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I. INTRODUCTION

The important competitive role played by information providers like credit-rating agencies is not matched by a well-developed competition analysis for the informational problems they pose. To be sure, competition law has developed approaches to some informational issues, such as collective suppression of information² and misleading statements directed at competing products.³ But it has not focused on allegations of anticompetitive manipulation of information by firms whose business is the provision of product ratings.⁴ This essay suggests that a requirement imposed on credit-rating agencies in the recent Dodd-Frank financial reform legislation is also well-suited to address competition issues.

II. RATING PROVIDERS AND RATING MANIPULATION

To begin, it should be noted that if the problem is characterized as the manipulation of product ratings, then credit-rating agencies are not the only entities that present this problem. Some of the recent allegations against Google are similar. Google has been alleged to have manipulated its search results (or ratings) in much the same way that the rating agencies have been alleged to have manipulated credit ratings. Although Google is alleged to have manipulated the ratings of competitors (e.g., potentially competing “vertical” search engines)⁵ and credit-rating agencies are alleged to have manipulated the ratings of customers (issuers of financial products),⁶ the basic phenomenon is the same. In this essay, I will use “ratings” to refer broadly to information provided to consumers based on quality evaluations conducted by the provider. Defined in this way, ratings include both rating agencies’ credit scores and Google’s search results. Considering Google together with credit-rating agencies reveals that the problem is not one confined to financial markets but one related to competition more generally.

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² *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978).

³ Areeda and Turner proposed a test that would make the competitive effect of false statements presumptively de minimis, rebuttable only “by cumulative proof that the representations were [1] clearly false, [2] clearly material, [3] clearly likely to induce reasonable reliance, [4] made to buyers without knowledge of the subject matter, [5] continued for prolonged periods, and [6] not readily susceptible of neutralization or other offset by rivals.” 3 P. Areeda & D. Turner, *Antitrust Law* ¶ 738a, at 279 (1978). The courts’ approaches, however, are mixed on this issue. Cf. *American Professional Testing Service, Inc. v. Harcourt Brace Jovanovich Legal & Professional Publications*, 108 F.3d 1147, 1152 (9th Cir. 1997) (adopting Areeda-Turner test); *National Ass’n of Pharmaceutical Mfrs. v. Ayerst Labs.*, 850 F.2d 904, 916 (2d Cir. 1988) (same) with *West Penn Allegheny Health System, Inc. v. UPMC*, 627 F.3d 85, 109 n.14 (3d Cir. 2010)); *International Travel Arrangers, Inc. v. Western Airlines, Inc.*, 623 F.2d 1255 (8th Cir. 1980).

⁴ *But see* Nicolas Petit & Norman Neyrinck, *Credit Rating Agencies and Competition Law*, CPI ANTITRUST CHRON. (August 2011 (2)).

⁵ *See, e.g.*, James Kanter & Eric Pfanner, *Europe Opens Antitrust Inquiry Into Google*, N.Y. TIMES (Nov. 30, 2010);

⁶ *See, e.g.*, Gretchen Morgenson, *Credit Rating Agencies Grilled by Lawmakers*, N.Y. TIMES (Oct. 22, 2008).

The business models of rating agencies and Google are similar and pose particular problems for competition. In each case, there is too much information for individual consumers to search efficiently themselves, so consumers pay the ratings agencies or Google to gather information for them. A key feature of these information markets is described by the paradox that Arrow identified regarding information: “its value for the purchaser is not known until he knows the information, but then he has in effect acquired it without cost.”⁷ As a result, a consumer will be seeking information only in circumstances in which she will be unable to evaluate the quality of the information she receives. This lack of transparency in quality can give an information provider market power, as does an absence of price transparency.

The two businesses are also similar in that consumers of the ratings do not pay for them directly. Google’s search results are free, but Google is supported by advertising, so consumers pay when they buy the products and services that advertise on Google. Investors who use credit ratings also do not pay directly, because ratings are generally paid for by those issuing securities; investors pay indirectly, though, because the companies in which they invest must pay for the ratings. This payment model matters, because it arguably makes Google and ratings agencies less accountable to consumers of information. If information is free, the recipient of that information comes out ahead so long as the information has *some* value. As a result, consumers of information may not scrutinize the information as carefully as they would if they paid for it.

A final similarity is in the rather ill-defined manipulation allegations in the antitrust suits brought so far against rating agencies and Google. Although Google is alleged to have manipulated both its “organic” search results and its advertising rates in order to disadvantage competitors, the allegations are not very specific.⁸ The basic problem is that there generally is no objective baseline against which to determine if Google has manipulated its search results or the quality scores used in determining its AdWords rates, and Google has so far been able to avoid discovery regarding its practices. Similarly, the ratings agencies are alleged to have allowed their ratings to be influenced by their efforts to attract ratings business, but, as with Google, the allegations are somewhat vague.⁹ Also, as with Google, the rating agencies generally have been able to avoid discovery regarding their rating practices.

III. MARKET POWER, RATING MANIPULATION, AND DODD-FRANK

A competition approach to the product-rating problem, at least if the rating is provided by a single firm, should focus on market power. Although some rating providers have large

⁷ Kenneth J. Arrow, *Economic Welfare and the Allocation of Resources and Invention* 10 RAND (1959), <http://www.rand.org/pubs/papers/2006/P1856.pdf>.

⁸ See Answer and Counterclaim of Defendant myTriggers.com, Inc., *Google, Inc. v. myTriggers.com, Inc.*, ¶ 12, No. 09 CVH-10-14836 (Comm. Pleas Ct. of Franklin Cty., Ohio filed Feb. 2, 2010), available at <http://googleopoly.net/MyTrigger.pdf> (“Not all competing websites to Google are subject to its exclusionary ‘quality scoring.’ Rather, on information and belief, Google enters into agreements with a number of search websites, including rival shopping comparison sites, that allow these sites to participate in AdWords keyword auctions without being subject to the same ‘quality’ scoring Google applies to other search rivals, including myTriggers.”)

⁹ See *Jefferson County School District No. R-1 v. Moody’s Investor’s Services, Inc.*, 175 F.3d 848 (10th Cir. 1999) (“The School District alleges that Moody’s statement was materially false in that it indicated that the School District’s financial condition was not creditworthy and conveyed the impression that Moody’s assessment was based on current information.”).

market shares, the source of power seems likely to be the providers' reputations. We can ask, then, whether a rating provider is capable of manipulating ratings without losing significant reputational market power. If manipulation would cause significant harm to a rating provider's reputation, then it seems unlikely that it would engage in such manipulation, even if it would also cause harm to the provider's competitors. Conversely, if a rating provider could manipulate its ratings without harming its reputation, there is reason for concern, though of course the power will not necessarily be exercised.

Assuming we are willing to accept that the manipulation of a rating to harm a competitor is plausible, how could it be determined when that manipulation has occurred? The key problem is that there generally is no objective baseline against which to determine if a rating has been "manipulated." There is another approach, however. It seems unlikely that any valid change in a rating would be applicable only to one rating. That is, one would expect a rating change to be made on some objective criteria that would apply not just to one rating but to a subset of ratings having common characteristics. Any rating change that applied just to one rating (and in particular just to one rating that had competitive implications for the rating provider) seems likely to be *ad hoc* and potentially anticompetitive. Therefore, instead of asking if a particular rating has been manipulated, we could ask whether a particular rating change has been applied in a systematic, rather than *ad hoc*, way.¹⁰

In fact, exactly this approach is taken in the Dodd–Frank Wall Street Reform and Consumer Protection Act. In Dodd–Frank, Congress directed the SEC to prescribe rules that, when credit-rating agencies make "material changes" to "rating procedures and methodologies," ensure that:

- a) the changes are applied consistently to all credit ratings to which the changed procedures and methodologies apply;
- b) to the extent that changes are made to credit rating surveillance procedures and methodologies, the changes are applied to then-current credit ratings by the nationally recognized statistical rating organization within a reasonable time period determined by the Commission, by rule; and
- c) the nationally recognized statistical rating organization publicly discloses the reason for the change¹¹

I have argued elsewhere that these same rules could be applied to Google.¹²

The Dodd–Frank solution thus has two main elements. First, the reason for material changes to the rating agencies' methodologies must be publicly disclosed. Second, such changes must be applied consistently to all ratings to which the algorithms apply. This approach is not a

¹⁰ This focus echoes the approach to certain pricing practices, where under competition law in various jurisdictions selective price-cutting is often seen as posing a greater competitive problem than are price cuts that are applied market-wide.

¹¹ Pub. L. No. 111-203, Dodd–Frank Wall Street Reform and Consumer Protection Act § 932(a)(8), codified at 15 U.S.C. § 78o-7(r).

¹² See, Daniel Fisher, *Should Regulators Treat Google Like Standard & Poor's?* FORBES (Sept. 29, 2011), available at <http://www.forbes.com/sites/danielfisher/2011/09/29/should-regulators-treat-google-like-standard-pooers>. Some of the present essay is derived from that prior discussion.

panacea, of course. Manipulation of ratings is still possible, but the rule makes that manipulation more difficult, for two reasons. First, the ratings agency is required to articulate reasons for changes in its ratings, which might, in itself, prevent some changes directed at injuring competitors. Second, the requirement that a change be applied uniformly means that a change to one rating could require other changes that the agency might prefer not to make, which would discourage some *ad hoc* changes.¹³

IV. ADVANTAGES OF THE DODD-FRANK APPROACH

This approach satisfies several desirable goals. First, it would not prevent a rating provider from making changes to its algorithm, even if those changes harmed its competitors, so long as the changes were applied consistently. Second, it would not require the provider to disclose its algorithm, only to explain changes to it. Google, particularly, is rightly protective of the investment that it has made in its algorithm, and although some have called for its disclosure—if only to the government—such a remedy seems too intrusive. Even a partial disclosure like that required by Dodd-Frank might be viewed as intrusive, but it seems likely that rating providers could provide reasons for changes without compromising the ability to improve their ratings. (The SEC’s proposed rules implementing the relevant Dodd-Frank section require disclosure not only of the reason for a material change, but also of the change itself.¹⁴ That may be going too far, at least for Google, but the provision has yet to take effect, so its implications will become more clear over time.)

The Dodd-Frank approach also seems appropriate if ratings are views as “opinions” rather than as the products of algorithms. Both rating agencies and Google have successfully defended against antitrust challenges to their rating practices by arguing that they are “opinions” protected by the First Amendment.¹⁵ The reason for protecting ratings under the First Amendment, presumably, is that we do not want to have a chilling effect on providers worried about making errors in their ratings.¹⁶ But if the competition-law requirement is that reasons for changes be disclosed and that the changes be applied consistently, or that disclosure and

¹³ The focus here is on competition issues. One comment on the SEC’s proposed rules argues that a consistency requirement creates another problem, in that it inhibits changes from outdated or discredited methodologies. See William J. Harrington, Comment on Proposed Rules for Nationally Recognized Statistical Rating Organizations, SEC File No. S7-18-11, Aug. 8, 2011, at 11. That is true, though, only if the prior application of the old methodologies is not corrected as the act appears to require. *But see* Financial Services Roundtable, Comment on Proposed Rules for Nationally Recognized Statistical Rating Organizations, SEC File No. S7-18-11, Aug. 8, 2011, at 5 (“A credit ratings change on existing securities when there has not been a change in the *performance* of the rated securities has the potential to be very disruptive to the market.”)

¹⁴ The SEC’s proposed rules to implement the Dodd-Frank section cited above require “[t]hat the nationally recognized statistical rating organization promptly publishes on an easily accessible portion of its corporate Internet website . . . [m]aterial changes to the procedures and methodologies, including to qualitative models or quantitative inputs, the nationally recognized statistical rating organization uses to determine credit ratings, the reason for the changes, and the likelihood the changes will result in changes to any current ratings” Securities and Exchange Commission, Proposed Rules for Nationally Recognized Statistical Rating Organizations, File No. S7-18-11, May 18, 2011, available at <http://www.sec.gov/rules/proposed/2011/34-64514.pdf>.

¹⁵ See *Jefferson County School District No. R-1 v. Moody’s Investor’s Services, Inc.*, 175 F.3d 848 (10th Cir. 1999); *Search King, Inc. v. Google Technology, Inc.*, 2003 U.S. Dist. LEXIS 27193 (W.D. Okla. 2003).

¹⁶ *Cf.* Nicolas Petit & Norman Neyrinck, *Credit Rating Agencies and Competition Law*, CPI ANTITRUST CHRON. 11-13 (August 2011 (2)).

consistency are relevant factors in determining whether there has been a violation, rating providers would not be exposed to suit by those who are merely unhappy with the ratings applied to them. Instead, to allege a competition claim, a plaintiff would have to allege some inconsistency in the rating provider's rating practices.¹⁷

That leads to the issue of discovery or other processes used (by agencies, for example) in seeking information from antitrust defendants. An antitrust focus on the justification for changes and the consistency of their application could be used to limit discovery to those particular issues. That is, a plaintiff could be prevented from making broad requests for all information relating to rating methodologies, which would be both expensive and likely to pose problems for the preservation of trade secrets. Instead, a plaintiff could be limited to seeking information regarding only a particular change to rating methodologies. This narrowing of the focus might encourage judges, particularly in the United States, not to dismiss cases prior to discovery and to allow at least limited scrutiny of rating providers' methodologies.

V. CONCLUSION

As information becomes a more central part of the economy—perhaps *the* central part of the economy—competition law must adapt. Most current competition rules developed in the context of tangible products, and those rules often do not transfer easily to information products. For example, competition law's current approach to assessing dominant-firm conduct focuses primarily on refusals by such firms to provide access to their products or services.¹⁸ But when the challenged conduct involves not denial of a good or service but the distortion of information, a new approach must be devised. The solution adopted for rating providers in the Dodd-Frank Act is a step in that direction. The larger problem, though, and the current challenge for antitrust, is the development of new techniques for preserving competition in an information economy.

¹⁷ This requirement could perhaps be applied early in litigation, as for example in the U.S. through the *Twombly/Iqbal* "plausibility" requirement.

¹⁸ Of course that is not uniformly true. For example, predatory innovation does not typically involve a refusal to deal, and in fact predatory innovation is a practice that shares some similarities with the manipulation of product ratings. The similarity only underscores the problem, though, in that competition law has never developed a very satisfactory approach to predatory innovation, either.