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Antitrust, Consumer Protection, and the New Information Platforms

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BY MARK R. PATTERSON

MARKET INFORMATION delivered by Google, Amazon, Yelp, and similar online platforms has become as important for consumer decision-making as advertising. Indeed, studies show that many consumers rely increasingly on online sources of information, despite concerns about possible manipulation and bias in that information.[1] This suggests that competition law, broadly understood, has a role to play in regulation of online information platforms. But what role? Some commentators argue that the effect of information on demand is the domain of consumer protection law.[2] However, some problems of online information markets, particularly those that cannot easily be characterized as deception, are better addressed by antitrust law.[3]

Consumer protection law is an informational analog of product liability law. Both regulate particular harms that low-quality products can cause: deception in the case of consumer protection and physical harm in the case of product liability. But product liability law is not the only legal constraint that helps to determine the quality of tangible products. On the contrary, it serves only to deter marketing of the most defective products, leaving to competition and to antitrust the task of ensuring that within the remaining range of possible products producers deliver the ones consumers want. Analogously, consumer protection law should not be the sole legal constraint on the delivery of market information. Deception is not the only informational harm that can injure competition, and when information goods are provided in markets distorted by collusion or exclusion, antitrust law should be applicable as well.

In this respect, the information economy presents new problems. Some types of online market information, such as search results and product reviews, are provided in what are best viewed as markets for information. Furthermore, the information is provided not by sellers of the products that are the subject of the information but by a variety of independent information providers, including search engines, ratings and review sites, and price-comparison sites. Information is often the ultimate product of such information providers, rather than advertising for other products, so it is not a good match for consumer protection laws directed at advertising.

Although such information can be skewed in various ways, the skewed information would not necessarily be false or misleading so as to make it subject to consumer protection law. For example, a search engine that in its search results downgraded a potential search competitor or favored its own related products over others' products would not necessarily be providing "misleading" results, at least if there is no requirement of even-handness.[4] And the same would be true for a review site that refused to display positive reviews for sellers that did not buy advertising on the site, or for a price-comparison site that displayed prices only for sellers that paid to be included.[5] Instead, the information in these instances would better be characterized simply as of low quality, just as are some tangible goods that are nevertheless not so dangerous as to make them subject to product liability law.

Admittedly, applying antitrust law to this sort of market information presents some novel issues. For the most part, although antitrust law has been applied to many information products—such as movies, ebooks, patented technology, etc.—it has not typically been applied to information about other products. But in some cases the Supreme Court has emphasized harm to information markets. Two examples are *National Society of Professional Engineers v. United States*[6] and *FTC v. Indiana Federation of Dentists*,[7] where the Court condemned "effort[s] to withhold (or make more costly) information desired by consumers for the purpose of determining whether a particular purchase is cost justified."[8] Moreover, in *Indiana Federation of Dentists* it said that "even if the desired information were in fact completely useless . . . the Federation would still not be justified in deciding on behalf of its members' customers that they did not need the information."[9]

It is true that these cases involved collusion, not exclusion, and the power of information may be more apparent in that context. But the point is that the effect of the collusion was on demand, not on supply (except supply of information), and the Court applied antitrust law. Applying antitrust law

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In choosing between antitrust and consumer protection we should ask not whether information is involved, but whether the relevant information problem is market power or deception. It is informational market power that is becoming increasingly important.

where an information provider has market power is arguably consistent with the Areeda antitrust treatise, too. As will be discussed further below, the treatise would apply antitrust to misrepresentations only where they are "not readily susceptible of neutralization or other offset by rivals."[10] That criterion suggests looking to barriers to entry in the information market and thus makes informational power a key element. In choosing between antitrust and consumer protection we should ask not whether information is involved, but whether the relevant information problem is market power or deception. It is informational market power that is becoming increasingly important.

The Evolution of Information Distribution

Much of the evolution of markets over the last century, at least for individual consumers, has been in product distribution. Specifically, much of product distribution has moved downstream from manufacturers to independent dealers. In the 20th century this transition generally took place in the context of the distribution of physical products. Independent dealers, not manufacturers, became the primary source from which consumers purchased goods. Dealers also promoted the goods and provided information about them, but for the most part did so as part of the distribution chain for the goods themselves. In the 21st century, however, the informational role has become increasingly decoupled from physical distribution. Providers like Google, Yelp, and Expedia provide information but not the actual products themselves.

The 20th-century changes in product distribution required parallel changes in the law. Both product liability law and antitrust responded to the presence of intermediary dealers between manufacturers and consumers. Product liability law made dealers strictly liable for defects in products that they sold but did not manufacture, and antitrust shifted much of its emphasis from horizontal production issues to vertical distribution ones. As suggested earlier, the two bodies of law are complementary, with product liability law providing compensation for defective products and antitrust ensuring competition on product quality within the range of products that fall outside the limits of tort.

Now distribution has changed again with the rise of Internet information intermediaries like Google and Yelp. These firms play key roles in product competition, but not necessarily through distribution of physical products. Instead, they provide information that can determine which products consumers will buy. In some instances, as in the case of Amazon, these Internet firms also deliver products, but even there the delivery of information like reviews and recommendations may be as important as is physical distribution.[11] Thus, just as the primary forum of competition moved first from manufacturing to distribution by independent dealers that provided both physical distribution and associated promotional activities, it has moved now to delivery of information by independent online platforms.

And just as product liability adapted to changes in physical distribution, consumer protection law has responded to changes in information delivery, with the FTC revising its endorsement guidelines and issuing guidelines for "dot com" disclosures and native advertising.[12] Those initiatives, however, do not fully address recent changes in information markets. To address problems like distorted search results or selective inclusion of reviews on review sites or pay-to-play on price-comparison sites,[13] more is needed. Those problems go beyond the deception of individual consumers to implicate market competition in the delivery of information, so antitrust law is the most relevant body of law.[14]

Antitrust and Information Markets

Courts have often been reluctant to apply antitrust to information issues, however. Several months ago the Fifth Circuit Court of Appeals in *Retractable Technologies, Inc. v. Becton Dickinson & Co.*[15] rejected an antitrust claim based on false advertising, relying on a peculiar rationale: "[F]alse advertising alone hardly ever operates in practice to threaten competition. . . . [F]alse advertising simply sets the stage for competition in a different venue: the advertising market."[16] The rationale is peculiar because one would not expect competition in an advertising market to make antitrust inapplicable. If an advertising market is a *market*, one would expect antitrust to apply in that market.

In declining to apply antitrust to advertising information, the *Retractable Technologies* court relied on cases from the Seventh Circuit, which has held that absent coercion "even demonstrably false [c]ommercial speech is not actionable under the antitrust laws."[17] Those Seventh Circuit cases, in turn, relied on the claim that information is not a restraint. For example, in one of those cases the court said that unilateral commercial speech does not violate the antitrust laws unless it "is accompanied by some sort of 'enforcement mechanism' designed somehow to coerce or compel that competitor to heed the admonition."[18]

This reference to enforcement mechanisms arguably misrepresents at least some of the decisions to which the Seventh Circuit pointed,[19] such as *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*[20] The information at issue in *ASME* was an "unofficial" letter on the ASME's stationery criticizing a competitor's product, and the Court did not rely, at least explicitly, on any enforcement mechanism. In fact, the Court said the letter was used "to discourage customers from buying Hydrolevel's product," and that the competitor involved "instructed its salesmen to tell potential customers that Hydrolevel's fuel cutoff failed to satisfy ASME's [standard]."[21] Other cases cited by the Seventh Circuit also involved little in the way of "enforcement" or "coercion."[22]

Thus, the hostility of some courts to information claims is not obviously shared by the Supreme Court. Of course, that information claims should not be summarily rejected by antitrust does not mean that many of them, or many types of them, should prevail. Professors Areeda and Hovenkamp say that "[a] monopolist's misrepresentations encouraging the purchase of its product can fit our general test for an exclusionary practice when the impact on rivals is significant."[23] But they also say that "[b]ecause the likelihood of a significant creation of durable market power is so small in most observed instances—and because the prevalence of arguably improper utterance is so great—the courts would be wise to regard misrepresentations as presumptively *de minimis* for § 2 purposes."[24]

When, then, would that presumption be overcome? A suggestion can be found in Maurice Stucke's comment, responding to Areeda and Hovenkamp, that "[i]f product disparagement is ineffectual, why would any firm, much less a monopolist, engage in it?"[25] A possible response is that informational conduct might be effective in a variety of ways. Misrepresentations and product disparagement can be effective, but, as Areeda and Hovenkamp indicate, they are unlikely to create market power, so they should be "presumptively de minimis for § 2 purposes." That is, they might be effective, but not through injury to market competition.[26] That interpretation is supported by one of the elements that Areeda and Hovenkamp demand to overcome the de minimis presumption: that the harmful information is "not readily susceptible of neutralization or other offset by rivals."[27] That can be interpreted as calling for some sort of barrier to entry in the information market, and hence a market-oriented, antitrust-based approach.

Antitrust and Information Platforms

Thus, antitrust should apply to information problems when those can be shown to be market problems. In fact, there were antitrust cases that involved information "platforms" even before online delivery of information became important. In *Home Placement Service, Inc. v. Providence Journal Co.*,[28] for example, a dominant local newspaper refused to allow a competing provider of apartment rental advertising to advertise in the newspaper's classified pages. The appeals court reversed a judgment for the defendant newspaper, holding that "the Journal was using its dominance in the newspaper advertising market to foreclose competition in the housing vacancy information market."[29]

Home Placement involved a refusal to deal, which makes it arguably similar, for example, to the basic theory of the European Commission's case against Google. The EC's statement of objections "alleges that Google treats and has treated more favourably, in its general search results pages, Google's own comparison shopping service 'Google Shopping' . . . compared to rival comparison shopping services."[30] Alternatively, a platform's treatment of certain sites more or less favorably could be viewed as a skewing of information, not a refusal to deliver it. Whichever perspective one adopts, the following paragraphs describe how such information-based claims could be approached under Sherman Act Section 2 or Article 102 TFEU. The focus here is primarily on power, which distinguishes antitrust enforcement in these cases from consumer protection, but some comments are also offered regarding anticompetitive informational conduct.

Power. For tangible goods and services, market share often accurately reflects the ability of a firm to act without regard to competition. If a firm with a large market share seeks to act anticompetitively—by raising price, for example—smaller competitors may be unable to respond—by selling at a lower price—if they are too small to produce the unmet demand. For information, though, an expansion of capacity often requires only the delivery of more "copies" of information that have already been produced by development of a search algorithm or the accumulation of user reviews. Online platforms, for example, may need only to expand server capacity or bandwidth, neither of which is likely to require expenditures or time on a scale comparable to that required with tangible goods or services.

The focus in evaluating informational power, then, should be on the particular market barriers that could prevent competitors from responding to a dominant firm's provision of low-quality information. One important barrier is the difficulty of distinguishing high-quality and low-quality information. It is not far wrong to say that whenever a consumer is seeking purchasing information, she is likely to find it difficult to evaluate the quality of the information she receives. Competitors, too, will often find it difficult to correct low-quality information provided to consumers. The U.S. Supreme Court recognized a similar problem in *Eastman Kodak Co. v. Image Technical Services, Inc.*[31] There the information at issue concerned the repair costs of Kodak copiers and similar products, and the Court pointed out the difficulty and expense for consumers of obtaining that information. Furthermore, it noted that even "[a] competitor in the equipment market may not have reliable information about the lifecycle costs of complex equipment it does not service or the needs of customers it does not serve."[32]

In the same way, information from online platforms may be difficult or costly for consumers and for competitors to evaluate. There is probably little problem with price information, where at least competitors presumably would easily be able to tell whether platforms are displaying the best prices. Quality information, though, is more problematic. Could TripAdvisor or another Yelp competitor determine whether Yelp included all relevant reviews? And could Bing

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or another search engine determine whether Google's omission of certain sites from its search results is justified because those sites are not valuable? Algorithmic secrecy and the consumer-specific nature of information exacerbate these problems.[33] As a result, the relevant barrier to entry in the information market may not be the inability to deliver sufficient quantities of information, but the difficulty of showing consumers that the information offered is better than alternatives.

This difficulty is in fact used by some commentators to argue that it is inappropriate to apply antitrust to these information providers. For example, Geoffrey Manne and Joshua Wright say that "[r]elevance is a slippery and subjective concept, different for every user and every query, and there is no *a priori* way to define it; as with pro- and anticompetitive conduct, it can be nearly impossible to differentiate between 'relevant' and 'manipulated' results."[34] Manne and Wright make this point in arguing that it is difficult to determine what is anticompetitive conduct in this context, but another implication is that conduct that is in fact anticompetitive (however defined) is less likely to be identified and countered.

A second barrier to competition is that of access to consumers when it matters. If a consumer is using Google and the consumer is delivered a search result that is of low quality, how is Bing to obtain access to the consumer to show it an alternative result? One might ask how this is different from the bricks-and-mortar world, in which a consumer at one store will not be easily accessible to other stores. There are two important differences, however. First, a consumer at a store knows that he or she is seeing only that store's offerings. The consumer is therefore on notice that he or she has incomplete information, in a way that a user of a search engine or price-comparison site that purports or is assumed to display the best options may not be. Second, a consumer in a store will generally be presented with the same products, at the same prices, as are presented to other consumers. That is, there will generally be no customization of the kind that is possible online.

To some extent, this situation echoes cases in which one information provider, like a newspaper or magazine, has refused to allow competitors to advertise in its pages. In the *Home Placement Service* case referred to above, for example, where the defendant newspaper refused to allow a competing provider of apartment rental advertising to advertise in its classified pages, the court focused on the importance of advertising in the newspaper:

> Thus, the relevant product is not all advertising, or even all classified advertising, but merely daily newspaper rental advertising. Defendant offered no rebuttal of plaintiff's substantial evidence, through numerous witnesses, that there was no effective substitute therefor. . . . In short, on the evidence, none of the alternative media identified by the court could be said to be "reasonably interchangeable" with, or competing "on substantial parity" with, the rental columns of daily newspapers.[35]

Online platforms pose similar but more severe problems. In *Home Placement Service*, the ultimate purchase was not made through the *Providence Journal*; rental agencies simply used the newspaper to attract customers, as with traditional advertising. Therefore, there were presumably other avenues (though the court found them unsatisfactory) for reaching consumers. For online platforms, though, the purchasing decision is often made while the consumer is on the platform. A consumer might make a purchase on Amazon, or determine which restaurant to patronize from Yelp, or click straight to a seller's page from Google. The platforms do not just offer advertising—they create platform-based markets, and competitors' ability to reach consumers outside those markets may be of little value.

Additionally, sellers denied equal access to platforms might find it difficult to match the apparent objectivity of the platforms. Consumers of information may view information from platforms like Google and Yelp differently, and less skeptically, than they view advertising from the seller of a product. The apparent independence of online platforms may lead consumers to think that the information they are receiving is more objective than it is. As New York Attorney General Eric Schneiderman said in announcing his office's crackdown on providers of false reviews on online platforms, "What we've found is even worse than old-fashioned false advertising. . . . When you look at a billboard, you can tell it's a paid advertisement—but on Yelp or Citysearch, you assume you're reading authentic consumer opinions, making this practice even more deceiving."[36]

This is a potential problem not just for sellers of products that receive false bad reviews on Yelp or are placed lower in Google's search results than their competitors, but also for direct competitors of Google, such as Bing. Suppose that Bing sought to persuade consumers that Google ranked certain sites too high or too low in its search results. Aside from the difficulty of assessing the contentions as a factual matter, a consumer would have to consider what weight to place on the different context in which Bing provided the information. It would be clear that Bing was providing the information for competitive purposes, but Google search results likely would not be seen so clearly, if at all, as an effort to gain a competitive advantage.

A variation on this problem was present in one of the few deception cases in antitrust, *American Professional Testing Service, Inc. v. Harcourt Brace Jovanovich Legal and Professional Publications, Inc.*[37] Harcourt distributed anonymous fliers suggesting that its competitor, American, was the subject of an SEC investigation and might be involved in a bankruptcy investigation.[38] In fact, American was not being investigated by the SEC, nor was it accused of violations. Yet it is unlikely that American could have persuaded the SEC to issue a denial, and the anonymity of the statements would have made them more difficult to refute because any response from American could have been seen as self-interested. Platforms are not anonymous, of course, but to the extent that they are viewed as objective, they acquire even more informational power.

To be sure, platforms that deliver low-quality information risk reputational harm. But there is evidence that reputation is not always an effective constraint on information providers,[39] in part because of the informational constraints just discussed. Reputation is particularly problematic for search engines. Many searches that a consumer performs on a search engine are for information that a search engine would have no incentive to distort. It is likely only searches related to possible purchases for which there would be such an incentive. Therefore, the experience of consumers is that Google and other search engines deliver exactly the information they want the great majority of the time, so the search engines could establish reputations based on these non-commercial searches and exploit that reputation in commercial ones.

George Akerlof and Robert Shiller describe a similar sort of "reputation mining" in their book *Phishing for Phools*.[40] Their discussion is of credit-rating agencies mining their previously established reputations for trustworthiness to successfully market low-quality information in the form of inaccurate credit ratings. In the search engine example, the idea would be one of mining a reputation for trustworthiness established in non-commercial searches to market low-quality information in commercial searches. To detect the difference in quality, consumers would have to be quite sophisticated in how they evaluated the different search results they received.

Exclusion. The exclusionary effect of a platform's provision of low-quality information would depend on how important the information on a platform is. There have been a number of allegations that Google has engaged in a variety of forms of search bias. Some of these have been made in antitrust suits, though no such suit in the United States has survived a motion to dismiss. More recently, economists and business journalists have conducted studies that appear to confirm such bias, at least in certain contexts.[41] Yelp, too, has been alleged to have used its power unfairly, by threatening removal of positive ratings for sellers that do not purchase advertising.[42]

This is not the place to evaluate these allegations in detail, and in any event the legitimacy of the platforms' justifications, discussed below, may be more important. But the reliance of consumers on information platforms indicates that the practices alleged could cause significant competitive harm. In this respect, the FTC noted in closing its investigation into Google's search bias that Google's algorithm changes "resulted in significant traffic loss to the demoted comparison shopping properties, arguably weakening those websites as rivals to Google's own shopping."[43] The magnitude of this harm may be difficult to quantify, but it would turn on the extent to which consumers rely on those sites. Here the platform's share is indeed important because it is a determinant of the portion of the information market (and, possibly, the product market) from which competitors are foreclosed.

An important aspect of some platform cases is that the platform might not itself be a competitor of the firms injured. Although some of the plaintiffs in cases against Google have been competing "vertical" search engines, and other firms sell products in competition with Google affiliates, some firms potentially injured by Yelp and Google are not themselves competitors of the platforms. There is, therefore, a causation issue here that requires a determination of whether exclusion from the information market causes harm in the underlying product market in a sufficiently direct and significant way.[44] Alternatively, such harm could be viewed as a harm directly in the information market, given that a firm's advertising is lessened in value by the information platform.[45]

Legitimate Business Purpose. The FTC (unlike the EC) terminated its Google investigation without taking action, but not because there was no exclusionary harm. Instead, it accepted that Google might have had a legitimate business justification for its conduct.[46] The justification generally offered by Google is that sites rank lower in search results not for competitive reasons but because the sites fall short in some way. There is unlikely to be a way to assess this justification from an external perspective. The most likely way in which a platform's justification could be rebutted would be internal evidence that it was making decisions regarding which results to display based specifically on competitive advantage. In such an instance, a platform's conduct would seem to lack a legitimate purpose because it would be choosing conduct other than that which would make its product more useful and attractive to consumers.[47]

One might think that this approach would be difficult to implement. Perhaps Google (or another platform) could simply find a proxy for its commercial interests, and use that in its search algorithm. For example, because most of the allegations against Google have been brought by vertical search engines, perhaps Google could claim that vertical search engines are downgraded in its results not to gain a competitive advantage but because searchers do not find vertical search engines to be useful. But antitrust law has considerable experience evaluating justifications to determine if they are pretextual. Google or another platform would presumably have to justify any algorithmic factors by reference to actual evidence of consumer preferences.[48] The goal would not be to interfere with Google's, or any other platform's "editorial" discretion but to determine whether it is truly editorial discretion or competitive advantage that is behind its decisions.

Importantly, the evaluation of such justifications could be both easier and more difficult than in more typical, non-informational cases. It would be easier to the extent that the platform's algorithms, or ad hoc exceptions to them, could reveal specific efforts to exclude. It would be more difficult, however, in that any exclusion would take place not in the real world, where it might be easier to detect, but within the decision-making systems of the platform. In other words, it might be more difficult to make out a prima facie claim of exclusion without discovery, but it might be easier, with discovery, to determine the validity of procompetitive justifications. That makes the dismissal of cases against platforms before discovery even more problematic. The difficulty here is described by Frank Pasquale in his recent book *The Black Box Society*,[49] where he compellingly describes the extent to which we are dependent, in search and other contexts, on firms' internal algorithmic results and decisions. As he says, "Antitrust law flirts with irrelevance if it disdains the technical tools necessary to understand a modern information economy."[50]

Conclusion

Online information platforms present important foundational questions for antitrust law. Does the development of such a platform, and its acquisition of power, create an obligation to act in an even-handed way? Antitrust and other claims against platforms have generally failed in the United States, often on grounds that the plaintiff has failed to adequately define a market or show sufficient power or that the platforms are free to grant or deny their services as they like.[51] Some claims against platforms no doubt should be rejected, but it is also the case that antitrust lacks a well-developed approach to information power and competition. Yet, in a very real sense the forum for competition has moved from the delivery of products to the delivery of information about them. Therefore, if antitrust is to serve its purpose of ensuring effective competition, it must be adapted to apply to online platforms and other information providers. ■

1 *See, e.g.*, Itamar Simonson & Emanuel Rosen, *What Marketers Misunderstand About Online Reviews*, HARV. BUS REV., Jan.–Feb. 2014, https://hbr.org/2014/01/what-marketers-misunderstand-about-online-reviews; Aaron Smith & Monica Anderson, *Online Shopping and E-Commerce*, Pew Research Center, Dec. 19, 2016, http://www.pewinternet.org/2016/12/19/online-shopping-and-e-commerce/.

2 Thomas B. Leary, Self Regulation and the Interface Between Consumer Protection and Antitrust, Speech (Jan. 28, 2004), https://www.ftc.gov/sites/default/files/documents/public_statements/self-regulation-and-interface-between-consumer-protection-and-antitrust/040128deweyballantine.pdf; Thomas B. Leary, *Competition Law and Consumer Protection Law: Two Wings of the Same House*, 72 ANTITRUST L.J. 1147 (2005); Julie Brill, *Competition and Consumer Protection: Strange Bedfellows or Best Friends?*, ANTITRUST SOURCE (Dec. 2010), http://www.abanet.org/antitrust/at-source/10/12/Dec10-Brill12-21f.pdf. Neil W. Averitt & Robert H. Lande, *Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law*, 65 ANTITRUST L.J. 713–14 (1997).

3 Better, but perhaps not best. It is possible that some such problems would be best addressed by *sui generis* solutions. *See infra* note 14.

4 *See generally* Kinderstart.com, LLC v. Google, Inc., Case No. C 06-2057 JF (RS) (N.D. Cal. Mar. 16, 2007); Jack Nicas, *Google Uses Its Search Engine to Hawk Its Products*, WALL ST. J. (Online) (Jan. 19, 2107), https://www.wsj.com/articles/google-uses-its-search-engine-to-hawk-its-products-1484827203; Michael Luca et al., *Does Google Content Degrade Google Search? Experimental Evidence* (Harvard Business School NOM Unit Working Paper 16-035, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2667143.

5 *See* Levitt v. Yelp! Inc., 765 F.3d 1123 (9th Cir. 2014); European Commission, *Comparison Tools: Report from the Multi-Stakeholder Dialogue: Providing Consumers with Transparent and Reliable Information* (Mar. 18–19, 2013), http://ec.europa.eu/consumers/documents/consumer-summit-2013-msdct-report_en.pdf.

6 Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679 (1978).

7 FTC v. Indiana Fed. of Dentists, 476 U.S. 447 (1986).

8 *Id.* at 461; *see also Professional Engineers*, 435 U.S. at 692–93; California Dental Ass'n v. FTC, 526 U.S. 756, 775 (1999).

9 476 U.S. at 462. *But see California Dental Association*, 526 U.S. at 776 (noting court of appeals's reference, citing PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 1505, at 693–94 (1997 Supp.)), to "the supply of information about individual dentists' services," but responding that "the relevant output for antitrust purposes here is presumably not information or advertising, but dental services themselves").

10 3A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION 273 (2d ed. 2002).

11 *See* Marina Lao, *Resale Price Maintenance: The Internet Phenomenon and "Free Rider" Issues*, 55 ANTITRUST BULL. 473 (2010).

12 Fed. Trade Comm'n, Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. Part 255 (revised 2009); Fed. Trade Comm'n, .com Disclosures: How to Make Effective Disclosures in Digital Advertising (Mar. 2013); Fed. Trade Comm'n, Enforcement Policy Statement on Deceptively Formatted Advertisements (Dec. 22, 2015).

13 *See supra* notes 4 & 5.

14 Of course, it is also possible that any regulation of information markets should be done neither by antitrust nor by consumer protection, but by some sort of *sui generis* system. For example, the Consumer Review Fairness Act of 2016 imposes various obligations regarding online consumer reviews, and those obligations do not clearly fit within either consumer protection or antitrust law. *See* Public Law No. 114-258 (2016). It is possible that such ad hoc solutions might better address particular problems of online platforms, though it still seems likely that antitrust's protection of competitive markets would be desirable.

15 842 F.3d 883 (5th Cir. 2016).

16 *Id.* at 895 (internal quotations omitted).

17 Mercatus Group, LLC v. Lake Forest Hosp., 641 F.3d 834, 852 (7th Cir. 2011) (internal quotations omitted).

18 *Id.* at 851 (citations omitted).

19 *See* Schachar v. Am. Acad. of Ophthalmology, Inc., 870 F.2d 397, 399 (7th Cir. 1989) (citing Nat'l Soc'y of Prof'l Eng'rs, Inc. v. United States, 435 U.S. 679 (1978)); Wilk v. Am. Med. Ass'n, 719 F.2d 207 (7th Cir.1983); Moore v. Boating Indus. Ass'ns, 819 F.2d 693 (7th Cir. 1987); Hydrolevel Corp. v. Am. Soc'y of Mech. Eng'rs, 635 F.2d 118, 124–27 (2d Cir. 1980), *aff'd on other grounds*, 456 U.S. 556 (1982); Indian Head, Inc. v. Allied Tube & Conduit Corp., 817 F.2d 938, 946–47 (2d Cir.1987), *aff'd on other grounds*, 486 U.S. 492 (1988)).

20 Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556 (1982).

21 *Id.* at 562. Similarly, the appeals court below, whose decision was actually the one cited by *Schachar*, analogized the conduct to defamation. 635 F.2d at 125.

[22] *Allied Tube*, the other Supreme Court case cited by *Schachar*, said that "[a]greement on a product standard is, after all, implicitly an agreement not to manufacture, distribute, or purchase certain types of products," 486 U.S. at 500, but the Court pointed to no evidence of such an agreement beyond the standard itself, and the court of appeals had said that "over half the states and cities polled either amended the [standard] before adopting it or refused to adopt it at all," 817 F.2d at 946. *See also* Mark R. Patterson, Antitrust Law in the New Economy: Google, Yelp, LIBOR, and the Control of Information 210–11 (2017) (discussing similar issues in *Professional Engineers*).

[23] Areeda & Hovenkamp, *supra* note 10, at 273.

[24] *Id.* at 274.

[25] Maurice E. Stucke, *How Do (and Should) Competition Authorities Treat a Dominant Firm's Deception?*, 63 SMU L. Rev. 1069, 1087 (2010).

[26] *See* Note, *Deception as an Antitrust Violation*, 125 Harv. L. Rev. 1235, 1245 (2012) (observing that "many deceptions do not impact price, output, or market power").

[27] The full test requires "cumulative proof that the representations were clearly false, clearly material, clearly likely to induce reasonable reliance, made to buyers without knowledge of the subject matter, continued for prolonged periods, and not readily susceptible of neutralization or other offset by rivals." Areeda & Hovenkamp, *supra* note 10. The discussion is limited to misrepresentations, though, not to other forms of informational conduct.

[28] Home Placement Serv., Inc. v. Providence J. Co., 682 F.2d 274 (1st Cir. 1982).

[29] *Id.* at 280.

[30] European Commission, Antitrust: Commission Sends Statement of Objections to Google on Comparison Shopping Service (Apr. 15, 2015), http://europa.eu/rapid/press-release_MEMO-15-4781_en.htm.

[31] Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451 (1992).

[32] *Id.* at 474.

[33] These are also central issues discussed in Patterson, *supra* note 22, at 61–86.

[34] Geoffrey A. Manne & Joshua D. Wright, *If Search Neutrality Is the Answer, What's the Question?* (White Paper, Apr. 7, 2011), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1807951.

[35] *Home Placement Service*, 682 F.2d at 280.

[36] NY State Attorney General, Press Release, A.G. Schneiderman Announces Agreement with 19 Companies to Stop Writing Fake Online Reviews, Sept. 23, 2013, https://ag.ny.gov/press-release/ag-schneiderman-announces-agreement-19-companies-stop-writing-fake-online-reviews-and.

[37] Am. Prof'l Testing Serv., Inc. v. Harcourt Brace Jovanovich Legal and Prof'l Pubs., Inc., 108 F.3d 1147 (9th Cir. 1997).

[38] *Id.* at 1150.

[39] *See* Patterson, *supra* note 22, at 57–60.

[40] George A. Akerlof & Robert J. Shiller, Phishing for Phools; The Economics of Manipulation and Deception 23–37 (2015).

[41] Nicas, *supra* note 4; Luca et al., *supra* note 4.

[42] Levitt v. Yelp! Inc., 765 F.3d 1123 (9th Cir. 2014).

[43] Statement of the Federal Trade Commission Regarding Google's Search Practices, In re Google Inc., FTC File Number 111-0163 (Jan. 3, 2013) [hereinafter FTC Google Search Practices Statement].

[44] *See* Streetmap.EU Limited v. Google Inc., [2016] EWHC 253 (Ch.), ¶ 96.

[45] In that case, there would be a challenging issue in the determination of damages. This issue is related to the damages issue to which the Second Circuit pointed in another informational case, that involving the manipulation of LIBOR. *See* Gelboim v. Bank of Am. Corp., 823 F.3d 759, 779–80 (2d Cir. 2016).

[46] FTC Google Search Practices Statement, *supra* note 43.

[47] This is an approach similar to that advocated in James Grimmelmann, *Speech Engines*, 98 Minn. L. Rev. 868 (2014).

[48] *See* Mark R. Patterson, *Manipulation of Product Ratings: Credit-Rating Agencies, Google, and Antitrust*, CPI Antitrust Chron. (Apr. 2012).

[49] Frank Pasquale, The Black Box Society: The Secret Algorithms that Control Money and Information (2015).

[50] *Id.* at 162.

[51] *Yelp! Inc.*, 765 F.3d at 1133–34; Kinderstart.com., Case No. C 06-2057 JF (RS) (N.D. Cal. July 13, 2006).