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“THE LIE, THE BIGGER LIE, AND THE BIGGEST LIE”—UNFAIR  
AND DECEPTIVE TRADE PRACTICES OF TRIPADVISOR AND  
OTHER ONLINE REVIEW WEBSITES

*Michael Flynn*



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“THE LIE, THE BIGGER LIE, AND THE BIGGEST LIE”—UNFAIR  
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*Michael Flynn\**

**The Reviews<sup>1</sup>:**

**Hotel Paradise—Marcy, 40 years old, Female, from Fort Lauderdale, Florida:**

Hello, my name is Marcy and my husband and I just recently stayed at Hotel Paradise. I give Hotel Paradise an overall 10 out of 10! My husband and I spent our 10th Year Anniversary here, and let me say, the splurge was well worth it. Although the hotel is rather pricey, everything from the service to the overall ambiance was simply fantastic. My husband and I couldn't have asked for a better experience. When we first arrived at Hotel Paradise, we were greeted by hotel staff with a complimentary glass of champagne. Then, the hotel manager went out of his way to give us a tour of the hotel grounds while our bags were being taken up to the room. Once we opened the doors to our room, I couldn't believe how luxurious, spacious, and particularly clean it was. It even had a complimentary bottle of wine waiting for us on our king-sized bed. That's not all . . . The hotel staff even took it upon themselves to notify the hotel restaurant we were dining at for our special night in advance, which to our surprise, included a complimentary bottle of champagne and dessert. Overall, a fantastic experience and I would highly recommend this hotel and restaurant to anyone, especially for those who are in need of a place to make a celebratory occasion extra special.

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<sup>1</sup> These reviews are fictitious and are meant to portray an online review posted by a person who had an overall great experience, and an overall poor experience at a hotel and restaurant.

**Hotel Paradise—Brian, 42 years old, Male, from Seattle, Washington:**

Hello, my name is Brian and I am from Seattle, Washington. I recently traveled to Hotel Paradise with my now fiancé, Abby. I had originally planned this trip so I could propose to Abby, and needless to say, I relied on many of the reviews online. They all seemed to have 10 out of 10 ratings, and the pictures looked really nice. Naturally, I decided to book it for the weekend. When we first arrived, the concierge did not have our reservation. To make matters worse, the suite that I originally booked was taken by someone else, and the staff did nothing to accommodate us. As we walked to our room, I could smell what seemed to be a rotten eggs odor emanating from the walls. The desk clerk assured us it was the sprinklers from outside and that it would go away later that day. It did not. The hotel room was terrible—it was very small, and of course, they only had two twin beds available. Not exactly the most romantic place to propose to your girlfriend. As if it couldn't get any worse, the hotel restaurant was disastrous. I had notified the staff hoping they would help me with the proposal before arriving at Hotel Paradise. Nobody did. The waiter was very rude and we waited over two hours before receiving our meals. Once we sat down, I noticed in the corner a cockroach and decided to call off the proposal. I could not bring myself to propose when I was in such a horrible mood. It was not until we got off the plane and back to our home in Seattle that I decided to propose. Thank you, Hotel Paradise, for hurting my wallet and ruining my plans of proposing. Do not waste your time here, go somewhere else! I give Hotel Paradise a 0 out of 10.

**I. THE LIE—INTRODUCTION**

In today's marketplace of fake news, alternative facts, spin, and deflection, Senator Daniel Patrick Moynihan's statement that "everyone is entitled to their own opinion, but not their own facts," may not be so true.<sup>2</sup> In fact, you may not even be able to trust that the opinion you read is indeed the opinion of the author. The reviews posted about Hotel Paradise are a

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<sup>2</sup> DANIEL PATRICK MOYNIHAN, DANIEL PATRICK MOYNIHAN: A PORTRAIT IN LETTERS OF AN AMERICAN VISIONARY (Steven R. Weisman ed., Public Affairs 2010).

combination of several reviews found on the TripAdvisor website.<sup>3</sup> Neither of the above referenced reviews are true; Hotel Paradise does not exist, and the two reviewers are fake too! How would you know?

Increasingly, consumers use review websites to gather information and make buying decisions.<sup>4</sup> This is especially true when it comes to travel and food.<sup>5</sup> Whether we are searching for a hotel, or trying to find a good restaurant, consumers turn to review websites to make decisions about where to sleep or eat.<sup>6</sup> This is nothing new. From the moment we realize there is more than just one burger joint in town, consumers looked to find the right fit. Before internet reviews really gained popularity, “reviews” were mainly generated by word of mouth.<sup>7</sup> The weight of those reviews depended on who you knew and trusted to give you honest feedback about a hotel or restaurant.<sup>8</sup> However, with today’s technology, we have thousands of reviews upon which to base our decisions.<sup>9</sup> What can be more reliable than an online review?

With about 60 million uses monthly, and more than one user contribution every second, TripAdvisor is now considered the world’s largest online travel company.<sup>10</sup> With more reviews being posted on TripAdvisor by the minute, how can we differentiate between which reviews are true and which ones are false? The truth is, consumers really do not know how to

<sup>3</sup> *TripAdvisor, LLC, Hotels*, TRIPADVISOR (Nov. 9, 2017), <https://www.tripadvisor.com/Hotels>.

<sup>4</sup> According to Forbes Magazine, a recent study found that 88% of consumers trust online reviews as much as a personal recommendations. Jayson DeMers, *How Important Are Customer Reviews for Online Marketing*, FORBES MAG. (Dec. 28, 2015), [www.forbes.com/sites/jaysondemers/2015/12/28/how-important-are-customer-reviews-for-online-marketing/#2332e6f9788c](http://www.forbes.com/sites/jaysondemers/2015/12/28/how-important-are-customer-reviews-for-online-marketing/#2332e6f9788c).

<sup>5</sup> According to eMarketer, an online digital database and research provider, online travel reviews and traveler databases have experienced about a 50% increase over the year. For example, in just 2013 alone, TripAdvisor has surpassed 100 million number of reviews. *With Online Reviews Critical to Travelers, Marketers Adjust Their Approach*, EMARKETER (July 1, 2013), [www.emarketer.com/Article/With-Online-Reviews-Critical-Travelers-Marketers-Adjust-Their-Approach/1010013#gUmzAddkks6CbHsO.01](http://www.emarketer.com/Article/With-Online-Reviews-Critical-Travelers-Marketers-Adjust-Their-Approach/1010013#gUmzAddkks6CbHsO.01).

<sup>6</sup> *Id.*

<sup>7</sup> *See supra* note 2.

<sup>8</sup> *Id.*

<sup>9</sup> *See supra* note 3.

<sup>10</sup> TripAdvisor is one of the many sites that dedicates its services to helping consumers plan their vacations. Others include: YELP, Kayak, Craigslist, and Angie’s List: Brian J. Cantwell, *Inside TripAdvisor: When Did Blackmail and Intrigue Become Part of the Vacation Planning?*, THE SEATTLE NEWS (Mar. 7, 2013), <http://Blogs.seattletimes.com/northwesttraveler/2013/03/07/inside-tripadvisor-when-did-blackmail-and-intrigue-become-part-of-vacaion-planning/>.

accurately differentiate the two. Evidence shows that consumers are more likely to base purchasing decisions on online consumer reviews from TripAdvisor-type review websites, and find these reviews helpful and credible.<sup>11</sup> TripAdvisor routinely tells consumers that the reviews they are reading on their website are authentic and come from real people who have had real experiences at the hotels, restaurants, or the other attractions listed.

It is not uncommon to hear about individuals or companies writing fake online reviews on TripAdvisor, to either boost their own ratings or hurt their rivals'.<sup>12</sup> In fact, it is easy to bypass detection and write fake reviews on TripAdvisor.<sup>13</sup> To illustrate just how easy writing a fake review on TripAdvisor can be, consider the rise and fall of La Scaletta, the fake Italian restaurant.<sup>14</sup> An Italian newspaper, along with several restaurant owners in the northern Italian town of Moniga del Garda, wanted to prove just how easy it is to fake reviews on TripAdvisor.<sup>15</sup> They created a fake restaurant profile, and then proceeded to post fake positive reviews.<sup>16</sup> As a result of the positive reviews, the fake restaurant ranked as a top spot to dine on TripAdvisor.<sup>17</sup> Despite what appears to be consumer confidence in the truthfulness and authenticity of the TripAdvisor reviews, the reviews seem just as likely to be fake.

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<sup>11</sup> According to Bright Local's 2014 Consumer Review, almost 90% of people trust online reviews more than word of mouth. *Local Consumer Review Survey 2014*, BRIGHT LOCAL (2014), <http://www.brightlocal.com/learn/local-consumer-review-survey-2014/>; see also *supra* note 2.

<sup>12</sup> Tom Rawstorne, *Disturbing Proof the Online Review That Made You Book Your Holiday May Be Fake: Investigation Reveals An Entire Industry is Dedicated To Generating Bogus Appraisals For Cash*, DAILY MAIL (Oct. 16, 2015), <http://www.dailymail.co.uk/news/article-3276617/Disturbing-proof-online-review-book-holiday-FAKE-Investigation-reveals-entire-industry-dedicated-generating-bogus-appraisals-cash.html>.

<sup>13</sup> *Id.*

<sup>14</sup> Siobhan Fenton, *TripAdvisor Denies Rating System Is Flawed, After Fake Restaurant Tops Rankings in Italy*, INDEPENDENT (June 30, 2015), <http://www.independent.co.uk/life-style/gadgets-and-tech/news/tripadvisor-denies-rating-system-is-flawed-after-fake-restaurant-tops-rankings-in-italy-10354818.html>.

<sup>15</sup> Beniamino Bonardi, *Il Ristorante Più Quotato Su TripAdvisor? Non Esiste. Un Esperimento Dimostra che il sito di recensioni non esercita controlli*, IL FATTO ALIMENTARE (June 25, 2015), <http://www.ilfattoalimentare.it/tripadvisor-esperimento-ristorante-inesistente.html>; see also *Italy Fines TripAdvisor €500,000 Over False Reviews*, THE GUARDIAN (Dec. 23, 2014), <https://www.theguardian.com/travel/2014/dec/23/italy-fines-tripadvisor-500000>.

<sup>16</sup> *Id.*

<sup>17</sup> See *supra* note 12.

This article will first detail the business of TripAdvisor, specifically, what TripAdvisor promises its business customers and consumers. Next, this article will analyze TripAdvisor's business practices in light of the Federal Trade Commission Act (the "FTCA"), and the State Unfair and Deceptive Trade Practice (the "UDTP") Statutes. Then, this article will examine the seemingly mind-bending connection and legal protection afforded TripAdvisor, and other similar hosting websites by Section 230 of the Federal Communication Decency Act (the "CDA").<sup>18</sup> Finally this article will conclude by commenting and suggesting that consumers, relying on such travel and other websites, who have been injured, need and deserve the remedies afforded by consumer protection laws.<sup>19</sup>

## II. THE BIGGER LIE—THE TRIPADVISOR MODEL AND THE CONTENT INTEGRITY TEAM

*With over 200 million reviews and opinions on TripAdvisor, and over 315 million travelers using our site each month, we're confident that we're taking the right steps to keep our content fresh and useful.*<sup>20</sup>

It is true, TripAdvisor has become one of the most powerful online review resources.<sup>21</sup> TripAdvisor's mantra is simple: the best advice comes from other travelers.<sup>22</sup> The website itself explains, "In keeping with this philosophy, our policy regarding review submissions is self-directed. While we do require reviewers to certify that they are reviewing their own experiences before they can submit their review to TripAdvisor, we don't seek third-party verification."<sup>23</sup>

TripAdvisor trusts their reviews are true, authentic and genuine. When asked about how TripAdvisor ensures the reviews are genuine and independent, President and CEO of TripAdvisor, Stephen Kaufer stated:

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<sup>18</sup> See *infra* Part IV.

<sup>19</sup> See *infra* Part V.

<sup>20</sup> *Content Integrity Policy*, TRIPADVISOR (2017), [https://www.tripadvisor.com/pages/content\\_integrity\\_policy.html](https://www.tripadvisor.com/pages/content_integrity_policy.html).

<sup>21</sup> *Id.*; Teixeira Thales & Leora Kornfeld, *Managing Online Reviews on TripAdvisor*, HARV. BUS. SCH. (Dec. 2013), <http://www.hbs.edu/faculty/Pages/item.aspx?num=46061>; Joshua Barrie, *TripAdvisor Reviews Are now so Powerful They Impact the Tourist Industry of Entire Countries*, BUS. INSIDER (Mar. 16, 2015), <http://www.businessinsider.com/tripadvisor-affects-tourism-of-entire-countries-2015-3>.

<sup>22</sup> *Supra* note 20.

<sup>23</sup> *Id.*

There is nothing more important to TripAdvisor as a company than the trust we continue to have from travelers who continue to use the site. If we lose that, we don't have much of a business. From Day One, we have taken a huge interest in maintaining the integrity of our reviews with a dedicated and specialist team focused on combating fraudulent reviews. When we ask travelers whether the information they read before their trip matched their actual experience, we rate in the high 90th percentile. People love the site—and keep coming back.<sup>24</sup>

TripAdvisor has “ensured” its followers that fake reviews will be deleted and eliminated from the site through its Content Integrity Policy Team, and the secrets behind its algorithm.<sup>25</sup> Under its Content Integrity Policy, TripAdvisor lists the steps it takes to identify and block fraud.<sup>26</sup> The Policy states:

We capture and record thousands of data points per hour and insert them into our proprietary fraud detection processes. We run reviews through automatic filters to identify moderation or integrity issues prior to publication. This process allows TripAdvisor to analyze and categorize massive amounts of data quickly and thoroughly. We have a staff of more than 300 people in seven countries working to manage content and to identify, block, and remove fraud. Once reviews are published, we allow business owners and community members to flag content for our review if they believe it is fraudulent. All reports from our community and owners are reviewed and analyzed by the Content Team. We proactively engage with companies trying to hire people to write reviews as well as property owners attempting to buy fake reviews in order to expose those that try to circumvent our systems.<sup>27</sup>

Each fraudulent submission that TripAdvisor identifies which “has a negative impact on a business's rank” is flagged by their “Popularity Index Algorithm.”<sup>28</sup> However, the site fails to explain exactly how the actual algorithm works.<sup>29</sup> All that is mentioned is that the algorithm has “unique processes for moderating the content submitted to TripAdvisor,” as well as

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<sup>24</sup> Steve Meacham, *TripAdvisor CEO Stephen Kaufer on His Favourite Hotels and How Travel Has Changed*, TRAVELLER (Sept. 13, 2016), <http://www.traveller.com.au/tripadvisor-ceo-stephen-kauffer-on-his-favourite-hotels-and-how-travel-has-changed-grefok>.

<sup>25</sup> *Supra* note 19.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *See id.* (explaining how the omission of any explanation on how the “Popularity Index Algorithm” actually works).

“proprietary algorithms that calculate a business’s daily rank with our Popularity Index.”<sup>30</sup>

The last prominent promise TripAdvisor makes to its customers is that they “aggressively pursue companies that offer to boost a business’s reputation by writing fake reviews on its behalf . . . When we catch them, we expose all of the fake reviews they’ve posted, and we penalize their clients.”<sup>31</sup>

The bottom line, though, is that TripAdvisor’s Content Integrity Policy and process have not worked to root out fake reviews, and TripAdvisor’s promise that their website can be trusted is not always true.<sup>32</sup> This is the bigger lie! Not only is the Content Integrity Policy not completely effective, it did not prevent the creation of a fake entity coupled with fake reviews that ended up being the highest rated entity of its type on the TripAdvisor website. In fact, the European Union issued a directive specifically alerting consumers that they cannot trust, and should not rely on the TripAdvisor website.<sup>33</sup>

### III. FTCA AND STATE UDTP STATUTES

Originally signed into law in 1914, the Federal Trade Commission Act (“FTCA”) has been amended over the years to grant broad authority to the Federal Trade Commission (“FTC”) to prevent “unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices.”<sup>34</sup> Congress’ failure to define specifically what constitutes an unfair or deceptive trade practice was deliberate because, as the Supreme Court of the United States explained in the case of *Sperry-Hutchison v. FTC*, “there is no limit to human inventiveness” when it comes to unfair trade practices.<sup>35</sup> In *F.T.C. v. Colgate-Palmolive Co.*, the Supreme Court also noted that the significance of Congress’ intent to grant flexibility to the

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<sup>30</sup> *Supra* note 20.

<sup>31</sup> *Id.*

<sup>32</sup> *Supra* note 14.

<sup>33</sup> *Supra* note 15.

<sup>34</sup> 15 U.S.C. § 45(a)(2) (2006) (which states, “The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.”).

<sup>35</sup> See *I.U. du Pont de Nemours & Co. v. F.T.C.*, 792 F.2d 128 (2d Cir. 1984); see also *American Fin. Serv. Ass’n v. F.T.C.*, 767 F.2d 957 (D.C. Cir. 1985).



proscriptions articulated in the FTCA, and to allow case law to define those proscriptions.<sup>36</sup>

An unfair trade practice, according to the current version of the FTCA, is any act or practice that “causes or is likely to cause substantial injury to the consumer which cannot be reasonably avoided by the consumers themselves and is not outweighed by countervailing benefits to the consumers or to competition.”<sup>37</sup> This definition, subscribed to by the FTC, is designed to codify the long standing federal case law. Historically, an unfair trade practice was understood to be an act that was immoral, unethical, unscrupulous, violated some established principle of public policy, or caused substantial consumer injury.<sup>38</sup> The court further refined this definition of unfairness to include not only a violation of a statute or other public policy pronouncement, but also any act or practice that falls within the penumbra of such public policy.<sup>39</sup> However, public policy, under the current version of the FTCA, cannot be used as conclusive proof that a particular act or practice is unfair.<sup>40</sup> Proof of intent, negligence or fraud is not required to establish that a particular act or practice is unfair.<sup>41</sup>

Federal case law defines a deceptive trade practice as an act or practice that has the tendency or capacity to deceive consumers.<sup>42</sup> The FTC, in an attempt to capture this meaning of deception, published guidelines that define a deceptive trade practice as an act or practice that is likely to deceive a consumer acting reasonably under the circumstances.<sup>43</sup> Again, no proof of

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<sup>36</sup> F.T.C. v. Colgate-Palmolive Co., 380 U.S. 374, 384–85 (1965) (stating “Congress amended the Act in 1938 to extend the Commission’s jurisdiction to include ‘unfair or deceptive acts or practices in commerce’—a significant amendment showing Congress’ concern for consumers as well as for competitors. It is important to note the generality of these standards of illegality; the proscriptions of which are flexible, ‘to be defined with particularity by the myriad of cases from the field of business.’”).

<sup>37</sup> 15 U.S.C. § 45(n) (2006).

<sup>38</sup> See F.T.C. v. Neovi, Inc., 604 F.3d 1150 (9th Cir. 2010); Charles of the Ritz Distrib. Corp. v. F.T.C., 143 F.2d 676 (2d Cir. 1944); *supra* note 37.

<sup>39</sup> *Supra* note 37.

<sup>40</sup> *Id.*

<sup>41</sup> DEE PRIDGEN & RICHARD M. ALDERMAN, CONSUMER PROTECTION AND THE LAW § 3.1 (2014–15 ed. 2014).

<sup>42</sup> Charles of the Ritz Distrib. Corp. v. F.T.C., 143 F.2d at 680.

<sup>43</sup> See *supra* note 21 (holding that a misrepresentation of any fact is deceptive so long as the misrepresentation of that fact forms the basis of the purchaser’s decision to buy a good or service).

actual deception, an intent to deceive, negligence, or fraud is required to make out a *prima facie* case that an act or practice is deceptive.<sup>44</sup>

Regardless of what definition a court chooses to use in defining a “deceptive trade practice,” the FTC policy statements on deception make it very clear that there are certain elements that underlay findings of deception.<sup>45</sup> Deception has been found where a material representation, omission, or practice, either in writing, orally or through conduct, which is likely to mislead a consumer acting reasonably under the circumstances, is actionable as a deceptive trade practice.<sup>46</sup>

Case law takes the FTCA one step further, by holding third parties liable for a violation of the FTCA when that third party places in the hands of another the means or instrumentality to perpetrate an unfair or deceptive trade practice.<sup>47</sup> In *Regina Corp. v. F.T.C.*, the federal court held a third party liable for publishing and furnishing distributors and retailers fake “manufacturer’s list prices” or suggested list prices,” therefore making the representation or implication that the ‘list prices’ were the usual and customary retail prices charged for its products, when such prices were not.<sup>48</sup> The court held that such activity violated the FTCA, stating that, “by contributing towards the cost of misleading advertisements,” the third party was “equally responsible with its retailers for the deceptive character of the representations that appear therein.”<sup>49</sup> The court ultimately found that the fake “suggested list prices,” which were inflated from the usual and customary retail prices charged, was a deceptive trade practice.<sup>50</sup>

While the FTCA affords a great range of authority to the FTC to battle unfair methods of competition and unfair or deceptive acts or practices in commerce, the FTCA falls short of its full intent of protecting consumers.

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<sup>44</sup> See CAROLYN S. CARTER & JOHNATHAN SHELDON, UNFAIR AND DECEPTIVE TRADE PRACTICES § 7.1.11 (8th ed. 2012).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Regina Corp. v. F.T.C.*, 322 F.2d 765 (3d Cir. 1963); *C. Howard Hunt Pen Co. v. Federal Trade Commission*, 197 F.2d 273 (3d Cir. 1952); see *Federal Trade Commission v. Winsted Hosiery Co.*, 258 U.S. 483 (1922).

<sup>48</sup> *Regina Corp.*, 322 F.2d at 767.

<sup>49</sup> *Id.* at 768.

<sup>50</sup> *Id.*

The FTCA does not provide a private remedy for injured consumers.<sup>51</sup> While the FTC enforces the FTCA with the intent of protecting consumers, it will only take action when it is in the best interest of the general public, and not when there are isolated consumer injuries.<sup>52</sup>

The states, realizing the shortcomings of the FTCA and wanting to provide greater consumer protection to their constituents, have created their own Unfair and Deceptive Trade Practice (UDTP) laws that allow injured consumers a private right of action.<sup>53</sup> Whether a business can sue depends on whether they are considered a “consumer” under the state statute.<sup>54</sup> Of all the states that have UDTP laws, thirty states allow a business to sue for injury sustained from an unfair or deceptive trade or practice.<sup>55</sup> These state UDTP laws generally mirror the FTCA.<sup>56</sup>

What separates the FTCA from state UDTP statutes is that the state UDTP statutes provide for government enforcement and private enforcement actions.<sup>57</sup> State UDTP statutes are often referred to as “little FTC acts” because most state UDTP statutes mirror the language of the FTCA in prohibiting unfair and deceptive trade practices.<sup>58</sup> Most states UDTP statutes explicitly state that the court precedent and the FTC rules and guidelines will be followed by the state, or at least given great deference in state court proceedings for unfair and deceptive trade practices.<sup>59</sup> Although each state is free to produce its own set of court precedent and administrative rules, the majority of states look to the FTCA and the FTC for guidance in this area.<sup>60</sup>

Many state UDTP statutes also include the term “unconscionable” when referring to a prohibited trade practice.<sup>61</sup> The term “unconscionability” is taken from Article 2 of the Uniform Commercial Code, governing contracts

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<sup>51</sup> See Jeff Sovern, *Private Actions Under the Deceptive Trade Practices Act: Reconsidering the FTC Act as Rule Model*, 52 OHIO ST. L.J. 437 (1991).

<sup>52</sup> *Id.* at 446.

<sup>53</sup> *Id.*

<sup>54</sup> Michael C. Gilleran, *The Rise of Unfair and Deceptive Trade Practice Act Claims*, A.B.A. (Oct. 17, 2011), <http://apps.americanbar.org/litigation/committees/businessstorts/articles/fall2011-unfair-deceptive-trade-practice-act-claims.html>.

<sup>55</sup> *Id.*

<sup>56</sup> *Nemours*, 792 F.2d at 448.

<sup>57</sup> CARTER & SHELDON, *supra* note 44.

<sup>58</sup> *Id.*; *Neovi*, 604 F.3d at 1156.

<sup>59</sup> *Supra* note 44, § 3.4.5.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* § 1.2.

for sale of goods.<sup>62</sup> Thus, most state courts look to the definition and application of the term unconscionability within state court precedent.<sup>63</sup> State courts are left with essentially two legal standards to choose from, because state UDTP statutes apply or give deference to both the pronouncements of the FTC and federal court precedent.<sup>64</sup> Thus, when determining whether a trade practice is unfair or deceptive, state court rulings can be unique to that state.<sup>65</sup>

Ambiguous but literally true statements, partial truths, conduct, and pictures can also be the basis of deceptive trade practice claims.<sup>66</sup> Specifically, “A practice is deceptive if the overall net impression of the representation, not just the specific explicit claim, is deceptive.”<sup>67</sup> Thus, deception can be found through innuendo, and not just through outright false statements.<sup>68</sup> It is vital for a consumer or potential litigant to understand that a representation can also carry an implied claim.<sup>69</sup> If that implied claim is false, then the overall representation is deceptive.<sup>70</sup> “Implied claims are present if consumers acting reasonable in the circumstances interpret the advertisement as containing that message.”<sup>71</sup> The FTC determines the meaning of implied claims by looking at the context of the representation, and the content of the representation as a whole.<sup>72</sup> This analysis includes juxtaposing the various phrases within the content, to the nature of the claim and all of the circumstances surrounding the content.<sup>73</sup>

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<sup>62</sup> The Uniform Commercial Code is a uniform law that covers commercial activities including transactions, sales of goods, secured transactions and negotiable instruments. Article 2 of the U.C.C. targets “sales.” Unif. Comm. Code § 2 (West 2016).

<sup>63</sup> *Supra* note 44, § 3.4.5.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* § 4.2.13; *Ambrose v. New England Ass’n of Sch. & Colleges*, 252 F.3d 488 (1st Cir. 2001); *Am. Home Prods. Corp. v. Fed. Trade Comm’n*, 695 F.2d 681 (3d Cir. 1982); *L.G. Blafour Co. v. Fed. Trade Comm’n*, 442 F.2d 1 (7th Cir. 1971); *J.B. Williams Co. v. Fed. Trade Comm’n*, 381 F.2d 884 (6th Cir. 1967).

<sup>67</sup> *Supra* note 45, § 4.2.13; *Fed. Trade Comm’n v. Stefanchik*, 559 F.3d 924, 928 (9th Cir. 2009); *Fed. Trade Comm’n v. Cyberspace.com, L.L.C.*, 453 F.3d 1196 (9th Cir. 2006).

<sup>68</sup> *Supra* note 45, § 4.2.13; *Regina*, 322 F.2d at 765; *Bakers Franchise Corp. v. Fed. Trade Comm’n*, 302 F.2d 258 (3d Cir. 1962).

<sup>69</sup> *Supra* note 44.

<sup>70</sup> *Novartis Corp.*, 5 Trade Reg. Rep. (CCH) ¶ 24, 614; F.T.C. Dkt. 9279 (May 27, 1999), *aff’d*, 223 F.3d 783 (D.C. Cir. 2000).

<sup>71</sup> *Supra* note 44.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

It is not a stretch to see how the representations of TripAdvisor fall within the prohibitions of the federal and state unfair and deceptive trade practices acts. TripAdvisor provides the means and instrumentality by which consumers are duped into believing and relying on the reviews presented by TripAdvisor. Even if TripAdvisor's unsubstantiated and dubious claim that it roots out most of the fake reviews over time is true, what about all of the consumers who are in fact injured by the fake reviews before such fake reviews are found out, or the consumers who are injured by fake reviews that are never found out? Federal and state unfair and deceptive trade practice law does not build into its enforcement "one free bite," or in the case of TripAdvisor, several million free bites, as some kind of defense to liability for such practices. As the purveyor of a profitable website that facilitates consumers being treated unfairly and being deceived, the promise of some kind of content integrity review through a secretly held mathematically formula that is less than completely effective, compounds the unfairness and deception hoisted on consumers by this bigger lie.

#### IV. THE BIGGEST LIE—THE COMMUNICATIONS DECENCY ACT ("CDA") AND IT'S APPLICATION TO ONLINE ACTIVITIES

##### *A. Precedent Before the CDA*

In *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, Stratton Oakmont, a New York stock brokerage firm sued Prodigy Services Company, an Internet service provider, for defamatory statements made on the site's message board by an unidentified third party.<sup>74</sup> The court held Prodigy liable as a "publisher" of the defamatory statements made by the third party.<sup>75</sup> The court reasoned that because Prodigy made a conscious choice to gain the benefits of maintaining editorial control over the content of the message board, they held themselves to a greater degree of liability as a "publisher."<sup>76</sup>

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<sup>74</sup> *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).

<sup>75</sup> *Id.* at \*4 (finding that Prodigy's decision to maintain editorial control was partially influenced by its desire to market their service as family-friendly).

<sup>76</sup> *Id.* at \*5.

The irony of the *Stratton Oakmont* decision is that, in hindsight, the statements made by the unidentified third party on Prodigy's message board were not defamatory, but rather true.<sup>77</sup> By 1998, Stratton Oakmont became infamously known for defrauding millions of dollars from investors, and its founder, Jordan Belfort, and President, Danny Porush, were both indicted and pled guilty to ten counts of securities fraud.<sup>78</sup>

Perhaps the equal, if not greater, importance of the *Stratton Oakmont* decision, is the lasting collateral legal effect that it has had on the internet service providers, as such services were now subject to tort liability as the publisher of defamatory content.<sup>79</sup>

### B. Section 230 of the CDA

With the *Stratton Oakmont* decision increasingly becoming a legal threat for internet service providers, in 1996, Congress passed the Communications Decency Act (CDA) to deal with the heightened concern over a minor's unregulated access to pornography and other offensive material on the internet.<sup>80</sup> According to Senator Exon, the sponsor of the piece of legislation, "the fundamental purpose of the Act was to provide the much needed protection for children in the new age of the Internet."<sup>81</sup> The CDA was incorporated into Title V of the Telecommunications Act of 1996.<sup>82</sup> The CDA called for the criminalization of knowingly transmitting obscene or indecent material to minors through the internet.<sup>83</sup> Senator Exon wanted to accomplish the goal expressed by the CDA through governmental

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<sup>77</sup> *Id.*

<sup>78</sup> See Edward Wyatt, *Stratton Oakmont Executives Admit Stock Manipulation*, N.Y. TIMES (Sept. 24, 1999), <http://www.nytimes.com/1999/09/24/business/stratton-oakmont-executives-admit-stock-manipulation.html>.

<sup>79</sup> See Gregory M. Dickinson, *An Interpretive Framework for Narrower Immunity Under Section 230 of the Communications Decency Act*, 33 HARV. J.L. & PUB. POL. 863, 864 (2010) ("Part IV attempts to solve these difficulties by interpreting section 230 in light of . . . *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, the defamation case that prompted Congress to pass section 230.").

<sup>80</sup> See 141 CONG. REC. 3203 (1995) (statement of Sen. Exon).

<sup>81</sup> 141 CONG. REC. 88088 (1995) (statement of Sen. Exon, "the heart and soul of the Communications Decency Act is to provide much-needed protection for families and children.").

<sup>82</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 133 (codified as amended in scattered sections of 47 U.S.C. § 200 *et seq.* (2006)).

<sup>83</sup> 47 U.S.C. § 223(a)(1)(B) (Supp. II 1997), *invalidated by Reno v. ACLU*, 521 U.S. 844, 858–61 (1997).

regulation of the internet, enforced by the Federal Communications Commission (FCC).<sup>84</sup>

Senator Exon's bureaucratic approach to enforcement of the CDA was highly criticized, as the general consensus of the House of Representatives at that time was that parents were in the best position to monitor and screen their children's access to internet-provided obscene and indecent material.<sup>85</sup> House Representatives Cox and Wyden then introduced the Online Family Empowerment Amendment in opposition to the CDA, which called for "an Internet free of government interference."<sup>86</sup>

For Senator Exon, the glory of seeing the Communication Decency Act become law was short lived, as the Supreme Court of the United States in *Reno v. American Civil Liberties Union* ruled that two provisions of the CDA unconstitutional.<sup>87</sup> The Court reasoned that the two provisions were facially overbroad, vague, and were blanket content-based restrictions on protected speech.<sup>88</sup> Despite this big court hit, the CDA was not completely gutted, because Section 230 of the Act remained part of the CDA.<sup>89</sup> However, credit for why Section 230 of the CDA is still intact cannot be attributed to any act on the part of Senator Exon, but rather to competing legislation, the Online Family Empowerment Amendment.<sup>90</sup>

Section 230 of the CDA overturned the *Stratton Oakmont* decision.<sup>91</sup> Moreover, Section 230 of the CDA makes it quite clear that it is the policy of the United States: (1) to promote the ongoing development of the Internet,

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<sup>84</sup> Olivera Medenica & Kaiser Wahab, *Does Liability Enhance Credibility?: Lessons from the DMCA Applied to Online Defamation*, 25 CARDOZO ARTS & ENT. L.J. 237, 249 (2007).

<sup>85</sup> 141 CONG. REC. H8470 (statement of Rep. Wyden, arguing that parents are better suited to protect children from online obscenity than government bureaucrats . . .).

<sup>86</sup> See Robert Cannon, *The Legislative History of Senator Exon's Communications Decency Act: Regulating Barbarians on the Information Superhighway*, 49 FED. COMM. L.J. 51, 67 (1996).

<sup>87</sup> *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 885 (1997).

<sup>88</sup> *Id.*

<sup>89</sup> See *id.*

<sup>90</sup> See David S. Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity Under Section 230 of the Communications Decency Act*, 43 LOY. L.A. L. REV. 373, 410 (2010) ("Neither Senator Exon's first bill nor his second bill contained any language resembling section 230. In fact, the provisions that ultimately became section 230 were introduced as a part of a competing piece of legislation . . . called the Online Family Empowerment Amendment (the Cox/Wyden Amendment)") (citing 141 CONG. REC. 22, 044 (1995)).

<sup>91</sup> H.R. REP. NO. 104-458, 104th Cong., 2d Sess., at 194, 1996 U.S.C.C.A.N. 10, 208; S. REP. 104-230, 104th Cong., 2d Sess., at 194 (containing same quote).

interactive computer services and other interactive media; (2) to preserve the market for the Internet free from governmental regulation; (3) to promote the development of technologies that maximize user control over content received by people, families, and schools who use the Internet and the interactive services; (4) to encourage parental control to restrict children's access to "objectionable or inappropriate" online content; and (5) to ensure the enforcement of Federal criminal laws to prevent and punish trafficking in obscenity, cyber-stalking, and harassment through the use of a computer.<sup>92</sup>

More importantly, Section 230 of the CDA set the standard of liability for Internet Service Providers and interactive computer services.<sup>93</sup> Section 230(c)(2) states:

No provider or user of an interactive computer service shall be held liable on account of—(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected or any action taken to enable or (B) make available to information content providers or others the technical means to restrict access to material described in paragraph (1).<sup>94</sup>

Moreover, Section 230 of the CDA provides a shield of immunity to internet service providers and interactive computer services from liability as "publishers" of information provided by third-party information content providers.<sup>95</sup> This statutory immunity accomplished Congress' goal of overturning the *Stratton Oakmont* decision.<sup>96</sup> In order for a defendant website, interactive computer service, or an internet service provider to receive immunity they must satisfy a three-prong test,<sup>97</sup> which requires that: (1) the defendant is an Internet service provider or user of an interactive computer service; (2) the cause of action treats the defendant as a publisher

<sup>92</sup> 47 U.S.C. § 230(b)(1)–(5) (West 2015).

<sup>93</sup> *See id.*

<sup>94</sup> 47 U.S.C. § 230(c)(2)(A)–(B) (West 2015).

<sup>95</sup> *See* 47 U.S.C. § 230(c)(1) (West 2015) ("No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.").

<sup>96</sup> *See supra* note 59.

<sup>97</sup> *See Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1107 (9th Cir. 2009), as amended (stating that a fourth inquiry be made as to whether the defendant made an enforceable promise thereby giving the plaintiff a promissory estoppel cause of action based in contract and not one derived from the defendant's status or conduct as publisher or speaker.).



or speaker of the information; and (3) a different information content provider disseminated the information.<sup>98</sup>

An information content provider is “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.”<sup>99</sup> As if granting immunity was not enough, Section 230 of the CDA also contains a preemption clause that prevents enforcement of any state or local law when it is inconsistent with the Section 230.<sup>100</sup> The preemption clause, coupled with the immunity that Section 230 grants under (c)(1), has made Section 230 of the CDA a strong legal shield for websites and internet service providers.<sup>101</sup>

*Zeran v. American Online (“AOL”), Inc.*, which was the first case to make a ruling on Section 230(c)(1) of the CDA, and is arguably the most noteworthy decision regarding Section 230 of the CDA, because the court eliminated distributor liability thereby giving websites an almost airtight affirmative defense to an otherwise valid tort claim.<sup>102</sup> In *Zeran*, the Plaintiff filed a negligence claim against defendant AOL, alleging that AOL unreasonably delayed in removing defamatory messages posted by an unidentified third party, which they knew were false and failed to screen for similar postings thereafter.<sup>103</sup> The Plaintiff claimed that the immunity granted

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<sup>98</sup> See *Batzel v. Smith*, 333 F.3d 1018, 1037 (9th Cir. 2003).

<sup>99</sup> 47 U.S.C. § 230(f)(3) (West 2015).

<sup>100</sup> 47 U.S.C. § 230(e)(3) (West 2015) (stating “Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.”).

<sup>101</sup> See David Lukmire, *Can the Courts Tame the Communications Decency Act? Service Providers: The Reverberations of Zeran v. America Online*, 66 N.Y.U. ANN. SURV. AM. L. 371, 372 (2010) (stating “Section 230 of the CDA not only escaped Supreme Court scrutiny, but has developed in relative obscurity into “one of the most important and successful laws of cyberspace.” [ . . . ] Over the years, state and federal courts have interpreted section 230 expansively, conferring a broad immunity upon website operators that host third-party content. The statute has grown into a ‘judicial oak,’ with impacts far beyond its language . . .”).

<sup>102</sup> See *supra* note 75 (explaining “The first major case interpreting section 230(c)(1) construed the provision in broad strokes, going further than was necessary to effectuate the congressional goals of overruling *Stratton Oakmont* and of removing obstacles to the empowering of parents to determine the content of communications their children receive. Decided by the Fourth Circuit in 1997, barely a year after the statute went into effect, no case has had more influence on section 230 jurisprudence than *Zeran*. Cited over 1,400 times, virtually every subsequent opinion regarding section 230 references *Zeran*.”).

<sup>103</sup> *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997).

under Section 230 of the CDA did not apply because his claim was based on distributor liability, and not publisher liability.<sup>104</sup> The court rejected this argument, and held that Section 230 immunity still applied.<sup>105</sup> The court reasoned that distributor liability was a subcategory of publisher liability, and that since Section 230 precludes publisher liability, distributor liability is precluded as well.<sup>106</sup>

*C. Section 230 of the CDA and the Application of the Immunity and Preemption Provisions to TripAdvisor and Other Online Review Sources*

Court precedent, like the *Stratton Oakmont* case, had a chilling effect on all internet service providers, including review sites. Relief for internet service providers eventually came from the unlikely source of the fortuitous enactment of the CDA, specifically Section 230 of the Act, and the granting of immunity and preempting enforcement of any inconsistent state or local law. Remembering that the purpose of the CDA was to regulate, or in the case of the Family Empowerment Amendment, deregulate the publication of pornographic content accessible to minors, the consequence of Section 230 of the Act was to leave policing for pornographic material to parents, and then to grant immunity and preemption for the benefit of internet service providers. This just may be a startling example of the law of unexpected, unwarranted, and unintended consequences at work.

The question remains regarding TripAdvisor, and whether the legal shield provided by Section 230 of the CDA applies. The CDA specifically provides a three-prong test to determine if an internet provider, such as TripAdvisor, is entitled to the immunity and preemption afforded by Section 230 of the CDA.

Looking at the first prong of the test, whether the entity is an internet computer service, TripAdvisor satisfies the requirement, as it operates a travel information service that provides or enables computer access by multiple users to a computer server.<sup>107</sup>

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<sup>104</sup> *Id.* at 331.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 331–32.

<sup>107</sup> 47 U.S.C. § 230(f)(2) (West 2015) (stating “The term ‘interactive computer service’ means any information service, system, or access software provider that provides or enables computer access by

TripAdvisor also meets the second prong for Section 230 test, in that the cause of action filed against them would treat them as a publisher of the information.<sup>108</sup> A state UDTP cause of action filed against TripAdvisor by an injured consumer would treat TripAdvisor as the publisher of the fake review which was posted and hosted on the TripAdvisor website, and which ultimately caused injury to the plaintiff consumer.

In order to satisfy the third prong of the Section 230 test, an additional information content provider must provide the information that is at issue in the lawsuit.<sup>109</sup> An information content provider is defined as, “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.”<sup>110</sup> If a website, as an interactive computer service, is also an information content provider, then Section 230 immunity does not apply.<sup>111</sup>

In *Fair Housing Council of San Fernando Valley v. Roommates.com LLC.*, the court ruled that if the defendant website is responsible, in whole or in part, by way of encouraging the development of what is specifically offensive about the content, the immunity and ultimate preemption afforded by Section 230 of the CDA will not apply.<sup>112</sup> The court went on to explain further that when a defendant website takes on the responsibility for the development of the information content, the immunity and therefore the preemption provided by Section 230 of the CDA will not apply.<sup>113</sup> The court then defined the term development to mean to draw out the offensive nature of the content or to make it visible.<sup>114</sup> This analysis of the application of the immunity and preemption offered by Section 230 of the CDA aligns with the line of cases following the *Zeran* decision. These cases all indicate that if a

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multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.”)

<sup>108</sup> 47 U.S.C. § 230(c)(1) (West 2015) (stating “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”).

<sup>109</sup> *F.T.C. v. Accusearch Inc.*, 570 F.3d 1187, 1196 (10th Cir. 2009).

<sup>110</sup> 47 U.S.C. § 230(f)(3) (West 2015).

<sup>111</sup> *Fair House Council of San Fernando Valley v. Roommates.com, LLC.*, 521 F.3d 1157, 1162 (9th Cir. 2008).

<sup>112</sup> *F.T.C.*, 570 F.3d 1187 at 1199.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 1198.

website goes beyond the traditional publisher function, the website can be held liable for the injury sustained.<sup>115</sup>

Applying this legal standard to TripAdvisor, the first point to note is that TripAdvisor, by establishing and utilizing the Content Integrity Policy Team and its processes, is more than a simple publisher of someone else's information content. Rather, TripAdvisor's choice to enter into the status of policing the information content provided by others, means that TripAdvisor does have a role in the creation of information content that is published on or removed from the website. In essence, TripAdvisor partners with its third-party information content providers to create and develop the information posted and removed from its website. This is quite different from the traditional role of a publisher or distributor of information content, but rather places TripAdvisor in the role of an editor and policer of information content. This role translates into drawing out, and according to TripAdvisor, removing the fraudulent or offensive character of the information content by making a visible showing of removing the fake content. Therefore, TripAdvisor is not only the publisher of information content from others, but is also an information content provider in that it rewrites or removes information content. As an information content provider, TripAdvisor is not entitled to the immunity or preemption accorded to other internet service providers under Section 230 of the CDA.

Even if the analysis of TripAdvisor's business plan, and the actual workings of the Content Integrity Policy Team and its other processes does not neatly place TripAdvisor outside of the grant of immunity and preemption accorded by Section 230 of the CDA, the application of the CDA to TripAdvisor is questionable in the context of unfair and deceptive trade practice claims. All of the CDA legislative history and related court opinions concern defamation or other similar tort claims. If the CDA is read and interpreted along the lines of its intended purpose, namely to combat the accessibility of pornography and other obscene materials to minors, then immunizing internet service providers like TripAdvisor from legal claims of unfair and deceptive trade practices is a non-sequitur. A statutory based claim for injury based on the perpetration of an unfair or deceptive trade practice is not a tort claim, not a common law claim, but rather a statutory claim. This

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<sup>115</sup> *Id.* at 1197; *Fair House Council*, 521 F.3d at 1162; *Ben Ezra Weinstein & Co., Inc. v. Am. Online Inc.*, 206 F.3d 980, 985 (10th Cir. 2000).

means, in part, that the legislature at both the federal and state level has made a policy pronouncement condemning unfair and deceptive trade practices, and implemented a design to protect consumers from such perpetrators. Such a statutory claim is not the equivalent of a defamation cause of action, or any other tort claim. Rather, the federal and state unfair and deceptive trade practice statutes are both a public and private legislative remedy that serve to combat unfairness and deception heaped upon consumers in the commercial marketplace.

When the courts are faced with interpreting two different statutes like the CDA and federal and state unfair and deceptive trade practice statutes, one of the cardinal guideposts is to construe each statute, if possible, as consistent with each other so as to not undermine the purpose of one statute in favor of another.<sup>116</sup> Further, any preemption provided by statute or court decision is to be strictly construed, so as to not bar other legal remedies.<sup>117</sup> The purpose of the Section 230 of the CDA is not undermined by allowing consumers to sue internet service providers for unfair and deceptive trade practices. Rather, the immunity and preemption permitted by Section 230 of the CDA can remain in place as to defamation or other similar tort claims. To insulate website and internet service providers, like TripAdvisor, from the reach of government and private enforcement of statutorily conferred consumer rights by some provision like Section 230 of the CDA, that was designed to regulate pornography and not commercial activity, is not only mind-bending, but illegitimate. Yet, this is exactly what the application of Section 230 of the CDA seems to support. This just may be the biggest lie!

## V. CONCLUSION

The train has left the station with regard to internet review sites, as they are multiplying daily. The CEO of TripAdvisor says that this growth proves that consumers love the concept and the content. However, this love affair with internet review sites does not mean that consumers may not suffer a loss from the operation of such sites, or that internet review sites should be immunized from all liability. If you think about it, this immunization and preemption accorded internet review sites like TripAdvisor from Section 230

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<sup>116</sup> BROWN & BROWN, STATUTORY INTERPRETATION (2d ed. 2011).

<sup>117</sup> *Id.* at ch. 5, § 5.10.

of the CDA are built on a series of lies—fake reviews; the broken promise of authenticity and fraud control, and the illegitimate application of an attempt to regulate access to pornography to preclude statutory unfair and deceptive trade practice lawsuits.

The online review system for TripAdvisor runs on a garbage-in garbage-out model. The truth is that all of the reviews posted on TripAdvisor and other similar websites must be questioned, despite TripAdvisor's continuing claim that all is real and true. Further, the courts have only compounded this ruse by defying basic statutory construction norms in interpreting an inapplicable statute to immunize these review websites, and preempt injured consumers from pursuing unfair and deceptive trade practice claims. This may be just what happens when you believe a lie!

