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DO WE NEED HELP USING YELP? REGULATING ADVERTISING ON MEDIATED REPUTATION SYSTEMS

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Yelp, Angie's List, Avvo, and similar entities enable consumers to access an incredibly useful trove of information about peer experiences with businesses and their goods and services. These "mediated reputation systems," gatherers and disseminators of consumer peer opinions, are more trusted by consumers than traditional commercial channels. They are omnipresent, carried everywhere on mobile devices, and used by consumers ready to transact.

Though this information is valuable, a troubling conflict emerges in its presentation. Most of these reputation platforms rely heavily on advertising sales to support their business models. This reliance compels these entities to display persuasive advertising right along with their presentation of authentic peer information. Consumers expecting to access this authentic peer information must also confront a persuasive message. The revenue lifeblood for these platforms comes from the very businesses under peer review.

This Article argues that the power of peer information provides an exceptionally credible context for persuasive advertising. Accordingly, advertising on reputation platforms should trigger more rigorous regulation in the form of disclosure requirements and prioritized enforcement.

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* Professor of Law, Willamette University College of Law. The ideas in this piece benefited from discussion and challenging feedback (at various points over the past few years) from Laura Appleman, Andrew Gilden, Eric Goldman, Jim Hawkins, and Nathalie Martin. The author thanks them sincerely.

Introduction

Yelp, Angie's List, TripAdvisor, Avvo, and similar entities deploy technology that has significantly changed the way consumers shop for almost everything: from dog groomers to furnace technicians, from greasy-spoon restaurants to travel resorts, and even for criminal defense lawyers. These companies solicit data from users about consumer experiences and repackage this data to present right back to the public. Search-engine, social-media, and retail giants also gather and disseminate this data, soliciting user reviews and repackaging them for the use of others. Courtesy of these "mediated reputation systems" (MRS), consumers can access vast amounts of peer experiences with goods, services, and their sellers on laptops, the touch of a mobile app, or even a brief voice command to Siri.[1]

1. Professor Eric Goldman coined the term "mediated reputation system," describing "third-party publisher[s that] gather, organize, and publish reputational information." Eric Goldman, *The Regulation of Reputational Information, in* The Next Digital Decade: Essays on the Future of the Internet 293, 294 (Berin Szorka & Adam Marcus, eds., 2010), https://www.nyu.edu/projects/nissenbaum/papers/The-Next-Digital-Decade-Essays-on-the-Future-of-the-Internet.pdf. He provides as examples "the Better Business Bureau's ratings, credit

This newly-created flood of data has proven influential and important to consumers, but consumers should also beware. Because of potential conflicts between serving the user public while also serving paying advertisers, regulators should more closely monitor MRS business practices.

There is a real tension between the MRS's need to attract users, while simultaneously soliciting payments from reviewed entities. The 2016 class action settlement in *Moore v. Angie's List* exposed this tension.[2] The plaintiffs in *Moore* alleged that Angie's List failed to disclose to paid user subscribers that the company received advertising payments from service providers and that these payments affected provider review ratings, review content, review availability, and site placement.[3] This case exposed the challenge that many MRS platforms face: providing an "authentic" user experience while monetizing the opportunity to do so.[4]

The problem lies in the way many MRS platforms employ or support a business model directly dependent on advertising, promotions, and sales-commission revenue from the very entities under review on the platform.[5] These advertising, promotional, and commission participation motives can put the "authenticity" of the user experience at risk. Consumers engage MRS platforms seeking non-biased experiential information from peer users but instead encounter this information in a commercial context. Consumers expecting to access peer information instead encounter persuasive

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reports/scores, investment ratings (such as Morningstar mutual fund ratings and Moody bond ratings), and consumer review sites." *Id.* In this article, I exclusively focus on consumer review sites when using the term "mediated reputation system."

2. Class Action Settlement Agreement, Moore v. Angie's List, Inc., No. 15-1243-SD (E.D. Pa. June 24, 2016), https://www.moorevalsettlement.com/Content/Documents/Settlement%20Agreement.pdf. Angie's List admitted no wrongdoing in the Settlement Agreement, so all allegations must be considered with that qualification. *Id.* at 4–5.

3. Conditional Amended Class Action Complaint, Moore v. Angie's List, No. 2:15-cv-01243 (E.D. Pa. July 11, 2016), 2015 WL 1320833 at ¶¶ 1–14.

4. I use "authenticity" to describe a user experience that engages with peer-information presented free of advertiser influence. A display of information without any advertiser involvement would be less likely to skew toward any particular advertiser—and would offer a more unbiased information presentation. In the MRS context I use "authenticity" and have recently used the more ambiguous term "neutrality" as a way "to describe how MRS platforms convey, both expressly and implicitly, a clear picture and distillation of user opinion about a business or offering. When the MRS deviates from that 'clear picture and distillation' through insertion or influence of [advertiser-generated content], this conception of [authenticity] and neutrality fades." David Adam Friedman, *Addressing the Commercialization of Business Reputation*, 80 LAW & CONTEMP. PROBS. 73, 76 (2017) [hereinafter, Friedman, *Addressing Commercialization*] (internal citation omitted.).

5. As I explore, *infra* Part I.B.2, some MRS platforms merely play a smaller role in supporting a broader engagement campaign for a search engine or social media network.

messages or redirection that, by design, attempt to trump the pure presentation of peer reviews.

Peer endorsements have a demonstrably special power of attraction when collected and presented in aggregate form. As Yelp's research shows, presentation of aggregated peer reviews draws in users at the moment when they wish to transact.[6] Of course, the reason to advertise on an MRS platform would be to nudge the user away from the user-generated content originally sought toward the persuasive messaging.

Advertiser-generated content ("AGC") integrated with user-generated content ("UGC") typically constitutes "native advertising." Native advertising, an old tactic finding numerous new adopters, describes commercial content "that bears a similarity to the news, feature articles, product reviews, entertainment, and other material that surrounds it online."[7] In 2015, the Federal Trade Commission promulgated the Enforcement Policy Statement on Deceptively Formatted Advertisements to lay out ground rules for how content providers, including providers of product reviews, should distinguish commercial content from editorial content for consumers.[8]

Despite this ubiquitous dynamic, the FTC only makes brief mention of MRS platforms in the Enforcement Policy Statement ("product reviews") and offers no illustrative examples involving MRS platforms. At minimum, this omission is worthy of correction. The baseline level of disclosure requirements is inadequate to inform platform users, in light of the special context of highly influential peer information, as opposed to the other contexts covered in the Enforcement Policy Statement. This Article therefore argues that enhanced disclosure of some form, tighter scrutiny of MRS platforms, or some combination, would ensure that user expectations of access to authentic information are met, while still preserving this flow of valuable consumer information.

This Article describes and explores the immense value that MRS data brings to the marketplace, while simultaneously addressing the need to take precautions. This Article contends that thorough disclosure is required to ensure that MRS platforms present information in a manner that matches consumer expectations for the nature of that information. Given that advertising on MRS platforms sits at the epicenter of concerns about both peer

6. *See infra* Part I.A.1.

7. *Native Advertising: A Guide for Business*, FTC (Dec. 2015), https://www.ftc.gov/tips-advice/business-center/guidance/native-advertising-guide-businesses.

8. FTC Enforcement Policy Statement on Deceptively Formatted Advertisements, 81 Fed. Reg. 22596 (Apr. 18, 2016).

endorsements and native advertising, MRS advertising requires enhanced disclosure requirements about its nature. If consumers transact based on confusing information or make choices based on a deliberate redirection from user-generated content to advertising, the transactions yield suboptimal outcomes. The consumer who *ex ante* sought to make decisions based on pure experiential information often can only do so after confronting something very different: commercial persuasion.

This Article proceeds in five parts. Part I explains the basics of MRS platforms, the diversity of their business models, and why the structure of the MRS platform can complicate matters. An MRS can operate as a stand-alone, self-sufficient business model but can also operate as a supportive cog in a larger system, bolstering complex enterprises focused, for example, on search-engine or social-media engagement. Part II begins by using information economics to describe the immense social value that this unprecedented flow of peer experiential information brings to markets. It will also show, however, that promoting advertising in the extraordinarily credible context of peer-information presentation risks disruption of consumer expectations in ways not readily apparent to the user. The consumer accesses the MRS expecting to make use of peer information yet departs the platform highly influenced by commercial content—if the advertiser's goals are met.

Part III explores the possibility that competitive dynamics, self-regulation, and private litigation will resolve potential concerns about MRS information integrity. This Part concludes that regulators need to ensure that consumers have the appropriate context for using MRS data because these market-oriented solutions still leave consumers vulnerable. Part IV recommends that regulators prioritize scrutiny of MRS platform advertising over other advertising contexts, due to the unique risks of confusion. Requiring enhanced disclosure of the nature of MRS advertising content may help contextualize the information expectations from using an MRS. The market pushes the MRS platform to maintain credibility, but where the consumer attributes too much credibility to the platform, more complete disclosure of the nature of the advertising helps clarify consumer expectations.

In Part V, the Article briefly concludes with a cautionary note that MRS platforms produce a significant social good. Regulators need to exercise care to ensure that any enhanced compliance or disclosure requirements do not unduly burden the flow of this valuable information.

I. MEDIATED REPUTATION SYSTEMS

Over the past fifteen years or so, the MRS emerged as an important broker between "sharer" and "user." Prominent platforms like Yelp,[9] Avvo,[10] TripAdvisor,[11] and Angie's List[12] formed, inducing consumers to join communities of reviewers, voluntarily contributing to databases of experiential information about goods, services, and providers. Multipurpose platforms such as Amazon,[13] Facebook,[14] and Google also aggregated and offered MRS data to support their models.[15] The lawfulness of presenting advertising

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9. Yelp launched in 2004. *See About Us*, YELP, https://www.yelp.com/about (last visited Oct. 17, 2017).

10. Avvo, founded in 2006, claims to have created profiles for ninety-seven percent of the attorneys in the United States, with over one million client and peer reviews. *See Avvo Fact Sheet*, AVVO, http://marketing-assets.avvo.com/media-resources/corporate-information/avvo_fact_sheet_20160303.pdf?_ga=1.140134003.1743469121.1462394668 (last visited Oct. 17, 2017).

11. TripAdvisor launched in 2000. *About TripAdvisor*, TRIPADVISOR, https://tripadvisor.mediaroom.com/us-about-us (last visited Oct. 17, 2017) ("TripAdvisor, the world's largest travel site . . . [w]ith more than 535 million reviews and opinions covering the world's largest selection of travel listings worldwide—over 7 million accommodations, airlines, attractions, and restaurants . . . .").

12. Angie's List, founded in the mid-1990s, launched online in 1999. *See Angie's List Timeline*, ANGIE'S LIST (May 21, 2012), https://www.angieslist.com/articles/angies-list-timeline.htm. The company claims that more than three million households nationwide check Angie's List reviews of service providers, submitting more than 60,000 reviews every month. *About Us*, ANGIE'S LIST, https://www.angieslist.com/aboutus.htm [https://web.archive.org/web/20171017210416/https://www.angieslist.com/aboutus.htm] (last visited Oct. 17, 2017). The company pitches to the peer experience "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." *Id.*

13. One recent study of the Amazon catalog relied on 144 million customer reviews of 9 million products. Julian McAualey et al., *Inferring Networks of Substitutable and Complementary Products*, *in* PROCEEDINGS OF THE 21TH ACM SIGKDD INTERNATIONAL CONFERENCE ON KNOWLEDGE DISCOVERY AND DATA MINING 785, 785 (Longbing Cao & Chengqi Zhang eds.,2015), https://dl.acm.org/citation.cfm?id=2783258.

14. Facebook appears to seek close entry into Yelp's user-location-based approach. *See* Jessica Guynn, *Yelp Falls 9% as Facebook Tests Local Business Reviews*, USA TODAY (Dec. 15, 2015, 1:22 PM), https://www.usatoday.com/story/tech/2015/12/15/facebook-local-businesses-rating-yelp-angies-list/77364056/.

15. Though quantifying the magnitude of Google's review database proves elusive, use of the basic search function on October 19, 2017 shows reviews of varied usefulness, including a self-described 6th grader giving a five-star review of Harvard Law School (Harvard Law School had 177 reviews). See Shamekia Williams, *Harvard Law School*, GOOGLE REV., https://www.google.com/maps/contrib/104012759808490449080/reviews/@42.3780901,-71.1188478,17z/data=!3m1!4b1!4m3!8m2!3m1!1e1?hl=en-US (last visited Oct. 19, 2017) (screenshot on file with author). Usage by business varies widely when comparing Google reviews to Yelp. For example, Google aggregated 935 reviews of the In-N-Out Burger location in Mountain View, California, while Yelp maintained only 260 reviews of that same location. *In-N-Out Burger*, GOOGLE REV., https://www.google.com/search?q=53+w+el+camino+in-n-out+burger+mountain+view+ca&oq=53+w+el+camino+in-n-out+burger++mountain+view+ca&gs_l=psy-ab.3. . .15726.19025.0.19772.19.17.2.0.0.0.117.1450.13j4.17. . . .0. . .1.1.64.psy-ab. .3.0.0. . . .0

alongside peer reviews, is of course, not in question.[16] This Article questions whether regulators should police the presentation of this advertising and to what extent.

If advertising compromises the MRS platform's appearance of neutral authenticity, users will migrate and search for useful information elsewhere until the marginal cost of information searching exceeds the expected return.[17] Nonetheless, the MRS may succeed at both preserving the appearance of authenticity for users and selling effective advertising to businesses. The potential for abuse emerges when consumers visit an MRS seeking pure, authentic information, and depart the platform making a transaction altered by exposure to persuasive content without having understood the true and complete nature of the MRS presentation.

Put differently, users expect MRS platforms to provide access to a trove of genuine consumer-generated experiences.[18] Advertisers pay for the opportunity to tilt that platform in their favor or preempt deep access to those peer experiences by promoting their businesses first. These advertising practices should be monitored more carefully and with higher standards than native advertising that appears in other apparently-authentic contexts. This is because the MRS offers an exceptionally influential platform due to the extra credibility that users lend to peer opinion. A regulatory strategy must preserve the flow of this valuable information, while simultaneously ensuring that consumers depart the platforms with the information presentation that they expected, rather than a version unduly disrupted or short-circuited by advertiser-generated content. Such a strategy, likely disclosure-focused, should optimize the minimization of consumer deception and advance consumer welfare.[19]

.kI60—aGfw8#lrd=0x808fb7283d63df9d:0x1f78ef5ad1ee6ee6,1,, (last visited Oct. 19, 2017) (screenshot on file with author); *In-N-Out Burger*, YELP, https://www.yelp.com/biz/in-n-out-burger-mountain-view-2 (last visited Oct. 19, 2017) (screenshot on file with author). Google, potentially as a consolation prize for attempting, then failing, to acquire Yelp, bought the noted and well-established restaurant peer-review publisher Zagat in 2011, as I discuss *infra* Part III.A.1. *See* Michael J. de la Merced et al., *In a Twist, Google Reviews Zagat, and Decides to Bite*, N.Y. TIMES: DEALBOOK (Sept. 8, 2011, 12:05 PM), https://dealbook.nytimes.com/2011/09/08/google-to-buy-zagat/?_r=0.

16. Case law appears almost devoid of any challenges to this proposition. *But see* Vrydolyak v. Avvo, Inc., 2016 WL 4765716, *5 (N.D. Ill. Sept. 12, 2016) (holding the First Amendment protects Avvo's right to present competitive advertising alongside an attorney's image without attorney's consent).

17. I discuss market solutions and the obstacles to market solutions *infra* Part III.

18. *See infra* Part I.C.

19. In competitive markets with perfect information, welfare is maximized. *See* Benjamin E. Hermalin, et al., *Contract Law, in* 1 THE HANDBOOK OF LAW AND ECONOMICS 3, § 2.2.1 (A.

More than ever before, MRS platforms provide consumers with experiential information that supports everyday transactional decisions.[20] FTC regulation of peer endorsements and native advertising offers no targeted guidance about the boundaries of MRS trade practices, including how they display advertising. Appreciation of the regulatory challenges requires a baseline understanding of the important role the MRS plays in the retail economy—and how MRS platforms function. Part I.A. shows how MRS platforms have grown increasingly influential over consumer transactional behavior. Part I.B. describes and differentiates, on a basic level, the economic models that sustain MRS models.

A. *The Role of the MRS in Consumer Transactions*

Taken alone, the leading exemplar of an MRS-centric entity, Yelp, shows the significant size, presence, and use of aggregated consumer peer-review data in consumer markets.[21] Yelp reports an application presence on nearly one-third of all mobile devices in the United States,[22] hosting over 100 million consumer reviews.[23] Yelp generates revenue by selling businesses local search ads, the ability for businesses to add photos and video to their automatically-generated pages, couponing and direct ordering buttons, and even the ability to buy removal or de-prioritization of competitor advertising.[24] In addition, a staggering total of 185 million unique users visited Yelp on average per month in the second quarter of 2017, including 102 million unique mobile users.[25] Investors received guidance that Yelp's 2016 revenue will exceed 2015, reaching $700 million, and yielding approximately $100 million in earnings.[26] This

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Mitchell Polinsky & Steve Shavell eds., 2007) (discussing core principles of the welfare economics of contract); *see also* Scott Peppet, *Freedom of Contract in an Augmented Reality: The Case of Consumer Contracts*, 59 UCLA L. REV. 676, 678–87 (2012) (discussing potential welfare gains in retail transactions resulting from the availability of newfound digital information).

20. *See infra* Part I.A.

21. *See* YELP, INC., YELP INVESTOR PRESENTATION Q1 2016 5, 18, 34 (2016), http://www.yelp-ir.com/static-files/0c81b4e9-d08f-443c-8625-c84893081e67 [hereinafter YELP, INVESTOR PRESENTATION].

22. *Id.* at 7.

23. *Id.* at 8.

24. *Id.* at 10.

25. *An Introduction to Yelp Metrics as of June 30, 2017*, YELP, https://www.yelp.com/factsheet [https://web.archive.org/web/20171017181107/https://www.yelp.com/factsheet] (last visited Oct. 17, 2017).

26. Press Release, Yelp, Inc., Yelp Announces Fourth Quarter and Full Year 2015 Financial Results (Feb. 8, 2016), http://www.yelp-ir.com/news-releases/news-release-details/yelp-announces-fourth-quarter-and-full-year-2015-financial.

performance points to continued vindication of the MRS-centric business model.

Factoring in Yelp's self-identified group of competitors—which only represent a partial set of the diverse universe of MRS platforms—these entities have deeply woven themselves into the fabric of consumer culture.[27] Several dynamics amplify the importance of peer reviews and the systems that share them. Consumers trust consumer online reviews, especially consumers in the rising and newly-dominant millennial demographic.[28] The ubiquity and deep public trust in the MRS indicates that the stakes warrant express regulatory guidance and scrutiny.

1. Consumers Trust Online Consumer Opinions

The MRS transformed many aspects of consumer shopping in recent years, while avoiding much regulatory attention.[29] Survey data and demographic trends indicate that the MRS will likely continue to assume a central role in guiding transactional decision making. In 2015, The Nielsen Company published a study about "trust in advertising," and the results demonstrated the high level of faith and confidence that consumers place in MRS peer data.[30] Surveying over thirty thousand people in sixty countries, Nielsen concluded that "[t]he most credible advertising comes straight from the people we know and trust."[31]

Nearly fifty years ago, Phillip Nelson observed that "a consumer can obtain information [about commercial experiences] from relatives and friends, consumer magazines, or even from advertising."[32] Nelson's observation still holds, even in the digital age. In 2015, over eighty percent of consumers deemed the direct, non-technological, personal recommendations of friends and family

27. *See* YELP, INVESTOR PRESENTATION, supra note 21 at 7 (listing as Groupon, TripAdvisor, YP Sites, FourSquare, and Angie's List Yelp's competitors). The satirical Comedy Central show, South Park, notably lampooned how America has become a nation of amateur restaurant critics armed with smartphones. *See South Park: You're Not Yelping* (Comcast television broadcast, Oct.14, 2015). Native advertising has also become commonplace enough to warrant cultural commentary. *See Last Week Tonight with John Oliver: Native Advertising* (Comcast television broadcast, Aug. 3, 2014).

28. NIELSEN CO., GLOBAL TRUST IN ADVERTISING: WINNING STRATEGIES FOR AN EVOLVING MEDIA LANDSCAPE 4–7 (2015).

29. Professor Eric Goldman observed that "[c]onsumer review websites are virtually unregulated." Goldman, *supra* note 1 at 297.

30. NIELSEN CO., *supra* note 28, at 2.

31. *Id.* at 4.

32. Phillip Nelson, *Information and Consumer Behavior*, 78 J. POL. ECON. 311, 312 (1970).

trustworthy.[33] But as the Nielsen report observed, "trust isn't confined only to those in our inner circle."[34] Sixty-six percent of those surveyed indicated that they trusted online consumer opinions.[35]

According to this Nielsen survey, reconstituted and summarized in Table 1, trust in online consumer opinions demonstrably exceeds the trust level for most sources of information consumers use to drive transactional decisions. This finding explains why MRS platforms will likely enjoy continued relevance. Despite potential authenticity issues, like the problems about Angie's List alleged in *Moore*, millions of users rely on and trust MRS information.

Table 1
Percentage of Respondents Who Trust Advertising Format
(2015 Nielsen global survey)[36]

Advertising Format / Venue	Trust %
Recommendations from people I know	83%
Branded websites	70%
Consumer opinions posted online	66%
Editorial content, such as news articles	66%
TV, print, outdoor ads; brand sponsorships	56–63%
Emails (opt-in), TV product placement	55–56%
Ads on radio, before movies, online video	48–54%
Ads in search engine results, social networks	46–47%
Ads on mobile devices, online banners	42–42%
Text ads on mobile phones	36%

This level of trust in online consumer opinions presents a challenge to advertisers seeking to deliver messages. This still-nascent source of information—nascent, that is, compared with traditional well-established formats like print, outdoor advertising, radio, and television—grants substantially less direct advertiser control, unless the aggregators of such information offer intervention. Marketers of goods and services, in other words, are highly motivated to find ways to insert influence into the flow of credible MRS information.

33. Nielsen Co., *supra* note 28, at 4–6.
34. *Id.* at 4.
35. *Id.*
36. *Id.* at 4–6. (emphasis added). Percentage reflects respondents who "completely or somewhat trust advertising format." *Id.*

Marketers can exert influence in two primary ways: (1) by directly inspiring or motivating users of MRS platforms to favorably review their experiences; or (2) by purchasing a persuasive presence on platforms where these consumers seek peer experiential information.

Nonetheless, observers should avoid the temptation to over-magnify the implications of the Nielsen survey. Despite the comparatively high amount of trust placed in "consumer opinions posted online," other forms of advertising still thrive.[37] Trustworthy venues abound for reaching and persuading consumers, and some will be more effective for reaching certain audiences with certain offerings than others.[38] Of note, a majority of consumers still express trust in AGC delivered through traditional media.[39]

The lower level of trust placed in social network advertising, search-engine results, and banner advertising may also explain the development of the MRS industry. As advertising-driven social networks and search engines seek to monetize their user bases, more seemingly-trustworthy MRS platforms can prove attractive for advertisers, yielding a more powerful return than banner ads, brand sponsorships and promotions, product placements, and paid appearances alongside searches.[40] Companies like Google and Facebook have constructed and acquired MRS data content,[41] perhaps in response to consumer preference for MRS information, as well as to attract new users and to deepen and extend engagement from existing users.

Also of note from the Nielsen survey is the equally high level of trust placed by consumers in independent editorial content. In the Enforcement Policy Statement on Deceptively Formatted Advertisements, the FTC expressed specific concerns about the integrity of editorial content presentation, noting the consumer trust factor in the authoritative editorial context surrounding certain commercial content: "[I]f a natively formatted ad appearing as a news story is inserted into the content stream of a publisher site that customarily offers news and feature articles, reasonable consumers are unlikely

37. *Id.*

38. *See generally id.*

39. *See generally id.*

40. *See id.*

41. *See infra* Part I.B.2. After an unsuccessful attempt to acquire Yelp in 2009 for nearly a half-billion dollars, Google acquired the well-established Zagat Reviews for $151 million in 2011. Chris Barth, *Google Paid $151 Million to Get Zagat, Ditch Yelp*, FORBES (Oct. 27, 2011, 1:44 PM), https://www.forbes.com/sites/chrisbarth/2011/10/27/google-paid-151-million-to-get-zagat-ditch-yelp/#798e762d4e5c.

to recognize it as an ad."[42] If trust in online consumer opinions proves at least as high as editorial content—looking at news websites, for example—concerns about the integrity of MRS presentation should expressly rise to the same level.
Perhaps more important than mere expressions of "trust," the Nielsen survey shows elsewhere that buyers express a high likelihood of *acting* on information from consumer opinions posted online.[43] Of all of the nineteen advertising avenues listed in Table 1, respondents deemed "consumer opinions posted on line" as the format third most likely to lead them to take action, only behind personal recommendations and branded websites.[44]

Not only do online peer opinions influence consumer action, they disproportionately influence the most valuable emergent demographic age group: millennials.[45] This group's increased purchasing power,[46] along with the power of the soon-to-mature "Digital Natives" in Generation Z,[47] indicate that the MRS will continue to play a key role in the retail economy.

2. Millennials Trust Online Consumer Opinions *More*

The Pew Research Center includes in the millennial generation "those born after 1980 and the first generation to come of age in the new millennium."[48] By 2015, according to the Census Bureau, the millennial population exceeded that of Baby Boomers.[49] Like the Baby Boomers of a generation ago, millennials have become a

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42. FTC Enforcement Policy Statement on Deceptively Formatted Advertisements, 81 Fed. Reg. 22596, 22600 (Apr. 18, 2016).

43. NIELSEN CO., *supra* note 28, at 8.

44. *Id.*

45. *See* Christine Barton et. al, *How Millennials Are Changing the Face of Marketing Forever*, BCG.PERSPECTIVES (Jan. 15, 2014), https://www.bcgperspectives.com/content/articles/marketing_center_consumer_customer_insight_how_millennials_changing_marketing_forever/ (establishing the current and future importance of properly addressing the millennial cohort from the standpoint of a marketer).

46. Steve Henderson, *Spending Habits by Generation*, U.S. DEP'T. LAB. BLOG (Nov. 3, 2016), https://blog.dol.gov/2016/11/03/spending-habits-by-generation.

47. Alex Williams, *Move Over, Millennials, Here Comes Generation Z*, N.Y. TIMES (Sept. 18, 2015), https://www.nytimes.com/2015/09/20/fashion/move-over-millennials-here-comes-generation-z.html?mcubz=0&_r=0 (describing attributes of "the generation born after millennials" and how that generation "is emerging as the next big thing for market researchers, cultural observers and trend forecasters . . . .")

48. Pew Research Ctr., *Topic: Millennials*, http://www.pewresearch.org/topics/millennials/ (last visited Oct. 17, 2017).

49. *See* Richard Fry, *Millennials Overtake Baby Boomers as America's Largest Generation*, PEW RES. CTR.: FACT TANK (Apr. 25, 2016), http://www.pewresearch.org/fact-tank/2016/04/25/millennials-overtake-baby-boomers/.

considerable economic force in American demography and in the setting of consumer market trends. Their information sourcing habits reflect their comfort with technology. Millennials interact with media differently than older generations, "exercising greater control over when and where they watch, listen and read content—and on which device."[50]

Millennials trust most of the sources of information in Table 1 more than other generations—and seventy percent say that they "completely or somewhat trust" consumer online opinions.[51] In comparison, a mere forty-seven percent of the Silent Generation (age over 65) places that level of trust in consumer online opinions.[52]

Another 2015 survey, co-sponsored by *Forbes*, reaffirms these conclusions, revealing that Millennials acquire market information and engage differently with advertising, marketing, and promotions.[53] Only one percent of millennials indicated (or admitted) that a "compelling advertisement would make them trust a brand more," while nearly one-third declared that they "[relied] mostly on blogs before . . . purchase."[54] As millennials accumulate more purchasing power, the future points toward a consumer environment more enthusiastically reliant on MRS data.

The value of this MRS data and the associated economic power of MRS users have been neatly monetized by MRS platforms and their advertising clients. Accepting Yelp's representations, MRS advertisers have found their return on investment to substantially surpass that of other advertising models.[55] This attractive return for advertisers, however, offers significant evidence of a conflict between serving advertising clients alongside this increasingly important type of authentic information-seeking audience. The MRS, in order to profit from the neutral platform, must manage a tension between generating opportunities for favorable advertiser treatment and preserving the appearance of informational integrity and trustworthiness for users.

The natural tendency to trust friends and relatives spills over into online reviews, but this trust is somewhat unwarranted, given the

50. NIELSEN CO., *supra* note 28, at 12.

51. *Id* at 13.

52. *Id.* (as labeled and defined by Nielsen).

53. Dan Schawbel, *10 New Findings About the Millennial Consumer*, FORBES (Jan. 20, 2015, 8:00 AM), https://www.forbes.com/sites/danschawbel/2015/01/20/10-new-findings-about-the-millennial-consumer/#593676db6c8f.

54. *Id.*

55. YELP, INVESTOR PRESENTATION, supra note 21, at 11.

commercialization activities of the MRS platforms. The "appearance" of information integrity and "information integrity" describe very different things: the former proves necessary to retain and engage users, and, as an examination of the MRS business models show, some deviation from perfection with the latter proves a necessary evil to attract advertisers.

B. *The MRS Business Model*

An MRS must provide return on investment to those who build a credible, attractive, and useful platform,[56] presenting the user data to the public in an appealing format. Several MRS business models have emerged, but in the interest of balancing simplicity with rigor, this Article focuses on two archetypes—the "stand-alone" MRS that relies heavily on advertising and subscription revenue, and the "supportive" MRS that attracts and engages users with a much larger platform for facilitating or brokering sales. Each MRS has unique attributes and some are a hybrid of these two archetypes.[57]

The stand-alone MRS archetype includes entities like Yelp, Angie's List, TripAdvisor, and Avvo. These entities primarily, but not entirely, engage in the business of offering aggregated reviews, largely depending on advertising and commission revenue from reviewed parties.[58] The supportive MRS archetype includes Amazon, which, among other wide-ranging sets of activities, collects and presents reviews on products it sells,[59] and Facebook and Google, both of which use MRS platforms, among many other mechanisms, to support broad campaigns to engage users.

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56. Unless functioning as a nonprofit, not an MRS, but an independent tester and reviewer, Consumer Reports "[f]ormed as an independent, nonprofit organization . . . [and] serves consumers through unbiased product testing and ratings, research, journalism, public education, and advocacy." *See Our Mission*, CONSUMERSUNION, http://consumersunion.org/about/mission/ [https://web.archive.org/web/20171017203320/http://consumersunion.org/about/mission/] (last visited Oct. 17, 2017). As the respected journalism industry blog, Romanesko, reported, the Consumer Reports nonprofit model appears to have financially struggled in part due to aging reader demographics. Jim Romanesko, '*Change is Hard*': *Consumer Reports Restructures to Survive in the Digital Era,* JIMROMANESKO.COM (Oct. 30, 2013), http://jimromenesko.com/2013/10/30/change-is-hard-consumer-reports-restructures-to-survive-in-the-digital-era/

57. I previously identified these two platform archetypes but did not offer much in the way of specifics or insights yielded from discussing a variety of specific business models, as I do in substantial detail here. *See* Friedman, *Addressing Commercialization*, *supra* note 4, at 76–79.

58. *See infra* Part B.1.

59. *See* Friedman, *Addressing Commercialization, supra* note 4 at 78 (briefly discussing role of MRS in Amazon model).

Both the stand-alone and supportive MRS models draw users to offer reviews in order to create a valuable platform for users, advertisers, and ultimately, investors. Both models cultivate communities to share experiences. The models diverge, however, in the way they extract value from the MRS. The stand-alone MRS uses the platform as the primary direct launching pad for revenue generation. This sets up a complex tension between reaching the requisite authenticity bar for users and producing a worthwhile financial return for both advertisers and platform owners. The supportive MRS, on the other hand, may not encounter as much of this tension because the MRS constitutes only a piece of a much larger, integrated user engagement model.

Below, the basic models employed by players in each archetype are described, demonstrating that the "stand-alone" MRS platforms by necessity *must* compromise authenticity but can do so imperceptibly. In comparison, the "supportive" MRS platforms have less pressure to compromise the authenticity of peer information, even if there are immediate advantages to so doing. Thus, adding an MRS as a feature that attracts overall users may bring all the value a broader platform like Google requires.

In addition, some non-exhaustive examples and illustrations of the different business models in this unique sector are offered to provide insight into the ways some models present more challenges to authenticity preservation than others. This Article focuses heavily on primary players, on the premise that they broadly stand in as representatives of the sector.

1. The Standalone Mediated Reputation System

A host of entities fit the description of the stand-alone MRS, soliciting advertising support while trying to present the aura of neutrality to attract consumers. A few stand-alone MRS models are described here, dissecting their strategies for generating a financial return on their accumulation and presentation of consumer reviews, and showing why these models should receive more express regulatory guidance.

Yelp, as noted, represents the quintessential MRS platform, maintaining reviews of local businesses.[60] Angie's List collects reviews for a different set of service providers, mostly in the household home services field but now also in the medical provider zone.[61] For years,

60. *See infra* Part I.B.1(a).
61. *See infra* Part I.B.2(b).

Angie's List relied on a subscription-based, user-funded model, but by 2016, found that model financially nonviable. It then opened up more free content to the public,[62] which ultimately has led to a potential sale of the company.[63] TripAdvisor focuses on the retail travel sector, enabling review of travel-related sites and generating revenue related to that audience, but faces strategic challenges as it attempts to transform itself from a review publisher into a travel broker.[64] Avvo, a platform for accumulating and disseminating client (peer) evaluations of lawyers,[65] sources financial support from their reviewed subjects, as well as from offering users do-it-yourself legal solutions.[66] According to a (methodologically opaque) Avvo survey, ninety-five percent of legal consumers indicate that "client reviews *matter*."[67]

The following sample of stand-alone MRS entities merely represents a slice of a complex sub-industry involving a variety of systems. The business model for each relies on extracting revenue without compromising the appearance of integrity that makes the platform attractive to visit and use. The true consumer transactional experience, however, may reflect what is *not* apparent to them—how the MRS used peer information to expose them to persuasive AGC.

62. *See* Brad Tuttle, *Angie's List Just Announced a Huge Change*, FORTUNE (Mar. 3, 2016), http://fortune.com/2016/03/03/angies-list-subscription/.

63. On May 1, 2017, Angie's List, in agreeing to an acquisition by the owner of its competitor, HomeAdvisor, may have "acknowledged a painful truth: People prefer finding their home service providers on another (free) website." James Briggs & Holly V. Hays, *Angie's List to be Acquired by HomeAdvisor Parent Company,* USA TODAY (May 2, 2017, 12:14 PM), https://www.usatoday.com/story/money/nation-now/2017/05/02/angies-list-acquired-homeadvisor-parent-company/308711001/.

64. *See infra* Part I.B.2(c).

65. *See* John Cook, *Legal Marketplace Avvo Accelerates with $37.5M, Eyes International Expansion and New Products*, GEEKWIRE (Apr. 15, 2014, 4:31 AM), http://www.geekwire.com/2014/legal-advice-startup-avvo-scores-37-5m-eyes-international-expansion/.

66. *About Avvo, Inc.*, AVVO, http://marketing-assets.avvo.com/media-resources/corporate-information/avvo_fact_sheet_20160303.pdf?_ga=1.252734153.1927918501.1477886519 (last visited Oct. 17, 2017).

67. AVVO, INC., THE NEW LEGAL CONSUMER IS 1 (2015), http://marketing-assets.avvo.com/media-resources/avvo-research/2016/avvo_research_new_legal_consumer_infographic_2016.pdf?_ga=1.56648682.1927918501.1477886519 (emphasis added). Cassandra Burke Robertson contends that Avvo and third-party peer ratings may prove less susceptible to "the risk of promoting a false sense of reliability" than if attorney evaluations emerged from an official source. Given that attorneys are highly-regulated service providers, expansive public alternatives to private MRS systems could exist. Cassandra Burke Robertson, *Online Reputation Management in Attorney Regulation*, 29 GEO. J. LEGAL ETHICS 97, 134–35 (2015). Official authority could trump peer authority but both have power.

a. Yelp

As noted, Yelp holds a strong position as a stand-alone MRS "connect[ing] people and great local businesses."[68] In 2015, Yelp relied on local and brand advertising for eighty-eight percent of total revenue,[69] selling businesses access to the peer-review platform. Yelp reported to investors that local advertisers enjoyed a robust 269 percent return on investment on their purchased presence on the platform.[70] Yelp helps advertisers generate this return by attracting consumers with peer-experience information, then placing paid content amidst this information.[71]

Yelp crisply describes the company's value proposition. The Yelp "platform provides value to consumers and businesses alike by connecting consumers with great local businesses at the critical moment when they are deciding where to spend their money."[72] As discussed *infra* Part I.A., Yelp's user and revenue base—and profitability—reflect a successful business model. Nonetheless, Yelp's own description of its model demonstrates the balance that an MRS must strike in leveraging neutral information into revenue generation. Yelp identifies four "key strengths" of their platform: (1) discovery; (2) engagement; (3) advertising; and (4) transactions.[73]

Discovery describes the way Yelp functions as a search engine vehicle for consumers looking for businesses. Yelp claims that their "platform is transforming the way people *discover* local businesses."[74]

Engagement describes Yelp's view of how consumers contribute content and how businesses can pay for the opportunity to interact with these consumers. Yelp encourages "consumers to share their everyday local business experiences, through reviews, tips, photos and videos, and engage directly with businesses . . . ."[75] For example, businesses can (and do) pay Yelp to get an advantage over those who do *not* pay to participate in the platform, though some basic services are free.[76] Businesses can " 'claim' the Yelp business

68. Press Release, Yelp, Inc., *supra* note 26.
69. *See* Yelp, Inc., Annual Report at 5 (Form 10-K) (Feb. 24, 2016).
70. YELP, INVESTOR PRESENTATION, *supra* note 21, at 10.
71. *See* Yelp, Inc., Annual Report, *supra* note 69, at 1 ("[User] contributors provide rich, firsthand information about local businesses . . . . Each review, tip, photo and video expands the breadth and depth of the content on our platform, which drives a powerful network effect: the expanded content draws in more consumers and more prospective contributors . . . . [T]his network effect underpins our ability to deliver clicks and ad impressions to advertisers.").
72. *Id.*
73. *Id.*
74. *Id.* (emphasis added).
75. *Id.*
76. *Id.*

listing page for each of their locations . . . [and] enhance the page with additional information about their business and respond to reviews . . . ."[77] The free business services present less of a data integrity temptation because all businesses have equal access to the free part of the platform—and allowing businesses to participate may enhance and clarify user experience information.[78]

Advertising on the Yelp website and mobile app platform provides Yelp's lifeblood—its primary source of revenue.[79] Yelp offers the opportunity for businesses to promote themselves through paid "premium services" to their "large audience of purchase intent-driven consumers . . . using targeted search advertising, discounted offers and . . . enhancements to their business listing pages."[80] Yelp recently phased out national advertising to focus on garnering revenue from local advertising.[81] Finally, the company also enables *transactions* by "providing consumers with a continuous experience from discovery to completion of transactions such as ordering food through a local delivery service and booking spa appointments."[82]

The concepts of advertising and "promotion" muddles the implicitly authentic attributes of the MRS. The sale of a "promotion" to a business literally enables the business to enjoy "promotion" over non-paying businesses on a platform perceived as authentic. The challenge for an MRS like Yelp is to both provide returns to advertisers and maintain credibility to perpetuate the viability of the "discovery" and "engagement" parts of the platform.

Yelp expressly recognizes the operational challenge of generating strong user engagement and a vibrant network of users, while at the same time commercializing access to the network to sell to advertisers. The first section of Yelp's Annual Report informs investors that "[Community contributions underpin] our ability to deliver

77. *Id.*

78. For contrast, consider the business model of the MRS ConsumerAffairs, where businesses pay for the ability to interact with consumer reviews on its platforms:

> A company that displays the ConsumerAffairs Accredited Seal has agreed to work with [ConsumerAffairs] to resolve consumer complaints. In exchange for a monthly fee, [ConsumerAffairs] provide[s] ConsumerAffairs Accredited companies with certain information regarding consumer reviews and complaints and allow ConsumerAffairs Accredited companies to respond privately or publicly to the consumer.

What is ConsumerAffairs for Brands?, ConsumerAffairs, https://www.consumeraffairs.com/about/faq/#what-is-consumeraffairs-for-brands [https://web.archive.org/web/20171017205811/https://www.consumeraffairs.com/about/faq/] (last visited Oct. 17, 2017).

79. *See* Yelp, Inc., Annual Report, *supra* note 69, at 1.

80. *Id.*

81. *Id.*

82. *Id.* ("In February 2015, [Yelp] acquired Eat24Hours.com, Inc., or Eat24, a leading online food ordering service . . . .").

clicks and ad impressions to advertisers. Increases in these metrics improve our value proposition . . . . For this reason, we . . . make the consumer experience our highest priority."[83] Yelp also notes that content metrics and user traffic metrics "improve [Yelp's] value proposition to local businesses as they seek easy-to-use and effective advertising solutions."[84]

The challenge for regulators is to ensure that whatever state an MRS achieves to make the "network effect" work for them,[85] the platform does not unduly distort the presentation of information. Advertising intends to persuade and yield favorable action. The purpose of promotional advertising is to divert the consumer toward transacting with the promoters. In this context, however, regulators should have extra concern about the contextual presentation of the message.

Consumers visit Yelp to "discover" and "engage." They may depart from their platform visit having made decisions based more on AGC (or redirection to AGC) than on the product of pure peer data. Consumers may believe that they have drawn upon a pure distillation of peer experiences, but the AGC, by design, attempts to interrupt that process.

b. Other Standalone MRS Players.

Yelp exemplifies the dependence of standalone players on platform advertising revenue: eighty-eight percent. Yelp presents AGC in the context of user-generated content. Other standalone entities demonstrate a similar level of reliance on revenue tied closely to an MRS platform. A brief sampling of other standalone models confirms the presence of this business model.

i. Angie's List

Angie's List, a company that has traditionally relied on a base of paid subscribers sharing reviews, boasts of serving three million households, offering "reviews to find the best local service providers."[86] The company claims that "[t]he people who join Angie's List

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83. *Id.*
84. *Id.*
85. *Id.*
86. *About Us,* ANGIE'S LIST, *supra* note 12.

are just like you—real folks looking for a way to find trustworthy companies that perform high-quality work."[87]

The Angie's List model continues to migrate from membership-subscription based revenues toward an openly-accessible platform, supported by advertising and promotions.[88] Angie's List still collects nominal fees from some subscribers.[89] In 2010, Angie's List sourced fifty-seven percent of its revenue from "service providers,"[90] increasing to eighty percent in 2015, reflecting the model's migration away from consumer subscriptions.[91]

ii. TripAdvisor

TripAdvisor focuses on an entirely different sector and set of transaction decisions, cultivating travel enthusiasts. TripAdvisor "offers advice from real travelers and a wide variety of travel choices and planning features with seamless links to booking tools that check hundreds of websites to find the best hotel prices. TripAdvisor branded sites make up the largest travel community in the world . . . ."[92]

TripAdvisor monetizes access to this community of its creation. This MRS relies on click and display-based advertising for seventy-five percent of total revenue, sourcing sixty-four percent of total revenue from "click-based advertising."[93] The company defines this as including payments related to linking to external booking sites like online travel agencies, hotels and airlines, and "contextually-relevant branded and unbranded text links."[94]

When users seek peer information on TripAdvisor, they confront a mixture of community reviews and advertising from travel services providers. The appearance of TripAdvisor advertising results from a bidding process to promote the advertisers' rates and availability on the site. "Bids are submitted periodically . . . and the size of the bid

87. *Id.*

88. *See* Tuttle, *supra* note 62.

89. *How Does Angie's List Make Money?*, ANGIE'S LIST (Nov. 20, 2015), https://web.archive.org/web/20160103221125/http://www.angieslist.com:80/faq/how-does-angie-s-list-make-money/ (the source is a web archive a previous version of a page on the Angie's List site) .

90. Angie's List, Inc., Annual Report at 3 (Form 10-K*)* (Feb. 25, 2013).

91. Angie's List, Inc., Annual Report at 14 (Form 10-K) (Mar. 8, 2016).

92. Press Release, TripAdvisor, Inc., TripAdvisor Announces Instant Booking Agreement with Expedia, Inc. (Dec. 20, 2016), http://ir.tripadvisor.com/releasedetail.cfm?releaseid=1004961.

93. TripAdvisor, Inc., Annual Report at 3 (Form 10-K (Feb. 18, 2016); *see also id.* at 3–4 (showing revenue sixty-four percent of revenue coming from click-based advertising and eleven percent of revenue coming from display-based advertising).

94. *Id.*

relative to other bids received determines the partner's placement in all metasearch placements on our site with one or more offers shown, including hotel comparison search results and the property detail page."[95] The aggressive bidders increase their visibility on this site that leads with the premise of "offer[ing] advice from real travelers" with the direct ability to transact.[96]

> The system is automated and the size of the partner's bid is the only factor impacting the partner's placementon that page, except that individual partners may be sorted lower in the event that they have not provided price information or if they cease to have availability for the property.[97]

This revenue stream also includes commissions when users complete a reservation on TripAdvisor.

TripAdvisor attributes another eleven percent of revenue to "display-based advertising," which enables advertisers to "promote their brands in a contextually-relevant manner through a variety of display-based [website] advertising placements . . . ."[98] Over the past few years, TripAdvisor's approach has gradually shifted from a click-and-display revenue model toward the offering of specialized promotion services to hospitality providers.[99]

iii. Avvo

Avvo, the attorney-sector MRS platform,[100] built and maintains a community of lawyers, some of whom answer basic questions for lay users, while maintaining a community of users who review lawyers.[101] Avvo sources revenue in part from attorney advertising, commercial messaging which would attempt to trump or redirect a user away from authentic search results. Lawyers spend as little as $100 per month on advertising to as much as "ten[s] of thousands"

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95. *Id.*

96. *See* Press Release, TripAdvisor, Inc., *supra* note 92.

97. TripAdvisor, Inc., Annual Report at 3 (Form 10-K) (Feb. 28, 2016).

98. *Id.*

99. *Id.* at 4. The fastest growing share of TripAdvisor's revenue comes from "subscription-based" and "transaction-based" sources. These are mostly flat fee services enabling "hotels, B&Bs and other specialty lodging properties" to list contact information and special offers. *Id.*

100. For a thorough analysis of the unique challenges faced by the legal profession in addressing online reputation management, see generally Robertson, *supra* note 67.

101. *See About Avvo, Inc.*, *supra* note 66.

of people,[102] certainly expecting a return. Additionally, Avvo profits from brokering certain fixed-fee services offered by lawyers.[103]

Unlike the previous three players discussed, Avvo remains a privately-held company, which makes the business model more difficult to dissect, particularly on revenue sources and profitability. However, Avvo appears to have been enjoying success as measured through a fundraising valuation in 2015 that rendered the company three times more valuable than the well-established Angie's List.[104] Avvo's CEO reported that "the [Avvo] model is working, with tremendous consumer benefit as well as 'great lawyers getting more business.' "[105] Presumptively, the lawyers who advertise amongst and amidst the Avvo peer-review content are these "great lawyers." As the CEO put it, "[f]rom the beginning, [Avvo] focused on building a high-quality and trusted community,"[106] which makes it a naturally valuable piece of virtual real estate for exposing consumers in need of services to commercial content offering those services.

These advertising-dependent platforms attempt to draw in users with an express pitch that they offer a repository of authentic consumer reviews of experiences. Yelp may not make direct claims of authenticity, but the above-mentioned description to investors reveals the centrality of the use of authentic reviews to support their model.

a. The Promotion of Review Authenticity to Lure and Engage Users

Presenting credible, authentic reviews lies at "the heart of [Yelp's business]" through "vibrant communities of contributors . . . [who] provide rich, firsthand information about local businesses . . . . Each review . . . expands the breadth and depth of the content on our platform, which . . . draws in more consumers and more prospective contributors."[107] As discussed in Part III, Yelp takes strong measures to preserve the true integrity of data and draws sharp lines about what advertisers can influence through content. The

102. Cook, *supra* note 65.

103. *See About Avvo, Inc.*, *supra* note 66.

104. *See* Spencer Soper, *Legal Website Avvo Valued at $650 Million in Funding Round*, Bloomberg Tech. (July 28, 2015, 7:30 AM), https://www.bloomberg.com/news/articles/2015-07-28/legal-website-avvo-valued-at-650-million-in-funding-round.

105. Cook, *supra* note 65.

106. *Id.*

107. Yelp, Inc., Annual Report, *supra* note 69 at 1.

question is whether these quality-control efforts are enough to protect the consumer from leaving the platform with a misimpression of the nature of the user experience.

Through its own advertising, Angie's List expressly emphasizes to users that it assumes the role of neutral arbiter. This can be seen in Angie's List video advertisements.[108] One asked, "Want feedback that's unbiased? We've got 10 million verified reviews . . . Join Angie's List for free."[109] Another commercial emphasized, "[E]veryone has access to our real reviews that we actually verify . . . . So if you need a great plumber, find one at Angie's List."[110] The message that "[the] people who join Angie's List are just like you—real folks . . . ." rounds out a collection of representations that could leave a reasonable user to conclude that when they use Angie's List, they are receiving an authentic sample of genuine consumer experiences with service providers.[111]

TripAdvisor, boasting status as "the world's largest travel site,"[112] emphasizes UGC expression of reviews, advice, and opinions in its value proposition to users on their way to transacting. "Browse over 435 million candid reviews, opinions, and photos of hotels, restaurants, attractions, and more—all by travelers like you. You'll also find low airfares, free travel guides, worldwide vacation rental listings, popular forums with advice about virtually every destination, and more."[113] Based on these claims, TripAdvisor users should expect an authentic travel search experience. After the travel recession following 9/11, TripAdvisor permanently pivoted from "white label search engine" to a user-review driven model. The approach requires availability of "fresh, authentic content" to drive traffic toward click-through, commission-driven revenue flows.[114] TripAdvisor's express strategic positioning invites consumers to enter transactions with the lure of authenticity. As with Yelp, maintaining this balance proves critical to success.

108. *See, e.g.*, Angie's List, Office Banter, YouTube (Aug. 8, 2016), https://www.youtube.com/watch?v=4ZC94C1Ni-Q; Angie's List, What Goes Down, YouTube (June 24, 2016), https://www.youtube.com/watch?v=CKpBfmtX3ME

109. Angie's List, Office Banter, *supra* note 108.

110. Angie's List, What Goes Down, *supra* note 108.

111. *See* About Us, Angie's List, supra note 12 ("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.").

112. *See About TripAdvisor*, *supra* note 11.

113. *See* https://www.tripadvisor.com/ (last visited Jan. 15, 2017) (screen capture on file with author).

114. *See* Jeff Bussgang, *The Secrets to TripAdvisor's Impressive Scale*, HARVARD. BUS. REV. (Oct. 2, 2012), https://hbr.org/2012/10/the-secrets-to-tripadvisors-im.

For perspective, the 2015 combined total revenue of Yelp, Angie's List, and TripAdvisor represents merely thirteen percent of Facebook's total revenue.[115] This fact is presented to demonstrate that if Facebook alone, which already internally maintains a supportive MRS, swallowed any or all of these entities, the MRS-driven component would only represent a small portion of the revenue stream. Facebook's top advertisers seek the general user engagement but tend toward national brands seeking to tie into user interests, rather than tying into reviews of their own businesses.[116] Additionally, Facebook's hefty profitability would dwarf that of the three entities combined, both in margins and sheer total. At a broad level, an entity with Facebook's scale and scope relies more on broader brand advertising revenue drawn to the ability to target Facebook's user profiles, while also benefiting from viral effects.

Generally, users approach Google, Facebook, and Amazon with broader motivations than the gathering of peer reviews and information, which puts less pressure on these entities to embed advertising in MRS information delivery.

2. The Supportive Mediated Reputation System.

Like standalone platforms, all supportive platforms differ, but generalizations emerge about their attributes. Facebook provides a prime example of a larger entity hosting an MRS without relying on the MRS as a primary springboard for selling advertising. Facebook's mission serves grander ambitions than the sharing of reviews: "to give people the power to build community and bring the world closer together . . . . [For users] to stay connected with friends and family, to discover what's going on in the world, and to share and express what matters to them."[117]

Facebook's invitation "to connect" and "discover" dominates user expectations, and the gathered audience proves attractive to major brand advertisers. UGC reviews within an entity like Facebook play only a supportive role in engaging users to use the platform for more connection and interaction. The big-ticket sales that drive

115. Yelp had revenue of $550 million, Angie's List $344 million, TripAdvisor, $1.5 billion, Facebook, $18 billion. *See* Angie's List, Inc., Annual Report, *supra* note 91, at 29; Facebook, Inc., Annual Report at 30 (Form 10-K) (Jan. 28, 2016); TripAdvisor Annual Report, *supra* note 97, at 29; Yelp, Inc., Annual Report, *supra* note 69, at 41.

116. *See* Jim Edwards, *These Are the 35 Biggest Advertisers on Facebook*, Bus. Insider (Nov. 28, 2013, 12:19 PM), http://www.businessinsider.com/top-advertisers-on-facebook-2013-11.

117. *Company Info*, Facebook Newsroom, http://newsroom.fb.com/company-info/ [https://web.archive.org/web/20171018030033/https://newsroom.fb.com/company-info/] (last visited Oct. 17, 2017).

Facebook's revenue have only an indirect relationship to the MRS, which again, serves as a mere cog in a larger interactive system.

Like Facebook, other broad platforms use "supportive" MRS platforms as a secondary mechanism to make the overall user experience more useful and engaging. Google and Amazon gather and host consumer previews of businesses, goods, and services.[118] Google Ad Words are promoted alongside the feature that allows businesses (for free) to respond to Google consumer reviews.[119] Generally, Google tries to preserve the quality of the search-engine user experience while optimizing the return to advertisers:

> We asked, what if ads weren't intrusive and annoying? What if we could deliver a relevant ad at just the right time and give people useful commercial information? What if we could provide products that allow for better attribution and measurement across screens so that we show great ads for the right people?[120]

In its securities filings, Google does not discuss the role of peer consumer reviews in the overall business model. Instead, Google declares a focus on gathering revenue from "performance advertising" and "brand advertising."[121] "Performance advertising" focuses on creation and delivery of click-through ads, leading to direct engagement with advertisers.[122] Brand advertising "enhances users' awareness of and affinity with advertisers' products and services, through videos, text, images, and other ads that run across various devices."[123] These descriptions imply, although concededly through omission, that Google does not materially depend on advertising embedded in peer-review content.

Amazon presents an entirely different model, as a direct seller and broker of goods and services, and as a host to retail outlets. In 1997, Amazon CEO Jeff Bezos mentioned reviews briefly in his annual letter to shareholders. At that point, still focused on bookselling, Amazon "maintained a dogged focus on improving the

118. *See About Customer Reviews*, AMAZON, https://www.amazon.com/gp/help/customer/display.html/ref=hp_left_v4_sib?ie=UTF8&nodeId=201967050, (last visited Oct. 17, 2017); *Google Maps Help*, GOOGLE MAPS, https://support.google.com/maps/answer/6230175?co=GENIE.Platform%3DDesktop&hl=en (last visited Oct. 17, 2017) (Google, like Yelp, collects local reviews with geolocation features.)

119. *See Read and Reply to Reviews*, GOOGLE MY BUS. HELP, https://support.google.com/business/answer/3474050?hl=en (last visited Oct. 17, 2017).

120. Alphabet, Inc., Annual Report at 2 (Form 10-K) (Feb. 11, 2016).

121. *Id.* at 2–3.

122. *Id.*

123. *Id.*

shopping experience . . . substantially enhanc[ing] [its] store . . . offer[ing] customers gift certificates, 1-Click[ ] shopping, and vastly more reviews, content, browsing options, and recommendation features."[124] Nearly twenty years later, reviews received no mention in the Amazon annual report, which described an audacious, sweeping business model that served businesses and consumers.[125] Clearly, although the platform uses peer-review content, it does not center on it.[126]

For all of these entities, however, MRS information does not drive revenue in the way that it does for Yelp, Angie's List, and TripAdvisor nor does MRS information serve as the primary bait for users. Isolating the role that MRS components play within these supportive entities proves difficult to break out because the MRS platform performs merely an auxiliary function. Nonetheless, for larger entities that do not rely on the MRS data to draw in users to view embedded advertising, integrity of MRS data presentation might prove less difficult to preserve. For a standalone MRS, however, the MRS data becomes the primary means of commercializing the platform.

Due to their sheer size, the practices of supportive MRS platforms certainly warrant scrutiny. In spite of their orbital position with respect to the core business model, reviews are viewed widely,[127] and could be tempting targets for manipulation. Compared with standalone platforms, though, concerns about authenticity on supportive platforms should be secondary, as the former entities are strikingly less dependent on integration of UGC with AGC.

Painting the landscape of this complex MRS industry, subindustry, or function proves challenging. Having this foundation, however, enables explanation of the unique challenges that this newly-emergent information channel presents to consumers and regulators. No other form of advertising has ever blended separately-established concerns about the power of peer influence and

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124. Letter from Jeff Bezos, Founder and Chief Exec. Officer, Amazon.com, Inc. to the Shareholders at Amazon.com, Inc. (1997), http://media.corporate-ir.net/media_files/irol/97/97664/reports/Shareholderletter97.pdf.

125. *See* Amazon.com, Inc., Annual Report (Form 10-K) (Jan. 29, 2016).

126. *See Amazon Customer Reviews*, *supra* note 118.

127. For example, Facebook's maneuvers and innovations in this review space indicate heavy activity on business review pages (and growth). For a snapshot of Facebook's position at the end of 2015, see Sara Perez, *Facebook Takes On Angie's List And Yelp With New Site for Finding Top-Rated Local Businesses*, TECHCRUNCH (Dec. 15, 2015), https://techcrunch.com/2015/12/15/facebook-takes-on-angies-list-and-yelp-with-new-site-for-finding-top-rated-local-businesses/.

the power associated with embedding advertising in authoritative contexts.

II. ADVERTISING AND REVIEWS: THE POWER OF PEERS AND ADVERTISING CONTEXT

MRS-platform advertising sits squarely in the overlapping shadows of two recent FTC concerns. One major concern encompasses the misuse of peer information. The other, the misleading use of contextual advertising. However, neither of these concerns have been applied to the MRS.

Peer-information concerns have focused on the advertiser's use of peer endorsements to create inflated expectations about consumer experience.[128] Likewise, contextual-advertising concerns have focused on "native advertising" and the potential for consumers to confuse AGC with news reporting, for example.[129] With MRS-platform advertising, though, advertising context can prove exceptionally powerful because of the identified power (and draw) of peer information, as well as the consumer's "readiness to transact" based on the MRS information.[130]

MRS platforms have generated a wave of robust peer experience information, and Part II.A. uses well-established principles of information economics to explain the exceptional power of this information. Noting that regulators have already expressed concern about misuse of this power, this part discusses the regulatory steps that the FTC has taken to address advertiser use of peer endorsements. The power of peer experiential information has long been formally recognized and has been addressed in other regulatory guidance. Ironically, it has not been addressed in this context, where peer-experiences have been uniquely commercialized. In light of the heavy reliance of the standalone MRS on platform-based commercial revenue, Part II.B. describes the FTC's concerns

128. *See* Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255.0 (2016).

129. *See* FTC Enforcement Policy Statement on Deceptively Formatted Advertisements, 81 Fed. Reg. 22596, 22596–98 (Apr. 18, 2016). This policy has longer roots. *See* Advisory Op. No. 191, *Advertisements Which Appear in News Format*, 73 F.T.C. 1307 (1968).

130. In 2013, Yelp publicized to advertisers a self-commissioned Nielsen study revealing that eighty-two percent of Yelp users say they visit the site when "intend[ing] to buy a product or service." *Nielsen: 4 out of 5 Yelp Users Visit the Site when Preparing to Spend Money*, YELP OFFICIAL BLOG (June 25, 2013), https://www.yelpblog.com/2013/06/nielsen-4-out-of-5-yelp-users-visit-the-site-when-preparing-to-spend-money-at-a-local-business. Sixty-seven percent make a purchase decision within a few days. *Id.* Also of note, in 2013, Google—far and away—was Yelp's closest competitor for user engagement. *See id.*

about native advertising, and the Commission's accompanying regulatory prescription. Most notably, in this area where the context of peer information proves most powerful for generating user attention, MRS-targeted enforcement guidance proves almost absent. Part II.B. also emphasizes that MRS platforms use powerful peer-generated information as a device for establishing contextual credibility for advertisers to influence the universe of MRS users.

MRS platform advertising rests at the epicenter of these two recently-addressed concerns: the misuse of the power of peer information to influence consumers and the consumer confusion resulting from advertising placed in credible contexts. The role of peer information in consumer decision-making can explain the power of peer information.

A. *The Power of Peer Experiential Information*

Technology has made this recent explosion (and accessibility) of peer-information data possible. Of course, this explosion of information availability only emerged because of high demand, driven by the information's utility. The utility of peer information surfaced in the well-established consumer-search theory developed in the 1970s by Phillip Nelson and others. This consumer search theory dissected advertising into three categories of claims: search, experience, and credence.[131] Peer information functions in the market as highly-credible experience claims.

1. Information-Search Economics.

Search claims constitute the basic claims necessary for communicating a product's nature, availability, and price.[132] Consumers can verify "*search*" advertising claims, like category claims ("is this a ripe tomato?"), relatively inexpensively—at the display or point of sale.

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131. *See* Gary T. Ford et al., *An Empirical Test of the Search, Experience and Credence Attributes Framework*, 15 Advances in Consumer Res. 239 (1988), http://www.acrwebsite.org/search/view-conference-proceedings.aspx?Id=6817 [https://permacc/E2E6-FTX6] ("[I]n the past, researchers have often referred to 'goods' or 'attributes' of goods as having either search, experience or credence qualities. More appropriately, the focus must be on the advertising claim, rather than the attribute of the product."). I embrace the approach of Ford et al., and others, on using search, experience, and credence to describe advertising claims rather than attributes or categories of goods.

132. Nelson, *supra* note 32, at 312–14, 327 (distinguishing the search category of advertising claims from the experience category.)

At the other end of the spectrum, credence advertising claims "describe advertiser communications that prove prohibitively costly or conceptually impossible for the consumer to verify, even post-purchase."[133] For example, a claim about the origin of manufactured clothing or the integrity of a "free-range chicken" food label would prove expensive for an individual consumer to investigate. Credence advertising claims, by definition, require consumers to put faith in (or appropriately discount) the claim with limited ability to verify the content.

Experience advertising claims occupy important ground in the information environment.[134] For example, consider a fast-casual restaurant's advertising a claim that the restaurant's salads taste "fresh."[135] In an environment without other information, consumers can individually test these sorts of claims, but only through expending time and effort on testing and sampling. The sampling typically takes place at the consumer's own risk. If the salad fails to meet freshness expectations, the consumer absorbs a negative experience, forgoing better consumption opportunities, and expending resources in the process.

Consumers could verify that fresh salad claim in the pre-MRS era most easily by investing time and money to buy a salad, fully absorbing the cost of testing the claim to verify it, including the risk of enduring the taste of a limp salad. The consumer could also invest time to seek out the opinions of others who had tried the restaurant's salad, but the costs of acquiring this information might exceed the cost of sampling. After the experience, in the pre-MRS era, the consumer might let others within an immediate social sphere know about the disappointing transaction, but this information dissemination would prove limited and impermanent, at least compared with the record that the MRS would keep. Pre-MRS, the consumer could complain to management and ask for a refund, which would require social cost and time for a small item. The least-costly reaction would be to retain the information and merely refuse to repurchase that item or transact with that vendor.

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133. David Adam Friedman, *Refining Advertising Regulation,* 49 CONN. L. REV. 837, 840 (2017) [hereinafter, Friedman, *Refining*]. Contemporaneously with Nelson's work, Michael R. Darby and Edi Karni identified the concept of credence qualities and credence "goods." *See* Michael R. Darby & Edi Karni, *Free Competition and the Optimal Amount of Fraud,* 16 J.L. & ECON. 67, 68–72 (1973); *id.* at 843–52.

134. *See generally,* Friedman, *Refining* at 844–47, *supra* note 133 (Part II.B).

135. Nelson used canned tuna fish as his instrument for exploring "experience." Nelson, *supra* note 32, at 322. I have modernized the example to incorporate a dining transaction, a transaction frequently reviewed on MRS platforms.

In the current world, however, an MRS like Yelp or TripAdvisor can present, in a curated manner, the shared experience of hordes of peers who have already tested the claim by eating the salad. If the masses adjudicate a restaurant's salads as "fresh," "not as fresh as they say," or "the freshest salad around," shoppers can access and internalize this experience information. They can do so at little to no cost, conserving shopping time, and eliminating the expensive sampling process. If MRS platforms accurately present ranges of experiences and opinions, consumers can easily appropriate the experience costs incurred by others, rendering the transactional search process, and thus the market, more efficient, increasing consumer welfare.

The value of aggregated and accessible peer information about transactional experiences has become readily obvious to consumers, making the development of MRS platforms attractive both in standalone and supportive roles.[136] MRS proprietors emerged to assemble and unlock the value of this information for consumers, as well as to monetize it. Though the role of consumer experience information in the shopping process remains conceptually unchanged, the volume, breadth, and quality of "experiential" information has elevated the importance of the category.

The economic role of experience information in the search process explains, in part, why the lower cost of accessing such data has led to increased usage and reliance—and why regulator efforts to preserve the integrity and authenticity of the information could increase welfare. If consumers expecting to encounter trusted experience information are first confronted with AGC or are redirected toward other choices in a misleading manner, the information may not be put to use in the transaction in a manner expected by the consumer.

However, the power of this information finds roots not just in reducing consumer search costs but also in the tendency (recognized elsewhere) for consumers to place higher value in the opinion of peers. The MRS can use this charged information to lure consumers to the platform—and peer reviews can serve as powerful context for embedding AGC. The FTC acknowledged the power of peer endorsements when promulgating guidelines about consumer testimonials, and the reasoning behind that regulatory initiative warrants revisiting.

136. Yelp alone hosts over 100 million unique visitors per month. *See* Yelp, Inc., Annual Report at 44–45 (Form 10-K) (Feb. 27, 2015).

2. Peer Endorsements.

MRS platforms offer to advertisers a backdrop of valuable peer information for their commercial message. In two different contexts, the FTC advises the handling of peer information with special care. Following this logic, the use of peer information as a backdrop for commercial messages should also warrant special regulatory attention, heightened over other suspect contexts.

In the Enforcement Policy Statement for Deceptive Formatting, the Commission singled out for scrutiny, "paid endorsements offered as the independent opinions of impartial consumers or experts."[137] The presentation of *paid* endorsements masquerading as impartial in origin, could, according to the FTC, confuse the consumer about the context of the statement. In an adjacent arena, the Commission found concern with advertisers' showcase of truthful, *unpaid* consumer testimonials and endorsements.[138] These two concerns about the power of peer information compound when peer endorsements are used as context or as a lure for presentation of AGC.

The presentation of advertising on MRS platforms stands squarely at the intersection of these two areas at risk for potential consumer deception. However, the FTC has not addressed formally regulating this very zone where these two concerns overlap—the presentation of consumer testimonials in the context of a mediated platform, rather than within an advertiser's own presentation.[139]

As noted, MRS data plays a role in driving a significant set of consumer decisions. Taken alone, the peer-driven creation of the data alone provides justification for heightened concern. Long before the emergence of the modern MRS platform, sellers famously deployed "peer" or "consumer" endorsements in their advertising to bolster efficacy of their narratives.[140]

137. FTC Enforcement Policy Statement on Deceptively Formatted Advertisements, 81 Fed. Reg. 22596, 22596 (Apr. 18, 2016).

138. *See* Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255.0 (2016).

139. On the enforcement side, the FTC twice investigated the recommendation software and business practices of Yelp, resulting in no action. Javier Panzar, *Yelp Says FTC has Ended 2nd Inquiry into its Practices, Software,* L.A. TIMES (Jan. 7, 2015, 2:34 PM), http://www.latimes.com/business/la-fi-yelp-ftc-investigation-20150107-story.html.

140. *See* David Adam Friedman, *Debiasing Advertising: Balancing Risk, Hope and Social Welfare,* 19 J.L. & POL'Y 539, 577–79 (2011) [hereinafter, Friedman, *Debiasing.*] (discussing the successful, but now infamous, "Jared" advertising campaign for Subway).

Formal studies commissioned by the FTC confirmed that peer endorsements have an outsized effect on consumers, perhaps explaining their frequent appearance in advertising.[141] Consumers tend to embrace the positive outlier endorsements as representative, typical outcomes.[142] Elsewhere, this Article has described the classic cognitive biases that explain the powerful consumer reaction to peer endorsements, warranting more scrutiny of the tactic.[143]

The *optimism bias* leads consumers to expect an exceptional peer experience as their likely outcome.[144] The peer experience may also provide the most vivid and salient expected outcome for consumers, tapping into the *availability bias*.[145] Truthful but exceptional peer experience narratives can establish reference points that enable unrealistic expectations, per the *framing* effect.[146] Peer endorsements also leverage the *representativeness* and *confirmation biases*, as consumers see random peer results as typical or view peer results as consistent with previous perceptions or desired potential outcomes, respectively.[147] Peer endorsements and consumer testimonials prove highly effective as advertising tactics, in part for these reasons.

Phillip Nelson's suggestion that consumers would find the shared experience of "friends" exceptionally credible rested in part on the assumption that "the expected utility of a sample selected by a

141. A decade ago, the FTC commissioned two studies that demonstrated the strong influence peer endorsements ("testimonials") have on consumers. MANOJ HASTAK & MICHAEL B. MAZIS, EFFECTS OF CONSUMER TESTIMONIALS IN WEIGHT LOSS, DIETARY SUPPLEMENT AND BUSINESS OPPORTUNITY ADVERTISEMENTS (2004), https://www.ftc.gov/system/files/documents/reports/effects-consumer-testimonials-weight-loss-dietary-supplement-business-opportunity-advertisements/report.pdf [hereinafter, HASTAK & MAZIS, CONSUMER TESTIMONIALS IN WEIGHT LOSS]; MANOJ HASTAK & MICHAEL B. MAZIS, THE EFFECT OF CONSUMER TESTIMONIALS AND DISCLOSURES ON AD COMMUNICATION FOR A DIETARY SUPPLEMENT (2003), https://www.ftc.gov/system/files/documents/reports/effect-consumer-testimonials-disclosures-ad-communication-dietary-supplement-endorsement-booklet/030920consumerreport.pdf [hereinafter HASTAK & MAZIS, CONSUMER TESTIMONIALS FOR A DIETARY SUPPLEMENT].

142. *See* Alex Wang, *The Effects of Expert and Consumer Endorsements on Audience Response,* 45 J. ADVERT. RES. 402 (2005) (concluding that positive consumer endorsements improve consumer attitudes about the endorsed offering. *see also* Ahmed E. Taha, *Selling the Outlier,* 41 J. Corp. L. 459 (2015) (describing the power of peer endorsements and the problem with outlier experiences.). *See generally* HASTAK & MAZIS, CONSUMER TESTIMONIALS IN WEIGHT LOSS, *supra* note 141, Hastak & Mazis, Consumer Testimonials for A Dietary Supplement, *supra* note 141.

143. *See* Friedman, *Debiasing, supra* note 140, at 585–97 (describing the various cognitive biases and effects triggered by peer opinions).

144. *See id.* at 585–90.

145. *See id.* at 590–91.

146. *See id.* at 591–94.

147. *See id.* at 594–97.

friend will be greater than the expected utility of a random sample."[148] He observed, writing amidst the technology of 1970, that friend-guided sampling would not prove endlessly renewable as a resource. In sum, friendship has privileges, but also boundaries. "Friends are more than happy to advise occasionally," Nelson observed.[149] "[M]ost would find continual guidance about all the details of purchasing somewhat unpleasant."[150]

Today, however, "social-media" friends, albeit not *personal* friends, have flooded the information marketplace, eager to volunteer details of purchasing everything from hockey sticks to movie tickets to restaurant meals—making their opinions perpetually and sometimes permanently available. Though Nelson's observations still hold, technology and social media have redefined friendship, expanding willingness to share experiences, and lowering the cost of accessing them. Nelson noted that social norms naturally lead people to limit their conversations with friends about consumer experiences and that accordingly consumers "try to use [a] limited amount of [friend] guidance to where it will do . . . the most good."[151]

Nelson contends that using a "guide" like a friend for sampling has social costs, and consumers have a choice about whether and when to use "guided sampling."[152] "Where unguided sampling is cheap, guided sampling will not be used."[153] MRS platforms have made "guided sampling" cheaper, if not free, and more readily accessible, enabling the consumer to tap into a larger, information-rich pool of high-utility information, albeit of varying quality.

Finally grappling with the power of traditional peer information, in 2011 the FTC formally promulgated the Guides Concerning the Use of Endorsements and Testimonials in Advertising.[154] The FTC cautioned advertisers against inducing unrealistic consumer expectations through the peer endorsement or "testimonial" technique.[155] Perhaps reflecting the aforementioned behavioral bias concerns, the FTC warned advertisers that these endorsements should leave an impression of an experience representative of "what consumers will generally achieve" through product use.[156]

148. Nelson, *supra* note 32, at 321.
149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.*
154. Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255.0–55.5 (2016).
155. *See id.*
156. *See* Consumer Endorsements, 16 C.F.R § 255.2(b) (2016).

In short, peer-created, consumer-testimonial data draws consumers to MRS platforms for a variety of reasons. First, the use of peer information proves attractive and influential, and has long predated the technology and ubiquity of the modern MRS. Second, peer information, especially when inexpensive to access, proves valuable to consumers seeking relevant and timely (if not instant) data to guide transactional decisions.

MRS platforms harness the power of these peer endorsements to attract users expecting a display of unbiased, authentic opinions. The sale of advertising or the ability to manipulate the MRS presentation seriously undermines these expectations. Preserving the integrity of this data through higher scrutiny should rise as a regulatory priority, particularly when MRS platforms and advertisers collaborate to use these platforms to promote a persuasive commercial message. This commercial message, as noted above, often emerges at the very moment when consumers seek to transact.[157]

B. *The Power of Advertising Context*

Having established that peer endorsements have a powerful draw, the context within which the MRS platform places the paid advertising warrants analysis. As noted, in 2015 the FTC promulgated the Enforcement Policy Statement on Deceptively Formatted Advertisements—enforcement policy mostly focused on disclosure requirements. These policies and associated guidance associated with "native advertising" reflect reactions to the tensions inherent in offering commercial content embedded in apparently neutral formats to lure consumer attention.[158]

The terms "sponsored content" and "advertorials" have often been used synonymously with native advertising.[159] As one advertising industry insider observed, defining native advertising with concreteness proves challenging. "Native advertising can't just be

157. *See supra* Part I.A. Eighty percent of Yelp users "visit Yelp because they intend to make a purchase . . . ." *By the Numbers: 52 Amazing Yelp Statistics,* DMR, http://expandedramblings.com/index.php/yelp-statistics/3/ [https://web.archive.org/web/20171018040357/https://expandedramblings.com/index.php/yelp-statistics/3/#.WebSxGhSzIU] (last updated Oct. 6, 2017).

158. FTC Enforcement Policy Statement on Deceptively Formatted Advertisements, 81 Fed. Reg. 22596 (Apr. 18, 2016); *see Native Advertising*, supra note 7.

159. *See* Erin Griffith, *Sponsored Content is the Holy Grail of Digital Publishing. But Does it Work?,* Fortune (July 9, 2014), http://fortune.com/2014/07/09/readers-dislike-sponsored-content-native-ads/. An advertorial is "[a] newspaper or magazine advertisement giving information about a product in the style of an editorial or objective journalistic article." *Advertorial*, Oxford Eng. Living Dictionary, https://en.oxforddictionaries.com/definition/advertorial.

about the creative that fills an advertising space. Native advertising must be intrinsically connected to the format that fits the user's unique experience."[160] Nonetheless, in guidance, the FTC arrived at the following definition: "content that bears a similarity to the news, feature articles, product reviews, entertainment, and other material that surrounds it online."[161]

The FTC expressed a primary concern about consumer welfare with respect to deceptive native advertising practices:

> In determining whether an advertisement, including its format, misleads consumers, the Commission considers the overall "net impression" it conveys . . . . [A]dvertising and promotional messages that are not identifiable as advertising to consumers are deceptive if they mislead consumers into believing they are independent, impartial, or not from the sponsoring advertiser itself. *Knowing the source of an advertisement or promotional message typically affects the weight or credibility consumers give it.* Such knowledge also may influence whether and to what extent consumers choose to interact with content containing a promotional message.[162]

Beyond this basic concern about the disproportionate "weight" and "credibility" of native advertising, the FTC also voiced specific concerns about digital media.[163] Advertisers have used native advertising in some form for nearly a century.[164] In 1917, the FTC's earliest infancy, the Commission ordered a vacuum cleaner seller to cease and desist from falsely presenting the context of its brash advertisement claims in a seemingly neutral format.[165] Though this advertising practice has established routes, today's platforms deliver the advertising right to devices, just at the point where consumers are ready to transact.

Today, MRS technology brings efficiency to the shopping process, as explored in the discussion of experience claims, but at the

160. Mitch Joel, *We Need a Better Definition of "Native Advertising,"* HARVARD BUS. REV. (Feb. 23, 2013), https://hbr.org/2013/02/we-need-a-better-definition-of.

161. *Native Advertising*, *supra* note 7.

162. *See* FTC Enforcement Policy Statement on Deceptively Formatted Advertisements, 81 Fed. Reg. 22596, 22596 (Apr. 18, 2016). (emphasis added).

163. *Id.*

164. *See generally* Lesley Fair, *Remarks, A Historical FTC Perspective: Advertorials, Infomercials, and Paid Endorsement*, *in* FTC, Blurred Lines: Advertising or Content? An FTC Workshop on Native Advertising 11, 11–24 (2013), https://www.ftc.gov/system/files/documents/public_events/171321/final_transcript_1.pdf.

165. *See* FTC v. Muenzen Specialty Co., 1 F.T.C. 30 (1917).

same time, amplifies the fundamental problems with native advertising. The FTC observes that the internet environment facilitates and has increased dissemination of commercial messages "indistinguishable from news, feature articles, product reviews, editorial, entertainment, and other regular content."[166] In contrast to traditional media "a [digital] publisher . . . can easily and inexpensively format an ad so it matches the style and layout of the content into which it is integrated in ways not previously available . . . . *The effect is to mask the signals consumers customarily have relied upon to recognize an advertising or promotional message*."[167]

Additionally, native advertising associates with the tactic of the "misleading door opener." The misleading-door opener describes when advertisers use a non-commercial pretext to lure the consumer to view a commercial offering.[168] These door openers can disrupt the consumer search process, leading them toward making a transaction that they might not have pursued if left to search for a transaction without the disruption. If a consumer believes that a platform is authentic, but the platform opens the door to paid offerings, the "door opened" based on trickery. Such "misleading doors" might, at quick glance, appear as news articles or appear in a manner that makes the consumer believe that the authority of the context seem authentic, like an MRS platform.[169]

Without the misleading door opener, the consumer may continue to search in an ordinary, uninterrupted course, and may find a more welfare-enhancing deal. In the context of the MRS, a user may use the MRS to seek the best nearby delicatessens but, upon commencing search, may first confront a promoted, paid-for advertisement that leapfrogs a search for the "best." If the commercial nature of the AGC is disclosed, the letter of meeting the requirements of the Enforcement Policy Statement have been satisfied. The question is whether this base-level of disclosure suffices in circumstances where the context for the advertisement carries much more credibility, as it does with peer endorsements.

In sum, the FTC's concerns about native advertising should apply to concerns about advertising in all formats but especially the MRS platform. The MRS platform can easily cloak the bias of a sponsored commercial message in its well-promoted and powerful

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166. FTC Enforcement Policy Statement on Deceptively Formatted Advertisements, 81 Fed. Reg. 22596, 22596 (Apr. 18, 2016).

167. *Id.* (emphasis added).

168. FTC Enforcement Policy Statement, , 81 Fed. Reg. at 22598.

169. For a news website illustration, see *Native Advertising*, *supra* note 7, at ex. 7.

authenticity. The FTC's concerns about the ability of online technology to exacerbate an old problem apply to this newer, cutting-edge manner of relaying transactional information.

In the MRS environment, the power of the peer endorsement meets the power of native advertising, creating a ripe opportunity for consumer confusion in the transactional process. Peer endorsements create integrity and authority expectations greater than that of a news website, extrapolating from the FTC's chosen area of concerns. People accord great weight to the opinions of friends, family, and neighbors. Although the aggregation of these opinions may not be as powerful as the real thing, the lower cost of the data renders it quite attractive to use.

Drawn to this platform, consumers expect an authentic presentation of information—and if the whole of this presentation yields an inauthentic effort to persuade or redirect, consumers may make decisions not in accord with their intent upon using the platform. The FTC has identified that advertising context can mask the signals that consumers typically seek in making transactional decisions or lead them to "open doors,"[170] disrupting their transactional search process, under manipulative pretexts.[171]

Without doubt, consumers benefit from the collection, aggregation, presentation, and ready access to MRS data. The impact on consumers from MRS cognitive and contextual manipulation on compromised MRS platforms, however, may distort transactions without consumers having awareness of their own manipulation. For example, after being drawn to a neutral MRS platform and led to an advertisement for a restaurant during a geography-based search, the consumer may never look further because of time constraints. Though the consumer may express satisfaction with the transaction, a superior transaction may have been forgone. As Judge Easterbrook put it colloquially, "One important reason for requiring truth is so that competition in the market will lead to appropriate prices. Selling brass as gold harms consumers independent of any effect on pain."[172] The consumer may not feel the pain of the forgone transaction, but the market disruption is real.

170. *See* FTC Enforcement Policy Statement on Deceptively Formatted Advertisements, 81 Fed. Reg. 22596, 22598–99 (Apr. 18, 2016) (describing misleading door openers).

171. *See* David Adam Friedman, *Reconsidering Fictitious Pricing*, 100 MINN. L. REV. 921, 960–63 (2016) [hereinafter, Friedman, *Fictitious Pricing*] (analyzing the negative welfare impact of another "misleading door opener," deceptive discount pricing).

172. FTC v. QT, Inc., 512 F.3d 858, 863 (7th Cir. 2008).

More formally, as Howard Beales et al. observed, information failures lead to resource misallocation and welfare reduction.[173] Consumers relying on compromised MRS data may make transactions based on poor information *about* information.[174]

> The importance of information to the operation of efficient markets is, by now, fairly well accepted. Information about price, quality, and other attributes allows buyers to make the best use of their budget by finding the product whose mix of price and quality they most prefer . . . . Without such information, the incentive to compete on price and quality will be weakened, and consumer welfare will be reduced.[175]

Further, as these sources become more important as a primary source of information in some markets (for example, the market for speedy retention of a criminal lawyer), the social importance of integrity escalates. Without doubt, the pre-advertising—and pre-internet—market for lawyers left consumers with fewer resources, and services like Avvo have been "game changers." Due to their unique intermediary nature, however, MRS platforms like Avvo have an extra duty to provide the public with authentic information. Choosing a lawyer might be socially more important than selecting a taco stand. Regulators stand positioned to mitigate the risk of suboptimal transactions in this zone.

As illustrated in Part III, market forces play a role in ensuring that the presentation of MRS data retains authenticity, but regulators may find themselves situated to supplement market forces to enhance welfare.

III. Potential Private Solutions

As Eric Goldman appropriately warned, "any regulation of reputational information needs to be carefully considered to ensure it is improving, not harming, marketplace mechanisms."[176] Regulating information can lead to a variety of ambiguous or unfavorable welfare outcomes, including reducing the overall amount

173. *See* Howard Beales et al., *The Efficient Regulation of Consumer Information*, 24 J.L. & Econ. 491, 492 (1981).

174. *See generally* Goldman, *supra* note 1 at 295 (discussing information failures and welfare loss specifically in the context of MRS).

175. Beales et al., *supra* note 173 at 492.

176. Goldman, *supra* note 1 at 296.

of information available in the market.[177] Beales and his coauthors observed that "remedying deficiencies in the information market is in some ways a more complex and subtle task than regulating product markets directly."[178] Therefore, exploring the potential for market solutions to an information problem should be a prerequisite to any regulatory prescription.

Markets may sort out most of the challenges involved in preserving the integrity of MRS platforms. If a platform appears biased, overly commercial, or "inauthentic," as discussed in Part III.A., users will stop engaging with the platform. Competition for users inspires platforms to compete on grounds of utility and credibility, and to develop self-regulatory mechanisms. Commercial players are also incentivized to keep each other honest, as explored in Part III.B. Also discussed is the role of private litigation in generating more authentic information, essentially as an externality. A scan of the few recent written opinions involving MRS platforms (reported and unreported) reveals that private litigation over issues of information integrity advances authenticity enough to obviate some need for public regulation. This litigation, however, does not help solve the problems inherent in the embedding of AGC amidst the powerful context of aggregated peer reviews.

A. *Market Solutions*

Standalone MRS enterprises compete vigorously for users. An active user community is the most basic requirement for drawing advertisers. A standalone platform requires a beehive of users regularly visiting the platform and contributing fresh content. To maintain viability, the MRS must acquire, retain, and engage users in the market—and compete with other advertising platforms to deliver a sufficient return on investment. Authenticity of the content presentation presents a primary dimension for competition for users.

177. For example, reducing the flow of information might interfere with the welfare-generating forces of price competition. One analysis revealed that "the prices of goods and services in places that restrict advertising tend to be higher than those in places that do not restrict advertising." Zeynep K. Hansen & Marc T. Law, *The Political Economy of Truth-in-Advertising Regulation During the Progressive Era*, 51 J.L. & ECON. 251, 255 (2008). Over time, industry-focused studies have revealed that deregulation of price disclosure reduces prices. *See* Friedman, *Reconsidering Fictitious Pricing, supra* note 171, at 958–59.

178. Beales et al., *supra* note 173, at 514.

1. Competition for Users.

Social media platforms, including MRS entities, compete aggressively for users; as such, competitors rise and fall quickly. Though not an MRS, a notorious example of competition in this dimension involved the rise and fall of Myspace, and the subsequent social-media domination by Facebook.[179] Former Facebook president Sean Parker attributed Myspace's troubles to a "junk heap of bad design,"[180] and perhaps more notably, to a failure to create a platform where users shared their authentic selves.[181] Parker's thesis was that users quickly flocked from Myspace to Facebook for these reasons, among others.[182]

With respect to MRS platforms, similar dynamics apply. The dynamics reveal themselves in broad form through an examination of the experience of some of the leading players.[183] Factors such as design and authenticity can take users away from competitors. Following Parker's perspective, within the MRS space, if design becomes overly cluttered, if the service generates an inauthentic experience or barriers to desired user interaction, users will be more likely to abandon the service.

Angie's List presents a compelling example of the importance of competition for users, given recent changes to their structure made in response to market dynamics. In 2016, after financial struggles and pressures from investors, Angie's List announced plans to remove their paywall to give broader access to reviews, focusing on

179. *See* Amy Lee, *Myspace Collapse: How The Social Network Fell Apart*, HUFFINGTON POST (Aug. 30, 2011), http://www.huffingtonpost.com/2011/06/30/how-myspace-fell-apart_n_887853.html. In early 2008, "Myspace was top dog." *Id.* By April 2008 ". . . upstart Facebook grabbed the lead . . . In [the subsequent] three years, Myspace . . . lost over forty million unique visitors per month, lost both co-founders, . . . [and] diminished to a cluttered afterthought of the power it once was." *Id.*

180. Alexia Tsotsis, *Sean Parker on Why Myspace Lost to Facebook,* TECHCRUNCH (June 28, 2011), https://techcrunch.com/2011/06/28/sean-parker-on-why-myspace-lost-to-facebook/. Parker noted Myspace's "failure to execute product development . . . . They weren't successful in treating and evolving the product enough . . . . There was a period of time where if they had just copied Facebook rapidly, they would have been Facebook." *Id.*

181. Amy Lee, *Facebook Ex-President Sean Parker: I Trolled for Girls on Myspace*, HUFFINGTON POST (Aug. 22, 2011), https://www.huffingtonpost.com/2011/06/22/sean-parker-nextwork-myspace_n_882183.html. Parker recalled that with Myspace "[t]here was no verifiable, accountable, persistent identity that could follow you from place to place, that you maintained and curated in an accurate way. . . . Until you establish that identity layer for the Internet a lot of things aren't possible. Myspace wasn't providing that." *Id.*

182. *See id.* A cautionary note on surveys and language, "authenticity" may carry different meanings to different groups. As such "authenticity" may prove to be a buzzword for millennials one year but not the next. *See* Barton et. al, *supra* note 45 at ex. 5 (noting that "authentic" was a buzzword for millennials in 2012 but not in 2013).

183. Though I do not offer a complete industry survey, I discuss representative MRS entities to illustrate the competitive dynamics.

generating revenue from advertising from reviewed businesses.[184] This change represented a fundamental departure from a focus on a consumer subscription-based model[185] to a user engagement model more like Yelp's. The changing user demographics[186] that have been highlighting the centrality of MRS platforms have also forced this established player to choose a different strategy. CEO Scott Durchslag explained that "the reviews paywall served the company well for the last twenty years, but looking ahead to the next twenty years — millennials are not going to pay for reviews."[187] 100 million people were visiting the site but ninety percent "were bouncing off the paywall."[188]

Though Angie's List has sourced revenue from advertisers in the past, if the company follows this new strategy, it will become substantially more dependent on advertising revenue.[189] Competition has compelled Angie's List to migrate from serving users by subscription to facing the tension of serving paid advertisers while maintaining authenticity. As Angie's List discloses to investors, "Our business depends on the strength of our brand, which is built on a foundation of authentic reviews and [consumer] trust . . . failure to maintain that *authenticity* and trust would damage our brand and harm our ability to maintain or expand our membership and service provider bases."[190]

Angie's List has recognized that the MRS model that yields the most tension between users and advertisers also offers the most promising path to maximizing shareholder value. The company almost perfectly echoes Sean Parker's warnings about "authentic" experiences made in the context of the collapse of Myspace. Competition pushed Angie's List, an MRS pioneer, toward this newer model. Consumers want to access information freely yet engage authentically—and Angie's List's struggles with its prior model reflect that challenge.

Competition for users may drive standalone MRS industry players toward this higher-tension, AGC-funded model, as embodied by Yelp. Angie's List's flight from a paid subscription service toward

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184. Kris Turner, *Angie's List to Drop Reviews' Paywall in Effort to Generate Revenue*, INDIANAPOLIS STAR (Mar. 3, 2016, 8:16 PM), http://www.indystar.com/story/money/2016/03/03/angies-list-drop-review-paywall-effort-generate-revenue/81212140/.

185. *See* Brett Molina, *Angie's List to Replace Subscription Model with Tiered Plans*, USA TODAY (Mar. 3, 2016, 1:41 PM), https://www.usatoday.com/story/tech/news/2016/03/03/angies-list-replace-subscription-model-tiered-plans/81251508/.

186. *See supra* Part I.A.

187. Molina, *supra* note 185.

188. Turner, *supra* note 184.

189. *See* Angie's List, Inc., Annual Report, *supra* note 91, at 3–4.

190. *Id.* at 10 (emphasis added).

this model suggests that users value free and open access to information, while discounting—or simply not noticing—the influence of advertisers amidst peer reviews. Regardless of the competitive forces driving the dynamic, striving for platform authenticity in an AGC-funded model may not yield actual authenticity, as success in this market for users only requires the mere appearance of authenticity.

Zagat, a pioneer and established brand in gathering and distributing restaurant reviews in hard copy form,[191] struggled with efforts to make the transition from a unique, successful book-based aggregator of information to competing with online review platforms.[192] Yelp, competing for a subset of Zagat users, enjoyed a superior engagement interface "by making its contributors the stars of its site," enabling them to achieve "elite status" and receive special invitations to events.[193] Zagat had to manage online cannibalization of the book that epitomized its brand, as well as the challenges presented by paywalls, including Google's disfavor of paywall sites in search results.[194] By a large magnitude, the open Yelp reviews became more accessible to users on the dominant search engine.[195]

Ultimately, Zagat's ownership sold the company to Google for $151 million, effectively liberating their valuable data.[196] Following the lead of one component of the tension model, user engagement became the priority for Google with respect to Zagat. As Google's Head of Zagat put it, "It's not about paying for information or creating registration barriers. We want to surface this content. It comes down to focusing on the user and what makes a good experience . . . ."[197] The integration with Google Maps also became a synergistic addition to a more engaged platform.[198] Moving to the model of freely-accessed and engaged reviews reflects the trend that

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191. *See Our History*, Zagat, https://www.zagat.com/about-us/our-history (last visited Oct. 17, 2017).

192. *See, e.g.*, Ron Lieber, *Zagat Survey Aims to Regain its Online Balance*, N.Y. Times (Nov. 13, 2010), http://www.nytimes.com/2010/11/14/technology/14zagat.html?mcubz=0.

193. *Id.*

194. *Id.*

195. *See id.*

196. Barth, *supra* note 41.

197. Paolo Lucchesi, *Google Unveils New Zagat Integration, Including Free Access to Zagat Restaurant Ratings*, Inside Scoop S.F, (July 29, 2013, 10:12 AM), http://insidescoopsf.sfgate.com/blog/2013/07/29/google-unveils-new-zagat-integration-including-free-access-to-zagat-restaurant-ratings/. Google's integration execution faced criticism. *See generally* Sam Grobart, *How Google Has Completely Botched Zagat,* Bloomberg News (July 31, 2013, 8:41 PM), https://www.bloomberg.com/news/articles/2013-07-31/how-google-has-completely-botched-zagat.

198. *See* Lucchesi, *supra* note 197.

drove Angie's List to move away from a subscription-heavy approach, further emphasizing that the market may move in this direction.

In terms of a market-based solution, the market appears to pull in the direction of free and open access to users, requiring the standalone MRS to rely on contextual advertising, but not necessarily requiring the same of the supportive MRS. For example, the MRS platforms of Google and Facebook may prove less likely to have a conflict with advertisers because of the substantive breadth of their search-engine and social media-based platforms.

Both Google and Facebook seek to engage and retain users by all means possible to lure eyeballs in for a broad array of advertising, not just advertising displayed for the narrow purpose related to the search. In other words, because Google and Facebook are not solely MRS-driven advertising businesses, the potential conflict dilutes. Nonetheless, some tension still inheres, and if the MRS market concentrates through mergers, acquisitions, and scale-driven growth, the commercialization of MRS platforms within these larger entities warrants scrutiny on these dimensions.

Ultimately, competition for users restricts the degree to which open MRS platforms can deploy persuasive advertising. Competition appears to have led toward free and open access. If a platform undermines its own authenticity in a visible way, an alternative information source will presumably emerge to displace it. Nonetheless, if viable entities similarly land on a strategy that presents information in a manner that deceives consumers undetectably while being injurious to their welfare, competition for users will have failed to address the problem of contextual advertising.

2. Self-Policing Authenticity.

MRS platforms have an incentive to prevent gaming of their platforms though businesses cheating the system to generate false positive reviews. Permitting false positive reviews to stand could undermine user confidence in the system and could ultimately create a rush to create false positive reviews—and false negative reviews of competitors. By 2011, a cottage industry and effort had emerged to generate positive reviews for businesses.[199] MRS platforms can ill-

199. *See, e.g.*, David Streitfeld, *In a Race to Out-Rave, 5-Star Web Reviews Go for $5,* N.Y. TIMES (Aug. 19, 2011), http://www.nytimes.com/2011/08/20/technology/finding-fake-reviews-online.html?mcubz=0.

afford to devalue the apparent integrity of their platform, lest they lose users and experience declined engagement, so they responded. Not to mention, the parasitic profiteering off of the platform's trust likely derailed the more legitimate (though still potentially troubling) path—paying for direct advertising on the platform.

As such, Yelp has launched "sting operation[s]" to ensure that reviews have integrity.[200] In 2012, Yelp ensnared eight businesses after a Yelp employee posing as an "elite reviewer" solicited payments in exchange for a positive review.[201] The offered payments in the sting ranged from $5–$30.[202] Yelp kept the punishments internal to the site. For three months, Yelp posted a "consumer alert" on the offending business pages, featuring the sting's e-mail exchanges and a note that declared, "We caught someone red-handed trying to buy reviews for this business."[203] Yelp continues to aggressively pursue those who generate false reviews,[204] right along with Facebook,[205] Twitter,[206] and Amazon.[207]

In 2014, Yelp was subject to an extensive investigation about manipulation of reviews. Prompted by business complaints, the FTC investigated and cleared Yelp of promoting certain reviews over others, based on whether a reviewed business advertised, and whether the site "manipulated reviews" based on "ad buy."[208] Further bolstering the FTC's findings, a 2016 *Management Science* study

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200. *See* David Streitfeld, *Buy Reviews on Yelp, Get Black Mark,* N.Y. Times (Oct. 18, 2012), http://www.nytimes.com/2012/10/18/technology/yelp-tries-to-halt-deceptive-reviews.html?mcubz=0; *see also* Friedman, *Addressing Commercialization, supra* note 4 at 83.

201. Streitfeld, *Buy Reviews on Yelp, Get Black Mark*, *supra* note 200.

202. *Id.*

203. *Id.*

204. *See, e.g.*, Luther Lowe, *How Yelp Protects Consumers from False Reviews,* Huffington Post (July 15, 2013), http://www.huffingtonpost.com/luther-lowe/how-yelp-protects-consume_b_3275848.html (editorial written by Yelp's public affairs director discussing sting operations and review filtering). *See generally* Kashmir Hill, *I Created a Fake Business and Bought it an Amazing Online Reputation*, Splinter News (Sept. 15, 2015, 7:00 AM), http://splinternews.com/i-created-a-fake-business-and-bought-it-an-amazing-onli-1793850918 (testing the seeming quixotic efforts of Yelp, Facebook, Twitter, and Amazon).

205. *See Facebook Pages: Keeping Activity Authentic*, Facebook Bus., https://www.facebook.com/business/a/page/fake-likes [https://web.archive.org/web/20171018050125/https://www.facebook.com/business/a/page/fake-likes] (last visited Oct. 17, 2017) (expressing Facebook's deep concerns about "fake 'likes' " of businesses).

206. *See Fake Engagements on Twitter*, Twitter Help Ctr., https://support.twitter.com/articles/20171870 [https://web.archive.org/web/20171018050237/https://support.twitter.com/articles/20171870] (last visited Oct. 17, 2017).

207. *See* Imysantiago, *Amazon a Virtual Marketplace or Big Brother?*, Imysantiago.com (July 2, 2015), https://imysantiago.com/2015/07/02/amazon-a-virtual-marketplace-or-big-brother/.

208. *See* Rolfe Winkler, *Yelp Says FTC Won't Act on Complaints About Its Reviews*, Wall St. J.: Digits Blog (Jan. 6, 2015, 4:27 PM), https://blogs.wsj.com/digits/2015/01/06/yelp-says-ftc-wont-act-on-complaints-about-its-reviews/.

recognizing that the "credibility of [ ] reviews is fundamentally undermined when businesses commit review fraud . . . ." confirmed that Yelp's algorithm appears largely effective at filtering out fake reviews.[209] Yelp, unsurprisingly, welcomed these results, citing the finding that "Yelp's current implementation of the filtering algorithm [did] not treat advertisers' reviews in a manner different to non-advertisers' reviews"[210] as the "debunking" of a "conspiracy theory."[211]

The FTC's review, and this independent study, affirm that Yelp's efforts to prevent users and reviewed businesses from tampering with the authenticity of the platform have been effective. These internal filtering systems, however, do not address the potential confusion resulting from AGC presented in the context of peer reviews. The market is protected from fraudulent review manipulation, but the potential confusion from the presentation of AGC alongside peer reviews presents an entirely different problem.

Likewise, Angie's List declares internal rules, raising and answering the question: "How Does Angie's List Make Money?" for those who make the effort to seek out the methods under their website's "frequently-asked-questions" tab.[212] In addition to membership fees, Angie's List tells the public that the company:

> [G]enerates revenue from service providers. For example, Angie's List allows providers who have earned an "A"- and "B"-overall rating and meet other eligibility requirements to pay to advertise coupons, discounts, or other promotions to . . . members through [their] website, magazine, and call center. If a provider's rating falls below a "B" or if they fail to respond to our Complaint Resolution team, [Angie's List] will revoke their advertising privileges and remove their coupons, discounts, and promotions from the magazine, our call center, and AngiesList.com.[213]

209. Michael Luca & Georgios Zervas, *Fake it Till You Make It: Reputation, Competition, and Yelp Review Fraud*, 62 MGMT. SCI. 3412, 3412 (2016).

210. Michael Luca & Georgios Zervas, Fake It Till You Make It: Reputation, Competition, and Yelp Review Fraud 12 (Nov. 8, 2013) (unpublished version of the article) (on file with Yelp, Inc.), https://www.yelpblog.com/2013/12/harvard-study-debunks-yelp-extortion-conspiracy-theory-yelp-doesnt-extort ; *see* Luca & Zervas, *supra* note 209, at 3417–18 (using similar language in the final version of the article).

211. Luther Lowe, Yelp, Inc., *HBS Study Debunks "Extortion" Conspiracy Theory*, YELP BLOG (Dec. 10, 2013), https://www.yelpblog.com/2013/12/harvard-study-debunks-yelp-extortion-conspiracy-theory-yelp-doesnt-extort.

212. *How Does Angie's List Make Money?*, ANGIE'S LIST (Feb. 9, 2017), https://www.angieslist.com/faq/how-does-angie-s-list-make-money/.

213. *Id.*

As Angie's List transitions from a subscription model to an advertising model,[214] these internal integrity rules may become more important mechanisms to preserve integrity.

Yet questions still remain about the effectiveness of these internal initiatives to discourage and eliminate false reviews. Journalist Kashmir Hill recently reported about her experiment that demonstrated how easily and inexpensively she could establish a fictional business with "purchased" buzz.[215] For her made-up business, the mobile "Freakin' Awesome Karaoke Express" (a/k/a "FAKE"), Hill paid people to generate Twitter followers, Facebook likes, and to write Yelp and Facebook reviews.[216] The efforts to generate buzz with fake information appeared to work, as Hill reported receiving phone inquiries about hiring out the "Express."[217]

This baseline integrity problem appears to draw enough attention from the platforms that further regulation might not be necessary—and the incentives of the platforms are somewhat aligned with deterring false information.

Some regulation has aimed to preserve information integrity. The FTC has, for example, declared unlawful the presentation of undisclosed paid reviews by bloggers and other peers[218] because consumers might not otherwise factor in the editorial bias. On a different dimension, Congress passed the Consumer Review Fairness Act of 2016 to prevent businesses from inducing consumers to contract away their rights to write reviews.[219] This new law banned the practice of insertion of "anti-review clauses" into consumer agreements,[220] protecting the "credibility and value of online

214. *See supra* Part I.B.1.b.i.

215. *See* Hill, *supra* note 204.

216. *Id.*

217. *Id.*

218. *See, e.g.*, Guides on Use of Consumer Endorsements and Testimonials in Advertising, 16 C.F.R. § 255.0 (2016).

219. Consumer Review Fairness Act of 2016, Pub. L. No. 114–258, 130 Stat 1355 (15 U.S.C. §§ 45b, 58); Eric Goldman, *Understanding the Consumer Review Fairness Act of 2016*, Mich. Telecom. & Tech. L. Rev. (forthcoming 2017) (manuscript at 1–2), https://ssrn.com/abstract=2922242.

220. *Id.* (manuscript at 1) (presenting a thorough background and analysis of the new law). Eric Goldman uses this term to encompass "gag clauses," "non-disparagement clauses," and also restrictions on reviews that are not disparaging. *Id.* (manuscript at 1 n.2). Goldman has also been a significant influencer of this legislation. *See, e.g., Zero Stars: How Gagging Honest Reviews Harms Consumers and the Economy: Hearing Before the S. Comm. on Commerce, Sci., and Transp.*, 114th Cong. 18–35 (2015) (statement of Eric Goldman, Professor, Santa Clara University); Eric Goldman, *You Shouldn't Need a Lawyer to Pick a Dentist*, Forbes (Apr. 17, 2013, 1:14 PM), https://www.forbes.com/sites/ericgoldman/2013/04/17/you-shouldnt-need-a-copyright-lawyer-to-pick-a-dentist/#161d8269691c.

consumer reviews [through prohibition of] clauses restricting negative, yet truthful" reviews.[221]

The paid-review disclosure helps consumers separate genuine peer reviews from advertising. The Consumer Review Fairness Act ensures the flow and caliber of genuine consumer reviews. These interventions preserve the flow and caliber of peer information. Nonetheless, the specific problem of contextual advertising on MRS platforms has gone largely unnoticed by lawmakers and regulators.

Private actors, discussed next, have made civil claims alleging integrity issues (i.e., falsehoods) with MRS data, but these actions will not yield integrity with respect to the inherent tension between serving users and advertisers on a platform full of peer reviews.

B. *The Role of Private Civil Actions*

Since 2012, MRS platforms have been party to several different archetypes of litigation. Although an examination of all of these cases would prove impractical, a sampling proves instructive. A Westlaw search for litigation involving Yelp, Angie's List, and Avvo from 2012 to 2017 reveals that litigation has been sparse but consistent.[222] Of course, this search excludes cases that involve MRS platforms as non-parties. Yelp reports receiving a steady flow of requests and demands for reviewer identities, indicating that businesses are attempting to address the content of reviews through legal processes—and perhaps otherwise.[223] Nonetheless, approximately seventeen distinct cases related to content emerged from

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221. H.R. REP. NO. 114–731 at 7 (2016); *see also* Goldman, *Understanding the Consumer Review Fairness Act of 2016*, *supra* note 219 (manuscript at 2) (explaining the goals of the statute).

222. David Adam Friedman, Case Count (Feb. 19, 2017) (unpublished Microsoft Excel file) (on file with author). These three entities were chosen because assessing the litigation of standalone players proves much more practical to distill. I searched for the names of these three entities in case captions during this period. Because I searched for litigation content, not holdings, I included unreported cases. *See id.* This search could be broader, and would reveal more instances of lawsuits over content posted on MRS platforms, not naming MRS platforms as a party. Eric Goldman summarized the nature of lawsuits brought by physicians against patients and patients' relatives over reviews posted on line. *See* Eric Goldman, *Patients' Online Reviews of Physicians*, 2013 LAHEY HEALTH J. OF MED. ETHICS 6.

223. Angus Loten, *Yelp Regularly Gets Subpoenas About Users,* WALL ST. J. (Apr. 2, 2014, 4:23 PM), https://www.wsj.com/articles/yelp-regularly-receives-subpoenas-about-users-1396467536.

this search method during this timeframe, including *pro se* matters.[224] Though this search does not purport to exhaust the array of legal activity involving MRS platforms, the results prove instructive.

The most typical cases involve simple, but unsuccessful, attempts by businesses or their owners to sue the MRS platforms for publishing or relaying disparaging reviews.[225] Defamation or related causes of action formed the basis of these complaints, which were largely dismissed because of the immunity afforded by Section 230 of the Communications Decency Act (CDA),[226] anti-SLAPP (Strategic Lawsuits Against Public Participation) laws,[227] and the like.[228]

Direct litigation from businesses against authors of defamatory reviews, apart from MRS platforms, can help correct certain MRS market information. If the civil litigation mechanism works properly, businesses can identify defamatory reviewers and pursue action against them, if the benefit of correcting the information exceeds the costs. But the risk of facing such litigation from well-resourced businesses may even chill legitimate negative reviews by under-resourced users, creating a potential information supply problem. Generally, business litigation against defamatory reviewers should align with consumer interests in receiving authentic information,

224. David Adam Friedman, Case Count, *supra* note 222 (search results on file with author).

225. *Id.* (though neatly categorizing these claims proves challenging, at least half of them fit this description).

226. 47 U.S.C. § 230 (2012).

227. *See, e.g.,* CA. CIV. PROC. CODE § 425.16–.18 (West 2016 & Supp. 2017); FLA. STAT. ANN. §§ 768.295, 720.304 (West 2011 & Supp. 2017); 735 ILL. COMP. STAT. 110/1–/99 (2017). "California's anti-SLAPP statute permits courts at an early stage to dismiss meritless defamation cases 'aimed at chilling expression through costly, time-consuming litigation.' The statute was passed in 1993 in response to the legislature's concern that strategic defamation lawsuits were deterring citizens from exercising their political and legal rights." Price v. Stossel, 620 F.3d 992, 999 (9th Cir. 2010) (citations omitted). By one count, twenty-eight states have enacted anti-SLAPP laws. *See State Anti-SLAPP Laws*, PUB. PARTICIPATION PROJECT, http://www.anti-slapp.org/your-states-free-speech-protection/ [https://web.archive.org/web/20171018053318/https://anti-slapp.org/your-states-free-speech-protection/] (last visited Oct. 17, 2017). For an extensive discussion of the origins and early impact of anti-SLAPP laws in California, see Kathryn W. Tate, *California's Anti-SLAPP Legislation: A Summary of and Commentary on its Operation and Scope*, 33 LOY. L.A. L. REV. 801 (2000).

228. *See, e.g.,* Albert v. Yelp, Inc., No. G051607, 2016 WL 3910830 (Cal. App. 4th July 5, 2016) (attorney unsuccessfully bringing defamation claim against Yelp for publishing disparaging reviews); Brompton Bld'g, LLC v. Yelp, Inc., No. 1–12–0547, 2013 WL 416185 (Il. App. 1st Jan. 31, 2013) (apartment complex unsuccessful in attempt to plead defamation against anonymous party, relieving Yelp of obligation to disclose identity); Courtney v. Vereb, No. CV–12–655, 2012 WL 2405313 (E.D. La. June 25, 2012) (physician unsuccessfully bringing defamation claim against Angie's List for publishing disparaging review by another physician).

unless the threat of such litigation overly chills honest reviewers.[229] Users can gain from any purity resulting from battles over untruthful reviews as third-party beneficiaries.

This category of litigation, however, tends to involve the integrity of the content of the reviews, not the core problem of concern in this Article: the way paid advertising potentially undermines user expectations of authenticity. The MRS is simply the vessel of the information under scrutiny in these matters.

The sampling of the litigation directly involving the MRS reveals that private parties are mostly focused on review content, not on litigation that indirectly polices any advertising practices related to contextual advertising. A challenge to the algorithm could be considered close to that category, and one of those cases is discussed. Also, four categories of private civil litigation involving MRS platforms are briefly explored, all touching on the quality and integrity of MRS information. The question remains whether competition from users, in conjunction with litigation by private actors, can sufficiently address the contextual advertising problem. This exploration starts with a discussion of defamation actions.

1. Defamation Litigation.

Defamation actions brought by businesses directly against MRS platforms engage the barrier of the CDA.[230] Section 230(c)(1) maintains that "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."[231] Federal and state courts have construed the definition of "interactive computer service" broadly,[232] regularly shielding MRS systems from liability

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229. *See* David G. Savage, *Blogger Beware: Your Postings Can Lead to Lawsuits,* L.A. TIMES (Aug. 23, 2010), http://articles.latimes.com/2010/aug/23/nation/la-na-blogger-suits-20100823. Eric Goldman observed,

> Most people have no idea of the liability they face when they publish something online . . . . A whole new generation can publish now, but they don't understand the legal dangers they could face. People are shocked to learn they can be sued for posting something that says, "My dentist stinks."

Id. If this threat is absorbed by the reviewing public, reviewers may be overly cautious, but the sheer number of extant reviews points in the general direction that reviewers remain highly active.

230. 47 U.S.C. § 230 (2012).

231. 47 U.S.C. § 230(c)(1) (emphasis added).

232. In part, the statute defines "interactive computer service" as "any information service, system, or access software provider that provides or enables computer access by multiple

for the words of users. As a result, Yelp frequently receives subpoenas seeking the identity of reviewers—at one point, at the rate of six per day—presumably to enable reviewed entities to engage in civil action against them.[233] Of course, MRS platforms often present a more lucrative target for plaintiffs than disgruntled individual users, so they occasionally draw complaints that are quickly dismissed.

For example, in *Westlake Legal Group v. Yelp, Inc.*,[234] a law firm brought suit against Yelp and a user, Schumacher, for defaming the firm in an online review.[235] The Fourth Circuit Court of Appeals affirmed the district court's dismissal of the case, noting that "courts have generally accorded § 230 immunity a broad scope."[236] In *Seaton v. TripAdvisor, LLC*,[237] a resort owner unsuccessfully sued TripAdvisor for defamation. The MRS put the resort on a list: "Dirtiest Hotels—United States as reported by travelers on TripAdvisor,"[238] along with a picture of a torn bedspread with a user quote, "There was dirt at least 1/2["] thick in the bathtub which was filled with lots of dark hair."[239] The court noted that "even if the complaint . . . had alleged that TripAdvisor's users' statements [were] defamatory, TripAdvisor [could not] be held liable for its users' statements under the [CDA]."[240] Courts have consistently and summarily shielded MRS platforms on these grounds.[241]

The CDA enables the MRS to play the role of intermediary without absorbing liability for content provided by users. Without this statutory protection, the MRS would absorb the risk associated with

users to a computer server . . . ." 47 U.S.C. §230(f)(2). *See generally* 3 E-COMMERCE AND INTERNET LAW 37.05[1][B] THE GOOD SAMARITAN EXEMPTION (SECTION 230 OF THE CDA) (CIRCUIT AND STATE LAW SUMMARY) (2015).

233. Loten, *supra* note 223.

234. 599 Fed. Appx. 481 (4th Cir. 2015).

235. *Id.* at 482.

236. *Id.* at 485.

237. 728 F.3d 592 (6th Cir. 2013).

238. *Id.* at 598–99.

239. *Id.* at 599.

240. *Id.* at 599, n.8.

241. *See, e.g.*, Reit v. Yelp, Inc., 907 N.Y.S.2d 411, 414 (Sup. Ct. 2010) ("Yelp's selection of the posts it maintains on Yelp.com can be considered the selection of material for publication, an action 'quintessentially related to a publisher's role.' Accordingly, Yelp may not be considered an internet content provider, so that Reit's defamation claims are barred by the CDA."); Kimzey v. Yelp, Inc., 21 F.Supp.3d 1120 (W.D. Wa. 2014) (holding Yelp immune under Section 230 from defamation and civil racketeering claims). *But see* Hassel v. Bird, 203 Cal. Rptr. 3d 203, 208 (Ct. App. 2016), *cert. granted*, 381 P.3d 231(Cal. 2016) (holding that CDA Section 230 did not prevent court from ordering Yelp to remove allegedly defamatory reviews, despite the fact that Yelp was not a named party in the defamation suit). This holding has drawn sharp criticism from commentators. For a catalog of critics, *see* Eric Goldman, *The Internet Rallies Against a Terrible Section 230 Ruling—Hassell v. Bird,* TECH. & MARKETING L. BLOG (Aug. 22, 2016), http://blog.ericgoldman.org/archives/2016/08/hassell-v-bird.htm.

publishing all user content, thus rendering the system impractical, if not impossible, to operate. Aggrieved reviewed entities therefore only have one avenue—identify and pursue individual user-reviewers, most of whom lack the financial resources of an MRS platform.

This type of civil litigation could help improve the overall authenticity of MRS information. That said, the mechanism is far from perfect for correcting information. In some scenarios, businesses might "over litigate" and intimidate under resourced users who write negative views. In other scenarios, businesses might "under litigate" and not have the resources to combat a coordinated defamation campaign launched by disgruntled employees or competitors. Defamation actions will not provide a clear corrective mechanism for market information. As for any concerns raised by contextual advertising, defamation actions serve little function.

2. MRS Algorithm-Challenging Litigation.

Recent litigation involving MRS algorithms involves businesses suing MRS platforms over perceived bias in review presentation, in part as a result of unproven allegations of salesforce extortion.[242] Some businesses perceived that the MRS punished them after they spurned solicitations to advertise on the platform.

Litigation has not yielded any proven MRS extortion nor evidence that the MRS has followed through on an "advertise-or-else" threat from a salesforce. In *Levitt v. Yelp, Inc.*,[243] the plaintiffs, owners of an animal hospital, filed a class-action suit "alleg[ing] that Yelp extorted or attempted to extort advertising payments from them by manipulating user reviews and penning negative reviews of their businesses."[244] The Ninth Circuit dismissed the case, finding that the plaintiffs failed to allege claims amounting to extortion,[245] wrongful threats of economic loss by manipulating user reviews,[246] or sufficient facts to infer that Yelp authored bad reviews.[247]

On the way to these conclusions, the court explained that even if the substance of the plaintiffs' allegation were true, an MRS still has

242. *See* Eric Goldman, *Court Says Yelp Doesn't Extort Businesses*, FORBES (Sept. 3, 2014, 12:20 PM), https://www.forbes.com/sites/ericgoldman/2014/09/03/court-says-yelp-doesnt-extort-businesses/#68eae5e76e4a ("For years, Yelp has been dogged by allegations that it manipulates user reviews to coerce businesses to advertise with it . . . businesses aren't likely to stop grumbling about these concerns any time soon.").

243. 765 F.3d 1123 (9th Cir. 2014).

244. *Id.* at 1126.

245. *Id.* at 1130, 1136.

246. *Id.* at 1133.

247. *See id.* at 1135.

broad latitude to withhold, publish, and order the presentation of reviews.[248]

> [The plaintiffs] have no claim that it is independently wrongful for Yelp to post and arrange actual user reviews on its website as it sees fit. The business owners may deem the posting or order of user reviews as a threat of economic harm, but it is not unlawful for Yelp to post and sequence the reviews. As Yelp has the right to charge for legitimate advertising services, the threat of economic harm that Yelp leveraged is, at most, hard bargaining.[249]

The court concluded by emphasizing that "extortion is an exceedingly narrow concept as applied to fundamentally economic behavior."[250] Though Yelp may not have engaged in any nefarious activity, the court nonetheless gave latitude to the methods of MRS advertisers. In theory, competition and the desire to preserve integrity to retain users should serve as something of a natural check on MRS manipulation. Nonetheless, the MRS has the incentive to manipulate its platform in such a way that users perceive it as authentic, while selling businesses on the notion that their advertising dollars would be best spent on appearing on this attractive, authentic platform.

Businesses have challenged the truthfulness of MRS representations about neutrality with respect to algorithms that determine presentation and aggregation of reviews. For example, in *Demetriades v. Yelp, Inc.*,[251] the plaintiff restauranteur claimed that he suffered injury from Yelp when, on behalf of his businesses, he "purchase[d] advertising from Yelp based on Yelp's [untrue and misleading] representations that user reviews were filtered,"[252] therefore providing an attractive advertising platform. The plaintiff focused on five statements Yelp made about its "filter" to consumers, which the court deemed exceeded puffery:[253]

> (1) "Yelp uses a filter to give consumers the most trusted reviews";[254] (2) "All reviews that live on people's profile pages go through a remarkable filtering process that takes the reviews

248. *Id.* at 1134.
249. *Id.* at 1134.
250. *Id.* at 1137.
251. 175 Cal. Rptr. 3d 131 (Ct. App. 2014).
252. *Id.* at 136.
253. *See id.* at 143–44.
254. *Id.* at 135.

> that are the most trustworthy and from the most established sources and displays them on the business page. This keeps the less trustworthy reviews out so that when it comes time to make a decision you can make that [decision] using information and insights that are actually helpful"; (3) "Rest assured that our engineers are working to make sure that whatever is up there is the most unbiased and accurate information you will be able to find about local businesses . . ."; (4)"Yelp is always working to do as good a job as possible on a very complicated task—only showing the most trustworthy and useful content out there"; and (5) "Yelp has an automated filter that suppresses a small portion of reviews—it targets those suspicious ones you see on other sites."[255]

The plaintiff challenged whether Yelp "[gave] consumers the most trusted reviews" and the filter's accuracy in identifying "trustworthy reviews" from "trustworthy sources."[256] According to the plaintiff's allegations, Yelp's filter "suppressed more than only a small portion of reviews; allowed posts of the 'most entertaining' reviews to be shown on the unfiltered portion of the Web site . . . ."[257] The appeals court allowed this lawsuit to proceed, deeming these claims outside the protection of the CDA,[258] in what could be considered an exceptional "end-run" around the statute.[259]

The court held that the plaintiff's claims concerned Yelp's commercial speech about its own offerings, not third-party reviews.[260] At trial, the filter and related practices could have been analyzed and measured against the claims, but the case apparently settled before this phase.

In sum, regulators should take note that MRS platforms have the right to tinker with the presentation of peer reviews with opaque algorithms, right along with the presentation of contextual advertising. Self-regulation and competition for users constrains the MRS presentation to a degree, but litigation over presentation linked to

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255. *Id.* at 135–36.

256. *Id.* at 136.

257. *Id.*

258. *See id.* at 145.

259. *See* Eric Goldman, *Does Yelp Have the 'Most Trusted Reviews'? A Court Wants to Know More,* FORBES (July 30. 2014, 11:15 AM), https://www.forbes.com/sites/ericgoldman/2014/07/30/does-yelp-have-the-most-trusted-reviews-a-court-wants-to-know-more/#38056a8d4748 (criticizing the court's failure to characterize Yelp's claims as "puffery" and the decision, along with others, as having the potential to undermine the aims of Section 230 of the CDA).

260. *Demetriades*, 175 Cal. Rptr. 3d at 145.

algorithms has only succeeded to an extent—and the contextual aspect of advertising presentation is not directly at issue.

3. Consumer Subscriber Litigation.

A consumer can maintain a direct fraud claim against an MRS that violates claims about the "filter" of reviews. For example, in the class action *Moore v. Angie's List, Inc.*,[261] the lead plaintiff consumer pled fraud, unfair trade practices, and breach of contract against Angie's List, alleging that the MRS did not display reviews based on the advertised algorithm.[262] Of note, Moore did not just rely on MRS reviews as a free user.[263] She had a contractual membership agreement with Angie's List.[264]

According to the plaintiff, Angie's List allegedly made the following representations about how it sorted through and presented reviewed companies:

> A provider's position in your search results is determined by their recent grades and number of reviews. Companies with the best ratings from members will appear first. To help prevent the same providers from always showing up first, companies who have earned similar grades are rotated within your results . . . . Companies with a poor rating from our members will appear lower down on the List after businesses who have earned good ratings for superior work.[265]

Moore claimed that she searched Angie's List for a contractor to remodel her kitchen and hired one based on the visible recommendations, none of which were negative.[266] After the contractor botched the job, in Moore's opinion, she posted a poor review of the contractor on Angie's List, "after which, [Moore] alleges, she was able to see for the first time a number of other negative reviews written by others, at least one of which revealed an experience identical to hers."[267] Moore claimed that she would not have hired the contractor had she read those reviews, thus attributing injury to the MRS's manipulation of the review.[268]

261. 118 F. Supp. 3d 802 (E.D. Pa. 2015).
262. *Id.* at 805, 808–09.
263. *Id.* at 809.
264. *Id.*
265. *Id.* at 808 (citations omitted).
266. *Id.* at 809.
267. *Id.* (citation omitted).
268. *Id.*

Moore alleged several means of manipulation, including that Angie's List simply "does not count negative reviews when compiling a rating and fails to make a negative review readable."[269] Moore contended that Angie's List "extract[ed] 'advertising fees' from service providers to ensure that positive reviews are highly visible and factored into a service provider's rating and search result ranking."[270]

Moore based her allegations, in part, on a confrontation with an Angie's List employee who did "did not characterize . . . the suppression of negative reviews . . . as an oversight or a technological error."[271] This led Moore to believe that what she read prior to hiring the contractors was the product of a *quid-pro-quo* at odds with Angie's List's express claims that search results and grades reflected a true summary of the reviews.[272] Moore alleged that Angie's List concealed the negative review of the contractor because the contractor paid off the company, and in so doing, defied her "reasonable expectation, as a member, that she would have access to all reviews for a given service provider."[273] Her suspicions were stoked by an electrician acquaintance who claimed to her that "he pays 'to be at the top' of [Angie's List] search results."[274]

As noted in the Introduction, Angie's List settled this case with Moore,[275] admitting no wrongdoing.[276] Nonetheless, this class action presents a rare example of a user complaint involving the advertising practices of an MRS. The fact that the complaint had contractual roots undoubtedly strengthened the plaintiffs' position—Angie's List made contractual representations to paid subscribers. A pure user case about misleading presentation of advertising would lack access to this pathway. This case does, in some respects, involve contextual advertising, but it appears to stand alone, and in some ways contrast, with the relationships that Yelp, Avvo, Google, and Facebook have with their review users.

269. *Id.* at 808–09.

270. *Id.* at 809 (citation omitted).

271. *Id.* (citations omitted).

272. *Id.*

273. *Id.*

274. *Id.* (citation omitted)

275. *See* Class Action Settlement Agreement, *supra* note 2.

276. *Id.* at 4–5.

4. Right of Publicity Litigation.

The class action plaintiffs in one recent case against an MRS came close to addressing authenticity issues related to contextual advertising, but the action failed to advance on First Amendment grounds.[277] In that suit, the putative lead plaintiff, a lawyer, challenged Avvo's nonconsensual use of his identity alongside advertisements for competing lawyers.[278]

In attempting to stop this contextual advertising practice *entirely* on right of publicity grounds,[279] these plaintiffs attempted to travel much further with their argument than the policy approach suggested here. The attorneys' profile information was public, and presenting competitive commercial messaging around that profile is not *per se* troubling, as long as the user fully understands the context of the advertising.

This Article advocates heightened scrutiny of contextual MRS advertising, not abolition. As a whole, all of this peer information, in conjunction with advertising, puts more information into the market. The challenge is to ensure that consumers are not confused or misdirected by this information. Any prescription should preserve the flow of valuable peer information—just as the shield of Section 230 has accomplished—while facilitating better consumer understanding of the entirety of the MRS platform's presentation.

Enhanced disclosure beyond that already required may prove to be the mechanism for accomplishing these ends, though concededly, disclosure as a general remedy is not without critics.[280]

IV. The Case for Regulation through Disclosure and Prioritized Scrutiny

Market forces and private incentives for improving the quality and authenticity of MRS presentations still leave room for additional improvement, as no strong mechanism exists to help consumer users appropriately contextualize AGC embedded in especially powerful UGC. Any such mechanism should be employed

277. Vrdolyak v. Avvo, Inc., 206 F. Supp.3d 1384 (N.D. Ill. 2016).

278. *Id.*

279. *Id.*

280. *See, e.g.*, Omri Ben-Shahar & Carl. E. Schneider, More Than You Wanted To Know: The Failure of Mandated Disclosure 182 (2014) (suggesting that the benefits of mandated disclosure are outweighed by social costs such as undercutting other methods of regulation); Omri Ben-Shahar & Carl. E. Schneider, *The Failure of Mandated Disclosure*, 159 U. Pa. L. Rev. 647, 737–42 (2011) (discussing areas in which mandated disclosures are inadequate solutions).

delicately and with precision, however, so as not to do more harm than good.[281]

The most readily-available, though concededly imperfect, mechanism for improving the totality of information available to MRS users would be enhanced mandatory disclosure. Such enhanced disclosure requirements would need to meet a higher bar than the baseline for native advertising.[282] If surpassing the baseline proves impractical, prioritizing the MRS platforms for scrutiny may be appropriate.

A. *Enhanced Disclosure*

Disclosure requirements often function as a regulatory information solution. The recent guidance on native advertising focuses on disclosure as the primary means of preventing consumer confusion resulting from the context of an advertisement. These very same disclosure requirements can be tailored to address the contextual advertising unique to MRS platforms.

1. Disclosure as Information Solution.

The disclosure category of regulatory intervention is well-established.[283] Beales et al. catalogued regulatory "information remedies" to address market failures. Beales and his coauthors distinguished the remedies into three categories: "[1] removing restraints on information; [2] correcting misleading information; [and] [3] encouraging additional information."[284] In this instance, enhanced disclosure could serve the purpose of correcting misleading information, such as the "misleading door openers" identified in the Enforcement Policy statement.[285] Also, "encouraging additional information," in the form of encouraging disclosures that

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281. Recently, I offered a cursory and incomplete case for "elevating scrutiny" of MRS platform advertising. *See* Friedman, *Addressing Commercialization*, *supra* note 4 at 75–76. I also briefly offered a vague prescription for thoughtful intervention in this zone but did not tender any concrete guidance. *See id.* at 85–86.

282. *See, e.g.*, *Native Advertising*, *supra* note 7.

283. *See* Christine Jolls & Cass Sunstein, *Debiasing Through Law,* 35 J. LEGAL STUD. 199, 207–08 (2006) (discussing the role of added information in consumer safety).

284. Beales et al., *supra* note 173 at 513–31 (discussing role of disclosure in face of consumer optimism). As noted, Beales et al. also cautioned about the difficulty of regulating information markets. *Id.* at 514.

285. *See supra* Part II.B; *see* FTC Enforcement Policy Statement on Deceptively Formatted Advertisements, 81 Fed. Reg. 22596, 22598 (Apr. 18, 2016).

ensure users understand the entirety of the MRS presentation of peer reviews, could also provide an "information remedy."

Christine Jolls and Cass Sunstein have generally explored the role of "additional information" and disclosure in the context of consumer safety law.[286] Some of their observations extend to issues of disclosure related to MRS platform advertising. Jolls and Sunstein observe that "[c]onsumers may not adequately understand . . . risks because they lack factual information [and] because they suffer from bounded rationality—most familiarly because of the phenomenon of optimism bias . . . ."[287] Where consumer misunderstanding, distorted by the optimism bias, reflects the mere "lack of information," they note George Stiglitz's identification of the "traditional corrective"—"the straightforward provision of additional information."[288]

Native advertising may not provoke the optimism bias, but it may unduly influence consumers with "source-based misleadingness."[289] Credible context of an advertisement can lend the message extra power because "consumers evaluate a claim based on the source of the claim rather than the content of the claim."[290] As Chris Hoofnagle and Eduard Meleshinsky found in their survey of advertorials:

> Advertorials draw on the authority of their editorial context and thereby cause consumers to give them the same deference as they give to editorial content. The trappings that surround an advertorial . . . prompt[ ] readers to give the advertisement consideration similar to what they accord the editorial content. This transfer of trust can be explained by reference to source-based misleadingness.[291]

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286. Jolls & Sunstein, *supra* note 283 at 207–08.

287. *Id.* at 207. Jolls and Sunstein explain the optimism bias: "[P]eople typically think that their chances of a range of bad outcomes, from having an auto accident to contracting a particular disease to getting fired from a job, awre significantly lower than the average person's chances of suffering these misfortunes—although, again, this cannot be true for everyone." *Id.* at 204. For a more formal overview of the optimism bias, see David A. Armor & Shelley E. Taylor, *When Predictions Fail: The Dilemma of Unrealistic Optimism*, *in* HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 334, 334–47 (Thomas Gilovich, Dale Griffin & Daniel Kahneman eds., 2002).

288. JOSEPH E. STIGLITZ, ECONOMICS OF THE PUBLIC SECTOR 90–91 (1986); Jolls & Sunstein, *supra* note 283 at 207.

289. Chris Jay Hoofnagle & Eduard Meleshinsky, *Native Advertising and Endorsement: Schema, Source-Based Misleadingness, and Omission of Material Facts*, TECH. SCI. (Dec. 15, 2015), http://techscience.org/a/2015121503.

290. *Id.*

291. *Id.*

Hoofnagle and Meleshinsky analyze advertorials, but the concept of "editorial context" should also extend to MRS platforms. As noted extensively in Part II.A., peer information carries special weight and power, and advertising placed in the MRS context, which presents an aggregation of peer information, should, by extension, also receive extra deference. In this case, additional information would correct this "source-based misleadingness," just as Jolls and Sunstein prescribed for correcting the optimism bias. The regime for regulating native advertising has been disclosure-based—the question is whether this approach suffices for MRS platforms in particular.

2. Disclosure in Native Advertising.

The FTC's recent guidance on native advertising advises on "how to make clear and prominent disclosures ['of the native ad's commercial nature'] . . . to avoid misleading consumers."[292]

a. *General Disclosure Requirements*

The FTC sets effectiveness standards for these disclosures. "Only disclosures that consumers notice, process, and understand can be effective. Inadequate disclosures can't change the net impression created and won't stop consumers from being deceived that advertising or promotional messages are something other than ads."[293] With respect to MRS platforms, the "net impression created" from the commercial content viewed in combination with the peer-information content should guide adjudications of "adequacy."

For general native-advertising disclosure effectiveness, the FTC recommends that advertisers focus on "proximity and placement," "prominence," and "clarity of meaning."[294] The guidance related to "proximity and placement" unlocks the key to a prescription for heightened MRS platform disclosure.[295] The FTC suggests that advertisers "place disclosures on the main page of a publisher site where consumers will notice them and easily identify the content to which the disclosure applies," cautioning advertisers against assuming that consumers internalize every piece of information on the

292. *Native Advertising, supra* note 7 at III.
293. *Id.*
294. *Id.*
295. *Id.*

site.[296] To avoid confusing consumers, the FTC suggests that "a single disclosure that relates to more than one native ad should be accompanied by visual cues that make it clear the disclosure applies to each ad in the grouping."[297]

In online or mobile device contexts, "[o]nce consumers arrive on the click-or tap-into page where the complete native ad appears, disclosures should be placed as close as possible to where they will look first."[298] Perhaps related in spirit to this Article's ultimate MRS disclosure prescription, the FTC recommends that "in multimedia ads, a disclosure should be delivered to consumers before they receive the advertising message to which it relates."[299]

The framework for enhanced regulation for MRS platforms can be drawn from these more general guides directed at advertisers and publishers. As noted, proximity and sequencing would likely be key to ensuring that the "net impression" from MRS advertising is adequate. Such sequencing should ensure that consumers understand that visiting a peer-information platform will take them through AGC before reaching peer content, for example.

b. Problems with Native-advertising Disclosure Effectiveness.

Native advertising regulation remains in its infancy, rendering no appropriate time better than the present to contemplate enforcement prioritization. In the months since the FTC released the Enforcement Policy Statement on Deceptively Formatted Advertising, not much evidence has surfaced to support the premise that the policy has been effective in changing behavior.

According to one study, the new policy and guidance have not yet yielded evidence of a substantial change in advertising practices—while "sponsored content" continues to proliferate.[300] In early 2016, research firm MediaRadar audited retail websites, finding seventy percent of them out of compliance with the guidelines.[301] Further demonstrating that retailers are either out of or not yet in step with the Native Advertising Guidelines,[302] just five

296. *Id.*

297. *Id.*

298. *Id.*

299. *Id.*

300. *See generally* Marty Swant, *Publishers Are Largely Not Following the FTC's Native Ad Guidelines: Popularity of Branded Content is Soaring*, AdWeek (Apr. 8, 2016), http://www.adweek.com/digital/publishers-are-largely-not-following-ftcs-native-ad-guidelines-170705/.

301. *Id.*

302. *Native Advertising*, *supra* note 7. The FTC prescribes certain terms as "likely to be understood" as labeling paid advertising content. *Id.* Namely, " 'Ad,' 'Advertisement,' 'Paid

percent of retail sites reviewed incorporated the word "ad" in native advertising.[303] Granted, the novelty of native advertising regulation, though in the works for several years,[304] makes it premature to assess the FTC's approach to native advertising.[305] The lack of compliance does raise the question of whether the FTC has substantially raised the profile of the problem, despite its efforts. Raising the profile for MRS platforms becomes an even more daunting task, in part because of the absence of attention from the FTC.

3. Prescription for MRS Disclosure.

Before offering a simple, starting-point prescription for native advertising on MRS platforms, note that the FTC does not even directly or substantially address MRS platforms. The Native Advertising Guides offer seventeen fact-pattern-style "examples of when businesses should disclose that content is native advertising,"[306] none of which include the MRS.[307]

Advertisement,' 'Sponsored Advertising Content,' or some variation thereof." *Id.* The FTC recommends labels the descriptions " 'Promoted' or 'Promoted Stories' [as] at best ambiguous and potentially . . . misleading [consumers to believe] . . . that [the] advertising content is endorsed by a publisher site." *Id.* Also designated as potentially troublesome were "Presented by [X]," "Brought to You by [X]," "Promoted by [X]," or "Sponsored by [X]" [because they could reasonably be interpreted to] mean that a sponsoring advertiser funded or "underwrote" but did not create or influence the content. *Id.*

303. Swant, *supra* note 300.

304. *See, e.g.,* Press Release, FTC, FTC Announces Agenda, Panelists for Native Advertising Workshop (Nov. 18, 2013), https://www.ftc.gov/news-events/press-releases/2013/11/ftc-announces-agenda-panelists-native-advertising-workshop (announcing workshop on the "blurring of digital ads and content," including representatives from the FTC, media companies, publishers, advertising agencies, academia, the advertising law bar, advertising interest groups, and at least one advertiser).

305. Despite the apparent absence of general compliance in the retail sector, the FTC has not been dormant on the enforcement front. The Commission entered into a consent decree against the retailer, Lord & Taylor for "[im]properly disclos[ing] paid native advertising and online endorsements for its products." *See* Decision and Order, *In re* Lord & Taylor, LLC, No. C-4576 (F.T.C. May 20, 2016), https://www.ftc.gov/system/files/documents/cases/160523lordtaylordo.pdf. Specifically, the FTC alleged that Lord & Taylor failed to disclose authorship of content appearing as articles and Instagram posts in a fashion magazine. *See* Complaint, *In re* Lord & Taylor, LLC, No. C-4576 (F.T.C. May 20, 2016), https://www.ftc.gov/system/files/documents/cases/160523lordtaylorcmpt.pdf. Though the Lord & Taylor matter presented a classic example of an advertiser deceptively placing paid, commercial content, appearing to consumers as natural content, the advertising did not have an immediate call to action. Advertising on an MRS enables the seller to reach consumers primed to buy, on a platform that promotes access to neutral opinions. The native appearance might require more of an alarm.

306. *Native Advertising*, *supra* note 7.

307. *See generally id.*

The Guides' examples cover hypothetical advertising on financial news sites,[308] online news, lifestyle, and informational magazines,[309] and home improvement shows,[310] among others. Express concerns about native advertising tactics include "ads . . . integrated into content, including entertainment programming and video games,"[311] and even "virtual world" games, and game apps.[312] Among this expansive and exhaustive list of content integration scenarios,[313] the FTC completely omits the MRS advertising context.

All of the recommended guidance on native advertising should apply as a baseline to MRS-platform commercial content. However, due to the yet-to-be-demonstrated effectiveness of this advertising regulation, perhaps a more focused and targeted set of rules should be deployed, given the power of peer endorsements, and given the immediacy of the role of the MRS in influencing transactions.

As noted in Part I.A., Yelp's mobile app has been downloaded to a staggering one-third of all mobile devices in the United States.[314] Facebook, containing a supportive MRS within, boasts over a half-billion "mobile-only" users globally.[315] Google Maps, the center of gravity for the Google supportive MRS, has over a billion users ("editors") and a substantial mobile presence, as well.[316] It is not difficult to conclude that huge numbers of people access MRS platforms through mobile apps.[317] The mobile app might present the most fruitful initial opportunity to intervene via enhanced disclosure requirements.

308. *Id.* at ex. 1.

309. *Id.* at ex. 2, 3, 4, 6 & 8.

310. *Id.* at ex. 12, 13, 14 & 17.

311. *Native Advertising*, *supra* note 7.

312. *Id.*

313. Though perhaps demonstrating some forward thinking in issuing guidance on "virtual world" games, considering the recent popularity of Pokemon Go. *See* Alex Oller, *No Fad: Niantic CEO Insists Pokemon Go is Still Going Strong*, Assoc. Press (Feb. 28, 2017), https://apnews.com/8f967839e1d74678b727c8b4e8568a94/no-fad-niantic-ceo-insists-pokemon-go-still-going-strong.

314. Yelp, Investor Presentation, *supra* note 21, at 7.

315. Anthony Ha, *More Than Half a Billion People Access Facebook Solely from Mobile*, TechCrunch (Jan. 28, 2015), https://techcrunch.com/2015/01/28/facebook-mobile-only-2/.

316. Aleks Buczkowski, *The US Mobile App Report—Google Maps App 64.5M Users, Apple Maps 42M*, GeoAwesomeness (Oct. 27, 2014), http://geoawesomeness.com/the-us-mobile-app-report-google-maps-app-64-5m-users-apple-maps-42m/; Sarah Perez, *Google Maps is Turning Its Over a Billion Users into Editors*, TechCrunch (July 21, 2016), https://techcrunch.com/2016/07/21/google-maps-is-turning-its-over-a-billion-users-into-editors/.

317. Though Yelp appears to lead the way on mobile presence, TripAdvisor and Groupon are not far behind. Angie's List appears to have less presence. *See* Yelp, inc., Yelp Investor Presentation Q4 2016 5–6 (2016), http://www.yelp-ir.com/static-files/a52e3812-f443-4d11-9bcf-a36a0eddc0b4.

The FTC already recommends, "[o]nce consumers arrive on . . . tap-into page where the complete native ad appears, disclosures should be placed as close as possible to where they will look first"—but perhaps this disclosure should also be made with a crisp disclosure about sponsored content—every time the app opens—or upon use of that app feature.[318] If that mandate proves too cumbersome, perhaps a regular, programmed periodic disclosure upon opening the app would be more fitting. The frequency of the disclosure only needs to generate a "net impression" of the nature of the entirety of the content of the MRS presentation.

Using the mobile app as the starting point would enable to policymakers to experiment in a context where users frequently put the MRS platform to work. The immediacy of mobile, combined with evidence that "consumer opinions posted on line" are strongly influential in leading users to take action, makes it rational to look here first.[319] After a geo-search for a business, users might have to scroll through advertisements before they can reach any peer reviews. In a zone where disclosure might need to be more brief and crisp due to space, simplicity matters. Finding the right balance of delivering effective information without making the apps inconvenient to access will prove important. The burden of the regulation should not outweigh the welfare benefits of free and open accessibility to this valuable peer data.

Of course, any disclosure initiatives should be subject to formal testing before deployment and evaluation. There might be many possible ways to match the "net impression" with reality. Recognizing that there might be a need for intervention is the important prerequisite for choosing the opportunity and tool for such intervention.

B. *Prioritizing MRS Scrutiny*

Enhancement of disclosure for MRS platforms may indeed prove too clumsy to enforce or may empirically project to be ineffective or inefficient. In that case, regulators have the option to apply existing standards but prioritize scrutiny of MRS practices over other native advertising locales.

The Commission's native advertising guide offers a "final note": "The FTC's Enforcement Policy Statement on Deceptively Formatted Advertisements doesn't apply just to advertisers. In *appropriate*

318. *Id.*
319. *See supra* Part I.A.1.

circumstances, the FTC has taken action against other parties who helped create deceptive advertising content – for example, ad agencies and operators of affiliate advertising networks."[320]

The MRS platforms, in their entirety, host a significant amount of native advertising within a unique and powerful format. The aforementioned "appropriate circumstances" could incorporate MRS practices that unduly misdirect or disrupt the consumer's expected platform experience.

The FTC has spoken informally about enforcement and MRS platforms in the media. In 2015, Mary K. Engle, Associate Director of the Division of Advertising Practices, said, "User ratings [and reviews] would be material to consumers, so they have to be truthful and non-misleading . . . whether it's a movie, a vacation purchase, electronics . . . . You go online to see what other consumers are saying . . . . [W]e're looking at issues where those reviews aren't what they purport to be."[321] If the FTC follows through on these issues, the effects of the advertising sold around those reviews should be examined, too—but there has not been evidence of follow through.

Like every enforcement issue before them, the FTC should weigh the costs and benefits of intervention systematically and with rigor.[322] Regulators should correct the omission of specific concerns about MRS platforms.[323] Rigorous consideration of the effects of MRS-platform advertising is in order, and guidance and enforcement, where appropriate, should be the product of that consideration. Given the evidence that the demographic that trusts and uses MRS data will be moving into prime spending years, the time to begin examining MRS platforms with more care is now.

Conclusion

MRS platforms have created immense value by making peer experiences widely accessible to consumers who are searching for information to guide transactional decisions. These platforms are already ubiquitous on devices, both mobile and traditional. The emerging generation of consumers trusts information from this platform over many other traditional sources.

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320. *Native Advertising*, *supra* note 7 (emphasis added).

321. Walt Hickey, *Be Suspicious of Online Reviews, Particularly Fandango*, FiveThirtyEight (Oct. 15, 2015, 9:52 AM), http://fivethirtyeight.com/features/fandango-movies-ratings/.

322. *See* Friedman, *Refining*, *supra* note 132 (prescribing a new approach toward prioritizing FTC advertising enforcement actions).

323. Apart from the fairly opaque investigation into Yelp in 2014.

Some of these platforms are highly dependent on advertising from the entities they review, which presents a tension between presenting the purity of authentic peer information and generating revenue. This tension can be resolved. The market rewards perceived authenticity, so competition can partially ensure that MRS platforms will self-regulate their presentations so as not to confuse or mislead consumers. Competition alone, however, may not always yield clear messaging about paid content displayed amidst peer content.

Businesses have the incentive to police the truthfulness of their reviews but typically only through litigation against users, not the MRS, to which the CDA affords protection. Users, unless they have contractual privity through subscription models, generally lack civil recourse against freely-accessible MRS platforms for misleading them through native advertising.

Therefore, regulators should experiment with a disclosure regime. This regime should ensure that consumers understand their MRS experience, commercial and non-commercial, in totality. A careful effort would improve the way that consumers use this valuable information while ensuring that the information continues to flow. No regulatory regime should be permitted to burden unduly the flow of this valuable information.