

Yelping About Yelp

By Andrew K. Jacobson

[Yelp](#) and other business profile websites are a common sore spot for many businesses. At a minimum, it is a free service to advertise your business, showcasing your products or services and attracting customers. However, there are strings attached. Yelp also offers its subscribers the chance to review businesses online. Every once in a while, someone leaves a defamatory review that is more than negative; it is untrue. What can a business do about that?

Don't Bother Suing Yelp. The first instinct is to sue Yelp to remove it. Unfortunately, federal law from the dawn of the Internet exempts suing internet service operators like Yelp for matter posted by third parties. Title V, [section 230](#), of the Telecommunications Act of 1996 (also known as the Communications Decency Act "CDA") exempts companies like Yelp from liability for defamatory posts by third parties. Hailed as a "[valuable tool\[\] for protecting freedom of expression and innovation on the Internet](#)" section 230 has provided an excellent protective wall for internet sites that allowed the Internet to flourish to what it is now, 20 years later.

[Kimzey v. Yelp](#) recently reinforced this protection for Yelp and other Internet sites. Mr. Kimzey is a Washington locksmith who sued Yelp for a negative review on its website that he claimed reduced his business 95%. To try to argue his way around section 230, he claimed the review was actually by Yelp, but he had no evidence to support that. He also claimed that the post was a Yelp scheme to get him to advertise on Yelp. Many small companies have complained that Yelp salesmen have insinuated that by advertising, companies can have negative reviews buried or removed. Nevertheless, Kimzey had no evidence of that either.

A Workaround? The good news for businesses unhappy with a Yelp review is that a lawyer in San Francisco may have found a way to remove libelous statements on Yelp without having to tear down federal protection for websites found in CDA section 230. Lawyer Dawn Hassell counseled a client about a personal injury case, but withdrew from representation before anything could be filed. The potential client retaliated by leaving false reviews that were easily traceable to her identity. Attorney Hassell sued the defamatory ex-client and won a default judgment. She did not file suit against Yelp, but did get the trial court to order the defamatory reviews removed from Yelp.

The appellate court upheld the removal order, finding that Yelp had no First Amendment protection against the order. It also found that CDA section 230 does not excuse Yelp from obeying the order. Yelp is not being punished; the defamatory defendant is, and Yelp is but a vehicle that the defamatory defendant used to publish the libel. While CDA section 230 immunizes Yelp and other Internet sites from direct liability, it does not prevent a court from directing Yelp to comply with a court order to remove the defamatory remarks. The inherent power of the court to enforce its own

orders, even against third parties, does not suffer because CDA section 230 immunizes internet providers.

Unfortunately, this workaround may be short-lived. The *Hassell v. Bird* case has been accepted for review by the California Supreme Court, which will hear oral arguments and issue a decision in about a year.

The media tends to portray this as a free speech issue; it is not. The First Amendment does not protect the right to defame someone. In the 1966 case of *Rosenblatt v. Baer*, the famed Supreme Court Justice William Brennan recognized “the important social values which underlie the law of defamation. Society has a pervasive and strong interest in preventing and redressing attacks upon reputation.” Everyone has the right to protect their own reputation from untrue statements; it is a core concept of everyone’s basic dignity. The *Hassell* trial court ruled on the facts that the ex-client’s statements on Yelp were untrue. They were designed to harm the reputational interest of the company on whose profile page it was posted. That part of the case is not subject to review.

Responding to Reviews. Short of going to the California Supreme Court, what should a business do when the inevitable negative review lands on its Yelp profile? First, resist the temptation to trash the reviewer – even if the reviewer deserves it. Potential customers land on your Yelp profile looking for good service. A flame war will cause them to flee, no matter the merits.

Second, most negative reviews are honest, not defamatory, even if you disagree with them. Take them as a learning experience. Can customer service be more sensitive to the needs of the customers? The negative review can help you avoid problems in the future.

Third, recognize that negative reviews are not only inevitable, but expected. No one makes the perfect meal or product, or provides the perfect service, every time. What tastes delightful to one person can be sour to the next. Customers are humans and understand this; they tend to become suspicious when every review is five stars. They have too much experience to be suckered otherwise.

Yelp offers a feature that allows the business to respond to reviews – [use it](#), but positively. Acknowledge the customer’s experience, and try to make it right. A coupon or discount is far cheaper than a dissatisfied customer, and can go a long way to show potential customers that you care about customer service.

But what if someone is deliberately defamatory, as in the *Hassell* case, above? You need to tread very carefully. Ironically, the worse the flame, the less people are likely to believe it. But some are so damaging, doing nothing doesn’t seem to be an option.

Should I Sue? Having long experience with defamation cases, I know that the plaintiff hardly ever comes out a winner in a defamation suit. First, they are expensive, and the attorneys’ fees are generally not recoverable against the defendant. Second, many liability insurance policies will provide a defense to an insured accused of defamation, so that there is a greater relative burden on the plaintiff. Next, a defense lawyer can have a

field day with a case like this, as the truth of an alleged defamation is the perfect defense. Imagine having the contact information of every customer you've ever had subpoenaed. Then each customer is contacted, asked about the allegations, and quizzed as to their experience with your company. This [Streisand Effect](#) would be far worse for your business than the bare allegation itself. A level-headed, fact-laden dismissal of the defamation in a response on your Yelp profile is far cheaper. © October 2016