

Fake It Until You Make It? Battling Fake Online Reviews



Law360, New York (June 09, 2014, 12:17 PM ET) -- Crowdsourced online business reviews and rating systems — such as reviews on Yelp, Google and Amazon — have become important tools that businesses use to differentiate themselves from their competitors. San Francisco restaurants, for example, are almost 50 percent more likely to sell out their evening reservations with just a half-star upgrade to their Yelp rating.[1] A one-star Yelp rating increase for a Seattle restaurant yields a 10 percent increase in revenue.[2] And the influence of online reviews continues to grow as crowdsourced reviews attract greater attention from increasingly tech-savvy consumers.

But now that the importance of online reviews has been recognized, some have tried to game the system by creating fake reviews. One research firm estimates that 10-15 percent of all Yelp reviews are fake.[3]

There are two main kinds of fake reviews — fake “positive” reviews and fake “negative” reviews. To get fake “positive” reviews, some businesses turn to professional online reviewers who write and post months of fake reviews for a fee of several thousand dollars.[4] The problem of fake “negative” reviews arises when anonymous reviewers submit unflattering reviews containing false information. This article focuses on what businesses can do to stop these fake negative reviews.

First, businesses can attempt to contact the poster on the website at issue and resolve the complaint informally. Reaching out to customers to correct a perceived slight can often turn a bad review into a good review, and a disgruntled customer into a loyal one. Reviewers will often update their reviews to reflect a business’ response to the bad reviews and adjust their rating accordingly. Public recognition of a business’ efforts to “make things right” with a customer will no doubt often be worth the cost.

Unfortunately, if someone maliciously posts a fake review, such informal attempts to resolve the issue will likely be unsuccessful. In such a case, a business owner’s sole means of redress may be to file a defamation suit. Because the anonymous poster’s identity is unknown, the business owner would have to file a lawsuit against an anonymous “Doe” defendant. After the complaint has been filed, the business

owner would then have the opportunity to serve a subpoena on the website on which the review was posted in order to obtain the poster's identifying information.

In a number of states — including California, New Jersey, Indiana, Maryland, New Hampshire and Pennsylvania — subpoenaing an anonymous user's identity is, however, difficult. These states protect anonymous reviewers' identities by requiring companies to prove a case against an anonymous reviewer on the merits before forcing the disclosure of the reviewer's identity. In California, for example, a subpoena seeking the disclosure of an anonymous defendant's identity will be quashed unless the plaintiff "make[s] a prima facie showing" for a case of defamation.[5] Such a showing requires companies to prove (1) the statement that was made, (2) that the statement is false, and (3) that the statement had a negative effect on the company.[6] The plaintiff must, therefore, have substantial evidence before bringing a lawsuit.

Companies should be especially wary of bringing suits in states that have enacted anti-SLAPP laws, like California. Anti-SLAPP motions enable defendants to dismiss certain causes of action — including defamation — early in a case and to recover attorneys' fees and costs from the plaintiff.[7] To succeed on an anti-SLAPP motion, a defendant must show that the statement in question (1) was made in a public forum, (2) concerned an issue of public interest, and (3) that the plaintiff is not likely to succeed on the merits of the claim.[8]

Online reviews, courts generally hold, are statements made in a public forum and do sometimes concern an issue of public interest.[9] But the last prong is particularly onerous to companies bringing suit because it requires them to provide proof that they are likely to succeed on their defamation claim. Leaping in with a lawsuit before carefully assessing a case and gathering the key facts may, therefore, lead a court to grant an anti-SLAPP motion and order the losing company to pay for its opponent's attorneys fees and costs.

But states like Virginia follow a different path. On Jan. 7, 2014, the Virginia Court of Appeals held that a business need not meet a heightened standard before being able to subpoena an anonymous commentator's identity.[10] In *Hadeed*, Hadeed Carpet Cleaning alleged it suffered numerous false reviews that harmed its business. After Hadeed compared the reviewers' facts and locations to its database of customers, it found no match and believed the reviews to be fake. Hadeed then brought suit against those reviewers for defamation. It subpoenaed Yelp for their identities. Yelp, however, did not comply. Yelp argued that Hadeed should first have to prove its case on the merits. The court held that, under a Virginia statute, a party seeking a subpoena need not prove its case on the merits before obtaining an anonymous reviewers' identity. It need only show that the speech "may be" tortious or that the party has a "legitimate, good faith basis" to believe the speech is tortious. Having found that Hadeed met this low burden, it ordered the reviewers' identities revealed.

On top of having this low burden for bringing a defamation lawsuit against an anonymous reviewer, it should also be noted that Virginia has not enacted anti-SLAPP legislation.

Even in states with business-friendly laws like Virginia's, another reason companies should look before

leaping into litigation is negative publicity. If a business sues an online reviewer, that reviewer's first inclination may be to pit public opinion against the business. That happened to Ron Gordon Watch Repair. The watch repair shop threatened a defamation suit against a Yelp reviewer. The reviewer posted the demand letter he received from the company's attorney on his Facebook page and — voilà — the post was picked up by an online gossip site, which posted a highly read (over 100,000 clicks) article lambasting the business.[11]

Luckily, efforts have been made to curb fake reviews. For example, New York's attorney general just announced the conclusion of a yearlong sting called "Operation Clean Turf." The sting busted 19 companies for writing fake Yelp reviews and fined them a total of \$350,000.[12] And Yelp, besides screening out fake reviews, has started bringing its own lawsuits against companies that post fake reviews.[13]

Regardless of these efforts, fake reviews will still make their way online. To avoid being victimized by these reviews, businesses should monitor their (and their competitors') Web footprints to verify that there are no dramatic fluctuations in online ratings or suspect reviews. Questionable reviews should immediately be reported to the attention of the responsible website. And as we mentioned before, businesses should attempt to informally resolve any negative comments with the reviewer before bringing a lawsuit. On the flip side, businesses should make sure that their employees are not posting false reviews about competing businesses, which can have serious consequences.

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[1] See Gregory Ferentstein, Berkeley Study: Half-Star Change in Yelp Rating Can Make or Break a Restaurant, TC (Sep. 2 2012), <http://techcrunch.com/2012/09/02/berkeley-study-half-star-change-in-yelp-rating-can-make-or-break-a-restaurant/>.

[2] See HARVARD MAGAZINE, HBS Study Finds Positive Yelp Reviews Boost Business (Oct. 5, 2011), <http://harvardmagazine.com/2011/10/hbs-study-finds-positive-yelp-reviews-lead-to-increased-business>.

[3] See Gerry Smith, Think Writing Fake Yelp Reviews is Easy? Think Again, HUFFINGTON POST (Nov. 25, 2013, 4:29 PM), http://www.huffingtonpost.com/2013/09/25/fake-yelp-reviews_n_3983564.html.

[4] Id.

[5] Krinsky v. Doe 6, 159 Cal. App. 4th 1154, 1171 (2008).

[6] See id. at 1172.

[7] See Wong v. Jing, 189 Cal. App. 4th 1354, 1359 (2010) (citing Cal. Code Civ. Pro. § 425.16).

[8] Id. at 1361-62.

[9] See Bently Reserve LP v. Papaliolios, 218 Cal. App. 4th 418, 425 (2013); Wong, 189 Cal. App. 4th at 1366-67.

[10] See Yelp, Inc. v. Hadeed Carpet Cleaning, Inc., 62 Va. App. 678 (2014).

[11] See Sam Biddle, Shitty Watch Repair Shop Threatens Lawsuit Over Two-Star Yelp Review, GAWKER (Mar. 20, 2014, 3:02 PM), <http://gawker.com/shitty-watch-repair-shop-threatens-lawsuit-over-two-sta-1548200656>.

[12] See Daniel Roberts, Yelp's Fake Review Problem, CNNMONEY (Sep. 26, 2013, 11:05 AM), <http://tech.fortune.cnn.com/2013/09/26/yelps-fake-review-problem/>.

[13] See Complaint, Yelp Inc., v. Catron, No. 13-2859 (N.D. Cal. Jun. 20, 2013); Complaint, Yelp Inc., v. McMillan Law Group Inc., No. CGC 13-533654 (Cal. App. Dep't Super. Ct. Aug. 20, 2013).