & Juliette Laser Hair Removal, Inc.*, 2016 WL 815205 at \*2 (“The defendants do not dispute that the Assara IP Address was associated with a computer terminal located at Assara’s place of business.”).

<sup>185</sup> *Id.* at \*7.

<sup>186</sup> For a brief example discussing defendant’s usage of search optimization companies (“SEOs”), see *infra* Part III.A.; see also N.Y. Gen. Bus. Law §§ 349, 350 (McKinney 2014). The plaintiff in *Romeo and Juliette*, in its first amended complaint, had separate claims alleging schemes that Assara was trying to manipulate consumers who were using Google searches and inconspicuous links utilizing the plaintiff’s trademark. These claims were ultimately abandoned in the plaintiff’s second amended complaint. See *Romeo & Juliette Laser Hair Removal, Inc.*, 2016 WL 815205.

<sup>187</sup> The Fed. Decency Comm. Act of 1996, 47 U.S.C. § 230 (1996).

confers immunity to websites that provide or “host” reviews, whether professionally written or not.<sup>188</sup> The operative language limiting civil liability for internet services and providers is codified in § 230(c)(2) and states that “no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”<sup>189</sup> The FCDA effectively bars claims against online review sites where third parties, or information content providers, have published information on online content providers such as social media websites, reviews sites, and blogs.<sup>190</sup>

This is a powerful tool for websites that allow consumers to post reviews of products and services. One of the most cited cases on this topic was brought against Yelp in New York. There, the claimant was a dentist who sued for defamation, as well as deceptive acts and practices under New York law.<sup>191</sup> Reit alleged that Yelp had “manipulated” positive reviews of dental practice by taking them down and additionally keeping only one alleged false and negative post that claimed his office was “small” and “smelly.”<sup>192</sup> Reit argued that as a result of Yelp’s acts, the number of people that called his office requesting appointments was cut in half.<sup>193</sup> He further argued—unsuccessfully—that Yelp’s acts were part of a large coercive business practice that forced professionals to pay for advertising on Yelp’s website.<sup>194</sup> The judge ruled that because Yelp was an interactive computer *service* and not an information content provider, as defined under the act, Yelp was immune under the FCDA, even if the review they published was false or defamatory.<sup>195</sup> The implications of the

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<sup>188</sup> See Short, *supra* note 160, at 460.

<sup>189</sup> 47 U.S.C. § 230(c)(1) (1996). Under the FCDA an “interactive computer service is “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.” Conversely, 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.” See 47 U.S.C. §§ 230(f)(2), (f)(3) (1996).

<sup>190</sup> See Eleanor Vaida Gerhards, *Your Store Is Gross! How Recent Cases, the FTC, and State Consumer Protection Laws Can Impact a Franchise System’s Response to Negative, Defamatory, or Fake Online Reviews*, 34 FRANCHISE L. J. 503, 504–05 (2015).

<sup>191</sup> *Reit v. Yelp!, Inc.*, 907 N.Y.S.2d 411 (N.Y. Sup. Ct. 2010).

<sup>192</sup> *Id.* at 412.

<sup>193</sup> *Id.* at 412–13.

<sup>194</sup> *Id.*

<sup>195</sup> See Short, *supra* note 160, at 460.

The court categorized Yelp as an ‘interactive computer service,’ defined in the statute as ‘any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server.’ This category is different than an ‘information content provider,’ which the statute defines as ‘any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.’ Only the former, the ‘interactive computer service,’ is immune from liability under the FCDA for publishing false or defamatory reviews provided by third parties. By

FCDA are serious in that plaintiffs are typically barred from pursuing defamation and Lanham Act claims against internet service providers or review site hosts who are likely to have deeper pockets than the individual reviewers or authors who do not have the financial viability to sustain large money judgments.<sup>196</sup>

Other barriers to bringing suit against online reviewers are so-called “anti-SLAPP” (Strategic Lawsuits Against Public Participation) laws.<sup>197</sup> The Public Participation Project (the “PPP”) is an organization that is currently seeking to pass anti-SLAPP legislation in Congress, as it currently addressed at the state level.<sup>198</sup> The PPP characterizes SLAPPs as “damaging suits [that] chill free speech and healthy debate by targeting those who . . . speak out on issues of public interest.”<sup>199</sup> The PPP also states that SLAPPs are used to “silence and harass critics” by forcing them to litigate defamation claims in court, often taking years and thousands of dollars to defend.<sup>200</sup> But defendants are not without recourse. As of 2015, twenty-nine states, including the District of Columbia, have adopted anti-SLAPP laws which allow defendants to file a motion to dismiss, where claims arise from the exercise of free speech and are unlikely to succeed on the merits.<sup>201</sup> The statutes have been categorized to contain several key features which allow for expedited procedures and award legal fees to successful defendants.<sup>202</sup> Although adopted in more than half the states, anti-SLAPP laws still require defendants to go to court. Thus, they still occupy time and money, however, at a greater risk to plaintiffs. These laws will likely cause those seeking unfair competition and defamation claims to be very careful before bringing suit.<sup>203</sup>

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categorizing Yelp as an interactive computer service, the court granted Yelp-and thereby similar websites-immunity from suit for defamation contained in negative reviews.

*Id.*

<sup>196</sup> See Sean D. Lee, “*I Hate My Doctor*”: Reputation, Defamation, and Physician-Review Websites, 23 HEALTH MATRIX 573, 588 (2013).

<sup>197</sup> *Id.* at 591.

<sup>198</sup> See *Who We Are*, PUB. PARTICIPATION PROJECT, <https://anti-slapp.org/who-we-are/> (last visited Apr. 23, 2018).

<sup>199</sup> *What is a SLAPP*, PUB. PARTICIPATION PROJECT, <https://anti-slapp.org/what-is-a-slapp/> (last visited Apr. 23, 2018).

<sup>200</sup> *Id.*

<sup>201</sup> See Gerhards, *supra* note 190.

<sup>202</sup> See Lee, *supra* note 196, at 590–92.

<sup>203</sup> *Id.*

## V. RECOMMENDATION

Because Internet traffic will likely increase as more and more consumers turn to online portals to purchase goods and services, it is likely that review websites will continue to receive an increasing amount of traffic of consumers wishing to read reviews of products and services before they purchase. It is also likely that companies like Amazon, Samsung, and Apple will continue to build upon and integrate more interactive review forums on their websites, while utilizing the star rating system as its primary review indicator. As such, this Note does not proffer a “one size fits all solution” or a “silver bullet” to deceitful astroturfing practices. However, there are a few issues that, if addressed, could align the incentives or disincentives for those looking to compete unfairly in the marketplace by writing false reviews.

A. *Bolstering the FTC’s Base and Budget Allocations*

First, it has been proposed that the FTC needs to increase its enforcement against companies that engage in deceptive commerce practices.<sup>204</sup> The FTC is arguably the largest consumer protection organization in the United States, yet only brings a handful of unfair and deceptive acts claims in the context of fake online reviews each year.<sup>205</sup> In order to increase and effectuate the number of enforcement actions the agency brings each year, the FTC needs to respond to and investigate more complaints. This requires a proportional increase in funding and staffing of the FTC *and* the allocation of those funds and resources to the specific bureaus within the Commission that are responsible for regulating deceptive or unfair business practices, conducted on the Internet. According to the FTC’s 2017 Congressional Budget Justification (the “2017 CBJ”),<sup>206</sup> the Commission requested a program level of \$342,000,000 and 1,211 full-time equivalent (FTE) positions.<sup>207</sup> But this is merely a \$35,100,000 budget increase from the prior year—one that includes only a small addition of 20 new FTE

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<sup>204</sup> See Short, *supra* note 160, at 468–69.

<sup>205</sup> See *Fiscal Year 2016 Agency Financial Report*, F.T.C. (2016), [https://www.ftc.gov/system/files/documents/reports/agency-financial-report-fy2016/ftc\\_fy2016\\_afr.pdf](https://www.ftc.gov/system/files/documents/reports/agency-financial-report-fy2016/ftc_fy2016_afr.pdf).

The agency is headquartered in Washington, D.C. and operates with seven regions across the United States. The agency utilized 1,165 full-time equivalent employees during FY 2016. The FTC’s new budget authority in FY 2016 was comprised of \$307 million of enacted authority and \$4 million of reimbursable authority, for total new budget authority of \$311 million.

*Id.* at 7.

<sup>206</sup> See *Fiscal Year 2017 Congressional Budget Justification*, F.T.C. (Feb. 9, 2016), <https://www.ftc.gov/system/files/documents/reports/fy-2017-congressional-budget-justification/2017-cbj.pdf>. [hereinafter 2017 CBJ].

<sup>207</sup> *Id.* at 2.

positions.<sup>208</sup> This budget increase is meager for an agency that is responsible for protecting consumers and promoting competition within the entire United States landscape, and more specifically, a landscape that continues to increase its use of e-commerce.<sup>209</sup>

What's more troublesome is how the FTC allocates its budget. The FTC justifies its funding request by allocation funds towards the agency's strategic goals: (1) protecting consumers and (2) promoting competition.<sup>210</sup> The FTC advances its goals via five enforcement areas and five functional areas, whereby truth in advertising, endorsements, and social-media marketing, including consumer-generated content, are enforced by the Advertising Practices (the "AP") enforcement area.<sup>211</sup> In 2016, the FTC allocated \$12,438,000 and 71 FTEs to support the AP, an amount that remains essentially flat in the FTC's 2017 CBJ.<sup>212</sup> Moreover, the "goal leaders" responsible for driving and accomplishing the agency's objective to identify and addresses deceptive or unfair business practices only received a combined \$700,000 more than they did in the 2016 fiscal year.<sup>213</sup>

These budget allocations are simply not sustainable for the exponential growth in online consumer spending. The most recent report from the Census Bureau of the U.S. Department of Commerce showed that total e-commerce sales grew by 14.6% in 2015, totaling nearly \$342 billion, and was projected to increase by 15.1% in 2016 to nearly \$350 billion.<sup>214</sup> As total e-commerce sales as percent of total U.S. sales also continues to rise,<sup>215</sup> and nearly 70% of consumers rely on online reviews before making a purchase, it seems necessary that the FTC must increase its budgetary allocation to support its AP and Enforcement areas. More FTEs and financial support in these areas would allow the FTC to respond to and investigate more consumer complaints in the scope of online consumer reviews, and also give the Commission more flexibility in pursuing enforcement actions against those other than the most egregious violators—efforts that could likely decrease are deter deceptive astroturfing practices.<sup>216</sup>

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<sup>208</sup> *Id.*

<sup>209</sup> See Zaroban, *infra* note 214.

<sup>210</sup> See 2017 CBJ, *supra* note 206, at 2.

<sup>211</sup> *Id.* at 135–36.

<sup>212</sup> *Id.* at 131.

<sup>213</sup> *Id.* at 3, 56. The Bureau of Consumer Protections (the "BCP") and the Bureau of Economics (the "BE") are the so-called goal leaders for fulfilling its objective to protect consumers and prevent unfair or deceptive business practices.

<sup>214</sup> See *Quarterly Retail E-Commerce Sales 4th Quarter 2016*, U.S. DEP'T OF COM. (Feb. 16, 2018), [https://www.census.gov/retail/mrts/www/data/pdf/ec\\_current.pdf](https://www.census.gov/retail/mrts/www/data/pdf/ec_current.pdf); see also Stefany Zaroban, *U.S. e-commerce grows 14.6% in 2015*, DIGITAL COMMERCE 360 (Feb. 17, 2016), <https://www.digitalcommerce360.com/2016/02/17/us-e-commerce-grows-146-2015/>.

<sup>215</sup> See U.S. Dep't. of Commerce, *supra* note 214.

<sup>216</sup> See 2017 CBJ, *supra* note 206, at 61. In 2015, the FTC received nearly 7.1 million consumer complaints.

### B. *Increase Astroturfing Penalties*

Because of its limited resources, the Commission is only incentivized to go after the most egregious wrongdoers, and even if the FTC does so, it does not always follow through. This fact is supported by the agency's own recent conduct after it dropped its enforcement action against Hewlett-Packard Company for violating its Endorsement Guides with respect to deceptive blogging practices.<sup>217</sup> Notwithstanding that HP had provided gifts to bloggers in exchange for blog posts about HP's products and its Inkology campaign—where no disclosure was made to consumers—the FTC decided not to pursue with any enforcement action.<sup>218</sup> The FTC's Associate Director Engle stated that one of the considering factors for abandoning its enforcement action was the “relatively small number of bloggers” that posted content about HP Inkology.<sup>219</sup> Thus, an agency empowered to regulate businesses and enforce consumer protection laws should not abandon enforcement actions once commenced, if there has been at least some level of harm to the consumer or business.

Moreover, in many of the cases described earlier in this note, the monetary damages imposed by the FTC against wrongdoers are often minimal or decreased, pending ongoing compliance with injunctions imposed by the FTC.<sup>220</sup> This sends the wrong signal to wrongdoers as it undermines the authority that the FTC has been empowered with. Conversely, the FTC should impose stiffer fines and utilize a tiered penalty structure to impose civil penalties. Penalties should be tied to the number of visitors a business has to their website, or to the number of visitors the specific product or service had on its respective webpage. Simply put, the more exposure the product or service has, the greater the penalty for the wrongdoer.

### C. *Amending the FTC's Guides*

The current FTC guidance does not sufficiently address online consumer reviews, and it causes businesses, and more importantly, astroturfers, to entertain the idea of engaging in these deceptive practices, either for money or for market share. The FTC's Endorsement

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<sup>217</sup> See Letter from Mary K. Engle, Assoc. Dir., Div. of Advertising Practices, Fed. Trade Comm'n, to Hewlett Packard Counsel (Sept. 27, 2012) (on file with author).

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> See e.g., Press Release, *supra* note 144; see e.g., Muncy, *supra* note 144.

Guides<sup>221</sup> should be amended to include express terms with respect to consumer review practices. To start, amendments could be made in § 255.0 to the Purposes and Definitions section. Subsection “(f)” could be added and state:

For the purposes of this part, *astroturfing* and *opinion-spamming* occur when individuals or businesses attempt to create false or misleading statements or impressions of products or services on dedicated online consumer review websites, or on internet retailer websites that utilize a review system for its products or services.

Further, in § 255.1 General considerations, subsection “(e)” could state:

With respect to subsections (a)-(d), *astroturfing* and *opinion-spamming* will be subject to liability for making false, misleading, or unsubstantiated statements or impressions on dedicated online consumer review websites or on internet retailer websites that utilized a review system for its products or services, whether made by the *reviewer*, *blogger*, *endorser*, or *advertiser*.

Moreover, § 255.2 Consumer endorsements, could align the force and effect of subsections (a)-(c) with consumer review websites by stating in subsection “(d),” that:

A *consumer review* employing endorsements by one or more consumers about the performance of an advertised product or service, or the consumers’ experiences while using an advertised product or service, that utilizes false, misleading, or unsubstantiated statements or impressions is considered *astroturfing* or *opinion-spamming*, and is likely subject to liability for false advertising as previously described in this part.

These amendments would bring the fake online consumer review within the same light as false advertising—as enforced by the FTC—and would directly address *astroturfing*. This level of incorporation would also give businesses ample notice that fake online consumer reviews are subject to the FTC’s scrutiny and would further deter the posting of fake online reviews.

#### CONCLUSION

*Astroturfing* is not a practice that is going to subside on its own. The competitive demand in the economy is fierce, as companies both public and private seek to generate profits and gain market share. Under enforcement will only incentivize those seeking to disparage competitors and promote their own or other’s products and services.

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<sup>221</sup> See Endorsement Guides, *supra* note 88.



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However, expansive legislation will potentially infringe on First Amendment rights. The private sector, alternatively and through its own initiatives, equally has a stake in fighting these deceitful practices by incorporating existing technologies, such as Yelp's review filtering algorithm, into consumer review websites and business websites with review capabilities.

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\* Associate Editor, *Cardozo Arts & Ent. L.J.* Vol. 36, Benjamin N. Cardozo School of Law (2018); J.D. Candidate, 2018, Benjamin N. Cardozo School of Law; B.S., Business Management and Finance, Brooklyn College (2011). I would like to thank Gow Mosby, Jessica Rosen, Matthew LoBello, and the entire Vol. 35 and Vol. 36 Editorial Boards for their support and dedication to *AELJ*. Most importantly, I'd like to thank my wife, Jamie, and my parents, Patty and Bill, and Cathy and David, for their unwavering love and support, as well as their encouragement throughout this process. This would not have been possible without them.