# ADDRESSING THE COMMERCIALIZATION OF BUSINESS REPUTATION

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## I
## INTRODUCTION

Beginning in the late 1990s, online mediated reputation systems (MRS),[1] such as Yelp and Angie's List, changed the consumer decisionmaking process in marked ways, making inroads into how consumers buy products, travel, dine, and choose plumbers and electricians. MRS platforms draw in consumer users to generate reviews of their experiences, which the MRS then aggregates and presents in various forms to consumers who seek information about a business or offering.

The impression made by the MRS presentation of reviews to consumers, however, reflects not only the raw inputs from consumer reviewers, but also the impact of the MRS revenue model. Businesses under review can pay for the opportunity to influence what consumers see when they seek MRS information. MRS advertising sales, promotional assistance, and reputation-management services, for example, all enable businesses to use the MRS platform to alter transactional behavior in favor of their business. The monetization of the MRS platform requires the platforms to present information differently than they would if they were only motivated by the purity of consumer education and information sharing.

This article explores the ramifications of this apparent conflict for consumers and offers possible avenues for improvement and preservation of the valuable information offered through the MRS channel.

The proliferation of MRS platforms unquestionably changed consumer information-gathering habits,[2] just as the electronic retail channel acquired

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*Associate Professor of Law, Willamette University College of Law. I am indebted to Professor Eric Goldman for his detailed comments—and challenging questions—and regret that I can only address them in part within this short piece. I hope to do so more fully in my next. I also thank Professors Pamela Foohey, Jim Hawkins, Nathalie Martin, and Creola Johnson for inviting me to participate in this symposium, and Professor Martin, in particular for her thorough critique and suggestions. I am also grateful to the student editors at *Law & Contemporary Problems* for their assistance, dedication, and hospitality.

1. Professor Eric Goldman appears to have been the first to use the term "mediated reputation system." Eric Goldman, *The Regulation of Reputational Information*, *in* THE NEXT DIGITAL DECADE: ESSAYS ON THE FUTURE OF THE INTERNET 293, 294 (Berin Szoka & Adam Marcus eds., 2010).

2. Yelp alone boasts well over 70 million unique users across multiple platforms. *An Introduction*

impressive scale.[3] Online consumer MRS platforms have transformed consumer shopping habits by establishing entirely new digital venues for shoppers to acquire and absorb data—such as peer experiences and opinions—about businesses and offerings.

If this unique, fairly new data flow has exceptional social value, then preservation of the volume and integrity of this data through scrutiny of the context of its presentation should take higher priority than other recently-identified advertising enforcement concerns.[4] The practices that surfaced during recent class action litigation involving Angie's List should urge more scrutiny of this information exchange. As part of a 2016 settlement, Angie's List agreed to change disclosure practices related to advertising practices on its site.[5] The plaintiffs alleged that Angie's List failed to disclose to paid subscribers that it received payments from service providers for advertising—and that these payments affected provider ratings, review content, review availability, and site placement.[6] In addition to changing these business practices, Angie's List agreed to pay the class $1.4 million[7] as it transitioned away from a subscription-reliant model.

Were Angie's List's disclosure problems the product of inherent tension between the cultivation of a user community and advertisers? Should this tension warrant extra industrywide scrutiny of MRS business practices, including advertising placement practices? If pervasive, such integrity issues warrant investigation and correction to preserve the quality of this important information source.

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*to Yelp Metrics as of September 30, 2016*, YELP, https://www.yelp.com/factsheet [https://perma.cc/AN4A-4FBS] (last visited Nov. 27, 2016).

3. Amazon alone, according to one Wall Street analyst, "accounted for 42% of all retail growth for 2015 as a whole, up from the 22% it generated in 2014." Rebecca Borison, *Amazon Is Hogging a Huge Share of Growth in the Retail Industry*, THESTREET (Feb. 2, 2016), https://www.thestreet.com/story/13444145/1/amazon-is-hogging-a-huge-share-of-growth-in-the-retail-industry.html [https://perma.cc/8SQ3-MYM8].

4. The Federal Trade Commission recently promulgated the Enforcement Policy Statement on Deceptively Formatted Advertisements, identifying a host of concerns about a variety of advertising tactics involving misleading context for commercial information. *See generally* FED. TRADE COMM'N, ENFORCEMENT POLICY STATEMENT ON DECEPTIVELY FORMATTED ADVERTISEMENTS (2015), https://www.ftc.gov/system/files/documents/public_statements/896923/151222deceptiveenforcement.pdf [https://perma.cc/T2YQ-VJKU] (requiring textual, auditory, or visual disclosures to distinguish advertising from non-commercial content). Concerns about MRS advertising differ from other comparators like advertorials in newspapers, or potential conflicts of interest that arise from news agencies accepting advertisements from businesses that reporters cover. The tensions within MRS advertising emerge because of unique background user expectations. MRS users engage the platform to access peer information, expecting a "clear picture" of peer opinion—and are met with targeted, temporal advertising often at a key moment of decisionmaking.

5. Class Action Settlement Agreement, Moore v. Angie's List, No. 15-1243-SD (E.D. Pa. June 24, 2016).

6. Conditional Amended Class Action Complaint at ¶¶ 1–14, Moore v. Angie's List, No. 2:15-cv-01243 (E.D. Pa. July 11, 2016).

7. Class Action Settlement Agreement, *Moore*, at ¶¶ 19–20.

These corrections may involve, for example, disclosure of revenue sourcing or potential conflicts—at a level more exacting than the regulatory guidelines to advertisers for avoiding engagement in deceptive practices.[8] The Federal Trade Commission's (FTC) recent Enforcement Policy Statement on Deceptively Formatted Advertisements focuses on mandating disclosure that helps the consumer distinguish advertising and promotions from surrounding non-commercial content.[9] For MRS platforms, the unique tensions in the operating model may warrant especially higher standards for distinguishing non-commercial content—or more frequent and focused enforcement. Like all advertising regulation, such interventions should be weighed against the real risk that intervention might impede the overall flow of information.[10]

## II

## A BRIEF CASE FOR ELEVATED SCRUTINY OF MEDIATED REPUTATION SYSTEMS

Three principal factors emerge to justify special scrutiny of MRS platforms. First, MRS platforms have enjoyed broad success in developing a presence in consumer markets. The justification for scrutiny rests on the newfound social importance of these platforms. Yelp alone boasts millions of users.[11]

Second, MRS platforms promote themselves as intermediary providers of user-generated content (UGC). Peer information carries more credibility with consumers than purely advertiser-generated content (AGC).[12] The FTC's 2011 guidance for embedding peer endorsements within AGC[13] reflected these concerns about the power of peer endorsements.

Third, MRS platforms promote their presentation of neutral UGC (content not produced to generate self-interested sales) to create a user audience for persuasive AGC. Granted, this third factor is more controversial because it deploys the ambiguous term, "neutral." Every content publisher or search engine makes choices of inclusion and priority of UGC presentation that leave a residue

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8. Note that the precise presentation of advertisements lies with the MRS, not the typical business purchasing a presence on the MRS platform.

9. *See generally* FED. TRADE COMM'N, ENFORCEMENT POLICY STATEMENT ON DECEPTIVELY FORMATTED ADVERTISEMENTS, *supra* note 4 (requiring textual, auditory, or visual disclosures to distinguish advertising from non-commercial content).

10. *See generally* Richard Craswell, *Regulating Deceptive Advertising: The Role of Cost-Benefit Analysis*, 64 S. CAL. L. REV. 550 (1991) (defending the application of cost-benefit analysis to deceptive advertising regulation).

11. *See infra* Part III.A. Yelp and others are singled out for the purposes of this article only because of their market leadership and presence, not because of any alleged unlawfulness of their practices.

12. *See* David Adam Friedman, *Debiasing Advertising: Balancing Risk, Hope, and Social Welfare,* 19 J.L. POL'Y 539, 577–82 (2010) (describing the power of peer endorsements).

13. Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255.2 (2009).

of bias.[14] Here, however, a different sort of concern emerges on top: classic search engine bias.[15]

This article uses the term "neutrality" as shorthand to describe how MRS platforms convey, both expressly and implicitly, a clear picture and distillation of user opinion about a business or offering.[16] When the MRS deviates from that "clear picture and distillation" through insertion or influence of AGC, this conception of neutrality fades. After all, rational advertisers have determined that investing in MRS promotions will yield a different result than if shoppers relied on the untouched, neutral UGC surfacing from reviews.

This third factor emphasizes the tensions in the MRS model that present a dynamic worthy of scrutiny. The MRS platforms that stand independently as self-sustaining business models present the most concern with respect to direct compromises of expected neutrality. "Standalone" platforms must generate substantially all revenue directly from the platform, rather than merely using the platform, as broader entities like Google or Facebook might, as a valuable "supportive" asset within a broader user-engagement ecosystem.

## III
## STANDALONE AND SUPPORTIVE MEDIATED REPUTATION SYSTEMS

Over the past few decades, entities like Yelp[17] and Angie's List[18] have established significant presences as dedicated, standalone MRS platforms. A standalone MRS builds a community of users, while aggregating and presenting the users' observational data back to the public. This type of MRS generates revenue by providing advertisers—typically reviewed entities—access to that

14. A decade ago, Eric Goldman observed that search engines maintained active editorial policies to produce socially desirable, meaningful results for users. "Every Internet venue accepting user-submitted content inevitably gets attacked by unwanted content. If left untended, the venue inexorably degrades into anarchy." Eric Goldman, *Search Engine Bias and the Demise of Search Engine Utopianism*, 9 YALE J.L. & TECH. 111, 119 n.31 (2006). His observations have been strikingly durable, especially when applied to the broader social media platforms that have flourished since.

15. The leading MRS platforms make no bones about using algorithms to filter reviews for relevance and integrity. In that sense, the leading platforms promote the notion that users are receiving a stream of information that businesses have not tampered with by writing phony reviews for themselves or about competitors, for example.

16. *See, e.g.*, Angie's List Commercial, *Office Banter*, YOUTUBE (Aug. 8, 2016), https://www.youtube.com/watch?v=4ZC94C1Ni-Q [https://perma.cc/9N8Z-CSUD] ("Want feedback that's unbiased? We've got 10 million verified reviews . . . Join [Angie's List] for free."); Angie's List Commercial, *What Goes Down*, YOUTUBE (June 24, 2016), https://www.youtube.com/watch?v=CKpBfmtX3ME [https://perma.cc/C7JA-MNLR] ("That means everyone has access to our real reviews that we actually verify . . . so if you need a great plumber, find one at Angie's List.").

17. *See About Us*, YELP, http://www.yelp.com/about [https://perma.cc/VD4E-EADZ] (last visited July 27, 2016) ("Our purpose: to connect great people with great local businesses.").

18. *See About Us*, ANGIE'S LIST, http://www.angieslist.com/aboutus [https://perma.cc/43UZ-PBFK] (last visited July 27, 2016) ("More than 3 million households nationwide check Angie's List reviews to find the best local service providers. . . . The people who join Angie's List are just like you—real folks looking for a way to find trustworthy companies that perform high-quality work.").

platform. A supportive MRS provides the same function as the standalone MRS, but within the broader context of a larger user-engagement system.

## A. Standalone Models

Standalone MRS platforms maximize enterprise value almost exclusively from the MRS by selling businesses access to their user bases. Advertising and promotions from the very entities under review provide a primary, direct financial underpinning of the standalone model.

Presenting a neutral platform while financially supporting that platform with the presentation of non-neutral, persuasive information about reviewed entities, however, presents a regulatory question. What would result if regulators intervened to require all MRS platforms to go above and beyond current advertising disclosure standards, thus ensuring that consumers could clearly confront and discern commercial content and motives behind what they see on these platforms? Such requirements would burden standalone MRS platforms substantially because they would have to disclose (more prominently) direct links between their information presentation and advertiser influence. Supportive platforms, discussed in part III.B, might show a more diffuse link between user information presentation and advertiser influence, and may thus find advantage from such regulation.

This sort of regulatory intervention could enable consumers to weigh search results and advertising with more awareness. Users would see more transparently how advertisers intervene to redirect them away from neutral search results. Such an approach, however, might also make the standalone MRS platform less economically viable, ultimately reducing the availability of potentially welfare-enhancing peer information.[19]

Regulatory intervention in information markets may yield *net* welfare improvements, but potential market changes must also be considered. In one post-intervention scenario, the standalone MRS platforms would operate with more transparency, but the platforms would have difficulty standing alone as independent, financially-viable entities. In this instance, standalone MRS platforms might, through merger or acquisition, find better homes within broader entities that would not depend almost exclusively on revenue flow from reviewed businesses. Broader entities would systemically benefit from the wider user base that established MRS platforms would bring to their environments.

In other words, regulation might inspire standalone MRS platforms to migrate toward enhancing the user experience within larger social media or search engine ecosystems. A partial overview of the supportive MRS helps inform what that dynamic might look like.

19. Eric Goldman credits the Communications Decency Act of 1996, Section 230 with enabling these reputation systems to thrive as valuable information hubs. Goldman, *supra* note 14, at 298. 47 U.S.C. § 230(c)(1) renders these entities largely immune from civil liability for the comments of users.

B. Supportive Models

Google and Facebook fall into the supportive category because they center their gravity of user engagement on, respectively, search and social networking applications, and only at most secondarily on their embedded MRS platforms. They are not as directly dependent on MRS platform revenue as Yelp and Angie's List. Google and Facebook use consumer reviews as an integrated tool to engage users on their sites, exposing users to more paid promotions and advertising.

Amazon.com (Amazon), is too big to ignore, and arguably comprises a unique category of retail entity. For purposes of evaluating its core MRS system, Amazon's securities filings declare that the company's "primary source of revenue is the sale of a wide range of products and services to customers."[20] Though Amazon mentions advertising within a broad list of other revenue sources, consumer sales revenue has been deemed the utmost priority, leading Amazon to look primarily like a retail seller and the MRS function to look like a customer engagement feature, rather than a primary driver of revenue.[21] User reviews are, however, integral to the customer experience, and advertising and promotions still strongly influence what the customer sees. Nonetheless, the MRS portion of Amazon that gathers and relays reviews and ratings plays only a small role in the prodigious Amazon business model.[22]

In contrast, Yelp and Angie's List exemplify business models centered almost completely on the MRS platform.[23] These entities generate cash by selling their

20. Amazon.com, Inc., Annual Report (Form 10-K) 18 (Apr. 6, 2016). Thin margins from proprietary direct sales could still draw a massive global user base to the Amazon platform for advertising revenue and payments from third-parties to sell on the site. Though some have attempted to explain the business model, there remains much mystique about Amazon's strategy. *See, e.g.*, Jay Yarow, *Former Amazon Employee Explains How the Company's Business Model Really Works*, BUS. INSIDER (Oct. 28, 2013), http://www.businessinsider.com/amazons-profits-what-people-dont-understand-2013-10 [https://perma.cc/GU4V-VS3M].

21. "We also offer other services such as compute, storage, and database offerings, fulfillment, publishing, digital content subscriptions, advertising, and co-branded credit cards." Amazon.com, Inc., Annual Report (Form 10-K) 18 (Apr. 6, 2016).

22. Amazon's use of the MRS platform and approach toward promotion and advertising warrants unique and detailed treatment that this short article cannot offer. Amazon engages in an increasingly complex and diverse array of marketing and sales activities. *See Amazon.com Announces Third Quarter Sales up 29% to $32.7 Billion* (Oct. 27, 2016), http://phx.corporate-ir.net/phoenix.zhtml?c=176060&p=irol-newsArticle&ID=2216765 [https://perma.cc/UT9L-5B7G]. The MRS feature on Amazon increasingly becomes a minor feature compared with innovations like Alexa.

23. Yelp's front door displays a simple ranked list of businesses, associated with aggregate ratings and number of ratings. A cursory search of Yelp for businesses in Durham, North Carolina lists first a sushi restaurant (along with its star ranking and number of user ratings), and then several other dining establishments in a ranked order. *See* https://www.yelp.com/search?find_desc=&find_loc=durham%2C+NC&ns=1 [https://perma.cc/Y7L8-URRQ] (last visited Oct. 22, 2016) (on file with author). When the user clicks on the link for that first restaurant, the user scrolls past two paid advertisements for other restaurants before the user encounters any peer reviews. *See* https://www.yelp.com/biz/m-sushi-durham [https://perma.cc/9CF6-MXQK] (last visited Oct. 22, 2016) (on file with author). *See also* sources cited *supra* note 16 (excerpting Angie's List commercials). Avvo provides another example, offering client reviews of lawyers, along with advice forums and access to lawyers. "Imagine having nearly every licensed lawyer in the US right at your fingertips, the moment you need help. Avvo has that, plus detailed profiles,

MRS audience to advertisers, whereas the other platforms generate cash by selling their broader audience to advertisers, or by selling products and services.

When standalone MRS entities sell promotion and advertising on their implicitly neutral platforms, the basic presence of persuasion puts the platform's neutrality and authenticity at risk. Unlike supportive MRS platforms, standalone entities rely heavily on soliciting revenue from advertisers who appear on their platforms. For the standalones, a patina of persuasive messaging coats the top of their implicitly neutral data presentations. For example, a user search for a nearby Thai restaurant may yield a list of rated establishments, but the user might have to scroll through paid links to other restaurants first—and the user might click on an advertised link first, thereby short-circuiting the comparative, peer-informed shopping process that the MRS purports to promote. Even though Yelp and Angie's List disclose the primary source of their revenue on their websites, users will not readily encounter those disclosures in the ordinary course of searching for businesses, but only upon examination of the nonsearch part of their sites.[24]

## C. Dissecting The Standalone Model

A dissection of the standalone MRS business model exposes the inherent tension between building a loyal user community and generating revenue from reviewed businesses. Yelp, Angie's List, Avvo, and ConsumerAffairs operate standalone MRS platforms, each specializing in reviews of different retail sectors. Yelp and Angie's List focus on reviews of local businesses, with the latter placing an emphasis on homeowner services. Avvo collects information about attorneys from clients and peers.[25] ConsumerAffairs offers general business reviews beyond the geolocation-centric focus of Yelp.[26] All of these neutral platforms source significant advertising, promotional, and reputation-management revenue from businesses reviewed on their sites—businesses seeking to improve or raise their profile, to nudge or otherwise persuade consumers to choose them over a competitor. Yelp and ConsumerAffairs in particular offer different approaches

reviews, and the Avvo Rating." *See About Us*, AVVO, https://www.avvo.com/about_avvo#founded [https://perma.cc/Q29B-7T3C] (last visited July 27, 2016).

24. These disclosures appear, but on secondary non-search web pages that would prove difficult to access through mobile applications. If a user clicks on the "About Yelp" link on the bottom of the homepage, they will reach a page that tells the visitor "10 things you should know about Yelp." Yelp lists at number six: "Yelp makes money by selling ads to local businesses—you'll see these clearly labeled 'Yelp Ads' around the site." *About Us*, YELP, https://www.yelp.com/about [https://perma.cc/JV7E-P25V] (last visited Oct. 22, 2016). Angie's List does something similar. *See About Us*, ANGIE'S LIST, https://www.angieslist.com/faq/how-does-angie-s-list-make-money/ [https://perma.cc/P2K4-L4UP] (last visited Feb. 23, 2017) (disclosing that revenue comes from nominal membership fees as well as advertising fees from Certified Service Providers).

25. For an in-depth analysis of the impact of online reviews on the market for legal services, including the general cognitive and psychological impact of online reviews on reviewers and the reviewed, see Cassandra Burke Robertson, *Online Reputation Management in Attorney Regulation*, 29 GEO. J. LEGAL ETHICS 97 (2016).

26. *See generally,* CONSUMER AFFAIRS: RESEARCH. REVIEW. RESOLVE., CONSUMERAFFAIRS, http://www.consumeraffairs.com [https://perma.cc/9LBX-3NUS] (last visited Sept. 18, 2016).

to standalone MRS business practices. Exploring both of these different models exposes common fundamental tensions between serving users and serving advertisers.

Yelp presents the highest-profile example of a standalone MRS finding a successful commercial balance between engaging users through authentic reviews and sourcing revenue from those reviewed.[27] Yelp boasts impressive user engagement. In the first quarter of 2016, Yelp reported (domestically) over seventy-seven million unique desktop users, sixty-eight million mobile web users, and twenty-one million "unique app device" users.[28] Yelp also maintains a database of over 101 million freely-contributed reviews, demonstrating the depth of the user community and the mass and scope of its data.[29] A cursory look at these numbers indicates that an impressive base of consumers trusts Yelp and uses the platform as a search and shopping tool.

Businesses recognize the exceptional value of advertising and appearing on promotion on Yelp.[30] Yelp reported nearly $450 million in locally-driven advertising revenue in 2015 and $31 million in brand advertising, numbers that have increased steadily over the past several years.[31] Retailers use advertising to influence and persuade,[32] and Yelp's platform provides a ready audience of decision makers.

Yelp offers to sell advertising and promotional dollars to reviewed entities seeking to make a positive impression or a raised profile amidst real, unmanipulated ratings, but other MRS platforms sell the opportunity for businesses to control the appearance of negative ratings.

Consider the business model of the for-profit MRS, ConsumerAffairs. ConsumerAffairs unambiguously proclaims independence: "ConsumerAffairs.com is an independent Web-based consumer news and resource center."[33] ConsumerAffairs tells consumers that the site "empowers [them] by providing a forum for their complaints and a means to be contacted by lawyers if their complaints have legal merit. . . . [C]omplaints and reviews may be published, shared with the news media and reviewed by attorneys at no cost to

27. Yelp achieved profitability in 2012 and profits have increased steadily since. *See* YELP, YELP INVESTOR PRESENTATION Q1 14, http://www.yelp-ir.com/phoenix.zhtml?c=250809&p=irol-irhome [https://perma.cc/SSF5-43X3] (last visited Sept. 18, 2016) (on file with author).

28. YELP, YELP 1Q16 DATA SHEET, http://www.yelp-ir.com/phoenix.zhtml?c=250809&p=irol-irhome [https://perma.cc/SSF5-43X3] (last visited Sept. 18, 2016) (on file with author).

29. *Id.*

30. Perhaps, in part, because the return on investment in their advertising surpasses competition, according to a Boston Consulting Group study the company cites. *See* YELP, YELP INVESTOR PRESENTATION Q1, http://www.yelp-ir.com/phoenix.zhtml?c=250809&p=irol-irhome [https://perma.cc/SSF5-43X3] (last visited Sept. 18, 2016) (on file with author).

31. Yelp, Inc., Annual Report (Form 10-K) 51 (Feb. 24, 2016).

32. *See* Sara Haan, *The Persuasion Route of the Law,* 100 COLUM. L. REV. 1281, 1282 (2000) (comparing commercial advertising strategies to legal reasoning).

33. *FAQ*, CONSUMERAFFAIRS.COM, https://www.consumeraffairs.com/about/faq/#about-us [https://perma.cc/4W7W-FMDM] (last visited July 25, 2016).

you."[34] ConsumerAffairs has presented a distinct face, until just recently promoting on its website's "about us" section the notion that it was "a consumer news and advocacy organization . . . ."[35] ConsumerAffairs since eliminated that language from its "about us" description, now declaring:

> We believe everyone deserves to make smart decisions based on unbiased feedback and research-driven information. Consumers and business owners need a trustworthy and neutral platform to share and respond to reviews. Brands need an efficient and effective platform to respond to feedback and engage with their customers. ConsumerAffairs is the place online where brands and their customers can connect.[36]

As Professor Eric Goldman observed in June, 2016, compared with the other MRS platforms that "have more traditional editorial and commercial practices," the "current business practices [of ConsumerAffairs] probably aren't going to impress you."[37] Nonetheless, a closer look at these practices of ConsumerAffairs highlights some of the inherent tensions in the MRS business model. A recent civil case revealed that ConsumerAffairs "modified its business model in order to earn increased revenue by inducing manufacturers and providers . . . reviewed on the ConsumerAffairs website to pay fees to become accredited members entitled to preferential treatment in the display and use of consumer ratings."[38] Paid preferential treatment for businesses in the display of consumer ratings appears in tension with claims that the site empowers consumers.

ConsumerAffairs generates a revenue stream from businesses wishing to preserve their reputation from unanswered criticism on the ConsumerAffairs website, charging fees for various services. In marketing material for businesses labeled "We've Got Your Back," ConsumerAffairs offered to "partner" with several "brands."[39] ConsumerAffairs claims to provide businesses with such

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34. *Review*, CONSUMERAFFAIRS.COM, https://www.consumeraffairs.com/review/ [https://perma.cc/MV2M-ZYCM] (last visited July 25, 2016).

35. *About ConsumerAffairs.com*, CONSUMERAFFAIRS, http://web.archive.org/web/20160422050152/https://www.consumeraffairs.com/about/ [https://perma.cc/F7YC-VHGF] (Apr. 22, 2016) (last visited March 11, 2017) (on file with author). A magistrate referred to that since-deleted language in recent litigation. *See* Magistrate Report, Consumer Cellular, Inc. v. ConsumerAffairs.com, 3:15-CV-1908-PK, 2016 WL 3176602 (D. Ore. Feb. 29, 2016) (slip opinion); Trial court adoption of magistrate report (D. Ore. June 2, 2016).

36. *About ConsumerAffairs.com*, CONSUMERAFFAIRS, https://www.consumeraffairs.com/about/ [https://perma.cc/Y7TN-JD5J] (last visited Mar. 11, 2017).

37. Eric Goldman, *Review Website Gets Hammered In Court–Consumer Cellular v. ConsumerAffairs*, TECHNOLOGY & MARKETING LAW BLOG (June 5, 2016), http://blog.ericgoldman.org/archives/2016/06/review-website-gets-hammered-in-court-consumer-cellular-v-consumeraffairs.htm [https://perma.cc/8ERH-AJ5X]. Although many of the platforms find themselves involved in litigation brought by reviewed businesses, some ongoing litigation looms especially ominously over ConsumerAffairs. *See* Magistrate Report, Consumer Cellular, Inc. v. ConsumerAffairs.com, 3:15-CV-1908-PK, 2016 WL 3176602 (D. Ore. Feb. 29, 2016) (slip opinion); Trial court adoption of magistrate report (D. Ore. June 2, 2016). For an extensive discussion about the potential implications of the case for other review sites, see Goldman, *Review Website*, *supra* note 37.

38. *Consumer Cellular, Inc.*, 2016 WL 3176602 at *4.

39. *See generally We've Got Your Back: 7 Reasons Why Your Brand Needs ConsumerAffairs*, CONSUMERAFFAIRS (2014), https://www.truthinadvertising.org/wp-content/uploads/2014/10/CA.pdf [https://perma.cc/9M67-ZVHT] (last visited July 25, 2016) (on file with author). Note that the back that ConsumerAffairs claims to have is not the consumer, despite the name of the company, but the back of

positives as accessibility to a broad audience,[40] consumer faith in the peer opinions they gathered,[41] help in encouraging customers to write positive reviews,[42] access to detailed information about their reviews,[43] assistance in turning consumer "brand assassins" into "brand ambassadors,"[44] and assistance with search engine optimization.[45]

Although ConsumerAffairs has a tiny presence[46] compared to Yelp and Angie's List, and operates in distinctly different ways, all of these standalone MRS entities share some broad attributes.[47] They attract user reviews and present them under a banner of objective authenticity. Then, through sales of advertising, promotional access, reputational management, and other platform access, they all invite businesses to alter the transactional behavior of users in favor of their business or brand.

Yelp's financial statements indicate that it apparently serves advertisers well, but could the MRS model serve consumers better? Could regulators engender a purer experience for consumers without significantly disrupting the valuable flow of data? The answer may rest with adjusting the rules applied to "native advertising"—commercial content "that bears a similarity to the news, feature articles, product reviews, entertainment, and other material that surrounds it online."[48] Regulators could compel MRS platforms to elevate their native-

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those reviewed by consumers on its website.

40. ConsumerAffairs warns businesses about the perils of ignoring reviews. "Now, imagine for a moment your brand is a candidate in the next presidential election. What would happen if you completely ignored certain voters and their collective voice? How would they consider the issues that are important if you didn't respond to them? Citizens would feel frustrated, betrayed and insignificant, and you would alienate part of your constituent base." *Id.* at 3. Concededly, ConsumerAffairs appears to be an MRS industry outlier with respect to tenor of message, but was this communication just a nakedly honest revelation about the basic standalone MRS model?

41. *Id*. at 4.

42. *Id*. at 5 ("While we can't change customers' star ratings for you, we can help you convince customers to change those ratings themselves, and help you gather more reviews which could improve your overall star rating. In addition, we can verify that your reviews are posted by real customers (and you can dispute those that are not).").

43. *Id*. at 6.

44. *Id*. at 7 ("Partners" get the opportunity to respond aggressively to "brand assassins." The implication is that non-partners lack this level of access. "When a Brand Assassin posts an extremely negative review about your brand, we not only work to verify its validity, we offer a dispute resolution window of 48 hours before the review is posted publically [sic].").

45. *Id*. at 8.

46. ConsumerAffairs claims roughly three percent of the user base of Yelp. *See id.* at 3.

47. *See Who is ConsumerAffairs Really Advocating For?*, TRUTH IN ADVERTISING (Oct. 21, 2014), https://www.truthinadvertising.org/consumer-affairs-com/ [https://perma.cc/2LZX-ZB8U] ("The [Electronic Retailing Self-Regulation Program] a division of the Council of Better Business Bureaus . . . determined that ConsumerAffairs did not adequately disclose its paid affiliation with company members on its website and recommended it do it in a more clear and conspicuous manner.").

48. FED. TRADE COMM'N, NATIVE ADVERTISING: A GUIDE FOR BUSINESS (2015), https://www.ftc.gov/tips-advice/business-center/guidance/native-advertising-guide-businesses [https://perma.cc/JQ4X-5DWU].

advertising disclosure standards above and beyond those recently set forth in the recent FTC Policy Statement,[49] as discussed in part IV.

## D. The Role Of MRS Internal Standards

Yelp recognizes that authenticity of information supplies lifeblood to its business model, and perhaps to instill user confidence, discloses, to some extent, the self-regulatory measures the company installed to ensure integrity. Most significantly, Yelp uses proprietary "automated recommendation software" to analyze the relevance, reliability, and utility of each review.[50] Yelp's software has guided the company to designate twenty-two percent of user reviews as "not recommended."[51] Use of this software has provoked some controversy because Yelp must keep the algorithm opaque to prevent businesses from gaming it.[52] Nonetheless, Yelp recognizes that preservation of review integrity, apart from the imprint of advertising, proves important for its viability.

Despite the hassles associated with deploying this software, Yelp persists in its campaign to prevent review manipulation. As part of its self-regulatory strategy, Yelp even launches "sting operations" to expose pay-per-review operations, actively cooperates with civil authorities in their investigations, brings civil actions against businesses engaging in deceptive practices on the platform, and tags tampering businesses with "consumer alerts" to warn users of suspicious activity on a page.[53]

Yelp goes far to ensure that businesses do not tamper with reviews, which would reduce consumer trust in the platform that they sell to advertisers. In maintaining these internal standards, Yelp protects the platform from unpaid manipulation from reviewed entities, but leaves consumers alone to contend with advertiser-driven manipulation of the user experience.

With these self-imposed and publicized efforts to police the Yelp platform, Yelp's facilitation of data availability enhances market efficiency, but only if consumers can adequately distinguish the native advertising embedded on its platform from the context of the other neutral information. In general, inexpensive and easily-accessible reputational information improves the quality

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49. FED. TRADE COMM'N, ENFORCEMENT POLICY STATEMENT ON DECEPTIVELY FORMATTED ADVERTISEMENTS 11–14 (2016), https://www.ftc.gov/system/files/documents/public_statements/896923/151222deceptiveenforcement.pdf [https://perma.cc/GZH2-X4JW].

50. Yelp, Inc., Annual Report (Form 10-K) 11 (Feb. 24, 2016).

51. *Id.* (seven percent of the reviews are removed completely for violating terms of service).

52. This opacity generated an unsupported suspicion that Yelp tampers with reviews to punish entities that choose not to advertise. "For years, Yelp has been dogged by allegations that it manipulates user reviews . . . businesses aren't likely to stop grumbling about these concerns any time soon." Eric Goldman, *Court Says Yelp Doesn't Extort Businesses,* FORBES (Sept. 3, 2014), https://www.forbes.com/sites/ericgoldman/2014/09/03/court-says-yelp-doesnt-extort-businesses/#142c19d76e4a [https://perma.cc/BA54-LJV2]; *see, e.g.*, Levitt v. Yelp, 765 F.3d 1123 (9th Cir. 2014) (animal hospital claiming Yelp review manipulation); Demetriades v. Yelp, 228 Cal. App. 4th 294 (Cal. Ct. App. 2014) (restauranteur directly attacking integrity of Yelp's representations about algorithm).

53. Yelp, Inc., Annual Report (Form 10-K) 11 (Feb. 24, 2016).

of consumer decisionmaking and overall market resource allocation.[54] MRS platforms compete against one another for users on the basis of the "reputation of reputation systems,"[55] which could inspire a race to the top in quality and integrity.

Despite Yelp's laudable—and market-driven—efforts to police the integrity of its site, paid advertising purposely nudges users away from the neutral outputs of Yelp's automated recommendation software and toward transactions that favor the advertiser. Yelp boasts to investors of the high return-on-investment from advertising spending on the site.[56] This high return is a direct result of Yelp's enabling businesses to present themselves in the context of an authentic platform. But no matter the level of internal scrutiny of reviews, users still confront reviews of paid advertisers when they visit.[57]

If users visit a platform expecting a pure distillation of peer reviews, should regulators devote extra scrutiny to advertising appearing on the platform? The FTC's *Enforcement Policy Statement on Deceptively Formatted Advertisements* warns advertisers that if consumers lack the ability to know the source of an advertising message, the message could be deemed deceptive.[58]

With MRS platforms, the emphatic neutrality of peer endorsements creates a context that requires disclosure beyond what the FTC illustrates for advertorials.[59] The formal guidance for businesses on native advertising practices offers seventeen hypothetical advertising scenarios, involving a variety of platforms, but not the MRS—a notable omission.[60] Any change in enforcement posture that would require more conspicuous disclosure than the current native advertising baseline would exceed this newly-minted guidance. Even calling out the MRS model through a single hypothetical advertising illustration would advance this notion.

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54. Eric Goldman, *The Regulation of Reputational Information*, *supra* note 1, at 295–96. Goldman also considers the risks of "distorted decision making from reputational information." *Id.* at 303.

55. *Id.* at 296 ("[R]eputation systems . . . typically seek to establish their own reputation. . .[T]he reputation of reputation systems . . . is the invisible hand that guides reputational information . . . to guide the invisible hand of individual uncoordinated decisions by marketplace actors." The reputation of reputation systems "allows the reputation system to earn consumer trust as a credible source . . . or to be drummed out of the market for lack of credibility (such as the now-defunct anonymous gossip website JuicyCampus).").

56. *See* YELP, YELP INVESTOR PRESENTATION Q1, *supra* note 27.

57. Yelp demonstrates that as reviews accumulate in a local market, advertising revenue tends to follow. *See id.* at 26 (using Philadelphia market as example).

58. FED. TRADE COMM'N, ENFORCEMENT POLICY STATEMENT ON DECEPTIVELY FORMATTED ADVERTISEMENTS, *supra* note 49, at 1.

59. FED. TRADE COMM'N, NATIVE ADVERTISING: A GUIDE FOR BUSINESSES, *supra* note 48, at Ex.1–Ex.6.

60. FED. TRADE COMM'N, NATIVE ADVERTISING: A GUIDE FOR BUSINESSES, *supra* note 48 (mentioning "product reviews" as content worthy of protection from deceptive native advertisings, but no illustrations are offered, and this is the only brief mention).

The context of this type of advertising—the presentation of peer endorsements—warrants concern when considering core, primary consumer motives for visiting these platforms and the potential for redirection from an expected neutral search. Otherwise, what could be an enhanced-information shopping process might turn instead into a diverted one that deviates from consumer expectations.

## IV
## IMPACT OF INCREMENTAL REGULATION

The FTC affords MRS platforms considerable latitude in the presentation of advertising. The advertiser shall not engage in "deception"—the misleading of consumers about material facts related to an offering.[61] In this instance, the "materiality" of concern lies in the "nature or source of advertising."[62]

On this subject, the FTC explains:

> Misleading representations or omissions about an advertisement's true nature or source . . . are likely to affect consumers' behavior with regard to the . . . advertisement. . . . Consumers with such a misleading impression, for example, are likely to give added credence to advertising messages communicated and to interact with advertising content with which they otherwise would have decided not to interact.[63]

Further, the FTC deems "certain misleading formats to be presumptively material."[64] Invoking concerns about peer endorsements, the FTC Policy Statement notes that "false claims that advertising and promotional messages reflect the independent, impartial views, opinions, or experiences of ordinary consumers or experts are presumed material."[65]

MRS platforms may avoid making such false claims through clear and conspicuous disclosures of sponsorship. Nonetheless, mishandling of peer information elevates the risks of undue "added credence" and consumer interaction with content that "they otherwise would have decided not to interact."[66]

A different, stronger presumption of materiality should apply to the context of MRS advertising. Under the current FTC approach to native advertising, MRS platforms may not flagrantly "misrepresent [the] source or nature"[67] of their advertising, nor blatantly trick consumers into "opening doors"[68] on which they otherwise might not have knocked. As argued above, however, higher standards are likely warranted.

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61. FED. TRADE COMM'N, ENFORCEMENT POLICY STATEMENT ON DECEPTIVELY FORMATTED ADVERTISEMENTS, *supra* note 49, at 14 (citing *Deception Policy Statement*, 103 F.T.C. at 182).
62. *Id.* at 15.
63. *Id.* 14–15.
64. *Id.* at 15.
65. *Id.*
66. *Id.*
67. *Id.* 3–6.
68. *Id.* 7–8.

Consumers open doors because the doors exist on a platform perceived as supremely objective and authentic. Unfortunately, opening a door created for the purpose of persuasion will not yield an authentically-driven transactional outcome. Here, the gap between expectation about the prospective use of MRS information and the actual experience may prove material. Although consumers may never know of any undue manipulation, the use of neutrality and authenticity as a lure to view persuasive information could lead to suboptimal transactions and welfare loss.[69]

For logistical reasons, any added burdens of compliance must fall on the MRS platforms, rather than advertisers, because advertisers have limited control of the placement of their advertising. The MRS platforms have control over the layout of their sites and mobile presentations, enabling them to control compliance with current enforcement policy. Advertisers hope for a high return from their marketing investment, but may lack ultimate control over the algorithms that drive contextual placement.

Potential regulation shifts welfare, and primary and secondary effects must factor into any cost-benefit calculation weighing the merits of the proposed intervention.[70] The first-order risk of implementing additional disclosure requirements resides in the impact from the extra expense of compliance, which might affect the financial viability of MRS entities. A more significant second-order risk is that enhanced disclosure would dampen the MRS platform model, impinging the collection, usage, and flow of the information for valid purposes.

If enhanced disclosure is effective, users will have more information, but the advertising might also be less effective. If advertiser return-on-investment diminishes enough, advertising dollars will flow elsewhere and marginally viable—but still socially valuable—platforms may disappear.

## V

## CONCLUSION

The social benefits of MRS platforms can be realized without undue distortions from advertising by reviewed entities. Regulators should weigh whether existing native advertising disclosure requirements suffice, and then consider whether the stakes have been heightened by the neutral appearance of the platform. A careful information intervention would give consumers a more complete picture of what the MRS presentation means, leading to consumers making better transactional decisions with this data.

69. *See* Howard Beales et al., *The Efficient Regulation of Consumer Information*, 24 J.L. & ECON. 491, 506–07 (1981) (generally describing market imperfections and distortions that can result from advertising and signal competition).

70. *Id*. at 501 ("The problem, at bottom, is that there is no easy way of distinguishing deception from the larger problem of inadequate consumer information . . . . However, perfect decision making is not ever possible, so the real issue is when the government can or ought to intervene in the information market to improve the market's performance.").