

U.S. Senate Committee on Commerce, Science, and Transportation
November 4, 2015 Hearing
“Zero Stars: How Gagging Honest Reviews Harms Consumers and the Economy”

Written Remarks of Professor Eric Goldman *

Members of the Committee:

I appreciate this opportunity to discuss the Consumer Review Freedom Act of 2015 and how Congress can help protect consumer reviews. I commend the committee, and the bill sponsors, for their leadership on this topic.

Consumer reviews are vitally important to our modern economy. Markets become stronger and more efficient when consumers share their marketplace experiences and guide other consumers toward the best vendors and away from poor ones.

Despite the social benefits generated by consumer reviews, some businesses try to distort their public reputation by contractually suppressing reviews from their customers. These efforts are categorically illegitimate. The Consumer Review Freedom Act will ensure every consumer has the opportunity to add their voice to the discourse so that other consumers can benefit from their experiences.

Because contractual restrictions on consumer reviews are such a terrible idea, it seems like existing law should already prohibit such practices. Although there is some precedent to support that conclusion, I’ll explore two reasons why we still need the Consumer Review Freedom Act.

First, it’s not clear if courts will enforce anti-review clauses.¹ Many judges will refuse to do so for unconscionability, public policy or other reasons. However, judges don’t like to override contracts, so anti-review contracts aren’t guaranteed to fail in court.

For example, in *Galland v. Johnston*,² a vacation rental contract required tenants to agree that they would not “use blogs or websites for complaints, anonymously or not.” We have no idea how many tenants self-censored due to this contract clause, but we know two tenants defied the ban and criticized the vacation rental online. The landlord sued the tenants in federal court. The court held that the reviews weren’t defamatory but the tenants nevertheless may have breached the rental contract. This ruling means the anti-review clause exposed the tenants to liability for sharing non-defamatory reviews.

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¹ Unfortunately, there is no widely accepted term to describe the types of contract clauses at issue here. I use the term “anti-review clauses,” but the terms “gag clauses” and “non-disparagement clauses” are also used. I don’t prefer the latter because businesses sometimes attempt to restrict all reviews, positive and negative.

² *Galland v. Johnston*, 2015 WL 1290775 (S.D.N.Y. Mar. 19, 2015), <http://law.justia.com/cases/federal/district-courts/new-york/nysdce/1:2014cv04411/428591/32/>.

The Consumer Review Freedom Act will eliminate any ambiguity over the enforceability of anti-review clauses. It will mean that vacation tenants—and all other customers—will enjoy legal certainty about their rights to speak up.

The second reason we need the Consumer Review Freedom Act is that businesses are always seeking ways to shape and manage their online reputations. As they offer the illusion of such control, anti-review clauses will keep proliferating unless they are banned.

The experiences of the healthcare industry illustrate how this might happen. In the late 2000s, a company called Medical Justice sold form contracts to doctors and other healthcare professionals that contained anti-review clauses.³ Medical Justice's sale pitch was elegant and tempting: by using its form contract, doctors and healthcare professionals would seemingly get a magic wand to scrub unwanted patient reviews from the Internet. Over the years, I estimate that over 1,000 healthcare professionals adopted Medical Justice's form contract and over 1 million Americans signed an anti-review contract.

The long-term marketplace damage attributable to Medical Justice's misguided campaign is incalculable. Although Medical Justice changed its position in 2011 and told its customers to stop using its forms, even today in 2015 it can be hard to find robust numbers of patient reviews for many healthcare providers.

Although the healthcare industry's adoption of anti-review contracts may be an extreme case, we're likely to see similar effects in other industries dominated by small businesses and professional service providers.

Why small businesses and professional service providers? In many cases, these proprietors' self-identities are closely linked to their professional reputations. Negative feedback about their business feels like it reflects on them as an individual. If a vacation tenant says she didn't like the rental's décor, the landlord might take that as criticism of her aesthetic tastes. Or if a patient says that she didn't like her doctor's bedside manner, the doctor may feel like her personality is being criticized. Small business owners and professional service providers will be attracted to anti-review clauses to prevent these public ego blows. Therefore, without the Consumer Review Freedom Act, I expect other industries will embrace anti-review clauses like the healthcare industry did—and we as consumers will be poorer for those efforts.

Consumer reviews are worth fighting for, and I'm thrilled to see Congress taking on that fight. I thank you for your work on the bill and for the opportunity to share my views.

³ The exact terms of the anti-review clause varied over the years. At some points, the contract banned reviews; other times, the contract assigned the IP rights to the patients' reviews.

ATTACHMENTS

- Eric Goldman, *How Congress Can Protect Online Consumer Reviews*, Forbes Tertium Quid, Nov. 2, 2015, <http://www.forbes.com/sites/ericgoldman/2015/11/02/how-congress-can-protect-online-consumer-reviews/>.
- Eric Goldman, *Court Might Enforce A Contract Ban On Consumer Reviews*, Forbes Tertium Quid, Mar. 27, 2015, <http://www.forbes.com/sites/ericgoldman/2015/03/27/court-might-enforce-a-contract-ban-on-consumer-reviews/>.
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- Eric Goldman, *The Regulation of Reputational Information* in THE NEXT DIGITAL DECADE: ESSAYS ON THE FUTURE OF THE INTERNET 193 (Berin Szoka & Adam Marcus eds.) (2010), <http://ssrn.com/abstract=1754628>.
- Eric Goldman, *Patients' Online Reviews of Physicians*, MEDICAL ETHICS (a journal published by Lahey Health), Fall 2013, at 6, <http://ssrn.com/abstract=2367092>.

How Congress Can Protect Online Consumer Reviews

Nov 2, 2015 @ 11:52 AM

For many Americans, the First Amendment is the alpha and omega of free speech protection. However, the First Amendment just sets a minimum level of free speech in our society. Legislatures, including Congress, may freely enact laws that go beyond the First Amendment to protect free speech. If done properly, those laws can help free speech more than the First Amendment.

The Consumer Review Freedom Act of 2015 ([S. 2044](#) and [H.R. 2110](#)) is an example of a law that would helpfully supplement the First Amendment's protection of free speech. The Act would prevent businesses from contractually restricting their customers from reviewing them online (what I call "anti-review clauses"). Although it may be hard to believe any business would ever ask its customers to do something so anti-consumer, it's likely that millions of Americans have agreed to such clauses. The Consumer Review Freedom Act would benefit them—and all of us.

About The Act

(Note: I'll critique and quote the Senate bill's language, but the House and Senate versions are pretty similar).

The Act defines "covered communications" to include written, verbal or photographic consumer reviews. The Act says that any form contracts that ban, impose fines for, or attempt to obtain the intellectual property rights to, covered communications are void. The Act also declares such contracts unlawful and authorizes the federal government and state attorneys' general to bring enforcement actions for imposing such contracts (the House bill designates the U.S. Department of Justice as the principal federal enforcement entity; the Senate bill, the Federal Trade Commission).

What's Good

Some of the best aspects of the Act:

- * **Broad Definition.** Consumers can critique businesses in lots of ways. The Act's multi-media definition of "covered communications" should be broad enough to cover all of those possibilities.
- * **Broad Prohibitions.** Businesses seeking to gag their consumers have tried many different contract tricks. The Act prohibits all of the known tricks (bans, fines and IP assignments), so it will not be easy for a business to skirt around this law.

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- * **Remedies.** The Act makes anti-review clauses both void and unlawful. Void means that no court will enforce them, and unlawful means that it's illegal for businesses to include an anti-review clause in its form, even if the business never plans to enforce it.

Possible Tweaks

While I support the Act in its current form, a few tweaks are worth considering:

- * **Restriction to Form Contracts.** The Act applies only when the anti-review clause is in a "form contract," defined as "a standardized contract used by a person and imposed on an individual without a meaningful opportunity for such individual to negotiate the standardized terms." This definition excludes individually negotiated non-disparagement clauses, which are sometimes found in settlement agreements. (A non-disparagement clause says that a person won't publicly say negative things—even if true—about someone else). Still, the statutory language leaves room for

debate over whether a contract qualifies as a “form contract.” Because I am skeptical that non-disparagement clauses are legitimate in any situation, I would favor extending the restrictions to all contracts, form or negotiated.

* Trade Secret Exception. The Act does not apply to “trade secret” protections, which makes sense because businesses should have the ability to protect their trade secrets. Unfortunately, businesses sometimes have ridiculously overexpansive views about what constitutes their trade secrets—including asserting that information disclosures to customers in ordinary buying-and-selling interactions constitute the business’ trade secrets. To preserve trade secret protection but curb abusive overreaching, the Act could specify that ordinary business-consumer interactions can’t qualify as trade secret disclosures.

* No Consumer Redress. The Act doesn’t give consumers any affirmative recourse if a business attempts to impose or enforce an anti-review clause. This could be fixed in two ways. First, if a business makes the unwise decision to bring a lawsuit based on an anti-review clause, the court should award attorneys’ fees and other defense costs to the consumer. Second, the statute should impose statutory damages on any businesses that includes anti-review clauses in their contracts.

* State Law Preemption. The Act doesn’t preempt state laws (the Act says “Nothing in this section shall be construed to affect any cause of action brought by a person that exists or may exist under State law”). This might be a good thing because it increases the range of legal tools to combat anti-review clauses. On the other hand, one of the principal benefits of federal law is that it can establish uniform rules across the country. Although I favor a multi-fronted effort to extinguish anti-review clauses, I probably favor legal uniformity a little more.

Aren’t Anti-Review Clauses Already Illegal?

Because anti-review clauses are such an obviously terrible idea, such clauses are already running into legal trouble. For example, a 2003 New York case [struck down an anti-review clause](#); the Department of Health and Human Service’s Office for Civil Rights has [told doctors they can’t use anti-review clauses](#); in 2014, California [enacted a law against businesses banning consumer reviews](#); and last month, the [Federal Trade Commission obtained a preliminary injunction prohibiting Roca Labs](#) from using anti-review clauses. With all of this precedent indicating that anti-review clauses aren’t permissible, do we need a federal law too?

Yes, we do. Anti-review clauses keep proliferating through different industries, so not every business has gotten the message. California’s law is a helpful start, but that still leaves 49 states without comparable statutes. Plus, at least [one case suggested that anti-review clauses may be enforceable](#). We need to put a decisive and unambiguous end to these anti-consumer, anti-competitive practices, and the Consumer Review Freedom Act would do just that.

A Final Thought

In addition to the Consumer Review Freedom Act, [Congress should enact a federal anti-SLAPP law](#)—another example of how Congress can extend the First Amendment’s free speech protections. Anti-SLAPP laws help protect consumers from businesses making spurious legal claims that negative consumer reviews are defamatory. Businesses often intimidate consumers into removing reviews by threatening costly legal action (even if the review is completely legitimate), so the procedural and financial protections in a federal anti-SLAPP law would curb such abusive threats. The combination of the Consumer Review Freedom Act and federal anti-SLAPP protection would provide a solid legal foundation for the continued growth and success of online consumer reviews.

Court Might Enforce A Contract Ban On Consumer Reviews

Mar 27, 2015 @ 11:04 AM

Claude and Violaine Galland own an apartment in Paris, France. They [offer it for rental through VRBO](#), an online service for vacation rentals. The Gallands' rental agreement include the following language: "The tenants agree not to use blogs or websites for complaints, anonymously or not." Though clumsily worded, this clause is similar to prior attempts to restrict consumer reviews, such as the provisions used by [doctors and dentists](#), [hotels](#), [apartment owners](#) and [other vacation rental services](#). As far as I know, no court has ever enforced any of these clauses purporting to suppress consumer reviews.

Two different renters, the Johnstons and Bowdens, rented the Gallands' apartment and subsequently posted critical reviews on VRBO. Mr. Galland allegedly offered \$300—unsuccessfully—to the Bowdens to remove their post. Instead, the Gallands sued the Johnstons and Bowdens for defamation, breach of contract and other claims.

The judge dismissed the defamation claims—but refused to dismiss the breach of contract claim because:

It is plausible that Defendants made the posts in violation of the contract. Moreover, it is plausible that such negative reviews could cause injuries to the Gallands' business. Nevertheless, these are questions for a trier of fact to decide...

Thus, the breach of contract claim will go to a trial to decide if the reviews violated the contract.

Surprisingly, the judge didn't discuss the illegality of the contract clause. In 2003, a New York court [instructed a software vendor to stop banning consumer reviews](#) in its contract (the exact restriction: "The customer will not publish reviews of this product without prior consent from Network Associates, Inc."). The court held that using such a clause may be a deceptive practice under New York's consumer protection law. I can't see any reason why the Gallands' clause wouldn't violate the same law. (The Gallands' case is being litigated in a New York federal court applying New York law). Irrespective of the New York law, the contract restriction should be void as a matter of public policy. I'm hoping the court will come to its senses and realize that no trial is needed because the clause should be condemned, not enforced.

It's remarkable that anyone had the confidence to litigate such a clause at all. We have seen relatively few courtroom battles over contractual bans on consumer reviews, and we aren't likely to see many such disputes in the future. The Gallands' contract provision clearly violates [California's new law against consumer review bans](#), and I believe a new federal bill will be introduced to make such bans nationwide. Eventually vendors will get the message and stop trying. Until they do, we need more tools to discourage such clauses in the future—and to discourage wasteful litigation intended to suppress renters' rights to express themselves.

For more on this topic, see my article, [The Regulation of Reputational Information](#).

Case citation: [Galland v. Johnston](#), 2015 WL 1290775 (SDNY March 19, 2015)

California Tells Businesses: Stop Trying To Ban Consumer Reviews

Sep 10, 2014 @ 12:46 PM

Increasingly, businesses are looking for ways to suppress or erase consumers' negative online reviews of them. In particular, we've recently seen a proliferation of contract clauses purporting to stop consumers from reviewing businesses online. Those overreaching contract clauses have never been a good idea, but yesterday, the idea got worse. Gov. Jerry Brown signed [AB 2365](#) into law, to be codified as California Civil Code Sec. 1670.8. The law is a first-in-the-nation statute to stop businesses from contractually gagging their consumers.

The [new law says](#) that a consumer contract "may not include a provision waiving the consumer's right to make any statement regarding the seller or lessor or its employees or agents, or concerning the goods or services." Any contract terms violating this provision are void. Simply including a prohibited clause in a contract, even if the business never enforces it, or threatening to enforce such a clause can lead to a penalty of up to \$2,500 (up to \$10,000 if the violation is willful). The penalties may be financially modest, but any California business foolish enough to take an anti-review contract to court will end up writing a check to their customers.

Instead of telling consumers they can't review the businesses, some businesses are imposing financial penalties on consumers for writing negative reviews. I [recently wrote about](#) a New York hotel's contract that fined customers \$500 if they, or their wedding guests, posted negative online reviews. Disputes over fines will rarely end up in court because the hotel simply deducted the fine from the customer's security deposit. Or other businesses, such as [KlearGear](#), have filed negative credit reports against consumers who didn't pay the fine. A consumer could challenge the security deposit deduction or negative credit report in court, but few will.

The statute tries to address the fining tactic by saying it's unlawful to "penalize a consumer for making any statement protected under this section." The statute doesn't define what statements are "protected under this section," so I'm not sure how courts will interpret the provision. The [legislative history](#) expressly references the KlearGear situation, so I anticipate the statute will cover fines against customers for writing negative online reviews.

We've also seen businesses use intellectual property claims to inhibit or discourage consumer reviews. The most notorious was the scheme by Medical Justice that helped doctors get their patients to assign the copyright in unwritten reviews. Unfortunately, the statute doesn't directly address this situation, and arguably these IP-based tactics don't constitute "waivers" prohibited by the statute. Perhaps courts will nevertheless interpret the statute to ban these abusive practices; otherwise, I fear we'll see more IP-based anti-review shenanigans following this law.

If you're responsible for your business' contract with consumers, today's a good day to review the contract and confirm that you don't have any language that might be interpreted as a restriction on your customers' ability to review your business. There are [so many better ways](#) to handle consumer reviews.

Fining Customers For Negative Online Reviews Isn't New...Or Smart

Aug 7, 2014 @ 10:47 AM

This week, we [learned](#) that a New York hotel, the Union Street Guest House, was fining guests \$500 for posting negative online reviews. The story received considerable media attention because the restriction violates our social norms and is almost certainly unlawful. Unfortunately, this is not the first time businesses have tried to control negative reviews online, a goal that some businesses apparently find irresistible. We shouldn't be surprised the next time we see businesses try to gag their customers, but it should make us mad...mad enough to demand new statutory punishments for businesses who disrespect their customers and the marketplace.

The Union Street Guest House Contract

Until recently, the Union Street Guest House included the following provision in its policies:

If you stay here to attend a wedding and leave us a negative review on any internet site you agree to a \$500. fine for each negative review.

If you have booked the Inn for a wedding or other type of event anywhere in the region and given us a deposit of any kind for guests to stay at USGH there will be a \$500 fine that will be deducted from your deposit for every negative review of USGH placed on any internet site by anyone in your party and/or attending your wedding or event (this is due to the fact that your guests may not understand what we offer and we expect you to explain that to them).

Allegedly, the guest house would refund the full deposit if the author removed the negative review.

We don't know how often the guest house actually fined its customers. [Slate reported](#) on one email exchange where the policy was invoked. I imagine other guests simply removed negative reviews in response to threats by the guest house.

The guest house's provision stands out for two reasons. First, it purports to hold the bride or groom accountable for posts made by their wedding guests. However, newlyweds can't really control what their guests feel or say. Second, the guest house could self-implement the remedy by deducting money from the customer's deposit, rather than bringing a lawsuit in court—which would almost certainly fail.

Past Attempts To Suppress Negative Consumer Reviews

The Business Insider article said the guest house's provision was "a novel way to keep negative reviews off Yelp and other sites," but that's wrong. Although we've seen a range of ways businesses have tried to suppress online reviews, we've also seen this story before. Here's a short survey of some prior efforts to gag customers:

Late 1990s. Software vendor Network Associates obligated its end users to "not publish reviews of this product without prior consent from Network Associates, Inc." In 2003, [a New York court enjoined Network Associates](#) from using that clause.

2007-2011. A small company, Medical Justice, provided doctors and dentists with form contracts designed to veto any

negative online reviews. The contracts initially banned online reviews outright. A division of the federal Department of Health & Human Services held that it was unethical for doctors to suppress patients' reviews. Medical Justice eventually changed its form so that patients assigned the copyright in their unwritten online reviews of the doctor or dentist. Armed with the purported copyright, doctors and dentists could threaten review websites with copyright infringement for continuing to publish any reviews the doctor/dentist wanted gone (presumably, only negative reviews). I believe that over 1 million Americans signed some variation of Medical Justice's form contract. In 2011, [Medical Justice "retired" its form](#) and advised doctors and dentists to stop using it. Meanwhile, there remains a pending lawsuit by a patient against a dentist who tried to invoke the form to demand the removal of a negative review. That lawsuit is [going poorly for the dentist](#). For more information on Medical Justice's anti-review efforts, see [DoctoredReviews.com](#).

2012. We [learned](#) that some vacation rental companies were pulling the same basic stunt as the Union Street Guest House. Some contracts contained a clause restricting online reviews, styled as a non-disclosure agreement. For example, one provision said the customer may not "discuss or disclose the occupancy of the subject property with any entity not bound by the terms of this agreement without the expressed written authorization of the homeowner and the property agent representing the homeowner." Furthermore, the rental company retained the customer's security deposit and could deduct fines from there. I'm not aware of any legal tests of these contracts.

2013. Online retailer KlearGear attempted to restrict negative consumer reviews by imposing a fine, but the customer says that KlearGear's contract didn't actually contain the restriction at the time of purchase. When the customer failed to pay the fine, KlearGear reported the non-payment to the credit agencies, damaging the customer's credit. The customer is suing KlearGear for its behavior, and [that lawsuit isn't going well for KlearGear](#).

In response to the KlearGear incident, a bill was introduced in California (AB2365) to ban surreptitious attempts to restrict customers' reviews. The bill [has some obvious deficiencies](#), including the fact that the bill's language might not restrict the guest house's provision. Still, I think the bill is a sign of things to come. It [hurts the marketplace](#) when businesses keep customers from sharing their experiences with other prospective customers, so we simply cannot tolerate such efforts. If businesses can't resist their impulses to hide their failings, the legislatures will have to step in.

INTERNET EXCEPTIONALISM ONLINE
GENERATIVITY CYBERLAW
BORDERLESS DISRUPTION INTERMEDIARIES
CENSORSHIP

DOMAIN NAMES SOCIAL NETWORKS OPENNESS
OPTIMISM PESSIMISM
NEUTRALITY
REPUTATION DEFAMATION

THE NEXT DIGITAL DECADE
ESSAYS ON THE FUTURE OF THE INTERNET

Edited by Berin Szoka & Adam Marcus

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CHAPTER 4

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The Regulation of Reputational Information

By Eric Goldman*

Introduction

This essay considers the role of reputational information in our marketplace. It explains how well-functioning marketplaces depend on the vibrant flow of accurate reputational information, and how misdirected regulation of reputational information could harm marketplace mechanisms. It then explores some challenges created by the existing regulation of reputational information and identifies some regulatory options for the future.

Reputational Information Defined

Typical definitions of “reputation” focus on third-party cognitive perceptions of a person.¹ For example, *Black’s Law Dictionary* defines reputation as the “esteem in which a person is held by others.”² Bryan Garner’s *A Dictionary of Modern Legal Usage* defines reputation as “what one is thought by others to be.”³ The Federal Rules of Evidence also reflect this perception-centric view of “reputation.”⁴

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¹ As one commentator explained:

Through one’s actions, one relates to others and makes impressions on them. These impressions, taken as a whole, constitute an individual’s reputation—that is, what other people think of you, to the extent that their thoughts arise from what they know about you, or think they know about you.

Elizabeth D. De Armond, *Frothy Chaos: Modern Data Warehousing and Old-Fashioned Defamation*, 41 VAL. U.L. REV. 1061, 1065 (2007).

² BLACK’S LAW DICTIONARY (8th ed. 2004).

³ BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE (1990).

⁴ *See, e.g.*, FED. R. EVID. 803(19), 803(21).

Although this definition is useful so far as it goes, I am more interested in how information affects prospective decision-making.⁵ Accordingly, I define “reputational information” as follows:

information about an actor’s past performance that helps predict the actor’s future ability to perform or to satisfy the decision-maker’s preferences.

This definition contemplates that actors create a pool of data (both subjective and objective) through their conduct. This pool of data—the reputational information—can provide insights into the actor’s likely future behavior.

Reputation Systems

“Reputation systems” aggregate and disseminate reputational information to consumers of that information. Reputation systems can be mediated or unmediated.

In unmediated reputation systems, the producers and consumers of reputational information communicate directly. Examples of unmediated reputation systems include word of mouth, letters of recommendation and job references.

In mediated reputation systems, a third-party publisher gathers, organizes and publishes reputational information. Examples of mediated reputation systems include the Better Business Bureau’s ratings, credit reports/scores, investment ratings (such as Morningstar mutual fund ratings and Moody bond ratings), and consumer review sites.

The Internet has led to a proliferation of mediated reputation systems, and in particular consumer review sites.⁶ Consumers can review just about anything online; examples include:

- eBay’s feedback forum,⁷ which allows eBay’s buyers and sellers to rate each other.
- Amazon’s product reviews, which allows consumers to rate and review millions of marketplace products.
- Yelp.com, which allows consumers to review local businesses.

⁵ Luis M.B. Cabral, *The Economics of Trust and Reputation: A Primer* (June 2005 draft), http://pages.stern.nyu.edu/~lcabral/reputation/Reputation_June05.pdf (treating information about reputation as inputs into Bayesian calculations).

⁶ Indeed, this has spurred the formation of an industry association, the Rating and Review Professional Association. <http://www.rarpa.org>.

⁷ <http://pages.ebay.com/services/forum/feedback.html>.

- TripAdvisor.com, which allows consumers to review hotels and other travel attractions.
- RealSelf.com, which allows consumers to review cosmetic surgery procedures.
- Avvo.com, which allows consumers to rate and review attorneys.
- Glassdoor.com, which allows employees to share salary information and critique the working conditions at their employers.
- Honestly.com,⁸ which allows co-workers to review each other.
- RateMyProfessors.com, which allows students to publicly rate and review their professors.
- DontDateHimGirl.com, which allows people to create and “find profiles of men who are alleged cheaters.”⁹
- TheEroticReview.com, which allows johns to rank prostitutes.¹⁰

Why Reputational Information Matters

In theory, the marketplace works through an “invisible hand”: consumers and producers make individual and autonomous decisions that, without any centralized coordination, collectively determine the price and quantity of goods and services. When it works properly, the invisible hand maximizes social welfare by allocating goods and services to those consumers who value them the most.

A properly functioning invisible hand also should reward good producers and punish poor ones. Consumers allocating their scarce dollars in a competitive market will transact with producers who provide the best cost or quality options. Over time, uncompetitive producers should be drummed out of the industry by the aggregate but uncoordinated choices of rational and informed consumers.

However, given the transaction costs inherent in the real world, the invisible hand can be subject to distortions. In particular, to the extent information

⁸ Honestly.com was previously called Unvarnished. See Evelyn Rusli, *Unvarnished: A Clean, Well-Lighted Place For Defamation*, TECHCRUNCH, Mar. 30, 2010, <http://techcrunch.com/2010/03/30/unvarnished-a-clean-well-lighted-place-for-defamation/>.

⁹ PlayerBlock is a similar service, tracking undesirable dating prospects by their cellphone number. See Leslie Katz, *Is Your Date a Player? Send a Text and Find Out*, CNET News.com, Oct. 22, 2007, http://news.cnet.com/8301-10784_3-9802025-7.html.

¹⁰ See Matt Richtel, *Sex Trade Monitors a Key Figure's Woes*, N.Y. TIMES, June 17, 2008. PunterNet is another website in this category, providing reviews of British sex workers. John Omizek, *PunterNet Thanks Harriet for Massive Upswing*, THE REGISTER, Oct. 5, 2009, http://www.theregister.co.uk/2009/10/05/punternet_harman/.

about producers is costly to obtain or use, consumers may lack crucial information to make accurate decisions. To that extent, consumers may not be able to easily compare producers or their price/quality offerings, in which case good producers may not be rewarded and bad producers may not be punished.

When information is costly, reputational information can improve the operation of the invisible hand by helping consumers make better decisions about vendors. In this sense, reputational information acts like an invisible hand guiding the invisible hand (an effect I call the “secondary invisible hand”), because reputational information can guide consumers to make marketplace choices that, in aggregate, effectuate the invisible hand. Thus, in an information economy with transaction costs, reputational information can play an essential role in rewarding good producers and punishing poor ones.

Given this crucial role in marketplace mechanisms, any distortions in reputational information may effectively distort the marketplace itself. In effect, it may cause the secondary invisible hand to push the invisible hand in the wrong direction, allowing bad producers to escape punishment and failing to reward good producers. To avoid this unwanted consequence, any regulation of reputational information needs to be carefully considered to ensure it is improving, not harming, marketplace mechanisms.

Note that the secondary invisible hand is, itself, subject to transaction costs. It is costly for consumers to find and assess the credibility of reputational information. Therefore, reputation systems themselves typically seek to establish their own reputation. I describe the reputation of reputation systems as a “tertiary” invisible hand—it is the invisible hand that guides reputational information (the secondary invisible hand) to guide the invisible hand of individual uncoordinated decisions by marketplace actors (the primary invisible hand). Thus, the tertiary invisible hand allows the reputation system to earn consumer trust as a credible source (such as the Wall Street Journal, the New York Times or Consumer Reports) or to be drummed out of the market for lack of credibility (such as the now-defunct anonymous gossip website JuicyCampus).¹¹

Thinking About Reputation Regulation

This part explores some ways that the regulatory system interacts with reputation systems and some issues caused by those interactions.

¹¹ Matt Ivester, *A Juicy Shutdown*, JUICYCAMPUS BLOG, Feb. 4, 2009, <http://juicycampus.blogspot.com/2009/02/juicy-shutdown.html>.

Regulatory Heterogeneity

Regulators have taken divergent approaches to reputation systems. For example, consider the three different regulatory schemes governing job references, credit reporting databases and consumer review websites:

- Job references are subject to a mix of statutory (primarily state law) and common law tort regulation.
- Credit reporting databases are statutorily micromanaged through the voluminous and detailed Fair Credit Reporting Act.¹²
- Consumer review websites are virtually unregulated, and many potential regulations of consumer review websites (such as defamation) are statutorily preempted.

These different regulatory structures raise some related questions. Are there meaningful distinctions between reputation systems that support heterogeneous regulation? Are there “best practices” we can observe from these heterogeneous regulatory approaches that can be used to improve other regulatory systems? These questions are important because regulatory schemes can significantly affect the efficacy of reputation systems. As an example, consider the differences between the job reference and online consumer review markets.

A former employer giving a job reference can face significant liability whether the reference is positive or negative.¹³ Giving unfavorable references of former employees can lead to defamation or related claims;¹⁴ and there may be liability for a former employer giving an incomplete positive reference.¹⁵

Employers may be statutorily required to provide certain objective information about former employees.¹⁶ Otherwise, given the potentially no-win liability regime for communicating job references, most knowledgeable employers

¹² 15 U.S.C. §§ 1681-81x.

¹³ See Tresa Baldas, *A Rash of Problems over Job References*, NAT'L L.J., Mar. 10, 2008 (“Employers are finding that they are being sued no matter what course they take; whether they give a bad reference, a good reference or stay entirely silent.”).

¹⁴ 1-2 EMPLOYMENT SCREENING § 2.05 (Matthew Bender & Co. 2008) (hereinafter “EMPLOYMENT SCREENING”).

¹⁵ *Randi W. v. Muroc Joint Unified Sch. Dist.*, 14 Cal. 4th 1066 (1997).

¹⁶ These laws are called “service letter statutes.” See EMPLOYMENT SCREENING, *supra* note 14. Germany has a mandatory reference law requiring employers to furnish job references, but in response German employers have developed an elaborate system for coding the references. Matthew W. Finkin & Kenneth G. Dau-Schmidt, *Solving the Employee Reference Problem*, 57 AM. J. COMP. L. 387 (2009).

refuse to provide any subjective recommendations of former employees, positive or negative.¹⁷

To curb employers' tendency towards silence, many states enacted statutory immunities to protect employers from lawsuits over job references.¹⁸ However, the immunities have not changed employer reticence, which has led to a virtual collapse of the job reference market.¹⁹ As a result, due to mis-calibrated regulation, the job reference market fails to provide reliable reputational information.

In contrast, the online consumer review system is one of the most robust reputation systems ever. Millions of consumers freely share their subjective opinions about marketplace goods and services, and consumer review websites keep proliferating.

There are several possible reasons why consumer review websites might succeed where offline reputation systems might fail. My hypothesis, discussed in a companion essay in this collection, is that the difference is partially explained by 47 U.S.C. § 230, passed in 1996—at the height of Internet exceptionalism—to protect online publishers from liability for third party content. Section 230 lets websites collect and organize individual consumer reviews without worrying about crippling legal liability for those reviews. As a result, consumer review websites can motivate consumers to share their opinions and then publish those opinions widely—as determined by marketplace mechanisms (*i.e.*, the tertiary invisible hand), not concerns about legal liability.

The success of consumer review websites is especially noteworthy given that individual reviewers face the same legal risks that former employers face when providing job references, such as the risk of personal liability for publishing negative reputational information. Indeed, numerous individuals have been sued for posting negative online reviews.²⁰ As a result, rational actors should find it imprudent to submit negative reviews; yet, millions of such reviews are published online. A number of theories might explain this discrepancy, but one theory is especially intriguing: Mediating websites, privileged by their own liability immunity, find innovative ways to get consumers over their fears of legal liability.

¹⁷ See Baldas, *supra* note 13.

¹⁸ The immunizations protect employer statements made in good faith. EMPLOYMENT SCREENING, *supra* note 14.

¹⁹ See Finkin & Dau-Schmidt, *supra* note 16.

²⁰ See, e.g., Wendy Davis, *Yelp Reviews Spawn At Least Five Lawsuits*, MEDIAPOST ONLINE MEDIA DAILY, Jan. 21, 2009, http://www.mediapost.com/publications/?fa=Articles.printFriendly&art_aid=98778; Agard v. Hill, 2010 U.S. Dist. LEXIS 35014 (E.D. Cal. 2010).

What lessons can we draw from this comparison? One possible lesson is that reputation systems are too important to be left to the market. In other words, the tertiary invisible hand may not ensure accurate and useful information, or the costs of inaccurate information (such as denying a job to a qualified candidate) may be too excessive. If so, extensive regulatory intervention of reputation systems may improve the marketplace.

An alternative conclusion—and a more convincing one to me—is that the tertiary invisible hand, aided by a powerful statutory immunity like Section 230, works better than regulatory intervention. If so, we may get better results by deregulating reputation systems.

System Configurations

Given the regulatory heterogeneity, I wonder if there is an “ideal” regulatory configuration for reputation systems, especially given the tertiary invisible hand and its salutary effect on publisher behavior. Two brief examples illustrate the choices available to regulators, including the option of letting the marketplace operate unimpeded:

Anti-Gaming. A vendor may have financial incentives to distort the flow of reputational information about it. This reputational gaming can take many forms, including disseminating false positive reports about the vendor,²¹ disseminating false negative reports about the vendor’s competitors, or manipulating an intermediary’s sorting or weighting algorithm to get more credit for positive reports or reduce credit for negative reports. Another sort of gaming can occur when users intentionally flood a reputation system with inaccurate negative reports as a form of protest.²²

Do regulators need to curb this gaming behavior, or will other forces be adequate? There are several marketplace pressures that curb gaming, including competitors policing each other,²³ just as they do in false advertising cases.²⁴ In

²¹ Lifestyle Lift Holding, Inc. v. RealSelf Inc., 2:08-cv-10089-PJD-RSW (answer/counterclaims filed March 3, 2008), <http://www.realself.com/files/Answer.pdf> (alleging that Lifestyle Lift posted fake positive reviews about its own business to an online review website).

²² For example, consumers protesting the digital rights management (DRM) in EA’s Spore game flooded Amazon’s review site with one-star reviews, even though many of them actually enjoyed the game. See Austin Modine, *Amazon Flash Mob Mauls Spore DRM*, THE REGISTER, Sept. 10, 2008, http://www.theregister.co.uk/2008/09/10/spore_drm_amazon_effect/. A similar protest hit Intuit’s TurboTax 2008 over its increased prices. See Steven Musil, *Amazon Reviewers Slam TurboTax Fee Changes*, CNET NEWS.COM, Dec. 7, 2008, http://news.cnet.com/8301-1001_3-10117323-92.html.

²³ See *Cornelius v. DeLuca*, 2010 WL 1709928 (D. Idaho Apr. 26, 2010) (a marketplace vendor sued over alleged shill online reviews posted by competitors).

addition, the tertiary invisible hand may encourage reputation systems to provide adequate “policing” against gaming. However, when the tertiary invisible hand is weak, such as with fake blog posts where search engines are the only mediators,²⁵ government intervention might be worth considering.

Right of Reply. A vendor may wish to publicly respond to reputational information published about it in an immediately adjacent fashion. Many consumer review websites allow vendors to comment or otherwise reply to user-supplied reviews, but not all do. For example, Yelp initially drew significant criticism from business owners who could not effectively reply to negative Yelp reviews because of Yelp’s architecture,²⁶ but Yelp eventually relented and voluntarily changed its policy.²⁷ As another example, Google permitted quoted sources to reply to news articles appearing in Google News as a way to “correct the record.”²⁸

Regulators could require consumer review websites and other reputation systems to permit an adjacent response from the vendor.²⁹ But such intervention may not be necessary; the tertiary invisible hand can prompt reputation systems to voluntarily provide a reply option (as Yelp and Google did) when they think the additional information helps consumers.

Undersupply of Reputational Information

There are three primary categories of reasons why reputational information may be undersupplied.

²⁴ See, e.g., Lillian R. BeVier, *A Puzzle in the Law of Deception*, 78 VA. L. REV. 1 (1992).

²⁵ See Press Release, New York Office of the Attorney General, Attorney General Cuomo Secures Settlement With Plastic Surgery Franchise That Flooded Internet With False Positive Reviews, July 14, 2009, http://www.ag.ny.gov/media_center/2009/july/july14b_09.html.

²⁶ See Claire Cain Miller, *The Review Site Yelp Draws Some Outcries of Its Own*, N.Y. TIMES, Mar. 3, 2009.

²⁷ See Claire Cain Miller, *Yelp Will Let Businesses Respond to Web Reviews*, N.Y. TIMES, Apr. 10, 2009.

²⁸ See Dan Meredith & Andy Golding, *Perspectives About the News from People in the News*, GOOGLE NEWS BLOG, Aug. 7, 2007, <http://googlenewsblog.blogspot.com/2007/08/perspectives-about-news-from-people-in.html>.

²⁹ See Frank A. Pasquale, *Rankings, Reductionism, and Responsibility*, 54 CLEV. ST. L. REV. 115 (2006); Frank A. Pasquale, *Asterisk Revisited: Debating a Right of Reply on Search Results*, 3 J. BUS. & TECH. L. 61 (2008).

Inadequate Production Incentives

Much reputational information starts out as non-public (*i.e.*, “private”) information in the form of a customer’s subjective mental impressions about his/her interactions with the vendor. To the extent this information remains non-public, it does not help other consumers make marketplace decisions. These collective mental impressions represent a vital but potentially underutilized social resource.

The fact that non-public information remains locked in consumers’ heads could represent a marketplace failure. If the social benefit from public reputational information exceeds the private benefit from making it public, then presumptively there will be an undersupply of public reputational information. If so, the government may need to correct this failure by encouraging the disclosure of reputational information—such as by creating a tort immunity for sites that host that disclosure, as Section 230 does, or perhaps by going further. But there already may be market solutions to this problem, as evidenced by the proliferation of online review websites eliciting lots of formerly non-public reputational information.

Further, relatively small amounts of publicly disclosed reputational information might be enough to properly steer the invisible hand. For example, the first consumer review of a product in a reputation system creates a lot of value for subsequent consumers, but the 1,000th consumer review of the same product may add very little incrementally. So even if most consumer impressions remain non-public, perhaps mass-market products and vendors still have enough information produced to keep them honest. At the same time, vendors and products in the “long tail”³⁰ may have inadequate non-public impressions put into the public discourse, creating a valuable opportunity for comprehensive reputation systems to fix the omission. However, reputation systems will tackle these obscure marketplace options only when they can keep their costs low (given that consumer interest and traffic will, by definition, be low), and reputation system deregulation helps reduce both the costs of litigation as well as responding to takedown demands.

³⁰ Chris Anderson, *The Long Tail*, WIRED, Oct. 2004, <http://www.wired.com/wired/archive/12.10/tail.html>.

Vendor Suppression of Reputational Information

Vendors are not shy about trying to suppress unwanted consumer reviews *ex post*,³¹ but vendors might try to suppress such reviews *ex ante*. For example, one café owner grew so tired of negative Yelp reviews that he put a “No Yelpers” sign in his café’s windows.³²

That sign probably had no legal effect, but Medical Justice offers an *ex ante* system to help doctors use preemptive contracts to suppress reviews by their patients. Medical Justice provides doctors with a form agreement that has patients waive their rights to post online reviews of the doctor.³³ Further, to bypass 47 U.S.C. § 230’s protective immunity for online reputation systems that might republish such patient reviews, the Medical Justice form prospectively takes copyright ownership of any patient-authored reviews.³⁴ (Section 230 does not immunize against copyright infringement). This approach effectively allows doctors—or Medical Justice as their designee—to get reputation systems to remove any unwanted patient reviews simply by sending a DMCA takedown notice.³⁵

Ex ante customer gag orders may be illegal. In the early 2000s, the New York Attorney General challenged software manufacturer Network Associates’ end user license agreement, which said the “customer will not publish reviews of this product without prior consent from Network Associates, Inc.” In response, the New York Supreme Court enjoined Network Associates from restricting user reviews in its end user license agreement.³⁶ Medical Justice’s scheme may be equally legally problematic.

From a policy standpoint, *ex ante* customer gag orders pose serious threats to the invisible hand. If they work as intended, they starve reputation systems of the public information necessary to facilitate the marketplace. Therefore,

³¹ See Eric Goldman, *Online Word of Mouth and Its Implications for Trademark Law*, in TRADEMARK LAW AND THEORY: A HANDBOOK OF CONTEMPORARY RESEARCH 404 (Graeme B. Dinwoodie and Mark D. Janis eds.) (2008) (discussing lopsided databases where all negative reviews are removed, leaving only positive reviews).

³² Stefanie Olsen, *No Dogs, Yelpers Allowed*, CNET NEWS.COM, Aug. 14, 2007, http://news.cnet.com/8301-10784_3-9759933-7.html.

³³ Lindsey Tanner, *Doctors Seek Gag Orders to Stop Patients’ Online Reviews*, ASSOCIATED PRESS, Mar. 3, 2009, http://www.usatoday.com/news/health/2009-03-05-doctor-reviews_N.htm.

³⁴ Michael E. Carbine, *Physicians Use Copyright Infringement Threat to Block Patient Ratings on the Web*, AIS’S HEALTH BUSINESS DAILY, Mar. 30, 2009, <http://www.aishealth.com/Bnow/hbd033009.html>.

³⁵ 17 U.S.C. § 512(c)(3).

³⁶ *People v. Network Associates, Inc.*, 758 N.Y.S.2d 466 (N.Y. Sup. Ct. 2003).

regulatory efforts might be required to prevent ex ante customer gag orders from wreaking havoc on marketplace mechanisms.

Distorted Decision-Making from Reputational Information

Reputational information generally improves decision-making, but not always. Most obviously, reputational information relies on the accuracy of past information in predicting future behavior, but this predictive power is not perfect.

First, marketplace actors are constantly changing and evolving, so past behavior may not predict future performance. For example, a person with historically bad credit may obtain a well-paying job that puts him or her on good financial footing. Or, in the corporate world, a business may be sold to a new owner with different management practices. In these situations, the predictive accuracy of past information is reduced.³⁷

Second, some past behavior may be so distracting that information consumers might overlook other information that has more accurate predictive power. For example, a past crime or bankruptcy can overwhelm the predictive information in an otherwise-unblemished track record of good performance.

Ultimately, a consumer of information must make smart choices about what information to consult and how much predictive weight to assign to that information. Perhaps regulation can improve the marketplace's operation by shaping the information that consumers consider. For example, if some information is so highly prejudicial that it is likely to distort consumer decision-making, the marketplace might work better if we suppress that information from the decision-maker.³⁸

At the same time, taking useful information out of the marketplace could create its own adverse distortions of the invisible hand. Therefore, we should tread cautiously in suppressing certain categories of information.

³⁷ Cf. Note, *Badwill*, 116 HARV. L. REV. 1845 (2003) (describing how companies can mask a track record of bad performance through corporate renaming).

³⁸ Cf. FED. R. EVID. 403 (“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury...”). This fear underlies a French proposal to enact a “right to forget” statute. See David Reid, *France Ponders Right-to-Forget Law*, BBC CLICK, Jan. 8, 2010, http://news.bbc.co.uk/2/hi/programmes/click_online/8447742.stm.

Conclusion

Although “reputation” has been extensively studied in a variety of social science disciplines, there has been comparatively little attention paid to how regulation affects the flow of reputational information in our economy. Understanding these dynamics would be especially valuable in light of the proliferation of Internet-mediated reputation systems and the irresistible temptation to regulate novel and innovative reputation systems based on emotion, not necessarily sound policy considerations.

Patients' Online Reviews of Physicians

By Eric Goldman*

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Online patient reviews are becoming a major force in the healthcare industry, but some healthcare providers lament this development. In fact, an opportunistic vendor, Medical Justice, preyed on healthcare provider fears and sold healthcare providers a form contract that asked patients to waive their rights to post reviews. Medical Justice eventually recognized the errors of that approach and did a complete reversal; it is now selling healthcare providers a service, eMerit, that monitors search engines and doctor rating sites.

Medical Justice's contracts prohibiting online reviews have not been definitively tested in court, but attempts to restrict patient reviews are problematic. Anti-review contracts prevent consumers from expressing their views, and they deprive other consumers of information that can help them make better marketplace choices. The provisions also create serious legal risks for the businesses imposing them, as illustrated by the following three incidents:

- In the late 1990s, software company Network Associates restricted buyers from publishing reviews of its software. In 2003, a New York court enjoined Network Associates from continuing to use that restriction.¹
- The U.S. Department of Health and Human Service's Office of Civil Rights required a doctor to stop using Medical Justice's anti-review form.² The agreement prohibited the patient from "directly or indirectly publishing or airing commentary about the physician, his expertise, and/or treatment in exchange for the physician's compliance with the Privacy Rule."
- New York dentist Stacey Makhnevich and her practice Aster Dental required that patients sign a Medical Justice-based confidentiality agreement as a precondition to treatment. This version of the agreement tried to silence patients by assigning to the dentists a copyright over any comments related to their treatment. The patient, Robert Lee, had a dental emergency and signed the agreement to get treatment. He later sued to invalidate the agreement. The court's initial opinion signaled serious skepticism about the legitimacy of the dentist's conduct.³

Even more important than the legal risks, asking patients to restrict their rights to review a healthcare provider sends a terrible message to patients and sets the stage for distrust.

While contractually restricting patients' reviews is not the right answer, some healthcare providers are frustrated by their perceived inability to publicly defend themselves from negative

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¹ New York v. Network Associates, Inc., 758 N.Y.S.2d 466 (N.Y. Sup. Ct. 2003).

² *Health Information Privacy: Private Practice Ceases Conditioning of Compliance with the Privacy Rule*, US Dept of Health & Human Services, Office of Civil Rights, Health Information Privacy: Private Practice Ceases Conditioning of Compliance with the Privacy Rule, <http://www.hhs.gov/ocr/privacy/hipaa/enforcement/examples/allcases.html#case29>.

³ Lee v. Makhnevich, 2013 WL 1234829 (S.D.N.Y. March 27, 2013).

patient reviews. Providers have ethical and legal obligations to maintain patient confidentiality, with severe penalties for noncompliance. These restrictions seemingly impose a gag order on doctors to rebut patient misstatements.

If a patient's review misstates facts, healthcare providers actually have several options:

- A patient may consent to discussing the matter publicly. Angie's List prospectively requires this consent from patients who review doctors.⁴
- Most patients' criticisms of their healthcare provider don't relate to individualized medical advice. As one recent study found, "Unhappy patients who post negative online reviews of their doctors complain about poor customer service and bedside manner four times more often than misdiagnoses and inadequate medical skills."⁵ If a healthcare provider feels the need to publicly respond, he or she can rebut most of these issues without discussing confidential patient information.
- If patients discuss their specific medical situations, the healthcare provider may discuss its general philosophies and standard protocols without disclosing confidential patient information.

Doctors also can bring lawsuits to redress negative patient reviews, but litigation isn't a great option. There is no point in suing online review websites for patient reviews. Review websites are categorically protected from liability for third-party content except in cases involving intellectual property (see 47 U.S.C. §230). No doctor has ever successfully won in court against an online review website for publishing patient reviews.

Suing patients is only marginally more attractive than suing review websites, even if a patient has lied. Inevitably the patient will respond with a malpractice claim or a complaint against a provider's license; a lawsuit calls more attention to the patient's assertions; doctors suing patients often look like they have something to hide; and, perhaps most importantly, doctors are not likely to win in court.

Over the past decade, I've identified about two dozen doctor vs. patient lawsuits over online reviews. Doctors have rarely won against their patients in court and, even worse, some doctors have been ordered to pay their patients' attorneys' fees.⁶

The legal analysis is more complicated if it can be proven that a competitor or vindictive party is posting fake reviews. Those lawsuits are more winnable than lawsuits against patients, but often the time and costs required to win simply aren't worth it.

⁴ Angie's List Membership Agreement, April 25, 2012, § 13, <http://my.angieslist.com/angieslist/aluseragreement.aspx> ("You also acknowledge that the healthcare or wellness provider about whom you submit Content may submit Service Provider Content that contain your private or confidential health information in response to Content you submit").

⁵ Press Release: *Online Doctor Reviews: Four Times More Patients Peeved About Service & Bedside Manner Than Medical Skills*, April 30, 2013, <http://www.reuters.com/article/2013/04/30/idUSnGNX736vBG+1c3+GNW20130430>.

⁶ See the complete chart at <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1289&context=historical>.

Online patient reviews remain a work-in-progress; more work needs to be done, especially on the part of review websites, to improve the credibility of patient reviews. Still, online patient reviews are good news to the healthcare industry, not bad news. Patient reviews will improve the industry's service levels, providing valuable customer feedback to healthcare providers and help them improve their service. Good healthcare providers will be recognized for the quality services they provide.