

## *Teaching Case*

# Dancing with Bigfoot: The Risks and Liabilities of Online Reviews

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## **Abstract**

The case provides an opportunity for classroom discussion of social media posts and legal responsibility as the authors describe a recent lawsuit brought against a person posting a review on TripAdvisor.com. As the online reviewing of businesses, products, and services increases, and the dependence of consumers on these evaluations concurrently grows, students would benefit from an understanding of the risks and liabilities associated with online reviews for posters, businesses, and Internet Service Providers (ISPs). The case can be used in an undergraduate or graduate level management information systems course, or as part of a capstone class experience. Suggested assignments include discussion questions regarding defamation, negligence, tortious interference, and disclaimers; an evaluation exercise containing examples of reviews with acceptable and libelous content; and a discussion exercise in which students discuss similar lawsuits.

**Keywords:** Teaching Case, Internet Law, Disclaimers, Libel, Defamation

## **1. INTRODUCTION**

As online reviews become increasingly important to consumers, and therefore, to the businesses that offer the reviewed products and services, knowledge of what is legally allowable in such postings is vital. For example, a current survey shows that over 26,000 reviews are posted by Yelp users every minute (Beeson, 2018); and, 93% of consumers read local online reviews to determine whether or not a business is good (Brightlocal.com, 2017). With regard to the content of online reviews, we know that the law protects "statements of pure opinion" and even

those that are considered "hyperbole, or rhetorical exaggeration." However, reviews that are defamatory in nature—those that feature false statements of fact—are actionable if they are negligently or maliciously posted, and cause material harm to the entity. This is the issue to be considered by examining the June 5th, 2018 Associated Press (AP) article entitled "Branson Attraction Sues Man Over TripAdvisor Review." The AP news story reveals that a popular Missouri theme park filed a lawsuit against a visitor who posted an "unfavorable" review. This teaching case outlines both the plaintiff and defendant's version of events, and describes the

corresponding ground upon which each side to the court case stands. This exercise also highlights some of the differences between acceptable and unacceptable speech in online postings, and what the legal consequences are for “fake” or inaccurate reviews.

## 2. THE REVIEW

In March 2018, Randy Winchester and his daughter Emily Winchester were visiting Branson to attend a cattle farmers’ conference. Randy and Emily operate Dancing Cow Farms in Kansas, where they raise, and care for, Scottish Highland cattle. As part of the conference, Randy and Emily visited a local Branson attraction called Bigfoot Fun Park for a meeting of the Heartland Highland Cattle Association. The amusement park entertains visitors with thrill rides, a mini-golf course, a tour of Bigfoot Farms and, supposedly, one of the largest herds of Scottish Highland cattle in the Midwest. In 2018, the Ozark park launched a “Bigfoot Discovery Expedition” where visitors have an opportunity to search for the legendary simian-like creature, Bigfoot, during an off-roading experience. During their visit, Randy, Emily and other meeting attendees took a tour of the park and saw some of their cattle. Upon returning home, Randy Winchester posted a three-star review of the attraction on TripAdvisor. In his review, Randy stated,

*“We did the Bigfoot Safari tour as part of a large group. The \$10 price tag is about right for what we got. Basically a tour through some pretty rugged country on some pretty narrow roads. They promote the fact they have the largest herd of Highland cows in the Midwest. You spend about 5-10 minutes feeding them range cubes at the beginning of the tour, and see maybe 10 of the cows. Then it’s off into the hills you go with a guide telling some pretty fanciful tales along the way. All in all a decent experience but had we paid more than the \$10 I would have been disappointed.”*

Not long after Randy posted his review, he downgraded the star rating from three stars to one star and posted the following update to TripAdvisor:

*“Since posting the above review, a person identifying himself as an owner of Bigfoot on the Strip has called my daughter on her cellphone repeatedly, has contacted my daughter by email, has tried to call my home phone at 8:30 p.m. on a Saturday,*

*has attempted to contact me by email, and has contacted the person who coordinated our tour, to complain about my original review. The ‘owner’ has also advised my daughter by email that he and his partners would likely be suing both of us.*

*I have significant reservations regarding any business run by someone who seems to think it is an acceptable business practice to contact family members and associates of a reviewer because they seem to be unhappy with a review. Consequently, I am changing my three-star review to one star.”*

## 3. THE LAWSUIT

On April 13, 2018, Bigfoot on the Strip, LLC, the Missouri-based company that owns Bigfoot Fun Park, filed a civil liability complaint in Taney County, Missouri against Randy, Emily and Dancing Cow Farms located in Douglas County, Kansas. The lawsuit specified grounds for libel (defamation), negligence and tortious interference with a business expectancy. (A claim of tortious interference in this case alleges that the action taken by the defendant caused significant economic harm to the plaintiff.) The case was moved shortly thereafter to Federal Court at the request of the Winchesters.

Details of the lawsuit focus on allegedly erroneous statements in Randy’s TripAdvisor reviews. Bigfoot’s complaint states that the Winchesters had not taken the tour and did not pay \$10 to take the tour. The company contends that the review was “born of evil motive,” exposed the business to “contempt and ridicule” and “intended to discourage people from visiting and to hurt business” (Zhu, 2018). In their filing, Bigfoot on the Strip asks the Winchesters to (1) remove the reviews, which they claim are “false and defamatory,” (2) pay \$25,000, and (3) pay all relevant legal fees.

Also in the complaint, Bigfoot on the Strip claims that “customers who take the tour do not spend five to 10 minutes feeding cattle range cubes and they also do not see 10 of the cows” (Zhu, 2018). The company also denies repeatedly calling Emily Winchester on her cellphone or the home phone of Randy Winchester on a Saturday evening. Court documents also indicate that “Tour tickets cost \$40 for an adult and almost \$30 for a child.” (Zhu, 2018).

Court documents further indicate that a lawyer representing the Winchesters “...argues that the

lawsuit should be dismissed because the court in which the lawsuit has been filed does not have jurisdiction over the defendants, who live and do business in Kansas” (Zhu, 2018). If a court does not have both personal jurisdiction (over the individual) and subject matter jurisdiction (over the specific type of claim), then that court cannot hear the case, and it would be dismissed.

#### 4. REVIEW HISTORY

The TripAdvisor website indicates that Randy Winchester has been a member since 2010 and has left a total of 63 reviews. In all of Randy’s posts, he only had one other one-star review for a restaurant that eventually closed (Zhu, 2018). As of June 8, 2018, TripAdvisor reviews for Bigfoot Fun Park list:

- 160 five-star (★★★★★),
- 10 four-star (★★★★),
- 4 three-star (★★★) ,
- 2 two-star (★★) , and
- 1 one-star (★) review.

#### 5. INAPPROPRIATE REVIEWS

Although most online reviews of products and services are opinion, and not factual statements, reviewers need to increasingly be careful about what they post. With more and more of a business’ success being dependent on favorable reviews, there is—not surprisingly—intense scrutiny of online postings. If a company believes an online review is untruthful or inaccurate, there are a number of alternative courses available to that organization, including the option to: flag or contest the review with the posting site; ask the reviewer to remove or revise the posting; respond to the review online; report the review to the Federal Trade Commission (if a “fake” review); or, in a worst case scenario, bring a lawsuit against the reviewer, the sponsoring website, or both.

#### 6. TRIPADVISOR’S DISCLAIMER

TripAdvisor posts a disclaimer separating the site from the content that is posted. Although the company has put measures in place to monitor content, the speed at which reviews are posted to the site makes it difficult to control all review activity. TripAdvisor’s disclaimer states:

*“TripAdvisor takes no responsibility and assumes no liability for any Content posted, stored, transmitted or uploaded by you or any third party, or for any loss or damage thereto, nor is*

*TripAdvisor liable for any mistakes, defamation, slander, libel, omissions, falsehoods, obscenity, pornography or profanity you may encounter. As a provider of interactive services, TripAdvisor is not liable for any statements, representations or Content provided by its users in any public forum, personal home page or other Interactive Area. Although TripAdvisor has no obligation to screen, edit or monitor any of the Content posted to or distributed through any Interactive Area, TripAdvisor reserves the right, and has absolute discretion, to remove, screen, translate or edit without notice any Content posted or stored on this Website at any time and for any reason, or to have such actions performed by third parties on its behalf, and you are solely responsible for creating backup copies of and replacing any Content you provide to us or store on this Website at your sole cost and expense.” (TripAdvisor, 2018).*

TripAdvisor provides a Help Center and support pages outlining the guidelines for appropriate review content. It is up to the review posters’ discretion to follow the guidelines in adding appropriate content to the travel site.

#### 7. TRIPADVISOR’S REVIEW POLICIES

TripAdvisor’s Help Center provides guidelines to users wishing to post reviews of their travel experience. The posting guidelines require reviews to be: family-friendly, relevant to travelers, unbiased, helpful and describing a first-hand experience, recent, original, non-commercial, respectful of private information, associated with the correct listing and easy to read (TripAdvisor Writing Reviews, 2018). Although TripAdvisor has technology and a team in place to monitor reviewer content, their process is not foolproof, and they have developed a reporting process for businesses to contest or flag inappropriate reviews.

TripAdvisor’s Support web site indicates that “We have technology in place, as well as a team of editors, to moderate reviews. But no system is perfect...Occasionally, an inappropriate review may slip through the cracks. In these rare instances, please report the material to us...” (TripAdvisor, 2018). Rather than contacting the reviewer directly, businesses receiving questionable reviews can submit their concerns through the TripAdvisor Management Center.

TripAdvisor’s policy statement addresses content posting to their site, including the posting of libelous content. Although the complete statement can be found at

<https://tripadvisor.mediaroom.com/us-terms-of-use>, the following content seems to correspond well with the circumstances surrounding the *Bigfoot Fun Park* case.

"As a condition of your use of this Website, you warrant that (i) all information supplied by you on this Website is true, accurate, current and complete...you understand that you are solely responsible for any information that you share with us.

By using any Interactive Areas, you expressly agree not to post, upload to, transmit, distribute, store, create or otherwise publish through this Website any of the following:

- a. Any message, data, information, text, music, sound, photos, graphics, code or any other material ("Content") that is unlawful, libelous, defamatory, obscene, pornographic, indecent, lewd, suggestive, harassing, threatening, invasive of privacy or publicity rights, abusive, inflammatory, fraudulent or otherwise objectionable;
- b. Content that would constitute, encourage or provide instructions for a criminal offense, violate the rights of any party, or that would otherwise create liability or violate any local, state, national or international law, including, without limitation, the regulations of the U.S. Securities and Exchange Commission (SEC) or any rules of a securities exchange such as the New York Stock Exchange (NYSE), the American Stock Exchange or the NASDAQ;
- c. Content that may infringe any patent, trademark, trade secret, copyright or other intellectual or proprietary right of any party;
- i. Content or links to content that, in the sole judgment of TripAdvisor, (a) violates the previous subsections herein, (b) is objectionable, (c) which restricts or inhibits any other person from using or enjoying the Interactive Areas or this Website, or (d) which may expose TripAdvisor or its affiliates or its users to any harm or liability of any type." (TripAdvisor Terms of Use, 2018).

## 8. ISP PROTECTIONS

Commercial interactive computer service providers, who may provide a forum for potentially defamatory online reviews, are generally immunized from legal responsibility by the Communications Decency Act (CDA). (Telecommunications Act of 1996), § 509(c)(1), 47 U.S.C.A. § 230(c)(1)). Section 230 of the CDA

absolves ISPs (including companies, websites, developers) of defamation liability over content and comments posted by users by stating: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." In the case *Zeran v. America Online (AOL)* (1996), the plaintiff Kenneth Zeran had his address and phone number posted as a hoax in connection with advertisements for souvenirs glorifying the Oklahoma City Bombing. As a result, Zeran sued AOL for negligence in allowing the postings. The court ruled in favor of AOL, citing that "interactive computer service providers may not be held liable for posting defamatory statements posted by 3rd parties via the ISP." ISPs may jeopardize this immunity, however, if they create or otherwise are directly responsible for the development of the content that is the source of the alleged liability. (*FTC v. Accusearch Inc., et al*, No. 08-8003 (10th Cir. 2009)).

## 9. ASSIGNMENTS

Faculty may use this exercise to address basic business law terms, web site policies and disclaimers, responsible content posting, and the responsibility of third party review providers for the content posted on their sites. Examples of potential assignments are provided. Discussion of answers for assignments are provided in the teaching notes.

### Questions for Discussion

**Courses:** Graduate or Undergraduate level MIS course

1. Go to Black's Law Dictionary at <https://thelawdictionary.org/> or the Lectic Law Library at <https://www.lectlaw.com/> Find and write a description for each of the following terms/actionable tort claims. Based on your findings, decide whether any of these claims are present in the case of *Bigfoot on the Strip, LLC v. Winchester*. Explain your reasoning:
  - a. Libel (Written Defamation)
  - b. Slander (Oral Defamation)
  - c. Negligence
  - d. Malicious intent
  - e. Tortious interference
2. Read through the online reviews listed below. Based upon what you have learned about the terms/claims addressed in question 1, which posting(s) do you believe

may potentially incur civil liability for the poster, and why?

(1) Posted by a client about his divorce attorney on Yelp: "Worst ever. Had to fire him after I gave him a chance for well over a year. Paid him his \$ 2,500 retainer, then paid him another \$ 2,500 shortly after...and I still owe him another several thousand dollars!...all for his hunt-and-peck filing typing b.s. while he makes me watch. Yelled at me once when I called to ask him about something his office had sent me that day. Told me to "GOOGLE IT!" Worst. Ever."

(2) Posted by a mother who contracted for musicians to perform at her son's wedding reception: [The band] did not deliver acceptable service. My son got married this past weekend and (1) the singer was awful (2) the number of musicians promised did not show up (3) the band leader had no personality whatsoever and though he tried hard to please, could not read the crowd. The band's electrical requirements [sent to me]...were all wrong and my electrician, at an enormous additional expense, had to work the night of the party, in the rain, to make sure that there was enough power. I would never, ever recommend using this company."

(3) Posted by a client about a home contractor: "...[the contractor] was to perform painting, refinish floors, electrical and handyman work. I was instead left with damage to my home and work that had to be reaccomplished for thousands more than originally estimated. The contractor invoiced me for work not performed; I filed my first ever police report when I found my jewelry missing and [the contractor] was the only one with a key. These people are thieves and con artists—DO NOT HIRE."

(4) Posted by a tenant about his landlord: "Sadly, the Building is (newly) owned and occupied by a sociopathic narcissist—who celebrates making the lives of tenants hell. Of the 16 mostly-long-term tenants who lived in the Building when the new owners moved in, the new owners' noise, intrusions, and other abhorrent behaviors (likely) contributed to the death of three tenants (Pat, Mary, & John) and the departure of another eight. There is NO RENT that is low enough to make residency here worthwhile."

(5) TripAdvisor published on its website a "dirtiest hotel" list of ten locations in 2011: On January 25, 2011, TripAdvisor's "2011 Dirtiest Hotels" list reported that Grand Resort in Pigeon Forge Tennessee was "the dirtiest hotel in America." The list incorporated a photograph and a quote from TripAdvisor users about each of the ten hotels, as well as a link to each hotel's page on TripAdvisor's website. The user quote for Grand Resort was: "There was dirt at least ½" thick in the bathtub which was filled with lots of dark hair;" the photograph for Grand Resort was of a ripped bedspread.

(6) Customer review of a restaurant: "My dining experience at the bistro was the WORST EVER. The atmosphere, food and servers were terrible. And in my opinion, the bistro owner is a member of a criminal organization that smuggles drugs in their food—my fish tasted like it was simmered in cocaine residue."

3. Review again the first review posted by Randy Winchester. In the case of Bigfoot on the Strip, LLC v. Winchester, who do you believe the court will find in favor of, and why?
4. What do you think about how Bigfoot Fun Park reacted to Randy's review? Could, or should, the company have reacted differently?
5. Read through TripAdvisor's Disclaimer. Do you believe TripAdvisor's statements protect them from liability in the *Bigfoot* case? Why or why not?
6. Visit another review-dependent site—Yelp.Com—and read through their Disclaimer. In reviewing both TripAdvisor and Yelp's policies, what do you notice about the policies? If you were starting a content sharing web site, which disclaimer would you prefer and why?
7. Examine the following scenarios, and decide if you believe the ISP involved would be liable for defamation. Support your answer.

(1) A gossip columnist published a report describing a famous individual as a drug addict and spouse abuser. None of the statements published were true. A well-known ISP was carrying the gossip report at the time of the defamatory posting, and

had sent a press release, just before the report was published, to all of its members touting the column as "The BEST source for Gossip and Rumors."

(2) An internet website receives posting of online reviews of consumer products. The website editors also review products and post their reviews. One of the editors is late finishing a review of a product, so he takes user posted review content, some of which was untrue and defamatory, to write his own review.

(3) An ISP hosts a "complaint" virtual bulletin board site that allows users to post business complaints after registering and providing contact information. On the site, multiple complaints from various sources are made against a pet breeder, suggesting the company had "stolen money from their customers, and fed their cats Tylenol, causing them to suffer horrible deaths and pre-death injuries." The ISP edits and modifies complaints submitted by users for grammar and punctuation, but not content.

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**Editor Notes:** Teaching Notes are available for this case, please contact the authors directly.