

**Before the  
Federal Trade Commission  
Washington, DC 20580**

In the Matter of )  
 )  
Medical Justice Corp. )  
\_\_\_\_\_ )

**Complaint and Request for Investigation,  
Injunction, and Other Relief**

**I. INTRODUCTION**

1. The Center for Democracy & Technology (CDT) submits this complaint to petition the Federal Trade Commission (FTC) to investigate the recent business practices of Medical Justice Corp., a Greensboro, North Carolina-based company that specializes in contracts and services aimed at shielding the reputations of medical practitioners against online criticism.
2. As part of the “web anti-defamation”<sup>1</sup> program that it sells to its clients, Medical Justice provides client medical practices with template contracts that patients must sign before receiving medical treatment.<sup>2</sup> Under the terms of these contracts, patients are either prohibited from posting reviews about the doctor online, or the patient transfers future copyright over any online reviews to the doctor. The strategic purpose of the copyright transfer is to enable medical practices to take down patients’ comments from consumer review websites, such as Yelp.com, through the “notice and takedown” procedures established by the Digital Millennium Copyright Act of 1998 (“DMCA”).
3. By providing means to medical practices to suppress patient reviews, Medical Justice is engaging in deceptive and unfair business practices in violation of Section 5 of the FTC Act.<sup>3</sup> First, these prohibitions on consumer speech are legally unenforceable and void for public policy reasons. Insofar as Medical Justice represents to doctors (and by extension, to patients) that these contracts are valid and enforceable, Medical Justice is engaging deceptive business practices in violation the Section 5 of the FTC Act.<sup>4</sup> These contractual terms are also unfair under Section 5, as they cause substantial injury to consumers and consumer review sites alike, they cannot be reasonably avoided by consumers, and the harm caused by these

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<sup>1</sup> LinkedIn, Web Ant-Defamation Protection, <http://www.linkedin.com/company/medical-justice-services/web-anti-defamation-protection-29118/product> (last visited, November 28, 2011).

<sup>2</sup> Piedmont Dermatology Ctr., Mutual Agreement to Maintain Privacy (Mar. 24, 2009), [http://www.piedmontdermatology.com/PDFs/MutAgrmntMntnPriv\\_English.pdf](http://www.piedmontdermatology.com/PDFs/MutAgrmntMntnPriv_English.pdf) (“In consideration for treatment . . .”).

<sup>3</sup> 15 U.S.C. § 45(n) (2006).

<sup>4</sup> 15 U.S.C. § 45(a)(1) (2006).

provisions is not outweighed by any countervailing benefits to consumers or competition that the practice produces

4. Moreover, from at least November 2010 through March 2011, medical review website RateMDs.com detected a number of reviews being posted to its site from IP addresses belonging to Medical Justice.<sup>5</sup> These reviews purported to be posted by real patients of doctors known to be clients of Medical Justice, and invariably featured highly positive comments. Yelp.com detected similar patterns of uncannily positive reviews being posted from Medical Justice servers. The circumstances surrounding these reviews indicates that Medical Justice was submitting misleading testimonials under false identities, violating the FTC's *Guides Concerning the Use of Endorsements and Testimonials in Advertising* and thereby engaging in deceptive business practices under Section 5 of the FTC Act.<sup>6</sup>

## II. PARTIES

5. The Center for Democracy & Technology ("CDT") is a non-profit, public interest organization incorporated in the District of Columbia and operating as a tax-exempt entity. CDT is dedicated to preserving an open, free, and innovative Internet, and works on a wide range of online issues, including free expression, consumer privacy, health privacy, security and surveillance, digital copyright, Internet openness and standards, international issues, and open government. CDT pursues its mission through public education and advocacy, litigation, and coalition building.
6. Medical Justice Corp. is a for-profit, membership-based organization headquartered in Greensboro, North Carolina, offering its services through its website, MedicalJustice.com. Medical Justice provides its clients with a suite of "offensive medical malpractice protections" designed to: "(1) Deter frivolous malpractice claims; (2) Address unwarranted demands for refunds; (3) Prevent Internet defamation, and (4) Provide proven, successful counterclaim strategies to hold proponents of frivolous suits accountable."<sup>7</sup> Services offered range from licensing templates for patient privacy agreements to direct assistance in defending lawsuits.

## III. STATEMENT OF FACTS

### A. *Medical Justice's Contracts*

7. Medical Justice offers a membership-based service to medical practices designed to deter malpractice lawsuits and to protect physicians' professional reputations. The cost of a membership ranges from \$350 to \$1990 a year.<sup>8</sup> Medical Justice's service plans address

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<sup>5</sup> John Swapceinski, *Medical Justice Planting Glowing Reviews on RateMDs.com*, RATEMDS.COM, May 24, 2011, <http://www.ratemds.com/social/?q=node/49926>.

<sup>6</sup> Letter from the Fed. Trade Comm'n to Hon. Wendell H. Ford & Hon. John C. Danford, S. Comm. On Commerce, Sci., & Transp. (Dec. 17, 1980), reprinted in *In re Int'l Harvester Co.*, 104 F.T.C. 949 app. at 1070-76 (1984), available at <http://www.ftc.gov/bcp/policystmt/ad-unfair.htm> [hereinafter *FTC Policy Statement on Unfairness*].

<sup>7</sup> Medical Justice, <http://www.medicaljustice.com/default.aspx> (last visited Nov. 18, 2011).

<sup>8</sup> Medical Justice, Get a Quote, <http://www.medicaljustice.com/medical-malpractice-insurance-quote.aspx> (last visited Nov. 18, 2011).

medical events and malpractice suits that occurred prior to and after the effective date of membership.<sup>9</sup> Some of the programs common to all of Medical Justice's service plans include:

- Establishment of pre-emptive critical practice infrastructure to deter plaintiffs without interfering with the patient-doctor relationship
- License to use Patient-Physician contract template language
- License to use contract template language to prevent being forced into small-claims court
- *License to use contract template language to deter physicians being defamed on the Internet*
- Access to program to address unwarranted requests for refunds or write-offs<sup>10</sup>

8. The italicized language refers to Medical Justice's "Web Anti-Defamation Program," recently rebranded as its "eMerit" program.<sup>11</sup> Medical Justice includes this program in its general service plan, and also offers the program as a stand-alone product.
9. Under this program, Medical Justice provides doctors with licensed templates for "Public Statements Agreement" (previously called "Mutual Privacy Agreement") contracts, designed to deter patients from posting negative reviews of doctors' practices on online review websites.<sup>12</sup> According to Medical Justice, "In the rare event the feedback is not constructive, doctors have a tool to address fictional or slanderous posts. . . . In return, patients are granted additional privacy protections by the doctor above and beyond those mandated by law."<sup>13</sup> Medical Justice then monitors review sites and alerts doctors when new posts by patients are detected, and provides doctors with a summary of patient review activity.<sup>14</sup> Medical Justice has been offering its template contracts since 2007.<sup>15</sup> While the contract has since undergone several revisions with respect to what is required of patients, the basic premise for the agreements has remained consistent: Patients who sign the contract must give up their rights relating to posting public reviews and comments about the physician's services, particularly on the Internet.

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<sup>9</sup> Medical Justice, Service Plans, <http://www.medicaljustice.com/medical-malpractice-insurance.asp> (last visited Nov. 18, 2011).

<sup>10</sup> *Id.*

<sup>11</sup> Medical Justice, eMerit: Medical Reputation Management, <https://www.medicaljustice.com/web-defamation-purch1.aspx> (last visited Nov. 18, 2011); *see also* eMerit: Medical & Dental Reputation Management, <http://www.emerit.biz> (last visited Nov. 18, 2011).

<sup>12</sup> Medical Justice, *supra* note 9.

<sup>13</sup> Medical Justice, The Problem of Physician Internet Libel and Web Defamation, <https://www.medicaljustice.com/internet-libel-physicians.aspx> (last visited Nov. 28, 2011) (emphasis added).

<sup>14</sup> eMerit: Medical & Dental Reputation Management, Features & Benefits, <http://www.emerit.biz/benefits#monitor> (last visited Nov. 18, 2011).

<sup>15</sup> Medical Justice, Doctor Rating Sites FAQ, <http://www.medicaljustice.com/feature-det.asp?feature-id=905495244> (last visited Nov. 18, 2011).

### *Medical Justice's Current Contract*

10. Medical Justice has represented to CDT that it is currently using a new version of its contract that it dubs the "Public Statements Agreement." CDT has not been able to verify whether this contract has been distributed to any doctors, and a web search for the terms of this contract does not show any doctors' offices that have uploaded this contract to their sites. Older iterations of the contract discussed "additional privacy protections" afforded to the patient (*see infra*, ¶ 12), but this version does not. However, this version of the contract requires patients to provide the medical practice with a five-year assignment of copyright in exchange for professional services. The terms of the "Public Statements Agreement" are as follows:

- 1) Doctor shall provide professional services to Patient;
- 2) Patient assigns copyright to Doctor for any public statement created by Patient — and posted on the Internet — referencing Doctor;
- 3) Patient's assignment set forth above (#2) shall be valid for five years from the last date of service by Doctor to Patient; and
- 4) Doctor agrees to abide by a Code of Internet Ethics. What this means: Doctor agrees to enforce no rights enabled by the assignment if Patient's public statement conforms to the Terms of Service for Google Maps/Earth — see [http://www.google.com/help/terms\\_maps\\_earth.html](http://www.google.com/help/terms_maps_earth.html). Google Maps/Earth is an Internet Rating Site."<sup>16</sup>

11. The Terms of Service for Google Maps/Earth (a wholly unrelated product owned by a different company) include many stipulations that are unrelated to medical services or Medical Justice's business model of shielding medical practice's reputations. However, Section 3 of the Google Maps/Earth Terms of Service includes the following language:

By way of example, and not as a limitation, you agree that when using the Products or the Content, you will not:

- (a) defame, abuse, harass, stalk, threaten or otherwise violate the legal rights (such as rights of privacy and publicity) of others;
- (b) upload, post, email, transmit or otherwise make available any inappropriate, defamatory, obscene, or unlawful content;
- (c) upload, post, transmit or otherwise make available any content that infringes any patent, trademark, copyright, trade secret or other proprietary right of any party, unless you are the owner of the rights, or have the permission of the owner or other legal justification to use such content<sup>17</sup>

### *Prior Medical Justice Contracts*

12. Previous versions of the Medical Justice contract — called "Mutual Privacy Agreement" or "Mutual Agreement to Maintain Privacy" — included language indicating that the medical

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<sup>16</sup> Medical Justice, Public Statements Agreement (on file with CDT).

<sup>17</sup> Google, Google Maps/Earth Terms of Service, [http://www.google.com/help/terms\\_maps\\_earth.html](http://www.google.com/help/terms_maps_earth.html) (last visited Nov. 18, 2011).

practice would offer the patient greater privacy protections than required by law if patients gave up rights relating public reviews and comments about the physician's services. The language concerning these "additional privacy protections" is largely the same in all versions of the "Mutual Privacy Agreements" contract:

Federal and State privacy laws are complex. Unfortunately, some medical offices try to find loopholes around these laws. For example, physicians are forbidden by law from receiving money for selling lists of patients or medical information to companies to market their products or services directly to patients without authorization. Some medical practices, though, can lawfully circumvent this limitation by having a third party perform the marketing. While personal data is never technically in the possession of the company selling its products or services, the patient can still be targeted with unwanted marketing information. Physician believes this is improper and may not be in the patients' best interest. Accordingly, Physician agrees not to provide medical information for the purpose of marketing directly to Patient. Regardless of legal privacy loopholes, Physician will never attempt to leverage its relationship with Patient by seeking Patient's consent for marketing products for others.<sup>18</sup>

13. To CDT's knowledge, there are three primary iterations of the older "Mutual Privacy Agreement" version of the contract, each with minor variations. All three versions are likely still in use by different medical practices. It is not publically known how many physicians utilize Medical Justice's contracts, or which version of the contract the medical practices use. However, Medical review website RateMDs.com lists sixteen doctors from twelve states that were using the Mutual Agreement contracts as of March 2009.<sup>19</sup> Medical Justice itself represents that it has "thousands of physicians" as clients;<sup>20</sup> a news article from earlier this year says that "around 3,000" doctors as using some form of Medical Justice's contracts.<sup>21</sup> A Google search for "Mutual Agreement to Maintain Privacy" with results limited to PDF format returns a list of more than fifty doctors which have "Mutual Privacy Agreement" versions of Medical Justice's contracts hosted on their websites, which implies that these older contracts are predominantly the ones in use.<sup>22</sup> It is unknown to what extent Medical Justice has reached out to its clients to urge them to use the most recent version of the contract, rather than the other versions. The three older versions of the "Mutual Privacy Agreement" contract are listed below, together with their relevant language.

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<sup>18</sup> Robinson Facial Plastic Surgery, Mutual Agreement (last modified Jun. 8, 2010), [http://s3.amazonaws.com/webgen\\_einsteinwebsites/public/assets/18758/MUTUAL\\_AGREEMENT.doc](http://s3.amazonaws.com/webgen_einsteinwebsites/public/assets/18758/MUTUAL_AGREEMENT.doc) [hereinafter *Robinson Facial Agreement*].

<sup>19</sup> RateMDs.com, Gag Contract Hall of Shame, <http://www.ratemds.com/social/?q=node/35256> (last visited Nov. 18, 2011).

<sup>20</sup> Dental Justice, What We Do, <http://www.dentaljustice.com/about-medical-justice.php> (last visited Nov. 28, 2011).

<sup>21</sup> Joe Mullin, *Can Doctors Use Copyright Law to Get Rid of Negative Reviews?*, PAIDCONTENT, Apr. 14, 2011, <http://m.paidcontent.org/article/419-can-doctors-use-copyright-law-to-get-rid-of-negative-reviews/>.

<sup>22</sup> See Google, Google Search for "Mutual Agreement to Maintain Privacy," <http://www.google.com/#q=%22mutual+agreement+to+maintain+privacy%22+filetype:pdf> (last visited Nov. 18, 2011).

### **i. The “Gag Order” Contract**

This is the earliest version of the Mutual Privacy Agreement, categorically prohibiting all patient commentary about the physician, and requiring patients to “use all reasonable efforts” to prevent family and acquaintances from commenting about the physician:

In consideration for treatment and the above noted patient protection, Patient agrees to refrain from directly or indirectly publishing or airing commentary upon Physician and his practice, expertise and/or treatment unless explicitly mandated by law. Publishing is intended to include attribution by name, by pseudonym, or anonymously. Physician has invested significant financial and marketing resources in developing the practice. In addition, Patient will not denigrate, defame, disparage, or cast aspersions upon the Physician; and (ii) will use all reasonable efforts to prevent any member of their immediate family or acquaintance from engaging in any such activity. Published comments on web pages, blogs, and/or mass correspondence, however well intended, could severely damage Physician’s practice.

Physician feels strongly about Patients’ privacy as well as the practices’ right to control its public image and privacy. Both Physician and Patient will work to prevent the publishing or airing of commentary about the other party from being accessed via Internet, blogs, or other electronic, print, or broadcast media without prior written consent. Finally, this Agreement shall be in force and enforceable (and fully survive) for a period of the longer of (a) five years from Physician’s last date of service to Patient; or (b) three years beyond any termination of the Physician-Patient relationship. As a matter of office policy, Physician is requiring all patients in its practice sign the Mutual Agreement to Maintain Privacy so as to establish that any anonymous or pseudonymous publishing or airing of commentary will be covered by this agreement for all Physician’s patients.<sup>23</sup>

### **ii. The “Veto Power” Contract**

Instead of a blanket prohibition on all patient commentary about the physician, this version requires patients to pre-assign all intellectual property rights in any commentary they write on the physician in the next five years:

Physician has invested significant financial and marketing resources in developing the practice. Nothing in this Agreement prevents a patient from posting commentary about the Physician - his practice, expertise, and/or treatment - on web pages, blogs, and/or mass correspondence. In consideration for treatment and the above noted patient protection, if

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<sup>23</sup> Sonoran Allergy & Asthma Ctr., Mutual Agreement to Maintain Privacy (Apr. 19, 2009), [http://www.sonoranallergy.com/00\\_docs/MUTUAL%20AGREEMENT%20TO%20MAINTAIN%20PRIVACY.pdf](http://www.sonoranallergy.com/00_docs/MUTUAL%20AGREEMENT%20TO%20MAINTAIN%20PRIVACY.pdf) [hereinafter *Sonoran Allergy Agreement*].

Patient prepares such commentary for publication on web pages, blogs, and/or mass correspondence about Physician, the Patient exclusively assigns all Intellectual Property rights, including copyrights, to Physician for any written, pictorial, and/or electronic commentary. This assignment shall be operative and effective at the time of creation (prior to publication) of the commentary.

This Agreement shall be in force and enforceable for a period of five years from Physician's last date of service to Patient. As a matter of office policy, Physician is requiring all patients in its practice sign the Mutual Agreement so as to establish that any anonymous or pseudonymous publishing or airing of commentary will be covered by this agreement for all Physician's patients. Further, this Agreement will survive for a minimum of three years beyond any termination of the Physician-Patient relationship.<sup>24</sup>

### **iii. The "Gag/Veto Power Hybrid" Contract**

This version containing both a blanket prohibition on commentary, and a copyright assignment for any patient comments that are written in spite of the contract:

In consideration for treatment and the above noted patient protection, Patient agrees to refrain from directly or indirectly publishing or airing commentary upon Physician and his practice, expertise-and/or treatment-the sole exceptions being communication to the confidential medical-peer review body; to another healthcare provider; to a licensed attorney; to a governmental agency; in the context of a legal proceeding; or unless mandated by law. Publishing is intended to include attribution by name, by pseudonym, or anonymously. If patient does prepare commentary for publication about Physician, the Patient exclusively assigns all Intellectual Property rights, including copyrights, to Physician for any written, pictorial, and/or electronic commentary. This assignment shall be operative and effective at the time of creation (prior to publication) of the commentary. Physician has invested significant financial and marketing resources in developing the practice. Published comments on web pages, blogs, and/or mass correspondence, however well intended, could severely damage Physician's practice.

Physician feels strongly about the practices' right to control its public image. Both Physician and Patient will work to prevent the publishing or airing of commentary about the other party from being accessed via Internet, blogs, or other electronic, print, or broadcast media without prior written consent. Patient will use all reasonable efforts to prevent any member of their immediate family or acquaintance from engaging in any such activity. Finally, this Agreement shall be in force and enforceable for a period of five years from Physician's last date of service to Patient. As a

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<sup>24</sup> Vein Ctr. of North Texas, Mutual Agreement (Jul. 22, 2009), <http://www.veincenternorthtexas.com/pdfs/ADMIN-Privacy-Agreement-0709b.pdf> [hereinafter *Vein Ctr. Agreement*].

matter of office policy, Physician is requiring all patients in its practice to sign the Mutual Agreement so as to establish that any anonymous or pseudonymous publishing or airing of commentary will be covered by this agreement for all Physician's patients. Furthermore, this Agreement will survive for a minimum of three years beyond any termination of Physician-Patient relationship.<sup>25</sup>

14. The purpose of assigning to the physician copyright rights in patient commentary is to allow doctors to take advantage of the “notice and takedown” procedure under the Digital Millennium Copyright Act (DMCA).<sup>26</sup> If the doctor owns the copyright in patient reviews, she merely has to send a takedown notice to the review hosting website alleging “a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law,”<sup>27</sup> and the site must take down the offending content or risk liability for copyright infringement. Thus, based on these contracts, doctors — or Medical Justice acting on behalf of doctors — can assert the right to take down any patient review they object to, on the grounds that it is infringing their copyright. Since Medical Justice began distributing these contracts to its clients, doctors — or, in some cases, Medical Justice acting on behalf of doctors — have attempted to use this ostensible copyright assignment to get negative reviews removed from consumer review sites such as Yelp, RateMDs, and Angie's List.<sup>28</sup>

### ***B. Questionable Patient Reviews***

15. Medical Justice also appears to have attempted to place positive reviews about its clients on those same review sites.
16. Between November 2010 and March 2011, medical ratings site RateMDs.com detected that IP addresses registered to Medical Justice were associated with ratings to their site claiming to be from satisfied patients.<sup>29</sup> RateMD's discovered a total of “86 ratings for 38 different doctors in 14 different states,” posted by six IP addresses associated with the domain, “medicaljustice.net.”<sup>30</sup> Every single one of the 86 reviews gave the reviewed doctors five stars out of five in every possible category.<sup>31</sup>
17. Technology news site *Ars Technica* reported in May 2011 that, at their suggestion, review site Yelp.com “reviewed its logs and found that those same six IP addresses had also been responsible for numerous favorable doctor reviews on Yelp” from November to March

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<sup>25</sup> *Robinson Facial Agreement*, *supra* note 18.

<sup>26</sup> See 17 U.S.C. § 512(c) (2006).

<sup>27</sup> 17 U.S.C. § 512(c)(3)(A)(v) (2006).

<sup>28</sup> Ed Oswald, *Doctors can compel you to remove negative reviews from Angie's List*, BETANEWS, November 20, 2011, <http://betanews.com/2011/11/20/doctors-can-compel-you-to-remove-negative-reviews-from-angies-list/>.

<sup>29</sup> RateMDs.com, *supra* note 5.

<sup>30</sup> *Id.*

<sup>31</sup> Timothy B. Lee, *Medical Justice Caught Impersonating Happy Patients on Yelp, RateMDs*, ARS TECHNICA, May 27, 2011, <http://arstechnica.com/tech-policy/news/2011/05/medical-justice-caught-impersonating-happy-patients-on-yelp-ratemds.ars>.

2011.<sup>32</sup> *Ars Technica* also quoted Medical Justice CEO Jeffrey Segal claiming that the reviews they posted were a test run of their new “Review Building Program,” where Medical Justice submits comments to rating sites on behalf of real patients, who fill out surveys in the waiting room.<sup>33</sup>

18. In conversations with CDT, Medical Justice has represented that under the current iteration of this project, patients of Medical Justice doctors are provided a tablet computer to fill out a qualitative evaluation of their doctor, and then given the option to post such review (on an anonymous, pseudonymous, or real-name basis) to various consumer review websites. According to one reporter, Medical Justice CEO Jeffrey Segal has stated under the new iteration of this program, doctors are given the opportunity to see any reviews before Medical Justice will attempt to post them online.<sup>34</sup> However, Medical Justice did not provide detailed information or any documentation about the program to CDT, and we have not been able to confirm or evaluate these statements.

#### IV. GROUNDS FOR RELIEF

19. Section 5 of the FTC Act provides that “unfair or deceptive acts or practices in or affecting commerce” are unlawful.<sup>35</sup> Under Section 5, when the FTC has reason to believe that any person has used or is using unfair or deceptive practices in or affecting commerce, it shall issue a complaint against such person in an administrative proceeding, if it believes such a proceeding to be in the public interest.<sup>36</sup>

20. The business practices of Medical Justice violate Section 5 in the following ways:

- 1) Medical Justice is engaging in a deceptive business practice by selling contracts which are themselves deceptive to doctors and patients as to whether they are legally enforceable
- 2) Medical Justice’s contracts are unfair in that they unduly burden patients’ ability to engage in online speech and to choose medical providers based on other patients’ reviews.; and
- 3) Medical Justice has seemingly engaged in a deceptive business practice by posting comments to review sites falsely claiming to be written and uploaded by patients, in violation of the FTC’s *Guides Concerning the Use of Endorsements*.

##### ***A. Claim 1: Medical Justice Deceives its Customers and Patients by Asserting Unenforceable Legal Rights over Reviewers’ Content***

21. Medical Justice’s distribution of its model contracts are also deceptive under Section 5 of the FTC Act, as the contractual terms limiting a person’s right to review a doctor are not enforceable under the law. This practice is deceptive both to Medical Justice’s client doctors

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<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> Ed Oswald, *Doctors can compel you to remove negative reviews from Angie's List*, BETANEWS, November 20, 2011, <http://betanews.com/2011/11/20/doctors-can-compel-you-to-remove-negative-reviews-from-angies-list/>.

<sup>35</sup> 15 U.S.C. § 45(a)(1) (2006).

<sup>36</sup> 15 U.S.C. § 45(b) (2006).

who are fooled into thinking they have enforceable rights, and to consumers who are falsely told they are either prohibited from reviewing their doctors, or that their doctors have the discretion to remove their reviews under copyright law.

22. First, Medical Justice’s contracts are clearly not binding on persons who have not signed them. However, Medical Justice markets its contracts to doctors as a means to control false reviews posted by non-patients with a hidden agenda against the doctor – in effect urging doctors to use the contracts against individuals who have not signed them. For example, the Medical Justice website identifies this as the first “problem” that its contracts are intended to solve:

**Problem 1:** On rating sites, patients, or people posing as patients- such as disgruntled employees, ex-spouses, or competitors can damage a hard-earned reputation. And a doctor has no recourse. As an arcane nuance of cyberlaw, the web sites are immune from any accountability. (Section 230 of the Communication Decency Act). Many sites have generally taken the position they will not monitor or police any content.<sup>37</sup>

Elsewhere, in media interviews, Medical Justice CEO Jeffrey Segal has stated that the intended use of the Medical Justice contracts is to address the problem of *reviews by non-patients*:

The agreements are the only way to reasonably address **fictional or fraudulent** posts. The doctor asks all patients to sign the agreement. Posts by competitors and ex-spouses are not labeled 'competitor' or 'ex-spouse.' They are labeled as someone posing as a patient. . . . The default assumption is that a person representing themselves as a patient has signed an agreement.

23. Second, even for patients who have signed the Medical Justice contracts, it is extremely unlikely that the prohibition on speech or assignment of copyright interests in future speech would be upheld by a court of law. Restrictive covenants on speech are highly disfavored by the courts, and typically will only be enforced when necessary to protect a person’s trade secrets or proprietary information.<sup>38</sup> Certainly, doctors cannot plausibly claim a trade secret interest in any opinions of them expressed by their clients; as such, the provisions limiting the right of consumers to post reviews about their doctors are unconscionable and unenforceable. Even in the unlikely event that a doctor could legitimately claim some sort of copyright interest in her patients’ online commentary, the patient would *still* have the right to post such commentary for non-commercial purposes without interference from the doctor under the fair

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<sup>37</sup> Medical Justice, The Problem of Physician Internet Libel and Web Defamation, <http://www.medicaljustice.com/internet-libel-physicians.aspx> (last visited Nov. 18, 2011); *see also* LinkedIn, Web Anti-Defamation Protection, <http://www.linkedin.com/company/medical-justice-services/web-anti-defamation-protection-29118/product> (last visited, November 28, 2011) (embedded video).

<sup>38</sup> *New York v. Network Associates, Inc.*, 758 N.Y.S.2d 466, 470 (Sup. Ct. 2003); Carol Bast, *At What Price Silence: Are Confidentiality Agreements Enforceable*, 25 Wm. Mitchell L. Rev. 627 (1999)

use doctrine, which allows use of copyrighted material for criticism, comment, news reporting, teaching, scholarship, and research.<sup>39</sup>

24. Medical Justice deceived its customers into thinking that the contracts legally limited what non-patients could say about the doctors online, and that the doctors had legally enforceable rights to suppress unwanted content after publication. In doing so, they sold to doctors “snake oil” that at least some consumer review sites steadfastly refuse to recognize — even in the face of the strong incentives to comply under the DMCA.<sup>40</sup>
25. By falsely stating to consumers that they legally could not post reviews online about the doctors, or that those reviews were subject to the doctor’s copyright control, Medical Justice’s contractual clauses also deceived consumers about their ability to put (and keep) factual reviews about the doctor online.<sup>41</sup> This is true both for the blanket “gag order” contracts as well as the copyright assignment contracts which purported to give doctors a discretionary veto over online reviews about the doctor.
26. In addition, Medical Justice’s representations to doctors and patients that their contracts afford patients greater privacy protections than under existing law are deceptive. As noted above at ¶ 11, older versions of Medical Justice contracts claim that there is a loophole in medical privacy laws that allows doctors to sell patients’ private information to third parties for marketing purposes.<sup>42</sup> Under the Mutual Privacy Agreement, the medical practice promises not to exploit this loophole.<sup>43</sup> (Medical Justice’s website still claims that “patients are granted additional privacy protections by the doctor above and beyond those mandated by law” in exchange for the copyright assignment.<sup>44</sup>)
27. Medical Justice’s agreement appears to misrepresent the current state of medical privacy laws. The “greater degree of privacy” claimed by Medical Justice’s agreement appears to be no more than the minimum privacy standards already required by law. Medical practices have a preexisting legal duty to protect the privacy of medical information — the Health Insurance

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<sup>39</sup> *OPG v. Diebold*, 337 F. Supp. 2d 1195 (N.D. Cal. 2004). Indeed, the preamble to Section 107 of the Copyright Act specifically mentions permitting “criticism [and] comment” as among the core purposes of the fair use doctrine. See 17 U.S.C. § 107.

<sup>40</sup> Ed Oswald, *Doctors can compel you to remove negative reviews from Angie's List*, BETANEWS, November 20, 2011, <http://betanews.com/2011/11/20/doctors-can-compel-you-to-remove-negative-reviews-from-angies-list/>.

<sup>41</sup> See, e.g., *Network Assocs.*, 758 N.Y.S.2d at 470; *Baker v. Burlington Coat Factory Warehouse*, 175 Misc.2d 951, 956 (Yonkers City Ct. 1998) (holding representations that “unfairly chill the consumer’s enthusiasm to enforce a statutory right” violate New York’s proscription against deceptive business practices); *Garrison Contractors, Inc. v. Liberty Mutual Ins. Co.*, 927 S.W.2d 296, 300 (Tex. Ct. App. 1996) (“Representing that an agreement confers or involves rights, remedies, or obligations which it does not have or involve is an actionable deceptive act or practice” under Texas Deceptive Practices Act), *aff’d*, 966 S.W. 2d 482 (Tex. 1998).

<sup>42</sup> See *Piedmont Dermatology Ctr.*, *supra*, note 1. “Federal and State privacy laws are complex. Unfortunately, some medical offices try to find loopholes around these laws. For example, HIPAA forbids physicians from receiving money for selling lists of patients or protected health information to companies to market their products or services directly to patients without authorization. Some medical practices, though, can lawfully circumvent this limitation by having a third party perform the marketing.”

<sup>43</sup> See, e.g., *id.*

<sup>44</sup> Medical Justice, *The Problem of Physician Internet Libel and Web Defamation*, <https://www.medicaljustice.com/internet-libel-physicians.aspx> (last visited Nov. 28, 2011).

Portability and Accountability Act (HIPAA) currently requires physicians to obtain a patient's authorization to use or disclose any of the patient's protected health information for marketing.<sup>45</sup>

28. The current HIPAA definition of marketing is a “communication about a product or service that encourages recipients of the communication to purchase or use the product or service.”<sup>46</sup> HIPAA currently requires the physician to obtain the patient's authorization to use or disclose any of the patient's PHI for marketing.<sup>47</sup> If the communication is not marketing (i.e., it falls under an exception to the HIPAA definition) the physician does not need to obtain the patient's authorization to disclose the PHI for the communication.
29. There are several exceptions to the HIPAA definition of marketing. A physician (or business associate) would not need patient authorization to send communications that fall under these exceptions, even if the physician is paid by a third party to do so. A communication is not marketing if it is made:
- For treatment of the individual;
  - For case management, care coordination, or recommending alternative treatments and therapies to the individual; or
  - To describe a health-related product or service provided by or included in a plan of benefits of the covered entity making the communication.<sup>48</sup>
30. Section 13406 of the HITECH Act — part of the 2009 stimulus legislation — altered the exception to the definition of marketing. HIPAA does not require physicians to obtain patient authorization to disclose PHI for treatment, payment, or operations purposes.<sup>49</sup> HITECH stated that a communication which would otherwise fall under the current definition of marketing would not be considered a health care operation – and would therefore require patient authorization – if the physician receives direct or indirect compensation for the communication. However, HITECH preserved within the operations exception – and therefore does not require patient authorization for – communications that described only a drug or biologic for that is currently being prescribed to the patient.
31. There are two implications of the HIPAA definition for Medical Justice's Agreements. First, the sentences in the Agreement regarding “loopholes” in privacy laws appear to misstate the law in an attempt to inflate the supposed privacy protections the contract offers. Although the described “loophole” does not make the arrangement between the physician, the company providing products/services, and the marketer entirely clear, the described scenario still appears to fall within the HIPAA definition of marketing. It still counts as marketing if the physician discloses a patient's protected health information (“PHI”) to a third party, and that third party issues a communication encouraging the patient to purchase the products or services of a fourth party. Under that scenario, the physician is still legally obligated to obtain

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<sup>45</sup> 45 CFR 164.508(a)(3).

<sup>46</sup> 45 CFR 164.501.

<sup>47</sup> 45 CFR 164.508(a)(3).

<sup>48</sup> 45 CFR 164.501.

<sup>49</sup> 45 CFR 164.506.

the patient's permission to disclose the PHI. Medical Justice's Agreements therefore mislead patients with respect to the current state of the law.

32. Thus, under the most generous interpretation, the "greater degree of privacy" afforded by the contract appears to be no more than the physician agreeing to refrain from asking the patient's authorization to use the patient's protected health information for marketing — which the patient could always deny anyway. Having to obtain patient consent for marketing hardly constitutes a "loophole" under health privacy laws, and it is likely that doctors and patients both would be misled as to the extent of the "additional" protections afforded by the Medical Justice contracts.
33. In at least one case, the Department of Health and Human Services' Office of Civil Rights (OCR) instituted an enforcement action against a doctor using one of Medical Justice's contracts.<sup>50</sup> The medical office in question used the straight "gag order" contract version that, according to OCR, "prohibited the patient from directly or indirectly publishing or airing commentary about the physician, his expertise, and/or treatment in exchange for the physician's compliance with the Privacy Rule."<sup>51</sup> OCR determined that: "A patient's rights under the Privacy Rule are not contingent on the patient's agreement with a covered entity. A covered entity's obligation to comply with all requirements of the Privacy Rule cannot be conditioned on the patient's silence."<sup>52</sup> The doctor was required to cease using the Medical Justice agreement and to change its privacy policies.<sup>53</sup>

### ***B. Claim 2: Medical Justice's Practices are Unfair to Consumers***

34. Section 5 of the Federal Trade Commission Act gives the FTC authority to restrict unfair acts or practices affecting commerce.<sup>54</sup> A practice will be deemed unfair and illegal under this Section if it (1) causes or is likely to cause substantial injury to consumers; (2) cannot be reasonably avoided by consumers; and (3) is not outweighed by any countervailing benefits to consumers or competition that the practice produces.<sup>55</sup> Each version of Medical Justice's template contracts satisfies this test.

#### **i. Substantial Injury to Consumers**

35. As courts have interpreted the statutory test, "A substantial injury is not one that is merely trivial or speculative, and the FTC has made clear that it has no concerns with *de minimus* injuries. . . . But even a small harm may qualify if it affects a large number of people."<sup>56</sup> The FTC's Policy Statement on Unfairness notes that consumer injury is not confined to financial

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<sup>50</sup> *Health Information Privacy: Private Practice Ceases Conditioning of Compliance with the Privacy Rule*, U.S. Dep't. of Health & Human Services., – Office of Civil Rights, Health Information Privacy: Private Practice Ceases Conditioning of Compliance with the Privacy Rule,

<http://www.hhs.gov/ocr/privacy/hipaa/enforcement/examples/allcases.html#case29> (last visited Nov. 18, 2011).

<sup>51</sup> *Id.*

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

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

<sup>54</sup> 15 U.S.C. §45(a)(1).

<sup>55</sup> 15 U.S.C. § 45(n) (2006); *FTC Policy Statement on Unfairness*, *supra* note 6.

<sup>56</sup> *Fed. Trade Comm'n v. IFC Credit Corp.*, 543 F. Supp. 2d 925, 945 (N.D. Ill. 2008) (internal citations omitted).

interests, but also “unwarranted health and safety risks.”<sup>57</sup> In evaluating consumer injuries in the past, the FTC has focused on seller behavior that unreasonably creates “an obstacle to the free exercise of consumer decisionmaking,” and unfairly hinders “the informed exercise of consumer choice.”<sup>58</sup> The FTC also looks to whether the business practice violates public policy as it has been established by statute, common law, industry practice or otherwise.<sup>59</sup>

36. Medical Justice’s contracts cause direct and substantial harm to both current and prospective patients, as well as Internet review websites. Medical Justice’s contracts cause substantial injury to patients by impeding patients’ publication of accounts and opinions regarding their experiences with physicians. Every version of Medical Justice’s contracts purportedly provides medical practices with the ability to estop patients from reviewing doctors, or to arbitrarily remove patients’ reviews through DMCA notice and takedown.<sup>60</sup>
37. Although the newest version of the contract — the “Public Statements Agreement — states that the medical practice will not enforce the copyright assignment so long as the patient’s public statement conforms with the Terms of Service for Google Maps/Earth, this restraint is illusory. While it may be proper for review websites to exercise wide discretion in enforcing their own Terms of Service, the effect of the Medical Justice contract is to confer the power to enforce the Terms of Service to the subjects of the reviews themselves. The Terms of Service for Google Maps/Earth are broadly drafted to prohibit “*inappropriate*” or harassing content — *at Google’s discretion*.<sup>61</sup> Under the “Public Statements Agreement,” a medical practice usurps the forum moderator’s discretion and asserts the unchecked authority to determine what is content is “inappropriate” (or “harassing,” or “abusive,” etc.).<sup>62</sup> Given that the subject of criticism is unlikely to be the most unbiased assessor of what constitutes valid and fair criticism, in effect the medical practice has the ability to freely revoke its permission for the patient to post reviews about the practice based on its subjective determination of what is appropriate or not. Given the broad parameters detailed in the Google Maps/Earth Terms of Service, Medical Justice’s “Public Statements Agreement” provides no meaningful restriction

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<sup>57</sup> *FTC Policy Statement on Unfairness*, *supra* note 6.

<sup>58</sup> *Id.* at 6, 7.

<sup>59</sup> *Id.*

<sup>60</sup> In the past, some medical practices have shown eagerness to bring baseless suits against online reviewers. For example, in June 2010, a physician from Duluth, Minnesota, sued the author of several negative online reviews – the son of the physician’s elderly patient – for defamation, seeking \$50,000 in damages. The District Judge dismissed the suit in April 2011, noting that the reviews did not constitute defamation, “but rather a sometimes emotional discussion of the issues.” See Mark Stodghill, *Patient’s Son Complains, Duluth Doctor Sues*, DULUTH NEWS TRIBUNE, June 12, 2010, available at <http://www.duluthnewstribune.com/event/article/id/171193>; see also Mark Stodghill, *Court Dismisses Duluth Doctor’s Lawsuit Against Patient’s Son*, DULUTH NEWS TRIBUNE, Apr. 29, 2011, available at <http://www.duluthnewstribune.com/event/article/id/197679>.

<sup>61</sup> See, e.g., Google, Google Maps/Earth Terms of Service § 3(b), [http://www.google.com/help/terms\\_maps\\_earth.html](http://www.google.com/help/terms_maps_earth.html) (last visited Nov. 18, 2011); see also Yelp, Yelp Content Guidelines: General Guidelines, <http://www.yelp.com/guidelines> (last visited Nov. 18, 2011).

<sup>62</sup> The May 2011 study “The Information Value of Online Physician Ratings” found that hyperbole – both positive and negative – is not uncommon among patient reviews. This is due in part, according to the study, to patients’ tendency to report their most extreme and flagrant experiences with physicians. See Guodong (Gordon) Gau et al., *The Information Value of Online Physician Ratings* 20 (Univ. of Md., Working Paper, May 2011), available at [http://www.rhsmith.umd.edu/chids/pdfs\\_docs/news/23May2011%20Information%20Value%20of%20Doctor%20Ratings.pdf](http://www.rhsmith.umd.edu/chids/pdfs_docs/news/23May2011%20Information%20Value%20of%20Doctor%20Ratings.pdf).

on a practice's power to bring a DMCA takedown action against patients' negative, but truthful, reviews of the practice on the Internet.

38. Older versions of the agreements, which appear to still be in use by a number of medical offices,<sup>63</sup> directly prohibit patients from engaging in any kind of commentary about physicians, and some versions even impose an affirmative duty on patients to prevent friends and relatives from engaging in such commentary.<sup>64</sup> The "Veto Power" version gives doctors the authority to have any critical speech about them removed from websites at will.<sup>65</sup> As we argue in more detail below, each of these versions of Medical Justice's contracts are legally unenforceable because they do not bind some parties to the contracts and are inadequately supported by consideration. However, due to the incentives put in place by the DMCA safe harbor provision, intermediaries such as review sites are strongly incentivized to automatically comply with takedown requests as a matter of course.
39. The structure of the DMCA gives intermediaries such as product review sites very strong incentives to remove allegedly copyrighted content upon receiving any assertion of copyright ownership and request to remove copyrighted material. Although neutral intermediaries are typically insulated from liability for the content they host under Section 230 of the Communications Decency Act,<sup>66</sup> that immunity does not extend to violations of copyright law.<sup>67</sup> However, review sites and others can still protect themselves from legal liability by taking advantage of "safe harbor" status provided by the DMCA which requires that content be removed upon receiving a takedown request.<sup>68</sup> Sites that do not take down allegedly copyrighted material on demand run the risk of incurring significant legal penalties by continuing to make the disputed content available; as a result, many (if not most) sites simply remove content as a matter of course in response to a takedown request.
40. Courts have consistently found that crowdsourced reporting serves societal interests because it "enables citizens to make better informed purchasing decisions by providing information about the consumer product."<sup>69</sup> These interests are heightened, of course, in the medical context, where consumers have a deeply vested interest in obtaining the best and most accurate information about doctors before deciding to engage in a medical treatment or procedure. Here, a bad decision based on poor available information can have devastating consequences.
41. Medical Justice's contracts impose a substantial burden on patients' freedom to discuss the quality of care they receive from physicians, and in turn hinder prospective patients' ability to make informed choices about healthcare providers. Reading about the experiences of others provides patients with critical information about the quality of care they will experience at a given medical office that they could not otherwise easily learn without a potentially expensive visit to the practice. Ideally, these characteristics would then become points of competition

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<sup>63</sup> See *Sonoran Allergy Agreement*, *supra* note 23.

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

<sup>65</sup> See *Vein Ctr. Agreement*, *supra* note 24.

<sup>66</sup> 47 U.S.C. § 230 (c).

<sup>67</sup> 47 U.S.C. § 230 (e)(2).

<sup>68</sup> 17 U.S.C. § 512 (2006).

<sup>69</sup> *Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264, 280 (3d Cir. 1980)

between medical providers, with each endeavoring to offer better service than others. If negative patient reviews on these review sites are squelched by doctors fearing criticism, the information patients can obtain will be unfairly skewed. As a result, patients could be deceived into visiting doctors they otherwise would not based on reviews creating an unduly positive impression. Information asymmetry — which review sites are meant to decrease — will hinder the informed exercise of patient choices in quality medical providers and harm competition in the marketplace.

- i. The Internet is an increasingly crucial source of information for modern patients. For example, May 2011 study from the Pew Internet and American Life Project, found that 34 percent of internet users have read someone else's commentary or experience about health or medical issues online. The same study found that 24 percent of internet users have consulted online reviews of particular drugs or medical treatments, 16 percent of internet users have consulted online reviews of doctors or other providers, and 14 percent of internet users have consulted online reviews of medical facilities.<sup>70</sup>
- ii. A May 2011 study on online physician ratings found that most reviews were for particularly good and particular bad physician experiences. Importantly, the study's results suggested that physician ratings were especially "informative when identifying low-quality physicians" — despite a greater use of hyperbole in patients' reviews of those physicians.<sup>71</sup> The use of hyperbole may be a trigger for some medical practices to attempt removal of negative — but honest — reviews from the practice's actual patients.<sup>72</sup>

42. Medical Justice's contracts also seriously harm the online review site industry. By purporting to transfer copyright in the reviews to the medical practice, Medical Justice's contracts circumvent the broad immunity conferred to online platforms by Section 230 of the Communications Decency Act.<sup>73</sup> Review websites can be subject to liability if they fail to respond to DMCA takedown notices for user-generated content that violates copyright.<sup>74</sup> Moreover, online review sites depend on trust to maintain credibility and drive traffic of both reviewers and individuals reading the reviews. Readers of reviews will be less likely to believe the reviews are believable or valuable if the reviews have been manipulated by

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<sup>70</sup> SUSANNAH FOX, PEW RESEARCH CTR., THE SOCIAL LIFE OF HEALTH INFORMATION 2 (2011), available at [http://pewinternet.org/~media/Files/Reports/2011/PIP\\_Social\\_Life\\_of\\_Health\\_Info.pdf](http://pewinternet.org/~media/Files/Reports/2011/PIP_Social_Life_of_Health_Info.pdf).

<sup>71</sup> Guodong (Gordon) Gau et al., *The Information Value of Online Physician Ratings* 21-22 (Univ. of Md., Working Paper, May 2011), available at [http://www.rhsmith.umd.edu/chids/pdfs\\_docs/news/23May2011%20Information%20Value%20of%20Doctor%20Ratings.pdf](http://www.rhsmith.umd.edu/chids/pdfs_docs/news/23May2011%20Information%20Value%20of%20Doctor%20Ratings.pdf).

<sup>72</sup> See Mark Stodghill, *Patient's Son Complains, Duluth Doctor Sues*, DULUTH NEWS TRIBUNE, June 12, 2010, available at <http://www.duluthnewstribune.com/event/article/id/171193>; see also Mark Stodghill, *Court Dismisses Duluth Doctor's Lawsuit Against Patient's Son*, DULUTH NEWS TRIBUNE, Apr. 29, 2011, available at <http://www.duluthnewstribune.com/event/article/id/197679>.

<sup>73</sup> 47 U.S.C. § 230 (2006).

<sup>74</sup> 17 U.S.C. § 512 (2006).

medical practices wielding copyright ownership. Reviewers are less likely to post candid commentary to a review site if they fear the review will be eliminated through legal action, especially when the reviewers themselves are threatened with legal action.<sup>75</sup> If other companies adopt Medical Justice's tactics, the online review site industry may find it difficult to maintain future business operations.

43. Medical Justice's contracts violate industry practices as well. Medical practices using Medical Justice's contracts may be in violation of the American Medical Association (AMA)'s ethics rules. AMA Ethics Opinion 8.03, which provides guidelines on avoiding conflicts of interest, states: "Under no circumstances may physicians place their own financial interests above the welfare of their patients. . . . If a conflict develops between the physician's financial interest and the physician's responsibilities to the patient, the conflict must be resolved to the patient's benefit."<sup>76</sup>

44. The website *Doctored Reviews*, dedicated to exposing Medical Justice's practices, explains how Medical Justice's Agreements potentially violate this guideline:

First, by forcing patients to sign anti-review contracts, doctors are valuing their reputations—and the associated financial benefits—above other considerations, including the effect on patients. Indeed, Medical Justice's contract typically notes that "Physician has invested significant financial and marketing resources in developing the practice," making it clear that the contract is seeking to protect the doctor's financial interests. Second, a doctor's "privacy" promise to forego marketing opportunities implies that those marketing opportunities aren't in patients' best interests. If not, then foregoing them is the ethical choice, whether the patient consents or not."<sup>77</sup>

Incurring such an ethical violation as a result of enforcing Medical Justice's Agreements could result in professional discipline by state medical associations and regulatory agencies against physicians, substantially harming their ability to practice medicine.

45. In short, Medical Justice's contracts violate public policy on several levels. The United States has a strong legal tradition of promoting freedom of speech and disfavoring any restraint of speech without just cause. Though the First Amendment does not apply to agreements between private parties, the existence of laws deterring Strategic Lawsuits Against Public Participation (anti-SLAPP laws) indicate a policy of preventing undue restraints on speech by private parties, where the speech at issue concerns matters of public importance. Similarly, as

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<sup>75</sup> This appears to have occurred in at least one case involving a Philadelphia dentist. The patient author of a negative review received a letter from the dentist claiming the patient was "in violation of the DMCA" and that if she did not remove the review she faced "legal action." See Timothy B. Lee, *Criticism and Takedown: How Review Sites Can Defend Free Speech*, ARS TECHNICA, June 1, 2011, <http://arstechnica.com/tech-policy/news/2011/06/criticism-and-takedown-how-review-sites-can-defend-free-speech.ars>.

<sup>76</sup> Am. Med. Ass'n, Code of Medical Ethics (2010-11), Opinion 8.03 ("Conflicts of Interest: Guidelines"), available at <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion803.page>.

<sup>77</sup> Doctored Reviews, *Creating Legal and Ethical Risks*, <http://doctoredreviews.com/doctors/creating-legal-and-ethical-risks> (last visited Nov. 18, 2011).

the FTC's Policy Statement on Unfairness points out, the importance on informed consumer choice is reflected in numerous statutes.<sup>78</sup> By chilling or removing patient speech and reducing the quantity and quality of information available to patients in the marketplace, the effect of Medical Justice's contracts runs counter to the Department of Health and Human Services' significant push to enhance patient engagement and patient-centered care in the health care system.<sup>79</sup> Medical Justice's contracts also violate the purpose of copyright protection, potentially running afoul of the "copyright misuse" doctrine, which prevents plaintiffs from prevailing on an infringement action when they attempt to use copyright to secure some right unrelated to the purpose of copyright.<sup>80</sup>

## ii. Cannot Be Reasonably Avoided

46. In determining whether injury to consumers can be reasonably avoided, "some courts have looked to 'whether consumers had a free and informed choice that would have enabled them to avoid the unfair practice.' . . . Others have said that '[c]onsumers may act to avoid injury before it occurs if they have reason to anticipate the impending harm and the means to avoid it, or they may seek to mitigate the damage afterward if they are aware of potential avenues toward that end.'" <sup>81</sup> Here, patients are unable to avoid harm because they are presented with the Medical Justice contract as a boilerplate contract that they typically must sign in order to receive needed medical treatment, and the terms of the Agreement are not negotiable.
47. While patients are not forced to see medical providers that use Medical Justice's contract, and do have other alternatives, these Agreements force the patient to choose between receiving medical treatment from the provider of their choice, and preserving their freedom to express themselves online for the benefit of other patients and the marketplace. While not all doctors affiliated with Medical Justice necessarily require patients to sign the agreement in order to receive treatment, at least some medical practices will not accept patients who refuse to sign them.<sup>82</sup> In some cases, such as where a Medical Justice affiliated physician is the only doctor in a small town or in practice areas restricted to a small number of specialists spread out across the country, patients may have no practical alternative but to see a doctor that requires them to sign Medical Justice's contract. And if the practice of forcing patients to sign agreements designed to suppress their ability to engage in critical speech about doctors becomes more widespread, it could eventually become difficult to find a doctor who would see a patient without forcing them to sign such a contract.

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<sup>78</sup> *FTC Policy Statement on Unfairness*, *supra* note 6, at n.20 ("Informed consumers are essential to the fair and efficient functioning of a free market economy." (quoting 15 U.S.C. § 1451 (2006))).

<sup>79</sup> Jodi G. Daniel, *Putting Patients at the Center of Their Health Care*, U.S. DEP'T OF HEALTH & HUMAN SERVS. HEALTHIT BUZZ (Nov. 14, 2011), <http://www.healthit.gov/buzz-blog/from-the-onc-desk/putting-patients-center-health-care>.

<sup>80</sup> Thus far, most copyright misuse cases have involved abusive terms in copyright licenses, where the plaintiff licensed its copyrights to the defendant with an unconscionable condition, which the defendant was then accused of violating. While this doctrine does not actually invalidate a copyright, it "bars a culpable plaintiff from prevailing on an action for the infringement of the misused copyright," and "forbids the use of the [copyright] to secure an exclusive right or limited monopoly not granted by the [Copyright] Office and which it is contrary to public policy to grant." *Alcatel USA, Inc. v. DGI Technologies, Inc.*, 166 F.3d 772, 792 (5th Cir. 1999).

<sup>81</sup> *IFC Credit Corp.*, 543 F. Supp. 2d at 945 (internal citations omitted).

<sup>82</sup> *See Lee*, *supra* note 64.

**iii. Not Outweighed by Any Countervailing Benefits to Consumers or Competition**

48. Although medical practices would perhaps receive some benefit in deterring fraudulent online reviews that could threaten their reputation, Medical Justice’s contracts apply to all reviews — not merely those that are fraudulent. Indeed, fraudulent reviews from competitors or other nonpatients would not be subject to Medical Justice’s contracts *at all*, since the reviewer would never have agreed to the terms. Physicians that determine an online review violates an online review website’s Terms of Service can petition the website to remove the review. Doctors that unjustifiably remove only negative reviews may damage their professional standing by attempting to suppress public review of their practice. Some online review sites have initiated efforts to publicly shame medical practices attempting to enforce these contracts.<sup>83</sup>
49. Doctors who believe that they are being defamed online already have recourse under existing law to unmask and sue reviewers (real patients or otherwise) who make false statements about them.<sup>84</sup> The only benefit that Medical Justice contracts offer is to allow doctors to short-circuit that established legal process to prohibit or remove any unwanted opinions (or unwanted opinions they deem “inappropriate”) from being published about them. This “benefit” of allowing doctors to falsely curate their online reputations is not be cognizable as a benefit to consumers or competition under the law, and certainly does not outweigh the harm that such power does to the online reputation ecosystem.

***C. Claim 3: Medical Justice Deceives Consumers by Posting False Endorsements of Medical Justice Clients***

50. The FTC considers deceptive consumer endorsements to be a form of false advertising, which is a deceptive business practice prohibited under Section 5 of the FTC Act. According to the *FTC’s Guide Concerning the Use of Endorsements and Testimonials in Advertising*:

Advertisements presenting endorsements by what are represented, directly or by implication, to be “actual consumers” should utilize actual consumers in both the audio and video, or clearly and conspicuously disclose that the persons in such advertisements are not actual consumers of the advertised product.<sup>85</sup>

Thus, if a company publishes an endorsement claiming to be written by an actual customer of a business, but that was actually written by one of the company’s employees, the endorsement runs contrary to the FTC’s Guidelines and qualifies as a deceptive business practice under Section 5 of the FTC Act.

51. There is strong reason to suspect that Medical Justice has been posting positive reviews of its client doctors on medical ratings sites, falsely purporting to be from

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<sup>83</sup> RateMDs.com, Gag Contract Hall of Shame, <http://www.ratemds.com/social/?q=node/35256> (last visited Nov. 18, 2011).

<sup>84</sup> *See, e.g.,* Columbia Insurance Co. v. Seescandy.com, 185 F.R.D. 573 (N.D. Cal. 1999).

<sup>85</sup> 16 C.F.R. § 255.2(c) (2010).

satisfied customers. Between November 2010 and March 2011, medical ratings site RateMDs.com detected IP addresses registered to Medical Justice posting ratings to their site claiming to be from satisfied patients.<sup>86</sup> RateMD's discovered a total of "86 ratings for 38 different doctors in 14 different states," posted by six IP addresses associated with the domain "medicaljustice.net."<sup>87</sup> According to RateMDs.com:

Every one of these submitted reviews is positively glowing, with a rating of 5 out of 5 in every category. Most of the associated comments are written in the first person, for example, "I am pleased with the care I have received from Dr. Fishman" or "Dr Rajagopal made me feel comfortable throughout the entire process of my surgery". The ratings were submitted between 11/5/2010 and 3/29/2011, when we finally noticed what they were doing and blocked their IP addresses."<sup>88</sup>

52. RateMDs cited three suspicious facts about one of the postings they detected. First, "a rating with the same comment, with the same two misspellings, [was] posted on 5 other rating websites (citysearch.com, insiderpages.com, vitals.com, doctorscorecard.com, yelp.com)." Second, "the account names of the submitters [were] different on two of these sites ('Skyler L.' and 'Devin C.')." Third, "this same comment [was] posted to RateMDs.com by a MJ IP address (208.109.235.23)."<sup>89</sup> Further substantiating this claim, in a news article covering the story, RateMDs.com spokesperson John Swapceinski stated that Medical Justice "created the accounts with 'obviously one-off, throwaway' e-mail addresses. He also pointed out that identical reviews are being posted on multiple sites under different names. For example, one plastic surgeon has identical glowing reviews on five different sites under the names 'Devin C,' 'Casey962,' 'Emerson342,' and 'Skyler L.'"<sup>90</sup>
53. Technology news site *Ars Technica* reported that, at their suggestion, review site Yelp.com "reviewed its logs and found that those same six IP addresses had also been responsible for numerous favorable doctor reviews on Yelp."<sup>91</sup> The article quoted Medical Justice CEO Jeffrey Segal claiming that the reviews they posted were a test run of their new "Review Building Program," where Medical Justice submits comments to rating sites on behalf of real patients, who fill out surveys in the waiting room. *Ars Technica* was unable to verify the truth of this statement or confirm that the reviews were in fact written by real patients and not Medical Justice's employees.<sup>92</sup>
54. This constitutes strong evidence that Medical Justice has been posting online reviews that misrepresent themselves as being posted by satisfied patients of its member doctors. At best, Medical Justice appears to be selectively choosing the most positive reviews among a range of patient feedback to upload to a multiple review sites under fake names in order to misleadingly inflate doctors' online reputation. These practices

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<sup>86</sup> RateMDs.com, *supra* note 5.

<sup>87</sup> *Id.*

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

<sup>89</sup> *Id.*

<sup>90</sup> Lee, *supra* note 31.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

are contrary to the *FTC's Guide Concerning the Use of Endorsements and Testimonials in Advertising*, and thus are a deceptive business practice prohibited under Section 5 of the FTC Act. Both the FTC<sup>93</sup> and state regulators<sup>94</sup> have previously found similar activities to violate Section 5's prohibition on deceptive practices (or state law equivalents).

## V. REQUEST FOR INJUNCTION AND OTHER RELIEF

55. CDT requests that the Commission:

- Enjoin Medical Justice from marketing or selling any variation of its “Public Statements Agreement” or “Mutual Privacy Agreement” contracts that (1) asserts any copyright interest in patient reviews and commentary regarding the doctor’s practice; (2) in any way restrains speech (or reserves rights over speech) by patients regarding doctors’ practices and the quality of care they received; or (3) falsely claims to offer greater privacy protection than required by federal and state privacy laws.
- Require Medical Justice to alert all of its client medical practices that have purchased its contracts that they are likely unenforceable and illegal, and that continuing to use the contracts could subject them to potential liability and enforcement actions by the American Medical Association, the Department of Health and Human Services, the FTC, or state Attorneys General.
- Enjoin Medical Justice from, either directly or indirectly, posting online reviews of medical providers that falsely claim to be written by patients, that are obtained from clients in a coercive or manipulative fashion, or that are selectively posted by doctors or Medical Justice in order to falsely inflate a doctor’s online reputation.
- Order Medical Justice to disgorge any monies received that are reasonably related to the sale of its Mutual Agreement contracts or the posting of fraudulent or misleading online reviews.

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<sup>93</sup> Federal Trade Commission, Public Relations Firm to Settle FTC Charges That It Advertised Clients’ Gaming Apps Through Misleading Online Endorsements, <http://www.ftc.gov/opa/2010/08/reverb.shtm> (last visited November 28, 2011).

<sup>94</sup> Office of the New York Attorney General, Attorney General Cuomo Secures Settlement with Plastic Surgery Franchise That Flooded Internet with False Positive Reviews, [http://www.ag.ny.gov/media\\_center/2009/july/july14b\\_09.html](http://www.ag.ny.gov/media_center/2009/july/july14b_09.html) (last visited November 28, 2011).

- Provide such other relief as the Commission finds necessary and appropriate.

Respectfully Submitted,

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