



# The FTC and Online Reviews

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# Syllabus

- ✓ Federal Trade Commission Authority
- ✓ Initial Regulation of Online Reviews
- ✓ 2021: FTC Notice of Penalty Offense to 700 Companies
- ✓ 2022: FTC Sharpens Focus on Reviews
  - ✓ Featuring Online Customer Reviews: A Guide for Platforms (Jan. 2022)
  - ✓ Soliciting and Paying for Online Reviews: A Guide for Marketers (Jan. 2022)
  - ✓ Fashion Nova Consent Decree (Jan. 2022)
  - ✓ Vision Path Consent Decree (Jan. 2022)
  - ✓ Draft Update to Endorsement Guidelines to Address Review issues (May 2022)

# Not Covered

Responding to consumer reviews can create issues for regulated businesses including legal, health care, and finance if consumer information or other protected information are shared.



## Twenty-three Words

*Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.*

*Federal Trade Commission Act, Section 5 (1914)*

*15 U.S.C. § 45*



# Nowadays, everything is subject to online reviews

## International Space Station (NASA)

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(16 reviews)

\*\*\*\*\* Great views, amazing experience. Decent wi-fi. Food could be better. Shame its not pet friendly and does not have airline partner points. MK

\*\*\*\* The views and the comraderies are the reason to go, but the whole going to bathroom thing is weird. They need to improve the entertainment selection. You can only watch *Gravity* or *Interstellar* so many times. Hal

\* They didn't disclose that parking is not validated. I paid \$9,000 in parking fees while orbiting. Major Tom

Image: [The station pictured from the spacex crew dragon 5 \(cropped\)](#), NASA (public domain)



# There Was a Time Businesses Openly Sought to Suppress Bad Reviews

- Non-disparagement clauses
- Liquidated damages clauses
- Assigning copyright in reviews to provider



# These Efforts Often Were Not Successful

- ***FTC v Roca Labs*** (filed 2015)
  - Product sold for \$480 but could charge consumers full price of \$1580 if consumers violated non-disparagement clause.
  - Consumers harmed by suppression of truthful reviews. FTC: “Roca Labs had an adversarial relationship with the truth.”
- ***Palmer v. Kleargear*** (D. Utah 2014)
  - Kleargear assessed \$3,500 for negative review and reported failure to pay to credit reporting agency. Led to consumer lawsuit, judgment of over \$300K plus attorneys’ fees and backlash pushing company out of business.
- ***McWhorter v Duchouquette*** (Dallas Cty. Dist. Ct. 2016)
  - Prestigious Pets failed attempted to enforce disparagement clause led to huge backlash and Yelp label: “Consumer Alert: Questionable Legal Threats”.



Image by WikilImages from Pixabay



# Consumer Review Fairness Act

- **2014:** The Kleargear lawsuit led to a California law prohibiting businesses from requiring that consumer waive their “right to make any statement regarding the seller . . . or concerning the goods or services.” (Business and Professions Code § 1670.8.)
- **2016:** Congress Enacts ***Consumer Review Fairness Act of 2016*** (15 U.S.C. § 45b) making form contracts “void from inception” if it:
  - prohibits or restricts the ability of an individual who is a party to the contract to write or provide a review or assessment;
  - Imposes any penalty for doing so;
  - Transfer or requires the transfer of intellectual property rights in the review or feedback





# FTC Enforcement Timeline

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- **2012: HP – [No Action](#).**  
HP gives bloggers \$50 for posting content to promote use of HP ink. Only a small number of bloggers posted and a few disclosed receipt of gift card.
- **2014: Yahoo! - [No Action](#).**  
Handful of Yahoo! employees give positive reviews of mobile app without disclosing affiliation. Not incentivized by Yahoo!
- **2014: Deutch LA – [Consent Decree](#).**  
Deutch directs employees to hype client Sony's PS Vita gaming device without disclosure of relationship. FTC: Failure to disclose was a deceptive trade practice.
- **2015: AmeriFreight – [Consent Decree](#).**  
Gave \$50 discount to consumers who agreed to write review with \$100 contest for best monthly review. Incentives not disclosed in marketing reviews. FTC – "Companies must make it clear when they have paid their customers to write online reviews. If they fail to do that – as AmeriFreight did – then they're deceiving consumers, plain and simple."

# FTC Enforcement Timeline

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- **2019: [FTC Announces First Enforcement Actions Under Consumer Review Fairness Act](#)**  
Three consent decrees with companies with non-disparagement provisions in their agreement.
- **2019: [Sunday Riley Modern Skincare – Consent Decree](#)**  
Skin care company directed managers and employees to post favorable reviews of their product on Sephora and other websites and attack negative reviews for two years.
- **2019: [UrthBox – Consent Decree](#)**  
Organic food company incentivized (store credit/snack boxes) reviews with BBB and review sites. No program to monitor if incentives were disclosed.
- **2020: [Shop Tutors, Inc, d/b/a LendEDU – Consent Decree](#)**  
LendEDU falsely claimed that the website provided “objective,” “accurate,” and “unbiased” information about consumer financial products, such as student loans, personal loans, and credit cards, when in fact they offered higher rankings and ratings to companies that paid for placement.



Division of Advertising Practices

UNITED STATES OF AMERICA  
Federal Trade Commission  
WASHINGTON, D.C. 20580

**Fall 2021: Notice of Penalty Offenses  
Sent to over 700 companies.  
From 1-800-Flowers.com to Zulily.**

## **Re: Unlawful practices relating to the use of endorsements and testimonials**

The **notice of penalty offenses** consists of Commission determinations in prior litigated cases that certain practices are deceptive or unfair and are unlawful under Section 5 of the Federal Trade Commission Act. As set forth in more detail in the notice, these acts and practices include: falsely claiming an endorsement by a third party; misrepresenting that an endorser is an actual user, a current user, or a recent user; continuing to use an endorsement without good reason to believe that the endorser continues to subscribe to the views presented; misrepresenting that an endorsement represents the experience, views, or opinions of users or purported users; using an endorsement to make deceptive performance claims; failing to disclose an unexpected material connection with an endorser; and misrepresenting that the experience of endorsers represents consumers' typical or ordinary experience. **Note that positive consumer reviews are a type of endorsement, so such reviews can be unlawful, e.g., when they are fake or when a material connection is not adequately disclosed.**



# Jan. 2022: FTC Sets the Record Straight

- [Fashion Nova Consent Decree](#)  
Used review platform to only publish four and five star reviews, leaving hundreds of others reviews in limbo. “Deceptive review practices cheat consumers, undercut honest businesses, and pollute online commerce”.
- [Vision Path Consent Decree](#)  
Incentivized reviews and used employees for reviews, without disclosure.
- Sent [warning letters to 10 companies](#) offering review management services, placing them on notice that avoiding the collection or publication of negative reviews violates the FTC Act
- Releases two guides on reviews
- May 2022: These principles included in [draft update to Endorsement Guidelines](#).





# Soliciting and Paying for Online Reviews:

## A Guide for Marketers

## Don'ts

- **Don't** ask for reviews from people who haven't used or experienced product or service
- **Don't** ask your staff/family/friends to write reviews – at least not without ensuring relationship is disclosed
- **Don't** ask for reviews only from consumers you expect would write a positive one
- **Don't** condition incentive on positive review
- **Don't** abuse platform reporting mechanisms to get rid of honest negative reviews.



## Featuring Online Customer Reviews: A Guide for Platforms



# Do's and Don'ts

## Review Collection

- **Don't** ask for reviews only from consumers you expect would write a positive one
- **Don't** condition incentive on positive review
- **Don't** prevent or discourage negative reviews

## Review Moderation

- **Do** have process to verify reviews
- **Do** treat positive/negative reviews
- **Don't** edit reviews to alter message

## Review Publication

- **Do** publish all genuine reviews
- **Do** disclose connections
- **Do** disclose methodology
- **Don't** display reviews in misleading way



BENNET KELLEY is the founder of the [Internet Law Center](#) in Santa Monica where he represents clients from across the globe on e-commerce, internet marketing, privacy, intellectual property, reputation management, cyber harassment and general business matters.

He has been named as among the nation's top internet lawyers by several publications including the *Los Angeles Business Journal* which named him one of the Most Influential Lawyers in Digital Media and E-Commerce. He frequently appears or is quoted in television, radio and print stories on internet legal developments, including appearing on The Today Show.

Bennet is a past Co-Chair of the California Lawyers' Association's Cyberspace Committee where he led the effort to develop a primer on cyberspace law for state policymakers. He also led the Technology, Internet, and Privacy subcommittee of CLA's Intellectual Property Section from 2016-2019.

In 2019, Bennet was one of a handful of lawyers, academics, prosecutors, law enforcement and judicial personnel invited to work with the Department of Justice on addressing ways to combat technologically enabled harassment.

In 2012, he was selected by the U.S. Department of Commerce to be part of the U.S. delegation and present on e-commerce law at the 17th U.S.-China Legal Exchange. The prior year he was part of a delegation of a dozen North American internet experts who met with leading Chinese netizens to promote greater freedom within China.

Bennet was host of *Cyber Law and Business Report* from 2011 to 2019.

Twitter: @InternetLawCent

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# Appendix

- [FTC v. Roca Labs, Inc.](#), Case No. 8:15-cv-02231-MSS-CPT (M.D. Fla. Sept. 14, 2018) (Order Granting Summary Judgment).
- [Palmer v. Kleargear.com](#), Case No. 1:13-cv-00175-DB (D. Utah May 5, 2014) (Order Entering Default Judgment).
- Leticia Miranda, [Court Upholds The Right To Leave A Bad Yelp Review](#), *BuzzFeed.News* (Aug. 31, 2016).