
DEFAMATORY REVIEWS ON YELP AND OTHER CONSUMER REVIEW WEBSITES

by MARCEL BUDIONO

"[W]ell, here is another business that doesn't even deserve one star. basically, dawn hassell made a bad situation much worse for me. she told me she could help with my personal injury case from falling through a floor, then renegeed on the case. . . ." *Hassell v. Bird*, 5 Cal. 5th 522, 527-28 (2018) (law firm sued former client for defamation). This is an excerpt of an actual Yelp review posted on a law firm's Yelp page.



As consumer review websites such as Yelp and Google Reviews become more prevalent, many businesses pay closer attention to their reviews and ratings on these websites. A negative, one-star review can heavily affect a business's reputation. Although some negative reviews may be warranted, an untrue negative review, such as the excerpt above, is problematic for respectable businesses. This article will address how a business can deal with such a review.

Fact vs. Opinion

As a preliminary matter, a business cannot initiate an action over every kind of published review. Only a review or statement that is defamatory is actionable, which essentially means that the review is a statement of fact that is false and can be proven false. See *Bently Reserve LP v. Papaliolios*, 218 Cal. App. 4th 418, 426 (2013). A statement of opinion is thus not actionable for libel. See *id.* Similarly, hyperboles or insults are generally not actionable. See *Seelig v. Infinity Broad. Corp.*, 97 Cal. App. 4th 798, 810 (2002). For example, calling a TV show participant "chicken butt" is not actionable because no finder of fact could reasonably interpret the comments as stating provable facts about the TV show participant. *Id.*

A false statement of fact is actionable regardless if it's expressly stated or implied. *Bently*, 218 Cal. App. 4th at 427. This is true even if such statement is framed as an opinion. *Id.* at

426. "So if a speaker says, 'In my opinion John Jones is a liar,' he implies a knowledge of facts" that Jones told an untruth. *Id.* The statement may still imply a false assertion of fact if those facts are either incorrect or incomplete, or if his assessment of them is erroneous. *Id.* at 426-27.

Courts look at the totality of the circumstances to decide whether a statement expresses or implies a provably false assertion of fact. *Id.* at 427. In *Bently*, the court determined that a former tenant's Yelp review of an apartment building implies a provably false assertion of actual fact. *Id.* at 428. In his lengthy review, though the tenant used

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some nonactionable hyperbole and name calling such as "sociopathic narcissist," the review also included purported facts about the apartment building. Among others, the tenant asserted in his review that the plaintiff landlords "(likely) contributed to the deaths of three tenants."

The landlords proved the falsity of such statement by offering evidence that two of the three supposedly dead tenants are, in fact, alive, and the other died of pneumonia and cancer. The tenant also attempted to add credibility to his review by stating that "[t]his is my own first-hand experience with this building, and its owners." *Id.* at 429. Providing such assurances, the court stated, suggests facts are being communicated, not opinions. *Id.* Thus, to initiate any action at all, the business must first be positive that the review is libelous (i.e., false).

Out-of-Court Actions to Remove the False Review

Once a business concludes that a review posted in one of the consumer review websites is libelous, a business has several avenues to remove the false, negative review. If the business knows or believes to know the identity of the reviewer, the business may send a demand letter to the reviewer to remove the false review as demonstrated in *Bird*.

In addition to sending a demand letter to the reviewer, a business may concurrently report or flag the false, libelous review to the respective website host (e.g., Yelp or Google Reviews). These sites may remove the false review if it violates their policies, terms of service, or content guidelines. Generally, a defamatory review violates their policies (e.g., Yelp's Terms of Service § 5(A)).

Alternatively, a business may respond to the false review by explaining that the review is untrue in a comment. By responding to the review this way, the business avoids paying legal fees to hire an attorney who would write the demand letter. The business could then request removal of the post. The downside of this approach is if the host website refuses to remove the post, the negative, false review would still impact the overall rating of the business and prevent the business from having a five-star overall rating.

Using the Court System to Remove the False Review

In the event that the poster of the false review refuses to comply with the demand letter or simply ignores it, the business may file a complaint against the reviewer for libel and seek an injunction against the reviewer to remove the post. And, yes, a corporation can be libeled by statements which injure its business reputation. *ZL Techs., Inc. v. Does 1-7*, 13 Cal. App. 5th 603, 623 (2017).

Often, however, if the reviewer decides to fight the complaint, he will attempt to strike the complaint by filing an anti-SLAPP (strategic lawsuit against public participation) motion under California Civil Procedure section 425.16. See, e.g., *Wong v. Jing*, 189 Cal. App. 4th 1354 (2010). Section 425.16 allows a defendant to dismiss causes of action that are designed to chill the exercise of First Amendment rights. *Siam v. Kizilbash*, 130 Cal. App. 4th 1563, 1568 (2005).

An anti-SLAPP motion requires a two-step process. First, the defendant has the burden to show that the challenged cause of action is one arising from protected activity (e.g., right of petition or free speech) in connection

with a public issue. *Wong*, 189 Cal. App. 4th at 1360. Then, the plaintiff has the burden to show a probability of prevailing on the claim. *Id.* Thus, only when a defendant shows that a cause of action is based on protected conduct and the plaintiff fails to show a likelihood of success on that claim will a SLAPP motion be granted. *Id.*

In *Wong*, a father posted a review about his son's dentist on Yelp. He stated that he regretted taking his son to the dentist because she used laughing gas (nitrous oxide) harmful to a child's nervous system, and used a cheaper dental filling containing mercury. *Id.* at 1361. The dentist plaintiff sued the father for libel among other claims, and the father filed an anti-SLAPP motion to strike the dentist's claims.

The court found that the defendant made a prima facie showing that the posted review was made in a public forum (internet) and involved a public concern about the use of silver amalgam that contains mercury and its potential adverse health effects. *Id.* at 1367. In other words, the review was not just a highly critical opinion of the dentist's performance, but it was also part of a public discussion and dissemination of information on issues of public interest. Thus, the burden shifted to the plaintiff dentist to make a prima facie showing of probable success on the merits, namely on her libel and other claims. After analyzing the defamatory claim in length, the court concluded that the dentist made a prima facie showing of probable success on her cause of action for libel. Thus, the court affirmed the trial court's denial of the defendant's anti-SLAPP motion as it applied to that claim. The court, however, dismissed plaintiff's other claims due to insufficient showing.

Therefore, in sum, while a business may file a complaint against a poster of a defamatory review, the business should anticipate that the poster may file an anti-SLAPP motion. In this regard, the business must be prepared to show that it has the probability of prevailing on the defamation claim (i.e., showing how the review is false and defamatory).

Actions Against the Consumer Review Website

It has been settled that a business may file a complaint against a reviewer who posted a defamatory review on a consumer review website, such as Yelp. If the business wins in court, the court can issue an injunction ordering the reviewer to remove the defamatory post. See *Hassell*, 5 Cal. 5th at 547. But, what if the business does not know the identity of the reviewer—which prevents it from sending a demand letter or filing a complaint—and Yelp refuses to remove the post? Can the business obtain a court order to compel Yelp to remove the post?

The answer is no. The Communications Decency Act (CDA) of 1996 confers broad immunity for “provider or user of an interactive computer service” against any liability imposed under any state or local law, including defamation liability. 47 U.S.C. § 230(e); *Barrett v. Rosenthal*, 40 Cal. 4th 33, 39 (2006). Essentially, such providers who host or republish statements that originated from others are immune from any liability. Yelp is a “provider” within the meaning of the CDA because Yelp merely acts as a host for its users to post reviews. *Hassell*, 5 Cal. 5th at 540. Thus, this immunity would shield Yelp from an injunction that requires Yelp to remove a review even if Yelp is not named as a defendant in the lawsuit. *Id.* at 541.

Fortunately, even if Yelp cannot be compelled to remove the defamatory review, Yelp can be compelled through a business records subpoena to reveal the identity of the anonymous poster of the challenged review when certain conditions are met. *Yelp Inc. v. Superior Court*, 17 Cal. App. 5th 1, 13 (2017). The subpoena may request potentially identifying information such as the reviewer's name, IP address, email address, physical address, and phone numbers.

Although the First Amendment covers the right to publish anonymously, such protection is not available when the review is defamatory. *Id.* at 13-14. Thus, in order to overcome the constitutional protection, the plaintiff issuing the subpoena must do two things. First, the plaintiff must make a prima facie

showing that the comment at issue is defamatory. *Id.* at 14. Again, this means persuading the court that the published statements can be reasonably interpreted as stating facts that are provably false. *Id.* at 16. The plaintiff may explain and provide evidence (e.g., declaration) to prove the falsity of the review.

Second, before the identity of the anonymous reviewer is disclosed, the reviewer must be provided with a notice and the opportunity to respond. *Id.* at 14. The burden is on the subpoenaed party (e.g., Yelp) to provide notice to the reviewer because, as the website host, Yelp presumably knows the identity or has access to information that may reveal it. *Id.* Therefore, even if a business does not know the identity of the reviewer, it can subpoena consumer review websites to reveal the identity, as long as the business can make a prima facie showing that the review at issue is defamatory. Once the identity is revealed, the business can send a demand letter or file a complaint as it deems fit.

Conclusion

Although the law in this area is still developing, businesses do have some recourse when a defamatory review is posted on their Yelp or other consumer review website page. Once a business has some proof that the review is false, the business can attempt to have the review removed using the methods discussed above depending on the business's needs and financial capacity.



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