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Jamie Cooperman

Golden Gate University School of Law

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California Supreme Court May Allow The Censoring Of Consumers' Online Reviews

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<https://blog.hubspot.com/blog/tabid/6307/bid/33741/12-places-businesses-should-be-collecting-online-reviews.aspx#sm.0000z0ivn86licrou3x1pbcyvqsuj> such as [Yelp](http://yelp.com/) (<http://yelp.com/>), [TripAdvisor](https://www.tripadvisor.com/) (<https://www.tripadvisor.com/>), [Amazon](https://www.amazon.com/gp/help/customer/display.html?nodeId=200791000) (<https://www.amazon.com/gp/help/customer/display.html?nodeId=200791000>), [Facebook](http://www.adweek.com/socialtimes/facebook-makes-recommendation-stories-in-the-feed-more-visual/289161) (<http://www.adweek.com/socialtimes/facebook-makes-recommendation-stories-in-the-feed-more-visual/289161>), and [Twitter](https://twitter.com/) (<https://twitter.com/>), provide consumers with the opportunity to voice their opinions by detailing their experiences as patrons of various restaurants and other local businesses. The [reviews](https://www.entrepreneur.com/article/236891) (<https://www.entrepreneur.com/article/236891>) of prior consumers can weigh heavily when potential consumers decide whether they want to support a particular business or not.

The use of social media to leave reviews creates a medium in which “word of mouth” can reach many more individuals who are in search of a specific product or service that can meet their needs. The accessibility of these forums reaching vast numbers of consumers lead to both positive and negative

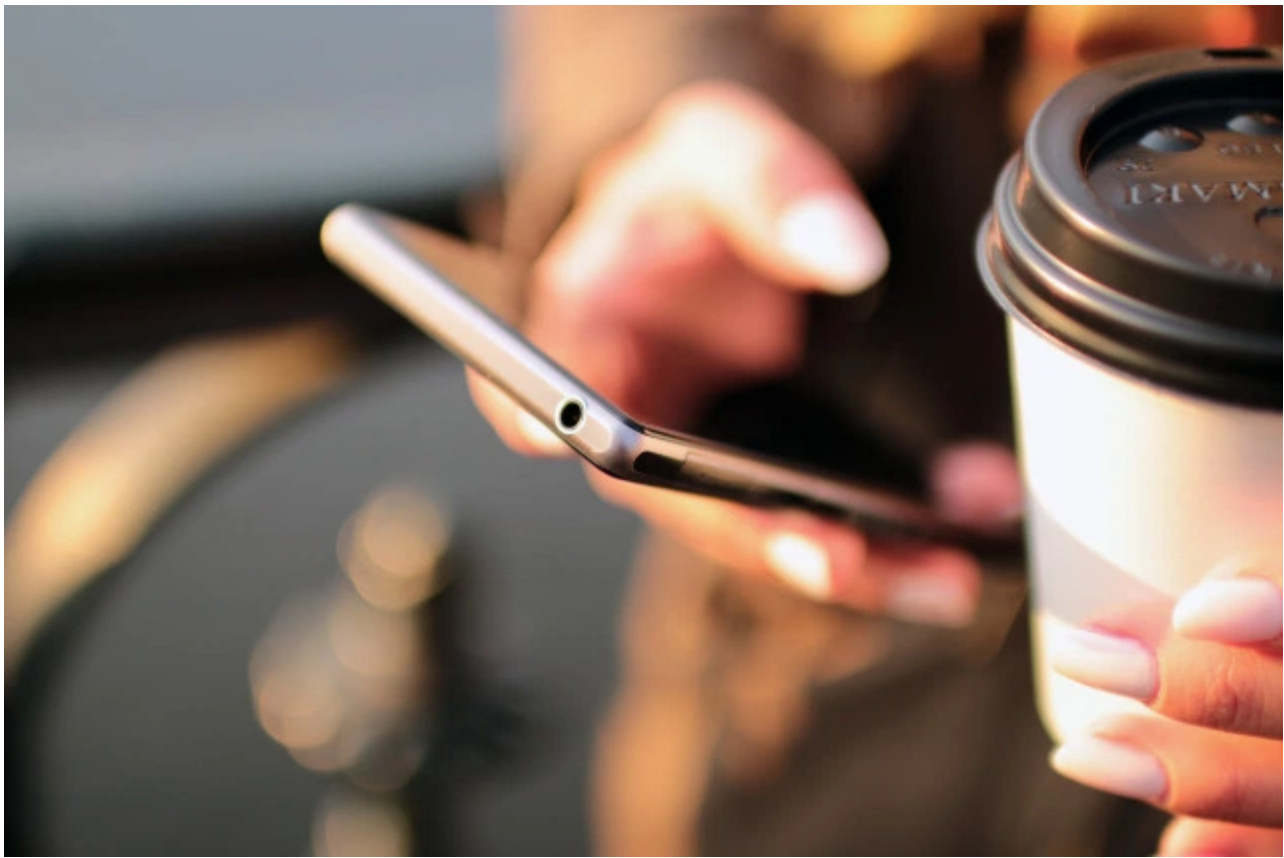
effects. For consumers, the ability to read about others' good, bad, and neutral experiences can help them determine if the particular business is a right fit for them. For business owners, both positive (<http://www.adweek.com/socialtimes/larry-alton-guest-post-product-reviews/648746>) and negative (<http://www.forbes.com/sites/amymorin/2014/05/06/why-negative-reviews-can-be-good-for-business/#1e1270223b27>) reviews can indicate to a business what consumers appreciate and also what the business should be doing in order to improve its interactions with consumers.

However, one of the main problems with online reviews occurs when consumers share false negative reviews of a business. Recently, California Courts have been presented with legal issues arising from the use of online forums, specifically, whether courts have the power to force any specific forum to take down a defamatory review. Furthermore, courts must address whether any infringement on a consumer's First Amendment right to free speech arises if a negative review is declared defamatory.

For instance, recently, a California law firm alleged that a past client fraudulently posted false negative Yelp reviews about her experience with their law firm. Due to the influence of Yelp reviews on a businesses' reputation, the law firm requested that the former client take down her negative reviews. The former client refused and the law firm sued the former client for defamation in state court, seeking help from the courts in ensuring its name would not be tarnished. This case between the law firm and its former client is *Hassell v. Bird* (<http://www.leagle.com/decision/In%20CACO%2020160607019/HASSELL%20v.%20BIRD>), and it has made its way all the way up to the California Supreme Court.

Currently, the California Supreme Court is deciding whether to let the Court of Appeals decision stand or whether the Court will issue its own decision. On September 29, 2014, the Superior Court declared, which then on June 7, 2016 the Court of Appeals affirmed with an opinion written by Justice Ruvolo, that the reviews of the former client were indeed defamatory. Although Yelp was not a party to the suit, the opinion ordered Yelp to step in to remove these negative false reviews. The Court explained that since Yelp is an "administrator of the forum" (<http://cases.justia.com/california/court-of-appeal/2016-a143233.pdf?ts=1465327858>) where the negative reviews are found, Yelp is responsible (<http://www.latimes.com/business/technology/la-fi-tn-yelp-ava-bird-20160921-snap-story.html>) for removing the defamatory speech.

The counsel for Yelp is optimistic that the California Supreme Court has decided to hear its case because it has given Yelp an opportunity to demonstrate how this decision will have a detrimental effect by "restrict[ing] the ability of websites to provide a balanced spectrum of views online" (<http://www.sfgate.com/business/article/California-Supreme-Court-to-hear-Yelp-free-speech-9237987.php>).” Yelp's counsel and other community members (<https://www.aclunc.org/our-work/legal-docket/hassell-v-bird-yelp-free-speech>) argue that this judicial decision will restrict a consumers' First Amendment right to free speech. On the other hand, the law firm's counsel, San Francisco lawyer Monique Olivier, strongly asserts that these false negative reviews, if considered defamatory, are not protected (<https://consumerist.com/2016/09/22/california-supreme-court-to-review-yelps-case-for-not-removing-allegedly-defamatory-reviews/>) by the First Amendment, and therefore there is no infringement on a consumers' right to free speech. Presently, the California Supreme Court has not decided the matter and the parties in *Hassell* are awaiting a decision as to whether the higher court will hear their case.



Main Issue Addressed by the Courts

The main issue presented before the California Supreme Court is whether an online publisher has a right to notice and the opportunity to be heard before a trial court orders removal of online content.

In Yelp's Opening Brief on the Merits (<http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=2338&context=historical>), Yelp argues that the Court of Appeals decision should be overturned mainly because the court did not provide Yelp with proper due process protections by not taking into account Supreme Court authority that requires notice and the opportunity to be heard when it relates to orders restraining the distribution of speech. Yelp argues that the Court of Appeals decision was extremely flawed because they created an avenue for courts to easily apply injunctions to non-parties, even without any inquiry into factual accounts of misconduct. Specifically, Yelp asserts that now anyone who seeks the judicial system to help provide relief to a case regarding defamation, can forum shop in California and “circumvent due process rights (<http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=2338&context=historical>)” in this state.

Yelp provides that as a publisher of third-party authorized speech, its First Amendment right to control its own website was violated by this decision. Furthermore, due to this decision, businesses now have an effective tool in removing unflattering commentary whereas online entities like Yelp are denied their right to exercise editorial control in publishing consumer reviews. Overall, Yelp urges the California Supreme Court to reverse the Court of Appeals' decision because this case provides an opportunity to abuse the court system in order to stifle speech on the Internet.

In Hassell's Answering Brief on the Merits (<http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=2394&context=historical>), Hassell argues that invoking the First Amendment, the Due Process clause, and the federal Communications Decency Act will not help Yelp escape a court order preventing them from republishing postings that have been judicially determined as defamatory. Hassell cites to

both cases from the U.S. Supreme Court and the California Supreme Court, who have consistently held that defamatory speech falls outside of the scope of First Amendment protections. For example, U.S. Supreme Court cases, *Ashcroft v. Free Speech Coalition* (<https://supreme.justia.com/cases/federal/us/535/234/case.html>) and *Keeton v. Hustler Magazine, Inc.* (<http://caselaw.findlaw.com/us-supreme-court/465/770.html>); and *Balboa Island Village Inn, Inc. v. Lemen* (<http://www.lawlink.com/research/CaseLevel3/11195>), a California Supreme Court case, all demonstrate that false statements are not protected from any constitutional provision because they harm both the subject of the false statements and the readers of the statement.

Overall, Hassell declares that the same prohibition against speakers to create defamatory speech should apply to anyone, like Yelp, who is distributing defamatory speech. Hassell argues that she tried to resolve this matter out of court with both Yelp and Bird, but since she was unsuccessful to coming to a reasonable agreement, she sought the relief that she is rightfully entitled to from the court.



Potential Lasting Effects on Online Forums

Any action the California Supreme Court takes will have a lasting effect on the limitations of free speech online. If the California Supreme Court determines that forum administrators, like Yelp, bear the responsibility of monitoring whether a consumer has posted a negative false review that is considered defamatory, businesses can easily have reviews removed (<https://consumerist.com/2016/09/22/california-supreme-court-to-review-yelps-case-for-not-removing-allegedly-defamatory-reviews/>) by the forum administrator if they believe that the review is offensive and inaccurate.

Anytime there is a negative review that a business believes is defamatory, the business can just go to court in order to receive a declaration telling the forum administrator to delete the personal reviews made by consumers.

Although this decision helps those who want to protect their businesses from false negative reviews, the decision may also create infringements on consumers' freedom of expression because there is a possibility that their accurate descriptions of their experiences can be declared defamatory and censored

by a court.

The restriction of past consumers to freely express their negative opinions of a business can also have an effect on future consumers, because future consumers may be attracted to a business who did something to improve (<http://www.socialmediatoday.com/content/impact-online-reviews-and-your-business-positive-only-vs-responding-negative-reviews>) its consumer experience. Also, without seeing constructive criticism from consumers, businesses will not know how to become better or have an incentive to change. An honest review is an important asset to a business because it can encourage more foot traffic or it can provide the business with an opportunity to better cater to its consumers. Although it is unknown how the California Supreme Court will rule, it is likely that this decision will have a lasting effect on how consumers use social media and online forums to review their experiences.



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