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Count Your Lucky Stars: Why Consumers May Be Thankful for Monopolistic Behavior in the Rating and Review Industry

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INTRODUCTION

At the heart of our antitrust jurisprudence lies the notion that competition is good and monopolies are bad.[1] A recent district court decision in *United States v. Bazaarvoice, Inc.* supports this doctrine.[2] The district judge prohibited a merger between the two largest rating and review ("R&R") companies, Bazaarvoice and PowerReviews, because it would have given Bazaarvoice a monopoly in the industry.[3] The antitrust laws and government-issued Merger Guidelines that were relied upon in this decision aim to prohibit anticompetitive behavior in large part to eliminate adverse effects on society.[4] This Note proposes that the R&R industry might better serve society by allowing monopolistic behaviors rather than promoting competition.

Part I of this Note will provide background information on antitrust law, on the *Bazaarvoice* decision, and on the unique features of two-sided platforms. Part II explores the efficiencies and benefits that may justify monopolistic behavior in the R&R field, mainly that ratings might be more accurate with fewer firms in the market. Finally, Part III presents additional solutions to increase the accuracy and transparency of ratings. In conclusion, this Note suggests that three of the generally acknowledged exceptions to basic antitrust principles are present in the R&R industry, and it argues that the *Bazaarvoice* court could have allowed the merger.

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1 *See* Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962).
2 No. 13-cv-00133-WHO, 2014 WL 203966, at *1–2 (N.D. Cal. Jan. 8, 2014).
3 See id. at *76.
4 *See* U.S. DEP'T OF JUSTICE AND FTC, HORIZONTAL MERGER GUIDELINES § 1 (2010) [hereinafter 2010 Merger Guidelines], *available at* http://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf ("Agencies normally evaluate mergers based on their impact on customers.").

I. PRELIMINARY MATTERS USED TO ANALYZE THE R&R INDUSTRY

Before understanding why a firm in the R&R industry may be justified in engaging in anticompetitive behavior, it is important to discuss the general topics on which this theory is premised. Part I.A will set out basic antitrust principles. Part I.B will discuss characteristics of R&R providers and the *Bazaarvoice* decision, and Part I.C will explain characteristics of two-sided platforms.

A. The Antitrust Framework

Antitrust laws set out to protect competition.[5] They do so by prohibiting firms from agreeing to restrain trade in some way (i.e., fixing prices), and by prohibiting monopolistic behaviors.[6] Section 7 of the Clayton Act specifically regulates monopolies by prohibiting mergers where the effect "may be substantially to lessen competition, or to tend to create a monopoly."[7]

Typically, antitrust claims will only be fruitful if a firm has market power,[8] meaning it has the ability to profitably raise prices above the competitive level.[9] Market power is determined by the firm's market share.[10] Before calculating the market share of a firm, the market, which consists of both the product market and the geographical market, must be defined.[11]

The product market must first be decided, usually by applying the "reasonable interchangeability" test.[12] This test posits that a

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5 *See* United States v. Phila. Nat'l Bank, 374 U.S. 321, 372 (1963).

6 15 U.S.C. § 1 (2004).

7 *Id.* § 18.

8 Thomas G. Krattenmaker et al., *Monopoly Power and Market Power in Antitrust Law*, 76 GEO. L.J. 241, 242 (1987) ("Most antitrust rules require the plaintiff to show that the defendant has or is likely to obtain 'market power' . . . .").

9 *See* William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937, 937 (1981).

10 *See* HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY 81–82 (3d ed. 2005).

11 *See* SMS Sys. Maint. Servs., Inc. v. Digital Equip. Corp., 188 F.3d 11, 16 (1st Cir. 1999) ("The purpose of defining a relevant market is to assist in determining whether a firm has market power.").

12 *See, e.g.*, United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 404 (1956); Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 481–82 (1992).

product market should include the product in question as well as any product that is reasonably interchangeable with the product in question.[13] The purpose of this test is to figure out what other options consumers would turn to if the provider of the relevant good increased its prices.[14] Those goods that a consumer would buy are to be included within the market, and those goods that a consumer would not buy are to be excluded.[15]

The Horizontal Merger Guidelines (discussed below) set out a "hypothetical monopolist" test to determine which products are considered reasonably interchangeable.[16] This test asks: if a hypothetical monopolist increased the price of its service by a small but significant amount, to what other goods would consumers turn?[17] In application, the agencies most often apply a hypothetical five percent increase in price,[18] and they look to history of customer price changes, information from customers, and any other reasonably available and reliable evidence to predict the effects of such a price increase.[19]

The relevant geographic market can only be defined after the product market is determined.[20] It includes geographical areas where a purchaser would go to buy a product or obtain services if a firm closer to him/her raises its prices by a small but significant amount.[21] The Merger Guidelines suggest using the hypothetical monopolist test for this as well, usually applying the hypothetical five percent increase in prices.[22]

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13 *See* United States v. Grinnell Corp., 384 U.S. 563, 571 (1966).

14 *See id.*

15 *See id.*

16 *See* 2010 Merger Guidelines, *supra* note 4, § 4.1.1 ("The Agencies use the hypothetical monopolist test to identify a set of products that are reasonably interchangeable with a product sold by one of the merging firms.").

17 *See id.*

18 *See id.* § 4.1.2.

19 *See id.* § 4.1.3.

20 *See* U.S. DEP'T OF JUSTICE AND FTC, HORIZONTAL MERGER GUIDELINES § 1.2 (1992, rev.1997), [hereinafter 1992 Merger Guidelines], *available at* http://www.justice.gov/atr/public/guidelines/hmg.pdf.

21 *See, e.g.*, Surgical Care Ctr. v. Hosp. Serv. Dist., 309 F.3d 836, 840 (5th Cir. 2002).

22 *See* 2010 Merger Guidelines, *supra* note 4, at § 4.2.1.

The ease in which a new firm can enter the market is also relevant to the discussions concerning the product and geographic market of a good or service.[23] If firms that are not yet a part of the market are presumed to restrain trade because it is so easy for them to enter and thereby constrain prices of incumbent firms, they could also be included within the market.[24] Defining the market accurately is extremely important to the merger analysis because an overly narrow definition will exaggerate anticompetitive harms while an overly broad definition will underestimate harms.[25]

Usually a challenger must prove something in addition to showing that a firm has the requisite market share to win its claim.[26] It must also prove that the firm engaged in some sort of anticompetitive behavior.[27] For collusion claims, this means the firm formed an agreement with another firm that restrains trade in some way.[28] For a monopoly claim, this means that the firm engaged in some sort of exclusionary behavior.[29] If, however, the monopoly challenge is to a merger, it is only necessary to show that exclusionary activity is likely to result from the merger.[30] The rest of this Note will analyze antitrust law in the context of merger challenges.

Section 7 of the Clayton Act allows the government to monitor merging firms, and, where acquisitions are valued in excess of $75.9 million,[31] it requires that the merger be reported.[32] A merger will usually be prohibited only where it is likely to have anticompetitive effects.[33] Usually this means that the merger will result in the firm increasing its prices, decreasing its output or quality, or harm-

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23 *See* United States v. Waste Mgmt., Inc., 743 F.2d 976, 982 (2d Cir. 1984).

24 *See id.*

25 *See* United States v. Oracle Corp., 331 F. Supp. 2d 1098, 1121 (N.D. Cal. 2004).

26 *Surgical Care Ctr.*, 309 F.3d at 839.

27 *See id.*

28 *See* Krattenmaker et al., *supra* note 8, at 261.

29 *See* United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 391 (1956).

30 *See* 15 U.S.C. §§ 12–27 (1982).

31 *See* Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 79 Fed. Reg. 3814 (Jan. 23, 2014). This figure is revised annually.

32 *See Premerger Notification Program*, FTC, http://www.ftc.gov/enforcement/premerger-notification-program (last visited Sept. 7, 2014).

33 *See* 2010 Merger Guidelines, *supra* note 4, § 1.

ing consumers in some other manner.[34] When a merger gives the firm monopoly power this establishes a rebuttable presumption that the merger creates anticompetitive effects.[35] This concept, known as "unilateral effects," is the idea that the merger enhances market power just by eliminating competition between the merging firms and, thus, violates antitrust law.[36]

The Department of Justice ("DOJ") began issuing Merger Guidelines in 1968 in order to describe the principles and standards the Agency used to analyze mergers.[37] More recently the Federal Trade Commission ("FTC") has assisted in developing these Guidelines.[38] The Guidelines do not serve as binding law; rather, they are intended to "help the agencies identify and challenge competitively harmful mergers while avoiding unnecessary interference with mergers that either are competitively beneficial or likely will have no competitive impact on the marketplace."[39]

The Horizontal Merger Guidelines, which apply to merging firms that are horizontal competitors (as opposed to firms that are vertically aligned in the supply chain), have been amended on multiple occasions to account for changes in the economy and the actual practices of the Agencies.[40] Most recently, the Guidelines were amended by the DOJ and FTC in 2010.[41]

The new guidelines emphasize that a merger analysis is ultimately about its effects on the marketplace.[42] Specifically, the guidelines suggest that the Agencies "evaluate mergers based on

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34 *See id.*
35 *See id.* § 2.1.3.
36 *See id.* § 6.
37 *See* U.S. DEP'T OF JUSTICE AND FTC, HORIZONTAL MERGER GUIDELINES (1968), *available at* http://www.justice.gov/atr/hmerger/11247.htm.
38 *See* Press Release, FTC, Federal Trade Commission and U.S. Department of Justice Issue Revised Horizontal Merger Guidelines (Aug. 19, 2010), http://www.ftc.gov/news-events/press-releases/2010/08/federal-trade-commission-and-us-department-justice-issue-revised.
39 *See id.*
40 *See id.*
41 *See id.*
42 *See* Carl Shapiro, *The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years*, 77 ANTITRUST L.J. 49, 56 (2010).

their impact on customers."[43] In other words, mergers that will hurt consumers are bad, while mergers that will help or have no impact on consumers are good, or at least permissible.[44]

Thus, in addition to prohibiting anticompetitive behavior, antitrust laws also aim to promote positive effects in the marketplace.[45] When these concepts come into tension with each other, a procompetitive justification may be able to outweigh a firm's anticompetitive behavior.[46] Examples of such justifications include behavior that creates efficiencies or other benefits to society.[47]

The Guidelines encourage the Agencies to examine the effects of a merger on the direct and, when applicable, the indirect customers of the merging parties.[48] Absent evidence to the contrary, the Agencies are to assume that mergers adversely affecting direct customers also adversely affect indirect customers.[49] Problematically, the Guidelines do not provide direction on how to analyze a merger that affects direct customers differently than indirect customers.[50] This Note presents the idea that in some two-sided markets, the direct and indirect customers are affected differently and may need to be considered differently to best serve society.

As discussed above, the prosecuting agencies use the Merger Guidelines to determine whether or not they should take action against a particular merger.[51] While a court will consider the Guidelines favorably, it will likely employ its own burden-shifting analysis. First, it will require the government to establish that the merger will create anticompetitive effects.[52] If this is satisfied, the burden will shift to the defending party to show that the effects are not an-

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43 *See* 2010 Merger Guidelines, *supra* note 4, § 1.
44 *See id.*
45 *See* Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 20–21 (1979).
46 *See id.*
47 *See id.*
48 *See* 2010 Merger Guidelines, *supra* note 4, § 1.
49 *See id.*
50 *See id.*
51 *See* Press Release, FTC, *supra* note 38.
52 *See* United States v. Bazaarvoice, Inc., No. 13-cv-00133-WHO, 2014 WL 203966, at *64 (ND Cal. Jan. 8, 2014).

ticompetitive or to discredit the government's assertions.[53] If this is successful, the burden shifts again to the government to persuade the court of the potential anticompetitive harms.[54]

B. Bazaarvoice, Power Reviews, and the Rating and Review Industry

In January 2013, the DOJ challenged the merger between e-commerce companies Bazaarvoice and PowerReviews based on the theory that the merger would give Bazaarvoice a monopoly in the R&R industry.[55] The court found for the DOJ and prohibited the merger.[56]

1. The Industry

R&R platforms are online mechanisms used by businesses to communicate with their consumers, allowing the consumer to rate products, leave a review, and ask questions. [57] These systems benefit product manufacturers and retailers by allowing them to communicate with customers and answer their questions,[58] to syndicate ratings among businesses,[59] and to increase brand loyalty among consumers.[60] The online consumer interaction stimulates web traffic and can lead to increased sales.[61]

These systems also allow consumers to communicate with one another by posting their opinions about particular products, services, restaurants, and other commodities on the Internet.[62] Consumers often rely on these posts when making purchasing decisions.[63]

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53 *See id.*
54 *See* FTC v. H.J. Heinz Co., 246 F.3d 708, 715 (D.C. Cir. 2001).
55 *See* Complaint at *5–6, United States v. Bazaarvoice, Inc., 2014 WL 203966 (ND Cal. Jan. 10, 2013) (No. C13-0133).
56 *See Bazaarvoice*, 2014 WL 203966, at *65.
57 *See id.* at *5–6
58 *See id.* at *26.
59 *See id.* at *6.
60 *See* BAZAARVOICE: CONVERSATIONS, http://www.bazaarvoice.com/solutions/conversations/ (last visited Sept. 5, 2014).
61 *See Bazaarvoice*, 2014 WL 203966, at *7.
62 *See* Louis Camassa, *Analyzing Customer Review Platforms; Amazon's Example,* PRACTICALECOMMERCE (Apr. 5, 2002), http://www.practicalecommerce.com/articles/3464-Analyzing-Customer-Review-Platforms-Amazon-s-Example.
63 *See Bazaarvoice*, 2014 WL 203966, at *66.

In fact, 70 percent of shoppers read such reviews before buying,[64] and 92 percent of consumers trust recommendations from other consumers above all forms of advertising.[65] Thus, these systems help consumers to be confident in their buying decisions.[66]

Because of these benefits, many businesses choose to integrate R&R platforms onto their websites.[67] In doing so, they can choose to make their own, in-house system or they can purchase the technology from a commercial provider.[68] The Bazaarvoice and PowerReviews R&R platforms provide these services and can be retained by a business to integrate R&R technology onto the company website.[69]

2. The Decision

At trial, the DOJ presented evidence that Bazaarvoice executives considered PowerReviews its "fiercest competitor" and was "challenging [Bazaarvoice's] price points."[70] Based on this and other evidence that established the merger would eliminate Bazaarvoice's competition, the government met its initial burden, creating a rebuttable presumption that the merger would cause a monopoly and anticompetitive effects.[71]

Bazaarvoice tried to rebut the argument by alleging that it did not have a significant enough share of the market to have monopoly power because there is a "broad array" of other interactive commerce options for businesses.[72] The Court disagreed with this de-

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64 *See* BAZAARVOICE: CONNECTIONS, http://www.bazaarvoice.com/solutions/ connections/ (last visited Sept. 5, 2014).

65 *See id.*

66 *See id.*

67 *See Bazaarvoice*, 2014 WL 203966, at *7.

68 *See* Complaint, *supra* note 55, at *5–6.

69 *See* BAZAARVOICE, http://www.bazaarvoice.com/solutions (last visited Sept. 9, 2014).

70 *See Bazaarvoice*, 2014 WL 203966, at *11.

71 *See id.* at *65 ("As stated at the outset of the Memorandum Opinion, the government easily established its prima facie case and Bazaarvoice was unable to rebut the presumption of illegality.").

72 *See* Pre-Trial Brief for Defendant (Redacted) at *30, *Bazaarvoice*, 2014 WL 203966 (No. C13-0133).

fense, finding that the market consisted of only R&R platforms and no other e-commerce businesses.[73]

However, it is not clear that the court was right in defining the market in such narrow terms. Bazaarvoice advertises its services as a way for companies to stimulate interest in products and increase sales by allowing them to communicate with their end-users.[74] Bazaarvoice recognizes that its service is only one of many platforms that businesses can turn to in order to engage with their customers.[75] Alternatives include Q&A dialogues and other forums where retailers can collect feedback.[76] Companies often use social networking sites like Facebook and Twitter exclusively for these communication features,[77] and some of these sites or a combination of sites may complement each other to some degree.[78]

However, even when the court defined the market narrowly to only include R&R systems, it may have overstated Bazaarvoice's market share of the R&R industry. As it presented at trial, Bazaarvoice must compete with in-house R&R platforms,[79] a factor to which the court gave little weight. Many companies have implemented in-house solutions and, considering the ease with which the platforms can be created, many more can.

Notably, Bazaarvoice had previously lost customers who created in-house systems, and some created these solutions in a matter of days or weeks, demonstrating how low the barriers are to entering the field.[80] Companies like Amazon have the means to

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73 *See id.* at *66.

74 *See* BAZAARVOICE, http://www.bazaarvoice.com (last visited Sept. 5, 2014) (emphasizing the ability customers have to respond to posts by users and showing how increased dialogue leads to more sales).

75 *See* Pre-Trial Brief for Defendant, *supra* note 72, at *30.

76 *See id.*

77 *See* Melanie Haselmayr, *Tips And Tricks To Manage Your Social Media Campaigns Like A Pro*, FORBES (MAY 16, 2014), http://www.forbes.com/sites/allbusiness/2014/05/16/tips-and-tricks-to-manage-your-social-media-campaigns-like-a-pro/.

78 *See* United States v. Bazaarvoice, Inc., No. 13-cv-00133-WHO, 2014 WL 203966, at *26 (N.D. Cal. Jan. 8, 2014).

79 *See* Post-Trial Brief for Defendant at *5, *Bazaarvoice*, 2014 WL 203966 (No. C13-0133).

80 *See id.*

quickly enter the market.[81] In fact, Amazon testified that it considers entering the industry "almost daily."[82] These providers of R&R could compete with Bazaarvoice and limit their ability to create adverse effects for consumers.[83] Still, the court rejected them as viable competitors.[84]

C. Characteristics of Two-Sided Platforms

Because R&R platforms are two-sided, there might be other justifications for why the merger could have been permitted. Two-sided platforms ("2SPs") are markets "with two distinct sets of consumers, such as buyers and sellers, who wish to transact with one another but lack efficient means of organization."[85] R&R platforms are two-sided in that they serve companies that retain R&R services as well as the businesses' consumers who rely on ratings when making purchasing decisions.[86]

Two-sided markets create network effects.[87] This is the notion that the value of a system increases as the number of users of the system increases.[88] A prototypical example of this phenomenon is the telephone. A single telephone owner values his telephone more as others purchase their own phones and the first owner can call more people.[89]

In two sided-markets, network effects are seen in one side of the market when more users join the other side, and are referred to as cross-group network effects.[90] For example, in R&R platforms, end-users who rely on ratings when making purchasing decisions are benefitted more as the number of companies providing review

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81 *See id.* at *7.

82 *See id.*

83 *See id.*

84 United States v. Bazaarvoice, Inc., No. 13-cv-00133-WHO, 2014 WL 203966, at *3 (N.D. Cal. Jan. 8, 2014).

85 Daniel M. Tracer, *Overcharge but Don't Overestimate: Calculating Damages for Antitrust Injuries in Two-Sided Markets*, 33 CARDOZO L. REV. 807, 808 (2011).

86 *See Bazaarvoice*, 2014 WL 203966, at *6–7.

87 *See* Kristine Laudadio Devine, *Preserving Competition in Multi-Sided Innovative Markets*, 10 N.C. J. L. & TECH. 59, 80–81 (2008).

88 *See id.*

89 *See id.*

90 *See id.*

platforms increases and there are more available reviews.[91] Similarly, the companies gain value as more end-users read product reviews because this leads to more purchases.[92]

2SPs can seek compensation from users on each side of the market.[93] In some cases, both users pay equally to benefit from the platform. [94] For example, many dating sites charge equal membership rates for men and women, because both parties are, in theory, benefitting equally from joining. [95]

In other 2SPs, a firm requires that one side of the market fully subsidizes the other in order to maximize profits, allowing the second side to benefit from the service for free or better.[96] R&R companies are examples of these types of markets. The business hiring the R&R provider pays for this technology while the end-user benefits at no cost.[97] This unique characteristic might require a different antitrust analysis because the R&R platform is only financially responsible to the businesses that purchase the R&R technology.

II. CREATING SOCIETAL BENEFITS THROUGH MONOPOLY

This Note suggests that monopolies should be permitted in the R&R industry. This theory is premised on the idea that monopolies would create benefits for society in these contexts. Part II.A discusses why a monopoly would create more efficient results from the industry by increasing the amount of product output through

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[91] Devine, *supra* note 87, at 79–80.

[92] United States v. Bazaarvoice, Inc., No. 13-cv-00133-WHO, 2014 WL 203966, at *6 (N.D. Cal. Jan. 8, 2014) (noting that there is a thirty percent increase in sales for products that have been reviewed, when compared to those that have not been rated, even when those reviews are negative).

[93] David S. Evans & Michael Noel, *Defining Antitrust Markets When Firms Operate Two-Sided Platforms*, 2005 COLUM. BUS. L. REV. 667, 675 (2005).

[94] *See id.*

[95] *See, e.g.*, *Cost Comparison: Internet Dating Sites*, REAL SIMPLE, http://www.realsimple.com/work-life/money/cost-comparison-internet-dating-sites-00000000028239/ (last visited Sept. 5, 2014).

[96] *See* Devine, *supra* note 87, at 59, 82; *see also* Evans & Noel, *supra* note 93, at 668.

[97] *See* BAZAARVOICE: CONNECTIONS, http://www.bazaarvoice.com/solutions/connections/ (last visited Sept. 5, 2014).

syndication. Part II.B discusses how monopolies can foster innovation, and Part II.C explains how monopolistic behavior in this field can increase the accuracy of the ratings.

A. *Network Effects and Syndication*

The network effects of R&R platforms are stronger when businesses are using the same R&R provider.[98] This is because of the possibility of syndication.[99]

Syndication occurs where content on one site is made available on another.[100] Bazaarvoice technology allows reviews posted on one company's site to appear on the websites of other companies that sell the reviewed product.[101] For example, someone reading reviews on Home Depot's website can presumably see the review posted on Lowes' website. This benefits businesses that may publish a greater amount of R&R, and it benefits consumers who have access to a greater amount of R&R. The existence of multiple competitors threatens this efficiency.[102] Because a concentrated market increases syndications, and syndication increases network effects, it is possible that one firm's monopoly in the industry may create societal benefits strong enough to outweigh the anticompetitive behavior.[103]

B. *Innovations and Free Riding*

Another reason for allowing monopolistic behavior in the R&R industry could be the importance of innovation. Some theorize that competition promotes innovation by forcing firms to maximize

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98 *See* United States v. Bazaarvoice, Inc., No. 13-cv-00133-WHO, 2014 WL 203966, at *8, *12 (N.D. Cal. Jan. 8, 2014).

99 *See id.* at *20.

100 *See Review Syndication*, POWERREVIEWS, http://www.powerreviews.com/review-syndication/ (last visited Sept. 9, 2014) ("The PowerReviews Syndication Network distributes your reviews to all major retailers and search engines.").

101 *See Bazaarvoice*, 2014 WL 203966, at *6.

102 The *Bazaarvoice* opinion presents this idea as one of the reasons that Bazaarvoice wanted to acquire PowerReviews on the theory that PowerReviews was stealing Bazaarvoice clients and thus taking away its competitive advantage of syndication. However, syndication benefits society and can therefore be used as a reason why anticompetitive behavior in this case may be acceptable. *See id.* at *11–13.

103 *See id.* at *51.

profits.[104] Others, however, propose that a dominating firm can foster innovation more so than firms in competition.[105]

Joseph Schumpeter's theory of "creative destruction" asserts that while a firm is dominating, it will be willing to invest in innovation,[106] a risk that would dissuade competitive firms because of the fear that others would piggyback off of new ideas.[107] The theory further purports that the domination is not dangerous because the market leader will eventually be displaced.[108] Others have supported this argument by advocating that antitrust rules should not apply when innovation is at stake.[109] This theory is based on the premise that a firm wants to stop others from free riding off of its investments. This is generally accepted in antitrust law as a procompetitive defense, and perhaps in this case poses a possible justification for encouraging a single firm to dominate.[110]

The major concern that a court might have with a procompetitive theory is that the effects are usually only justified when the monopolistic behavior has continued for a period of time.[111] For example, if Bazaarvoice were trying to exclude PowerReviews from a market of which PowerReviews was not originally a part, the free riding justification might be accepted as procompetitive.[112] However, because the R&R market operated competitively while Bazaarvoice and PowerReviews were acting individually, procompetitive justifications are likely to have less merit.[113]

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104 *See* David McGowan, *Innovation, Uncertainty, and Stability in Antitrust Law*, 16 BERKELEY TECH. L.J. 729, 732 (2001).

105 *See* Devine, *supra* note 87, at 99–100.

106 *See id.* at 99.

107 *See id.* at 100.

108 *See id.* at 99–100.

109 *See* Daniel F. Spulber, *Unlocking Technology: Antitrust and Innovation*, 4 J. COMPETITION L. & ECON., 915, 966 (2008).

110 *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 878 (2007).

111 *Compare* Verizon Comm. Inc. v. Law Offices of Curtis Trinko LLP, 540 U.S. 398 (2004), *with* Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985).

112 *See Verizon Comm.*, 550 U.S. at 409.

113 *See Aspen Skiing Co.*, 472 U.S. at 585.

C. Credit Rating Agencies and Why Ratings Become Less Accurate

The credit rating industry is another example of a 2SP, and it shares many qualities with the R&R market.[114] CRAs evaluate the creditworthiness of firms ("issuers") by assessing their ability to pay back their debts in a timely manner.[115] This evaluation is reported as a "credit rating" that is usually a letter- and number-based estimate of risk.[116] Investors rely on credit ratings before providing an issuer with capital.[117] If a credit rating is high, as opposed to low, investors are more likely to contribute to that issuer because he is more likely to get a return on his investment.[118]

Because of this, issuers want high credit ratings so that investors are willing to supply them with capital.[119] Investors, who rely on an entity's credit rating when deciding how to invest, want the rating to be accurate in order to know where to invest.[120] These desires might not be consistent.

Originally, the credit rating industry only hosted two main agencies: Moody's and Standard & Poor's.[121] Around 1989, Fitch started to become a major CRA as well, and the firms are currently considered the "Big Three" agencies.[122] Upon Fitch's entry to the market, the accuracy of ratings began to decline, and research suggests this is because CRAs are more accurate when there is less competition.[123]

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114 *Compare* SEC, *Report on the Role and Function of Credit Rating Agencies in the Operation of the Securities Markets* 21 (2003), *with* Tracer, *supra* note 85, at 808.

115 SEC, *supra* note 114, at 21.

116 Julia Zukina, *A Step Short of Change: Examining the Recent Regulation of Credit Rating Agencies and Its Shortcomings in a Global Market*, 13 J. BUS. & SEC. L. 259, 261–62 (2013).

117 *See* SEC, *supra* note 114, at 21.

118 *See id.* at 27.

119 *See id.*

120 Where an investor has already invested under the guise of an inaccurate rating, he does not want the credit rating of that entity to downgrade even if that means it will continue to be inaccurate. Mark Patterson, *Looking at Credit-Rating Agencies Through a Leegin Lens*, CPI ANTITRUST CHRONICLE 2 (2014).

121 *See* SEC, *supra* note 114, at 5.

122 Zukina, *supra* note 116, at 264.

123 Bo Becker & Todd Milbourn, *How Did Increased Competition Affect Credit Ratings?* 4 (Harvard Bus. Sch., Working Paper No. 09-051, 2010).

Various studies have been conducted to explain why the presence of Fitch in the industry caused less accurate ratings.[124] A recent study by Bo Becker of Harvard Business School and Todd Milbourn of Washington University in St. Louis offered two possible explanations for the results, each of which has been supported by other research.[125] First, they theorize that issuers will "shop" for the CRA that will rate it the highest.[126] Second, they explore the possibility that the incentive to maintain a good reputation is diminished when more competitors are present.[127]

The idea of "rating shopping" is that an issuer will seek out the agency that will provide the highest credit rating.[128] Because different agencies can interpret the same information differently,[129] issuers can seek out the agency that will provide it with the best score. It follows that the greater number of agencies competing, the more shopping options issuers will have. To adequately compete in the industry and offer a "better" product to their customers, the agencies will force each other to provide higher—and less accurate—ratings.[130] This incentive system may please issuers, but it is contrary to the desires of the investors who seek reliable information.[131] Presumably, this issue is less likely to come about with less competition because there are fewer shopping options, meaning less pressure among competitors to inflate ratings.[132]

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124 *See, e.g.*, Heski Bar-Isaac & Joel Shapiro, *Ratings Quality Over the Business Cycle*, 108 J. FIN. ECON. 62 (2010); Andrew Cohen, *Rating Shopping in the CMBS Market* (Sept. 2011) (unpublished paper), *available at* http://www.federalreserve.gov/events/conferences/2011/rsr/papers/Cohen.pdf.

125 *See* Becker & Milbourn, *supra* note 123.

126 *See id.* at 6.

127 *See id.*

128 Cohen, *supra* note 124, at 2.

129 Cesare Fracassi, Stefan Petry & Geoffrey Tate, *Are Credit Ratings Subjective? The Role of Credit Analysts in Determining Ratings* 2 (Univ. of N.C. at Chapel Hill, Working Paper, 2014), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2230915.

130 *See* Becker & Milbourn, *supra* note 123, at 1.

131 *See* Zukina, *supra* note 116, at 263.

132 *See* Cohen, *supra* note 124, at 2.

Becker and Milbourn's second hypothesis involves CRAs' reputations.[133] CRAs highly value their reputation.[134] In fact, the former VP of Moody's said, "What's driving us is primarily the issue of preserving our track record. That's our bread and butter."[135] Similarly, an S&P representative claimed, "reputation is more important than revenues."[136]

Over time, data can be collected on how accurately a particular company can predict ratings, giving each agency a reputation.[137] Those agencies with better reputations will be more trusted by investors, making them more useful.[138] Thus, issuers who are trying to attract investors will only retain CRAs with trustworthy reputations.

Becker and Milbourn's research determined that reputational concerns are a cause of less accurate ratings.[139] They arrived at this conclusion by finding that agencies care less about their reputations when there are more competitors, and this undermines the quality of ratings.[140] Though they did not specify why this is the case, they found the reputational incentives work best in modest competition.[141]

Research suggests that the unique features of the CRA industry likely contribute to increases in competition, leading to less accurate ratings.[142] The three features that the CRA industry possesses that give rise to this phenomenon are that: (1) the field is controlled by three main agencies; (2) the ratings are paid for solely by the firms being rated and not those relying on the ratings; and (3) there is a basic tension between what the firms whose securities are being

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133 *See* Becker & Milbourn, *supra* note 123, at 6 ("Our findings of reduced ratings quality could be related to a reputation story.").

134 *See id.*

135 *Id.* at 6–7.

136 *See id.* at 6.

137 *See id.*

138 *See* Bar-Isaac & Shapiro, *supra* note 124, at 2.

139 *See* Becker & Milbourn, *supra* note 123, at 10.

140 *See id.*

141 *See id.*

142 *See generally id.*

rated want (high ratings) and what the consumers relying on the ratings want (accurate ratings).[143]

This analysis is relevant in the R&R context given the similarities between the two industries. Like the CRA industry, the R&R field is dominated by few firms,[144] is compensated only by the companies whose products are being rated while the consumers access the platform at no cost,[145] and tension exists between these companies (who want high ratings) and the end-users (who want accurate ratings).[146] The similarities are suspicious enough to raise concerns of competition in the industry.

A major distinction between the two industries is that R&R platforms integrate their technology onto the already existing websites of their customers.[147] If the businesses choose, they can display the name of the R&R provider on their product review web page, but on other customers' sites, the provider's name never appears.[148] Even where the R&R provider identifies itself, it is small and nonobvious to end-users.[149] Thus, it is unlikely consumers ei-

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143 *See id.* at 1.

144 *See* United States v. Bazaarvoice, Inc., No. 13-cv-00133-WHO, 2014 WL 203966, at *23 (N.D. Cal. Jan. 8, 2014) (recognizing that, prior to the merger, Bazaarvoice and PowerReviews were duopolists in the industry).

145 *See id.* at *8 (describing how Bazaarvoice and PowerReviews are compensated by charging their customers a subscription-based fee).

146 *Compare* Becker & Milbourn, *supra* note 123, at 5 (describing how an increase in a star rating can lead to increases in revenues), *with* Michael Luca, *Reviews, Reputation, and Revenue: The Case of Yelp.com* 2 (Harvard Bus. Sch., Working Paper No. 12-016, 2011) (describing how consumers trust online reviews).

147 BAZAARVOICE, http://www.bazaarvoice.com/solutions/ (last visited Sept. 11, 2014).

148 *Compare* Review of Weber Grill, LOWE'S, http://www.lowes.com/pd_404344-505-46510001_4294610385__?productId=3881659&Ns=p_product_qty_sales_dollar|1&pl=1&currentURL=%3FNs%3Dp_product_qty_sales_dollar%7C1&facetInfo=#BVRRWidgetID (last visited Sept. 11, 2014), *with* Review of Weber Grill, HOME DEPOT http://www.homedepot.com/p/Weber-Spirit-E-310-3-Burner-Propane-Gas-Grill-with-Porcelain-Enamel-Grates-DISCONTINUED-4421001/203435379?keyword=Weber+Spirit+E-310+Black+Porcelain+Enamel+3-Burner#customer_reviews (last visited Sept. 11, 2014). Note that the Lowe's site shows the Bazaarvoice trademark indicating "Authentic Reviews," while the Home Depot site does not indicate that they are using Bazaarvoice technology.

149 *See* Review of Weber Grill, LOWE'S, http://www.lowes.com/pd_404344-50546510001_4294610385__?productId=3881659&Ns=p_product_qty_sales_dollar|1&

ther notice or focus on which R&R company is providing its services.

Because end-users are not financially liable to R&R providers, they lack influence in choosing a provider.[150] Instead, consumers must use whichever technology is provided to them, and they likely cannot differentiate between R&R providers.[151] Thus, businesses are free to "shop" for the provider who will give them increased ratings without affecting the trust of their end-users.[152]

The seemingly transparent nature of R&R platforms does not ensure accuracy. Though a consumer may think he is receiving a full array of accurate ratings because he can see which reviewers posted and what each said, this can be misleading.[153] R&R systems like Yelp.com use specific algorithms to filter reviews.[154] The alleged purpose of these algorithms is to hide what might be a "fake" review, an untrustworthy review, or a review that the company paid someone to write or wrote themselves.[155] It can also eliminate explicit and inappropriate reviews.[156] However, some business owners contend that Yelp.com chooses to filter out good reviews if the establishment does not advertise with Yelp.[157]

Extensive research conducted by Michael Luca, a professor at the Harvard Business School, finds that Yelp.com does not actually

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pl=1&currentURL=%3FNs%3Dp_product_qty_sales_dollar%7C1&facetInfo=#BVRRWidgetID (last visited Sept. 11, 2014).

[150] *See Bazaarvoice*, 2014 WL 203966, at *5–6.

[151] *See, e.g.*, *supra* note 148 and accompanying text.

[152] *See* Becker & Milbourn, *supra* note 123, at 5 (indicating that theories of rating shopping are most compelling in a market for ratings of structured products).

[153] *See Why does Yelp hide reviews?*, WASH. POST (May 21, 2013), http://www.washingtonpost.com/video/thefold/why-does-yelp-hide-reviews/2013/05/21/c860baa0-c199-11e2-8bd8-2788030e6b44_video.html (explaining that the presence of negative reviews instills trust in the consumer).

[154] *See id.*

[155] *Why would a review not be recommended?*, YELP, http://www.yelp-support.com/article/Why-would-a-review-not-be-recommended?l=en_US (last visited Sept. 10, 2014).

[156] *Content Guidelines*, YELP, http://www.yelp.com/guidelines (last visited Sept. 7, 2014) (showing where reviews have been removed for violating Yelp's Content Guidelines or Terms of Service).

[157] *See Why does Yelp hide reviews?*, *supra* note 153.

filter its reviews based on advertising.[158] A public R&R platform like Yelp.com has reputational concerns to consider when devising its algorithm.[159] The incentive to maintain a positive social image is absent in outsourced companies like Bazaarvoice, incentivizing businesses to ratings-shop.[160]

High ratings over the Internet are extremely important to businesses. Luca's research revealed that a one-star increase in a Yelp.com rating leads to a five to nine percent increase in revenues.[161] Conversely, where companies' ratings drop, their business can suffer greatly.[162] For example, a company called Beauty Doctor NV, an electrolysis spa in Northern Virginia, used to have seventy-five customers on a typical day.[163] However, when the company's Yelp.com review dropped to one star, it was left with few appointments daily.[164] Further, discount companies like Living Social and Groupon, would no longer collaborate with Beauty Doctor.[165]

Businesses are incentivized to ratings-shop because of the financial benefits of a high rating and the financial harms of a negative one.[166] In a competitive environment, R&R platforms are incentivized to inflate ratings to satisfy their customers, because there are limited reputational or other restraints on R&R platforms encouraging them to provide accurate information.[167] Whether or not R&R platforms are currently or purposefully providing inaccurate information to consumers, they have the technology and ability to do so, which would make competition within the industry harmful to the trusting consumers who rely upon the industry for much of their purchasing decisions.

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158 *See id.*

159 *See id.* (explaining that Yelp.com reviews are not integrated onto the sites of those being reviewed).

160 *See id.*

161 Luca, *supra* note 146, at 2.

162 *See Why does Yelp hide reviews?*, *supra* note 153.

163 *See id.*

164 *See id.*

165 *See id.*

166 *See* Becker & Milbourn, *supra* note 123, at 5.

167 *See id.* at 1.

III. AVOIDING DECEPTION

The conflict illustrated in the above section is not to say that the merger between Bazaarvoice and PowerReviews should have been allowed, or that monopolies make for a better economy. Rather, it is intended to highlight some benefits that may justify anti-competitive behavior in the R&R industry. However, when these justifications are denied, our legal system must at least find a way to counteract the possibility of inaccurate ratings to protect consumers.

Our legal system has developed many protections to ensure that consumers are not deceived.[168] We have laws against false advertising to help close the information gap between buyers and sellers.[169] We have laws regulating endorsements to ensure buyers know that a celebrity who is promoting a product is only doing so in exchange for money.[170] Likewise, we need regulations in the R&R industry so that consumers are not tricked by seemingly accurate review systems.

The R&R industry might best be suited by government regulation. This section presents two possible ways that the industry could be regulated to protect both direct and indirect consumers: (1) the government can mandate product certification for R&R platforms to ensure that consumers are getting accurate information; and/or (2) the government can increase transparency by requiring platforms to reveal their identity as the provider of an R&R service, and how, if at all, the ratings and reviews are filtered.

A. Product Certification

Product certification is a way to expose certain attributes of a product, to decrease the cost of information gathering for consum-

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168 *See* 15 U.S.C. § 45 (2006) (prohibiting "unfair or deceptive acts or practices in or affecting commerce").

169 *See* 16 C.F.R. §§ 238.0–238.4 (2014) (prohibiting bait advertising).

170 *See* 16 C.F.R. § 255.0 (2009) ("For purposes of this part, an endorsement means any advertising message . . . that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser . . . .").

ers, and to make the product more transparent.[171] Most often product certification is used when consumers cannot identify the important traits of a product even after the purchase is made.[172] For example, the organic food industry must be certified because most consumers will not know whether the food is organic even after consumption.[173] The R&R industry epitomizes this concept.

If an R&R provider were using an algorithm that skews the accuracy of ratings, an end-user reading the ratings would never know of the deception. Imagine an end-user who purchased a product believing it to have a high star-count, and the consumer ended up disliking the product. That consumer will not likely think the R&R provider deceived him; rather, he will probably believe that his taste differs from that of the other consumers. He might be unhappy with the purchase, yet he will not be aware of the trickery used to make the sale and might continue to rely on that information provider in the future.

Such trickery is not condoned in our society nor well tolerated in our legal system. Certifying R&R products can help solve this potential harm. The FTC (the same body that regulates commercial advertising) could certify R&R algorithms used to filter and display reviews to ensure that providers are conveying accurate reviews. This option could be impractical if the algorithms are trade secrets of the company. However, it is possible that the algorithms are not trade secrets or that the FTC could somehow guarantee each algorithm's secrecy.

B. Transparency and Consumer Awareness

The current R&R industry could be changed in two ways to make the systems more transparent to consumers. The first is that users of these systems should be made aware that an algorithm fil-

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[171] *See* Pola Karolczyk, *Product Certification – the next big standard-setting debate?* KLUWER COMPETITION L. BLOG (Mar. 14, 2013), http://kluwercompetitionlawblog.com/2013/03/14/product-certification-the-next-big-standard-setting-debate/.

[172] *See id.*

[173] *See id.*

ters some ratings.[174] Second, consumers should know which R&R providers are integrated into which websites.

Some consumers are probably unaware that R&R systems filter certain reviews and that these reviews are not factored into the average star rating.[175] This is especially problematic when a system makes errors in filtering reviews or filters them for the wrong reasons. Usually, this process is intended to eliminate fake reviews created by the company itself, or vulgar reviews.[176] However, if consumers would like to read the filtered reviews, they should be readily available.

If platforms are using filtration systems, they should be required to disclose that some reviews are filtered and clearly explain how the reviews are filtered. These disclaimers should be in a visible location on each review page. Further, the filtered reviews should be accessible to consumers, even if in another location. For example, Yelp.com provides a hyperlink to its filtered reviews for users who scroll to the bottom of each page.[177] Though this does not necessarily make the site more transparent because a user must scroll through many reviews before even finding this link, it is an example of how consumers may be able to view filtered reviews. Also, consumers should be explicitly notified whether or not filtered ratings factor into a product's star-count, to avoid any possible confusion.

Further, some consumers are probably unaware that companies outsource to commercial providers of R&R.[178] This can be problematic in attributing blames or successes of the software to the commercial R&R providers.[179] In order to help ameliorate this problem, R&R providers should be required to display their trademark somewhere on each review page.

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174 *See supra* notes 153–156.

175 *See supra* notes 153–156.

176 *See How Yelp Helps You Find the Right Local Business*, YELP, http://officialblog.yelp.com/2013/11/yelp-recommended-reviews.html (last visited Sept. 11, 2014).

177 *See id.*

178 *See supra* Part I.B.1.

179 *See supra* text accompanying notes 144–49.

As discussed earlier, the credit rating industry has a strong incentive not to exaggerate ratings because the agencies need to maintain a strong reputation.[180] If R&R providers are required to put their trademark in a visible location on each review page, consumers will come to identify providers and either trust or distrust certain platforms. This will presumably improve accuracy of review algorithms, as R&R providers will have to protect their reputations.

Admittedly, this might not improve competition among the rating agencies. However, it should provide protection to consumers by ensuring that the ratings and reviews that they read are more accurate or improving their understanding of what they are reading. Both of these measures will make the platform more accountable to the consumer, balancing the two sides of the market.[181] This accountability will likely create more accurate ratings by putting a reputational burden on the provider, and will give the consumer more information regarding the technology of the system.

CONCLUSION

The R&R industry might better serve society if it operates as a monopoly. This is because it would have the potential to create efficiencies, foster innovation, and provide more accurate ratings.

This Note argues that the ability of R&R providers to manipulate ratings, the incentives they have to do so, and the fact that they can do so without consumers' knowledge requires some form of regulation of the industry. Without such regulation, traditional antitrust principles are inapplicable to the R&R industry, and the *Bazaarvoice* judgment may be victim to this, and other, fallacies.

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[180] *See* discussion *supra* Part II.C.

[181] *See* discussion *supra* Part I.C (explaining two-sided platforms).