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Computer Reservations Systems, Airlines, and the Internet

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COMPUTER RESERVATIONS SYSTEMS, AIRLINES, AND THE INTERNET

AIMEE MINICK*

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AMERICANS GO on thousands of business trips and vacations every year. Many potential travelers go through a travel agent to book their trips. The travel agents, in turn, use sophisticated systems to determine the best price and times for their customers to travel and the best available hotels in their destination cities. These systems are called computer reservations systems (CRS). Computer reservations systems are the backbone of the travel agent's business. These systems allow the agent to reserve airline tickets, hotel rooms, and rental cars.

Computer reservations systems first appeared in the late 1970s; since then, they have become increasingly important, almost indispensable, for both travel agents and airlines. Airline companies first developed CRS and still control a majority of the current CRS. The close connection between travel booking (CRS) and travel operation (airlines) led to a climate where legal challenges seemed inevitable. Smaller airlines filed antitrust suits against the airlines that owned CRS.¹ The plaintiffs in these suits claimed that the airlines that controlled the CRS unfairly prejudiced the displays, which in turn affected reservation volume in favor of the CRS owner's airline.²

¹ When the Civil Aeronautics Board reviewed CRS practices, they found actions that may be "analogous to conduct that would be labeled an abuse of monopoly power under section 2 of the Sherman Act, 15 U.S.C. § 2." Carrier-Owned Computer Reservations Systems, 49 Fed. Reg. 11,644, 11,647 (1984) (to be codified at 14 C.F.R. pt. 255).

² See *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 538 (9th Cir. 1991).

After airline deregulation in 1978,³ the Civil Aeronautics Board (CAB) found it necessary to regulate the CRS industry.⁴ The CAB promulgated many administrative regulations.⁵ The regulations dealt with all facets of the CRS industry.⁶ The CAB regulations sought to avoid the problems identified in various antitrust cases.⁷ These regulations, with few modifications, exist today. This comment will examine many topics; one important question it seeks to answer is: "Are the regulations still necessary?"

In the late 1990s, the CRS industry made these systems available to non-travel agent users, via the Internet. The programs allow users to choose a time, date, and destination for travel. The CRS then searches its database to find an acceptable itinerary based on the user's preferences (price, airline, etc.). Internet users may purchase their tickets on-line through secure connections in the system.⁸ This form of travel reservation may soon surpass agent reservation.⁹ Because Internet use of CRS by non-travel agents is new, many are questioning what impact the

³ See Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (codified as amended at 49 U.S.C.).

⁴ It was assumed that when Congress deregulated the airline industry, the absence of economies of scale would increase the number of competitors. In reality though, the existence of CRS reduced airline competition through marketing and pricing structures. CRS owning airlines would bias their flights over other airlines participating in the CRS. This would give the owner of the CRS a competitive advantage in the airline market. In addition, CRS were a barrier to the entry of new and smaller airlines. They could not afford to participate in a CRS, a vital component in competition since most travel agents book through a CRS. These factors, along with others, led to a supposed need for regulation. See Marj J. Leaming, *Enlightened Regulation of Computerized Reservations Systems Requires a Conscious Balance Between Consumer Protection and Profitable Airline Marketing*, 21 TRANSP. L.J. 469, 476 (1993).

⁵ See Carrier-Owned Computer Reservations Systems, 14 C.F.R. §§ 255.1-255.12 (1998).

⁶ The regulations will be discussed more fully in later sections, but include display bias, discrimination among carriers, participation by owner airlines, term of contracts, marketing, and booking information.

⁷ See generally, *Alaska Airlines*, 948 F.2d at 536 (explaining that problems include biasing, small carrier biasing, and violations of antitrust statutes).

⁸ A secure connection is a connection via the Internet in which it would be virtually impossible to "hack" into the system and steal the user's credit card number. In essence, it is a connection that allows safe passing of personal information.

⁹ The DOT recognized the growing field of Internet CRS systems. They stated, though, that there are currently "relatively few bookings through these services." Computer Reservations System (CRS) Regulations, 62 Fed. Reg. 47,606, 47,607 (1997) (to be codified at 14 C.F.R. pt. 255). The DOT also recognized that industry experts believe that the Internet will eventually reduce the importance of

current regulations have or will have on these sites. This comment will examine whether or not the current regulations apply to the Internet CRS or, if in the current business climate, the regulations are still necessary. Because the DOT has called for comments on revisions of the current regulations, this topic is timely.¹⁰ The revision is still not complete. In the interim, the question remains, do the Internet CRS have to conform to the DOT regulations?

This comment will examine the implications of continued regulation of CRS. Part I looks at the development, participation in, and operation of CRS. Part II examines the concerns surrounding CRS. Part III focuses on the legal developments concerning CRS. Because most CRS are owned by airlines that try to get an advantage, there have been many challenges to CRS development and marketing. Part IV focuses on the current Department of Transportation (DOT) promulgated regulations and their continued necessity. Finally, Part V examines how the DOT regulations will apply (or will not apply) to CRS use on the Internet.

I. BACKGROUND

A. DEVELOPMENT OF COMPUTER RESERVATIONS SYSTEMS

1. *Original Computer Reservations Systems*

Before the development of CRS, airline carriers or travel agents working with the carriers sold airline tickets. The travel agent would question the traveler as to his travel needs. The agent would then turn to the Official Airline Guide (OAG), a book containing carrier schedules and fare information.¹¹ Using this information, the travel agent would determine the flights and carriers that could best fit the customer's needs.¹² The agent would next turn to the carrier tariffs, volumes con-

CRS. *See id.* at 47,608. An important note, though, is that Internet travel information is facilitated through existing CRS.

¹⁰ *See generally* Computer Reservations System (CRS) Regulations, 62 Fed. Reg. 47,606 (1997) (to be codified at 14 C.F.R. pt. 255). The DOT keeps extending the sunset date of the CRS regulations. Currently, the regulations remain in force until March 31, 2001. *See* Third Extension of Computer Reservation Systems (CRS) Regulations, 65 Fed. Reg. 16,808, 16,809 (2000) (to be codified at 14 C.F.R. pt. 255).

¹¹ *See* Carrier-Owned Computer Reservations Systems, 49 Fed. Reg. 11,644, 11,648 (1984) (to be codified at 14 C.F.R. pt. 255).

¹² *See id.*

taining the fare, rules, and restrictions for each flight.¹³ The agent would then call the air carrier to confirm the price and availability and to make a reservation for the traveler.¹⁴ Finally, the agent would write the airline ticket by hand to complete the process.¹⁵

In the 1960s, the first attempt at a CRS was under the name of Automatic Travel Agency Reservations System (ATARS).¹⁶ This was to be a joint venture among travel agents and twenty-one different airlines.¹⁷ This failed, in part, due to an early investigation by the Civil Aeronautics Board (CAB).¹⁸ The CAB investigated the proposal to examine the possible impact of an industry-wide, single system on the air transportation industry.¹⁹ The CAB refused to grant antitrust immunity to the proposed system.²⁰ Accordingly, the project was abandoned.

Soon after, in 1976, both American Airlines and United Airlines announced that they would separately develop their own CRS.²¹ TWA soon followed in announcing that too would develop its own system.²² The "traditional" process of finding and reserving seats on airlines was cumbersome.²³ In response, airlines began developing their own in-house computer reservation systems.²⁴ It was only a matter of time before these in-house systems were expanded to be an industry-wide system.²⁵

Airline deregulation also began to emphasize the necessity of these systems.²⁶ The systems became necessary after deregulation because the number of fare and service offerings grew.²⁷ In

¹³ See *id.*

¹⁴ See *id.*

¹⁵ See *id.*

¹⁶ See Leaming, *supra* note 4, at 471.

¹⁷ See *id.* at 472.

¹⁸ See *id.* The CAB was the government agency charged with regulating the airlines. See *infra* Part III.B.1.

¹⁹ See *id.*

²⁰ See *id.*

²¹ See Donald J. Boudreaux & Jerome Ellig, *Beneficent Bias: The Case Against Regulating Airline Computerized Reservation Systems*, 57 J. AIR L. & COM. 567, 571 (1992).

²² See Carrier-Owned Computer Reservations Systems, 49 Fed. Reg. 11,644 11,649 (1984) (to be codified at 14 C.F.R. pt. 255).

²³ See *supra* notes 11-15 and accompanying text for a discussion of the "traditional" process.

²⁴ See Carrier-Owned Computer Reservations Systems, 49 Fed. Reg. at 11,648.

²⁵ See *id.*

²⁶ See *id.*

²⁷ See *id.*

addition, fare and schedule changes became more frequent.²⁸ Those in the industry needed a computer-based system able to deal with vast amounts of information. New carriers also entered the market after deregulation.²⁹ This too required a sophisticated system able to deal with the ever-increasing number of flights.

Computer reservations systems and their development quickly became an industry.³⁰ The CAB recognized in 1984, "that CRS's [sic] have become the primary information and distribution resource for airlines and travel agents."³¹ CRS vendors have since captured a niche in the travel industry. Most travel agencies use CRS and most airline sales are through CRS.³²

There have been many different CRS in the past; most of which have been owned by airline companies. For example, in 1983 there were six different CRS: Apollo, owned by United; DATAS II, owned by Delta; MARS PLUS, developed by ITT in conjunction with various airlines; PARS, operated by TWA; Sabre, owned by American; and SODA, operated by Eastern.³³

Due to consolidations and closures there are currently only four domestic CRS. These include Sabre, Apollo, Worldspan, and System One/Amadeus.³⁴ Sabre recently spun-off from American Airlines,³⁵ Apollo is operated by Galileo International which is owned by United Airlines, Worldspan was formed through a merger of Trans World Airline's and Delta's systems and was joined by Northwest Airlines, and System One, was developed by Eastern Airlines and acquired by Continental Airlines.³⁶ Galileo (Apollo) has public shareholders, it is not wholly

²⁸ See *id.* For example, airline carriers change about 133,000 fares and more than 3,000 flight schedules in a typical day. See Leaming, *supra* note 4, at 475.

²⁹ See Carrier-Owned Computer Reservations Systems, 49 Fed. Reg. at 11,648.

³⁰ See Leaming, *supra* note 4, at 472. ("When the major airline carriers developed their CRSs, a new industry emerged.")

³¹ Carrier-Owned Computer Reservations Systems, 49 Fed. Reg. at 11,648.

³² See Leaming, *supra* note 4, at 472. ("By 1987, 95 percent of all domestic travel agencies used CRSs and travel agents booked 92 percent of the domestic airline sales through them.")

³³ See Carrier-Owned Computer Reservations Systems, 49 Fed. Reg. at 11,649.

³⁴ See Kevin J. Johnson, *Computer Reservations System Participation: Is It Still Necessary for Smaller Carriers?*, 11 SPG AIR & SPACE LAW 1, 1 (1997).

³⁵ See SABRE, *AMR Completes Sabre Spin-Off*, News Release, Mar. 16, 2000 (visited Apr. 14, 2000) <http://ir.stockmaster.com/wc/form/P1?template=ir/TSG/view_article2&Symbol=TSG&first=&ArticleID=SM-TSG-20000316a>.

³⁶ See Robert F. Barron II, *Code-Share Agreements: A Developing Trend in U.S. Bilateral Aviation Negotiations*, 72 IND. L.J. 529, 536 (1997); Fair Displays of Airline

owned by the airline.³⁷ Sabre and Apollo are the two largest systems. In 1999, the Sabre Group had revenues of \$2.4 billion.³⁸ Galileo's (Apollo) revenue in the same year was \$1.5 billion.³⁹

In conclusion, many factors led to the development of CRS. Airline deregulation was probably the most important of these. In addition, travel industry growth also propelled development. Because of their ability to manage a vast amount of travel information, the CRS have become more important and possibly indispensable to the travel industry.

2. Internet Computer Reservations Systems

Many Internet sites allow users to access CRS. Sabre offers www.travelocity.com; Galileo originally developed www.travelpoint.com, which is no longer available, but they have now acquired www.trip.com; Worldspan controls www.worldspan.net⁴⁰; and Amadeus offers www.amadeus.net. These are the same systems offered to travel agents.

Internet CRS are relatively new. If rated by market share, Sabre and Galileo are the two most popular CRS.⁴¹ Sabre launched its Travelocity site in March of 1996.⁴² Galileo launched its system through Travelpoint November 4, 1997.⁴³ Since then, the use of the Internet to book flights has greatly increased. For example, Travelocity recently broke records with its first million dollar day and six million dollar week.⁴⁴

Services in Computer Reservations Systems (CRSs), 62 Fed. Reg. 63,837, 63,839 (1997) (to be codified at 14 C.F.R. pt. 255).

³⁷ See Fair Displays of Airline Services in Computer Reservations Systems (CRSs), 62 Fed. Reg. at 63,839.

³⁸ See SABRE, *Corporate Facts* (visited Apr. 14, 2000) <http://www.sabre.com/about/corp_facts.html>.

³⁹ See Galileo, *1999 Financials* (visited Apr. 14, 2000) <<http://www.galileo.com/investor/fin/invfin99.htm>>.

⁴⁰ Worldspan is provided through Tampa Travel Service, Inc. See Worldspan, *Dates & Destinations* (visited Apr. 14, 2000) <<http://www.worldspan.net>>.

⁴¹ See Computer Reservations System (CRS) Regulations, 62 Fed. Reg. 59,784, 59,785 (1997) (to be codified at 14 C.F.R. pt. 255).

⁴² See SABRE, *Travelocity Breaks On-Line Sales Records with First \$1 Million Day and First \$6 Million Week* (last modified July 29, 1998) <<http://www.sabre.com/news/new98729a.htm>>.

⁴³ See Galileo, *Galileo International Announces Global Launch of Travelpoint.com*, News Release, Nov. 4, 1997 (visited Apr. 14, 2000) <<http://www.galileo.com/investor/fml>>.

⁴⁴ See SABRE, *Travelocity Breaks On-Line Sales Records with First \$1 Million Day and First \$6 Million Week*, (last modified July 29, 1998) <<http://www.sabre.com/news/new98729a.htm>>.

Travelocity provides reservation capabilities for more than "420 airlines, more than 40,000 hotels and more than 50 car rental companies."⁴⁵

On the Amadeus web site, users must actually purchase the ticket through a travel agent. The site states "[i]f you are new to Amadeus, you will have to find a travel agent to handle your bookings."⁴⁶ Using this system, people may only check on flight availability and price. Internet users on the Travelocity, Trip.com, and Worldspan sites may actually book and purchase tickets to be mailed or picked up at the airport. These systems allow Internet users to bypass travel agents entirely.

In addition to allowing non-travel agents to use CRS on-line, many companies have developed sites for use by travel agents. For example, EasySABRE is used by travel agents on-line.⁴⁷ In addition, there are other various sites such as www.airtickets.com, which allow registered travel agents to use airfare consolidators through multiple CRS.⁴⁸

B. PARTICIPATION IN COMPUTER RESERVATION SYSTEMS

"[V]irtually all U.S. airlines have found it essential to distribute their services through each of the four CRSs operating in the United States due to two factors: the importance of travel agencies in the distribution of airline services and each travel agency's predominant use of a single system."⁴⁹ These two factors are an important part of the decision of air carriers, especially smaller carriers, to participate in CRS.

In 1987, ninety-five percent of travel agents subscribed to a CRS.⁵⁰ In addition, ninety-two percent of ticket sales were booked through a travel agency.⁵¹ Air carriers cannot ignore these statistics. Most travel agencies subscribe to only one

⁴⁵ See *id.*

⁴⁶ Amadeus, *Amadeus.net* (visited Apr. 14, 2000) <http://www.amadeus.net/home/en/bookings/index_ta.htm>.

⁴⁷ See <<http://www.easysabre.com>>.

⁴⁸ Airfare consolidators are businesses, like the aforementioned site and Council Travel, which buy large blocks of airline tickets at reduced prices. These reduced prices allow the businesses to sell airline tickets to customers at greatly reduced fares.

⁴⁹ Computer Reservations System (CRS) Regulations, 61 Fed. Reg. 42,197, 42,198 (1996) (to be codified at 14 C.F.R. pt. 255).

⁵⁰ See Johnson, *supra* note 34, at *9.

⁵¹ See *id.*

CRS.⁵² Therefore, the airline companies, even smaller carriers, usually must participate in all of the available CRS in order to compete with other airlines. This reliance on CRS has allowed the CRS industry to dictate its own terms for participation in the system.⁵³ This is a problem because the terms of the CRS owner may not be favorable for competing airlines or for travel agents. Because of the structure of the CRS industry, however, the competing airlines and travel agencies really have no other choice but to participate on the CRS vendors' terms if they plan to compete in the travel industry. This has caused the anticompetitive problems discussed in Part II.

C. OPERATION OF COMPUTER RESERVATIONS SYSTEMS

1. *Travel Agent Operation*

"A CRS consists of a periodically-updated central database that contains information on airline services and other travel services sold through the system."⁵⁴ The flow of information is almost instantaneous. Airlines load their fares electronically through the Airline Tariff Publishing Company (ATPCO).⁵⁵ ATPCO is a distribution system owned by twenty-four different international and domestic airlines.⁵⁶ This company currently collects information from over 550 airlines and distributes it to CRS (e.g., Amadeus/System One, Galileo International, and Sabre).⁵⁷ This database creates efficiencies in the process by per-

⁵² See *id.* In addition, many CRS make it very difficult for travel agencies to subscribe to more than one CRS. The CRS restrict travel agents by requiring that a certain percentage of bookings must be by their system. This percentage is always greater than fifty percent. See Carrier-Owned Computer Reservations Systems, 49 Fed. Reg. at 11,651.

⁵³ See Computer Reservations System (CRS) Regulations, 62 Fed. Reg. at 59,784. (The terms for participation can include equipment clauses, participation levels for travel agents, and parity clauses for competing airlines.)

⁵⁴ Computer Reservations System (CRS) Regulations, 62 Fed. Reg. 59,313, 59,314 (to be codified at 14 C.F.R. pt. 255).

⁵⁵ See Leaming, *supra* note 4, at 474.

⁵⁶ These include: Air Canada, Air France, Alaska Airlines, Inc., Aloha Airlines, Inc., American Airlines, Inc., British Airways, Canadian Airlines International, Ltd., Chicago Helicopter Airways, Inc., Continental Airlines, Inc., Delta Air Lines, Inc., Federal Express Corporation, Hawaiian Airlines, Inc., Iberia Air Lines of Spain, Japan Airlines, KLM Royal Dutch Airlines, LA Helicopter, Inc., Lufthansa German Airlines, Northwest Airlines, Inc., Reeve Aleutian Airways, Inc., Scandinavian Airlines System, Swissair, Trans World Airlines, Inc., United Air Lines, Inc., US Airways, Inc. See ATPCO, *Our Owners* (visited Jan. 5, 1999) <<http://www.atpco.net/setabout.html>>.

⁵⁷ See ATPCO, *About ATPCO* (visited Jan. 5, 1999) <<http://www.atpco.net/setabout.html>>.

mitting each airline to submit its information via ATPCO, thereby giving each CRS the opportunity to access a single source of fare-related data.⁵⁸ The CRS and airlines subscribe to the ATPCO. To the CRS, ATPCO offers automated data subscriptions of passenger fares, rules, routings, cargo rates, and car rental rates.⁵⁹ The CRS then provides the ATPCO information to their subscribers, the travel agents.

The CRS system itself is made up of computer terminals, printers, and telecommunications links located in the travel agent's office, usually leased from the CRS company.⁶⁰ This computer is connected, via modem, to the CRS master computer. It allows travel agents to determine "schedule, fare, and seat availability information for every airline that subscribes to the CRS."⁶¹ In addition, the travel agent can reserve a seat for the customer and print out tickets.⁶² The reservations are made through the CRS by routing the information provided by the travel agent to the central database of the CRS vendor, which then relays the information to the air carrier.⁶³

2. Internet Operation

Anyone (travel agents or not) may log on to a CRS on-line. All four CRS have web sites.⁶⁴ Most of the sites require that the user have a user name and a password to enter.⁶⁵ This is easily obtained on first entry to the site. Users simply enter name, e-mail, password choice, address, and travel preferences. The system creates a user profile and then the user can automatically access the site. After entering a name and password, the system allows the user to choose from many options including airline, hotel, and/or car reservations.

⁵⁸ See *id.*

⁵⁹ See *id.*

⁶⁰ See Leaming, *supra* note 4, at 474.

⁶¹ *Alaska Airlines, Inc. v. United Airlines, Inc.* 948 F.2d 536, 538 (9th Cir. 1991).

⁶² See *United Airlines, Inc. v. Civil Aeronautics Bd.*, 766 F.2d 1107, 1109 (7th Cir. 1985).

⁶³ See Leaming, *supra* note 4, at 475.

⁶⁴ See *supra* notes 38-40, 46 and accompanying text for Internet addresses of the CRS.

⁶⁵ The passwords seem to be a marketing tool for the company providing the site. For example, Travelocity states: "We . . . use information you provide during member registration or as part of the reservation process to customize the content of our site to meet your specific needs and to make product improvements to Travelocity." Travelocity, *Privacy Policy* (visited Feb. 18, 2000) <<http://www2.travelocity.com/about/privacy.html>>.

To obtain airline tickets, users enter the time, date, and cities of both departure and return. They may also enter one or more of several preferences: airline carrier, price, etc. After all the required information has been entered, the system checks its database and returns several different travel options.

II. CONCERNS REGARDING COMPUTER RESERVATION SYSTEMS

A. BIASING

Biasing is a serious concern in the CRS industry, it is defined as "displaying flight information in a way that favors their [CRS owners] own flights."⁶⁶ Biasing became a noticeable problem in the early 1980s. The Department of Transportation found that display bias was "rampant" before regulation began.⁶⁷

Biasing is a problem of "deception."⁶⁸ Many people did not realize that when they talked to a travel agent and asked him to book them on the most convenient flight the agent would be using a "reservation system tilted in favor of the carrier that sold him the system."⁶⁹ In reality, however, CRS carriers biased the displays in favor of their own services.⁷⁰ This inhibits a travel agent's ability to provide objective advice.⁷¹

The ability of the CRS to control biasing is created by the industry itself. Because airlines must participate in all systems due to the role of travel agencies in airline distribution and the agencies' reliance on CRS, each CRS is able to dictate its terms for airline participation.⁷² The CRS control of the terms of participation gives travel agents and airlines little leverage to question bias.

There is great potential for airlines to bias their displays. Airlines would use their system to "prejudice airline competition and give consumers misleading or incomplete information in order to obtain more bookings."⁷³ In addition, the Department of Justice found that "airlines which own computerized reserva-

⁶⁶ *United Airlines*, 766 F.2d at 1107.

⁶⁷ See Boudreaux & Ellig, *supra* note 21, at 573.

⁶⁸ See *United Airlines*, 766 F.2d at 1113.

⁶⁹ *Id.*

⁷⁰ See Carrier-Owned Computer Reservations Systems, 49 Fed. Reg. 11,644, 11,647 (1984) (to be codified at 14 C.F.R. pt. 255).

⁷¹ See *id.*

⁷² See Computer Reservations System (CRS) Regulations, 62 Fed. Reg. at 59,784.

⁷³ Computer Reservation System (CRS) Regulations, 62 Fed. Reg. at 47,607.

tion systems use them to weaken competition from other airlines."⁷⁴

CRS vendors were often biasing the algorithms⁷⁵ used to determine priority on the screen by weighting specific criteria designed to produce the result that their flights were a "better fit."⁷⁶ In this way, for example, CRS vendor X (airline owner X) can instruct the computer CRS program to find X a better choice for the customer (using price, route, or on-time variables). There are dangers in the process even if airline X's flight is not the first displayed. For example,

A CRS can display a limited number of flights on its screen at a time; if more flights are available in a market than can be displayed on a single screen, an agent using the CRS must ask to see additional screens to see more flights. Travel agents often work under significant time pressure, and as a result agents are more likely to book a flight that shows up on the first screen than flights appearing on later screens, even if the latter would better meet a customer's needs.⁷⁷

Possibly because the agents believed that the systems were unbiased, they were more likely to book a flight when it appeared on the first screen of the display, and the flight most often booked was the first flight shown on the first screen.⁷⁸

Another type of biasing can occur if fare information is omitted or delayed.⁷⁹ Apparently, new schedules or fares were often not included in CRS.⁸⁰ In addition, some full flights would show up as available and flights with unsold seats would show up as full.⁸¹ Misinformation such as this is just as harmful as the dis-

⁷⁴ *United Airlines*, 766 F.2d at 1110-11.

⁷⁵ Algorithms are the formulas used by a CRS vendor to determine which flights fit the customer's request best and ultimately determine the order of those flights that will appear on the screen in response to a travel request.

⁷⁶ See Leaming, *supra* note 4, at 485. (CRS vendors establish weights for certain criteria such as departure and arrival times, plane types, city pairs, connecting time, etc. By weighting one or more of these criteria, a CRS vendor can almost ensure that their flights are first. The DOT found that United increased its revenues by thirteen percent using this method.)

⁷⁷ Computer Reservations System (CRS) Regulations, 57 Fed. Reg. at 43,785-86.

⁷⁸ See Fair Displays of Airline Services in Computer Reservations Systems (CRS), 61 Fed. Reg. 42,208 (1996) (to be codified at 14 C.F.R. pt. 255).

⁷⁹ See Leaming, *supra* note 4, at 485.

⁸⁰ See Carrier-Owned Computer Reservations Systems, 49 Fed. Reg. 11,644, 11,662 (1984) (to be codified at 14 C.F.R. pt. 255) (sales and special fares may be delayed, resulting in lower bookings).

⁸¹ See *id.*

play biasing previously discussed. CRS owners' control of the flow of information can also harm competition. Special deals from smaller carriers may not timely appear on the CRS display, causing that carrier to book fewer flights and hence, earn less money.

The airlines could also bias using certain criteria to rank flights. For example, they could "select a limited number of connecting points for each city-pair market and construct connections over those points and edit out certain connections, based on various criteria."⁸² This type of biasing, too, could harm competition. The CRS vendor could designate the criteria in a way to choose its own airline carrier on a consistent basis. For example, CRS vendor X (airline owner X) is headquartered in Dallas, Texas. The CRS vendor could construct a program that no matter the customer's other preferences, if he were to fly into Dallas, airline X would always be displayed first. Because it could not be detected easily, the potential for abuse, and therefore impact on competition, is great.⁸³

Other types of display biasing include: omitting types of services available from an airline at a given hub, limiting the amount of information available on competing airlines, creating an advantageous algorithm that consistently chooses the CRS vendor airline over others, and providing inaccurate or skewed information on connecting services.⁸⁴

It seems that a slight bias in display would not make a difference. The Department of Transportation found that "it [the problem of biasing] is big enough to generate millions of dollars in extra passenger revenues for such airlines."⁸⁵ The CAB originally adopted CRS rules to prevent and correct the above-mentioned forms of bias.⁸⁶

B. COMPENSATION AND INCENTIVES FOR TRAVEL AGENTS

Travel agencies must use CRS in order to provide services to their customers. Agents usually subscribe to only one CRS.⁸⁷ There are agents, though, that subscribe to more than one CRS.

⁸² *Id.* at 11,657.

⁸³ *See id.*

⁸⁴ *See* Leaming, *supra* note 4, at 485-86.

⁸⁵ *United Airlines, Inc. v. Civil Aeronautics Bd.*, 766 F.2d 1107, 1110 (7th Cir. 1985).

⁸⁶ *See* Fair Displays of Airline Services in Computer Reservations Systems (CRSs), 62 Fed. Reg. at 63,839.

⁸⁷ *See* Johnson, *supra* note 34, at *9.

In order to increase bookings, CRS give incentives to travel agents who use their system to book flights.

There are four types of incentives that CRS give to travel agents.⁸⁸

First, agents enjoy "override commissions" based on the volume of business booked with the airline offering the bonus. Second, agents may be given membership in the airline's VIP club, providing special waiting area and additional services for members. Third, while flights may appear on the CRS screen as completely booked, agents have overbooking privileges on the carrier that owns the CRS that they are using. This privilege is particularly useful to agents who must reserve last-minute trips—generally for their business customers. Finally, airlines provide free tickets through an award system similar to frequent flyer plans for their passengers. Airlines will also offer sales incentives through free or reduced fare tickets to employees of travel agents.⁸⁹

In addition to these, travel agents may receive funding from CRS vendors to advertise.⁹⁰ These types of incentives not only influence the system used by travel agents but also the level of travel agent participation. These incentives also affect the choices available to consumers. This potential limitation on consumer choices is important for the same reason discussed in the previous section: deception. Many people see travel agents as their agents, not the agents of the CRS vendors. The influence of the CRS inhibits a travel agent's ability to provide objective advice.⁹¹

C. SMALL CARRIER BIASING

CRS are a great advantage to air carriers. They allow numerous travel agents all over the world to access the carrier's schedule and fares. Because travel agents are the primary distribution mechanism and CRS are their main information source, smaller carriers must participate in every CRS or they will be at a disadvantage in relation to their larger competitors.⁹² Smaller carriers are almost required to participate in CRS in order to fill flights.⁹³ Small carriers may not have a large advertising budget

⁸⁸ See Leaming, *supra* note 4, at 482.

⁸⁹ See *id.*

⁹⁰ See *id.*

⁹¹ See *id.*

⁹² See Leaming, *supra* note 4, at 481.

⁹³ See *id.*

required to overcome the need to participate in a CRS.⁹⁴ Instead, small carriers must enter into co-host agreements with at least one CRS.

The co-host agreement is disadvantageous to the smaller carrier. In order to participate in the CRS, they often have to participate on terms that are not especially favorable for the airline. As part of the co-host agreements, the small carrier must pay booking fees to the CRS owner depending on the number of flights booked.⁹⁵ One of the problems created by these co-host agreements is that the smaller less-favored carriers must pay higher booking fees per ticket.⁹⁶ This is even more true when the carrier directly competes with the CRS owner.⁹⁷ The higher booking fees per ticket translate into higher fare prices for the consumer. It has been estimated that CRS vendors make over \$300 million per year from smaller airlines.⁹⁸ This money is generated through the booking fees, mentioned above, from the smaller carriers. These fees far exceed the CRS actual transaction costs.⁹⁹ In fact, booking fees produce a 50 percent rate of return of invested capital for Galileo and a 75 to 90 percent rate of return for Sabre.¹⁰⁰ These co-host agreements, display bias, and compensation and incentives for travel agents are all barriers to a competitive market. They do not allow the travel agent or the display on the CRS system to be unbiased. Each of these problems influence the consumer's choice of travel provider by directly biasing the travel agent's advice as to which carrier fits the consumer's preferences or by indirectly biasing the prices.

III. LEGAL HISTORY

A. ANTITRUST ACTIONS AGAINST AIRLINES

1. *Legal Theories*

When discussing antitrust actions, there are a few concepts that must be understood. First, the Sherman Antitrust Act¹⁰¹ regulates anticompetitive practices. In addition, there are two

⁹⁴ See *id.* at 480.

⁹⁵ See *id.*

⁹⁶ See *id.*

⁹⁷ See *id.* at 480-81.

⁹⁸ See *id.*

⁹⁹ See *id.*

¹⁰⁰ See *Hearing on the Airline Competition Enhancement Act of 1992*, (H.R. 5466, 138 CONG. REC. H. 8,093 (daily ed. Aug. 12, 1992) (statement of Rep. Oberstar).

¹⁰¹ Sherman Antitrust Act, 15 U.S.C. §§ 1, 2 (1998).

distinct theories that are often discussed. These are the monopoly leveraging argument and the essential facilities doctrine.

The first two sections of the Sherman Act are the important for this analysis.

§ 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.

§ 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony. . . .¹⁰²

Section 1 deals with *concerted activity*, activity between or among more than one company.¹⁰³ Section two deals with *unilateral activity*, activity of a single entity.¹⁰⁴ The Supreme Court has recognized that the Sherman Act "contains a 'basic distinction between concerted and independent action.'"¹⁰⁵ The Court also stated that concerted activity (§ 1 activity) is subject to punishment if it restrains trade; unilateral activity (§ 2 activity), on the other hand, is subject to punishment if it threatens actual monopolization.¹⁰⁶

In the CRS context, Section 2 is the more important section. In order for a plaintiff to recover under Section 2 of the Sherman Act, he must show either actual monopolization or attempted monopolization. *Actual monopolization* requires a showing of two elements: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."¹⁰⁷ A claim for *attempted*

¹⁰² *Id.*

¹⁰³ See *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 541 (9th Cir. 1991).

¹⁰⁴ See *id.*

¹⁰⁵ *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767 (1984) (quoting *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 761 (1984)). In *Copperweld*, the Supreme Court was examining whether or not a parent company and its subsidiary could be in concert for the purposes of the Sherman Act. The Court found that they could not.

¹⁰⁶ See *id.* at 767-68.

¹⁰⁷ *Alaska Airlines*, 948 F.2d at 541 (quoting *Aspen Skiing Co. v. Aspen Highlands Skiing Co.*, 472 U.S. 585, 596 n.19, (1985) (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71, (1966))).

monopolization has two elements: "1) a specific intent to monopolize a relevant market; 2) predatory or anticompetitive conduct; and 3) a dangerous probability of success."¹⁰⁸ Attempted monopolization arises when "the danger of monopolization is clear and present, but before a full-blown monopolization has necessarily been accomplished."¹⁰⁹

a. Monopoly Leveraging

The Second Circuit examined the monopoly leveraging theory in *Berkey Photo v. Eastman Kodak Co.*,¹¹⁰ in 1979. It recognized monopoly leveraging as a distinct cause of action under Section 2 of the Sherman Act. The doctrine, as articulated by the Second Circuit, states that "the use of monopoly power attained in one market to gain a competitive advantage in another is a violation of § 2, even if there has not been an attempt to monopolize the second market."¹¹¹ Other circuits have followed the Second Circuit and have used the monopoly leveraging theory as an independent theory of recovery.¹¹²

There are two parts to the monopoly leveraging doctrine. First, there must be a showing of an unwarranted advantage gained from the use of the monopoly power.¹¹³ Second, the plaintiff must show that the two markets claimed to be leveraged

¹⁰⁸ *Alaska Airlines*, 948 F.2d at 542; *see also* *Catlin v. Washington Energy Co.*, 791 F.2d 1343, 1348 (9th Cir. 1986); *Foremost Pro Color, Inc. v. Eastman Kodak Co.*, 703 F.2d 534, 543-44 (9th Cir. 1983), *cert. denied*, 465 U.S. 1038 (1984).

¹⁰⁹ *Alaska Airlines*, 948 F.2d at 542.

¹¹⁰ 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980). (*Berkey* was one of the largest and most significant antitrust suits in history. The case was unusual because Kodak was both *Berkey's* competitor and supplier in various markets. The issue on appeal dealt with a new type of photo system, the 110.)

¹¹¹ *Id.* at 276.

¹¹² *See, e.g.,* *Carolina Water Serv., Inc. v. City of Winston-Salem*, 61 F.3d 1 (4th Cir. 1998); *St. Louis Convention & Visitors Comm'n v. National Football League*, 154 F.3d 851 (8th Cir. 1998); *Aquatherm Indus., Inc. v. Florida Power & Light Co.*, 145 F.3d 1258 (11th Cir. 1998); *Great W. Directories, Inc. v. Southwestern Bell Tel. Co.*, 63 F.3d 1378 (5th Cir. 1995); *Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal & Professional Publications, Inc.*, 63 F.3d 1540 (10th Cir. 1995); *Fineman v. Armstrong World Indus., Inc.*, 980 F.2d 171 (3d Cir. 1992).

¹¹³ *See* *Catlin v. Washington Energy Co.*, 791 F.2d 1343, 1346 (9th Cir. 1986); *see also* *Joseph M. Callow, Jr., Cut Throat Competition in the Friendly Skies: Alaska Airlines v. United Airlines*, 948 F.2d 536 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1603 (1992), 61 UNIV. CIN. L. REV. 681, 690-91 (1992).

are different and related.¹¹⁴ Definition of the market however has been difficult and many factors must be taken into account. These factors include geography, product information, and usage demographics.¹¹⁵ The plaintiff must show that there are two distinct markets and that the markets are related because the defendant used its monopoly power to gain an advantage in the second market.¹¹⁶

The monopoly leveraging concept can be applied to the area of CRS. The CRS vendor can use the CRS system to secure a monopoly over certain routes.¹¹⁷ The DOT even claims that "the concept of monopoly leveraging is applicable to CRS's [sic], since each vendor has the power and incentive to use its control of a system to unfairly prejudice the competitive position of its airline rivals."¹¹⁸ The monopoly leveraging concept, however, ignores the fact that, as discussed in Part IV, display bias can be controlled through market forces. "[T]he expected monopoly profits may not exceed the value of revenues earned by selling the premier listing to another airline."¹¹⁹ This theory also seems to ignore the fact that travel agents are more likely to subscribe to the CRS that gives their customers the best deal. While there are lengthy contracts, travel agents can change their subscription. In addition, customers will search for the travel agency that gives them the best deal. As these two elementary examples show, the monopoly leveraging doctrine does not fit well to the reality of CRS and airlines.

b. Essential Facilities

The essential facilities doctrine requires a business that controls an essential facility fails to provide its competitors reasonable access to that facility.¹²⁰ "An essential facility is one which cannot be reasonably duplicated and to which access is neces-

¹¹⁴ See Callow, *supra* note 113, at 691. (For example, the CRS industry and the airline industry could be considered related. One makes reservations and tracks information for the other.)

¹¹⁵ See *id.*

¹¹⁶ See *id.* at 692.

¹¹⁷ This can occur through display biasing, discussed in *supra* Part II.A.

¹¹⁸ Computer Reservation System (CRS) Regulations, 56 Fed. Reg. 12,586, 12,602 (1991).

¹¹⁹ Boudreaux & Ellig, *supra* note 21, at 581.

¹²⁰ See *In re Air Passenger Computer Reservations Sys. Antitrust Litig.*, 694 F. Supp. 1443, 1451 (C.D. Cal. 1988); *Byars v. Bluff City News Co.*, 609 F.2d 843, 856 (6th Cir. 1979).

sary if one wishes to compete.”¹²¹ This doctrine “imposes liability when one firm, which controls an essential facility, denies a second firm reasonable access to a product or service that the second firm must obtain in order to compete with the first.”¹²² In order to recover under the doctrine of essential facilities, a plaintiff must prove “that it is economically infeasible or impossible to reproduce the facility, and that it imposes a severe handicap on the market entrant if access is denied.”¹²³ The essential facilities doctrine has not been accepted by all circuits and has not been ruled on by the United States Supreme Court.¹²⁴

The question that arises here is: Are CRS essential facilities? There are differing answers to this question. The DOT stated in 1996 that it believes CRS are essential facilities.¹²⁵ Based on the idea that CRS are essential facilities, the DOT required that every system must offer all airlines access to its services on reasonable terms.¹²⁶ The Ninth Circuit, in *Alaska Airlines, Inc. v. United Airlines, Inc.*, however, found that CRS were not essential facilities.¹²⁷ This case occurred before the DOT mandate and no cases have been brought since this declaration.

2. *Alaska Airlines, Inc. v. United Airlines, Inc.*

In 1991, the Ninth Circuit, in *Alaska Airlines, Inc. v. United Airlines, Inc.*, examined both the essential facilities doctrine and the monopoly leveraging doctrine in relation to CRS.¹²⁸ In *Alaska Airlines*, airline competitors sued United and American based on

¹²¹ *In re Air Passenger Computer Reservations Sys. Antitrust Litig.*, 694 F. Supp. at 1451. See also *Fishman v. Estate of Wirtz*, 807 F.2d 520, 539 (7th Cir. 1986).

¹²² *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 542 (9th Cir. 1991).

¹²³ *Callow*, *supra* note 113, at 689.

¹²⁴ See generally *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985). In deciding this case, the Supreme Court refused to address the question of whether or not the essential facilities doctrine was a viable doctrine. “Given our conclusion that the evidence amply supports the verdict under the instructions as given by the trial court, we find it unnecessary to consider the possible relevance of the ‘essential facilities’ doctrine, or the somewhat hypothetical question whether nonexclusionary conduct could ever constitute an abuse of monopoly power if motivated by an anticompetitive purpose. If, as we have assumed, no monopolist monopolizes unconscious of what he is doing, that case is unlikely to arise.” *Id.* at 611 n.44.

¹²⁵ “We concluded in our rulemaking that each of the systems is comparable to an essential facility.” Computer Reservations System (CRS) Regulations, 61 Fed. Reg. at 42,203.

¹²⁶ See *id.*

¹²⁷ See *Alaska Airlines*, 948 F.2d at 549.

¹²⁸ See *id.* at 541-49 (discussing essential facilities and monopoly leveraging).

allegations that their control over a CRS denied them access to an essential facility, thus violating the Sherman Act.¹²⁹ The plaintiffs were subscribers to Apollo and Sabre (the defendants' CRS) and were concerned with the booking fees charged by these particular CRS.¹³⁰ The plaintiffs claimed the defendants had violated Section 2 of the Sherman Antitrust Act by controlling an essential facility.¹³¹ The trial court granted summary judgment for the defendants, failing to recognize monopoly leveraging or essential facilities doctrines.¹³² The plaintiffs appealed to the Ninth Circuit claiming that the district court had incorrectly applied the doctrines.¹³³

a. Monopoly Leveraging

The plaintiffs claimed that the United and American Airlines were using their power in the CRS market to gain a competitive advantage over non-CRS-owner airlines.¹³⁴ The plaintiffs, however, admit that there is no claim under the theory of attempted monopolization because there was no danger that either United or American would monopolize the downstream market.¹³⁵ The Ninth Circuit closely examined the *Berkey* monopoly leveraging theory.¹³⁶ It rejected the monopoly leveraging doctrine as an independent theory of liability.¹³⁷ In fact, the Ninth Circuit went further in stating that it "believe[s] that *Berkey Photo* misapplied the elements of Section 2 by concluding that a firm violates Section 2 merely by obtaining a competitive advantage in the second market, even in the absence of an attempt to monopolize the leveraged market."¹³⁸

¹²⁹ See *id.* at 536.

¹³⁰ See *id.* Airlines joined as plaintiffs included: Alaska Airlines, Muse Air Corporation, Midway Airlines, and Northwest Airlines.

¹³¹ See *id.*

¹³² See *id.* at 538.

¹³³ See *id.*

¹³⁴ See *id.* at 546.

¹³⁵ See *id.* at 545.

¹³⁶ See *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980); see also *supra* notes 110-119 and accompanying text.

¹³⁷ See *Alaska Airlines*, 948 F.2d at 547.

¹³⁸ *Id.*

b. Essential Facilities

Alaska Airlines claimed that United Airlines and American Airlines had control¹³⁹ of an essential facility (the CRS) and thus had violated antitrust laws.¹⁴⁰ The plaintiffs requested that the court take a very broad view of essential facilities doctrine, claiming that the defendants had individually violated the Act even though the defendants' control of the CRS did not give them power to eliminate competition.¹⁴¹ The Ninth Circuit reviewed cases where courts found that the essential facilities applied and analyzed each of cases in turn.

First, the Supreme Court has only dealt with one case involving a single firm's control of an essential facility.¹⁴² In *Otter Tail Power Co. v. United States*, the defendant (the power company) refused to deal with its downstream competitors. The district court found that Otter Tail had attempted to monopolize and had actually monopolized distribution of electric power in its area.¹⁴³ When Otter Tail's retail franchises in small towns expired, it attempted to prevent the small towns from establishing their own municipal electric systems, thereby limiting competition.¹⁴⁴ In refusing to allow competitors access, Otter Tail eliminated any possibility of competition. The district court found that Otter Tail had indeed illegally monopolized the electric power industry in the area.¹⁴⁵ The Supreme Court affirmed this finding, concluding that Otter Tail, acting alone, had attempted to monopolize and had in fact monopolized the market for electrical services.¹⁴⁶

The second case that the Ninth Circuit examined was *MCI Communications Co. v. AT&T*. In *MCI Communications Co.*, the Seventh Circuit found that the essential facilities doctrine did apply.¹⁴⁷ AT&T refused to allow MCI to use its network. MCI sued AT&T for four separate causes of action: monopolization,

¹³⁹ The control, as claimed by the plaintiffs, was individually, not jointly, exercised. Because the plaintiffs did not claim any violation under Section 1 of the Sherman Act (concerted activity, with a much lower legal standard required for showing of violation) the Ninth Circuit did not examine any wrongdoing under that statutory section. *See id.* at 542 n.8.

¹⁴⁰ *See id.* at 536.

¹⁴¹ *See id.* at 542.

¹⁴² *See Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973).

¹⁴³ *See id.* at 368.

¹⁴⁴ *See id.*

¹⁴⁵ *See id.* at 373.

¹⁴⁶ *See id.* at 377-79.

¹⁴⁷ *See MCI v. AT&T*, 708 F.2d 1081 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983).

attempted monopolization, conspiracy to monopolize—under Section 2 of the Sherman Act—and conspiracy of restraint of trade under Section 1 of the Sherman Act.¹⁴⁸ Following a jury verdict of \$600 million, the trial court trebled the damages as required by the Clayton Act, resulting in a judgment against AT&T of \$1.8 billion.¹⁴⁹ The Seventh Circuit found that AT&T refused to grant access to a network that could not be duplicated and that this refusal allowed AT&T to eliminate the competition in a downstream market.¹⁵⁰

The final case examined by the Ninth Circuit is the Second Circuit's decision in *Twin Lab., Inc. v. Weider Health & Fitness*.¹⁵¹ Twin Labs was a competitor of Weider, both were involved in making and marketing nutritional supplements.¹⁵² Twin Labs often advertised in Weider publications. Weider later promulgated a rule that would not allow Twin Labs to advertise in its publications.¹⁵³ Twin Labs asserted three federal law claims: monopolization, denial of essential facilities, and attempted monopolization.¹⁵⁴ The district court granted summary judgment for the defendants.¹⁵⁵ On appeal, the plaintiff-appellant argued only the essential facility and attempted monopolization claims.¹⁵⁶ The Second Circuit found that the denial of access to advertising was not an essential facility stating that "[a]ntitrust law, however, does not require one competitor to give another a break just because failing to do so offends notions of fair play."¹⁵⁷

After examining these cases, the Ninth Circuit found that in order to have a facility considered "essential," the facility must have "the power to eliminate competition in the downstream market."¹⁵⁸ The Ninth Circuit held that in *Alaska Airlines*, the defendants' control did *not* give them the power to eliminate competition since the plaintiffs were free to withdraw from Sa-

¹⁴⁸ See *id.* at 1092.

¹⁴⁹ See *id.* at 1093.

¹⁵⁰ See *id.* at 1133.

¹⁵¹ 900 F.2d 566 (2d Cir. 1990).

¹⁵² See *id.* at 567.

¹⁵³ See *id.*

¹⁵⁴ See *id.* at 568.

¹⁵⁵ See *id.* at 567.

¹⁵⁶ See *id.* at 568.

¹⁵⁷ *Id.*

¹⁵⁸ *Alaska Airlines*, 948 F.2d at 544.

bre or Apollo.¹⁵⁹ Therefore, the CRS was not an essential facility.¹⁶⁰

B. REGULATION OF COMPUTER RESERVATIONS SYSTEMS

1. *Civil Aeronautics Board Authority*

The Civil Aeronautics Board (CAB) promulgated the original CRS regulations in 1984.¹⁶¹ The CAB stated that in the Airline Deregulation Act, Congress placed a high priority on

the prevention of unfair, deceptive, predatory, or anticompetitive practices in air transportation, including the avoidance of "excess market domination and monopoly power" and other conditions "that would tend to allow one or more air carriers unreasonably to increase prices, reduce services, or exclude competition in air transportation."¹⁶²

In fact, the CAB expressly stated that in light of the Airline Deregulation Act, "we believe that we have not only the authority but the responsibility under section 411 to take action to prevent the use of market power in the CRS industry to lessen competition in air transportation."¹⁶³ The Seventh Circuit agreed with the CAB.¹⁶⁴ The court stated that the provision in the Federal Aviation Act that allows the CAB to make rules also empowers it to "make only rules 'pursuant to and consistent with the provisions of' the Act."¹⁶⁵ Section 411 authorizes the Board to "investigate and determine whether any air carrier . . . has been or is engaged in unfair or deceptive practices or unfair methods of competition."¹⁶⁶ In addition, the Board may order

¹⁵⁹ *See id.* at 545.

¹⁶⁰ *See id.* at 549.

¹⁶¹ *See* Carrier-Owned Computer Reservations Systems, 49 Fed. Reg. 11,644 (1984) (to be codified at 14 C.F.R. pt. 255).

¹⁶² *Id.*

¹⁶³ *Id.* at 11,656.

¹⁶⁴ *See* United Airlines, Inc. v. Civil Aeronautics Bd., 766 F.2d 1107 (7th Cir. 1985).

¹⁶⁵ *See id.* at 1111. (Interpreting two sections of the CAB regulations: 14 C.F.R. §§ 255, 256).

¹⁶⁶ *See id.*; *see also* Federal Aviation Act, 49 U.S.C. § 1381 (1985) (codified at 49 U.S.C. § 41712). In fact, the Board has been issuing rules based on this section since 1960; *see, e.g.*, 14 C.F.R. pt. 250 (dealing with overbooking); 14 C.F.R. pt. 254 (dealing with liability of airlines for lost luggage).

the air carriers to stop such behavior.¹⁶⁷ This rule is still currently in place with only slightly modified language.¹⁶⁸

Various agencies of the government were concerned about anticompetitive practices. Complaints were filed about the operation of the CRS systems.¹⁶⁹ The CAB found that "[t]he companion prohibition against 'unfair or deceptive practices' in both section 411 and section 5 of the Federal Trade Commission Act was intended to protect consumers from trade practices which, while not necessarily anticompetitive, were misleading, contrary to recognized public policy or injurious to consumers."¹⁷⁰ They felt that they could "forestall conduct where we find that a potential for abuse exists."¹⁷¹ In 1984, the potential was great enough that the CAB issued regulations regarding the use and operation of CRS.¹⁷²

2. Development of CAB Regulations

The CAB found that "CRSs became essential for airline distribution in the early 1980s"¹⁷³ because of their "predominant role in the marketing of airline services to customers."¹⁷⁴ The CAB determined that the rules regulating the CRS were necessary because travel agencies and their customers could not prevent the

¹⁶⁷ See *id.*; Federal Aviation Act, 49 U.S.C. § 1381 (1985) (codified at 49 U.S.C. § 41712).

¹⁶⁸ *Unfair and deceptive practices and unfair methods of competition*. On the initiative of the Secretary of Transportation or the complaint of an air carrier, foreign air carrier, or ticket agent, and if the Secretary considers it is in the public interest, the Secretary may investigate and decide whether an air carrier, foreign air carrier, or ticket agent has been or is engaged in an unfair or deceptive practice or an unfair method of competition in air transportation or the sale of air transportation. If the Secretary, after notice and an opportunity for a hearing, finds that an air carrier, foreign air carrier, or ticket agent is engaged in an unfair or deceptive practice or unfair method of competition, the Secretary shall order the air carrier, foreign air carrier, or ticket agent to stop the practice or method. 49 U.S.C. § 41712 (1996).

¹⁶⁹ Complaints were filed by many airlines. In addition, many airlines commented that regulations were needed. See generally *Carrier-Owned Computer Reservation Systems*, 49 Fed. Reg. 11,644 (1984) (to be codified at 7 C.F.R. pt. 255).

¹⁷⁰ *Id.* at 11,653.

¹⁷¹ *Id.*

¹⁷² See *Carrier-Owned Computer Reservations Systems*, 14 C.F.R. § 255.1-255.12 (1998). CAB regulations deal with most aspects of the CRS industry including: display bias, enhancements, contracts with participating carriers, and participation. See *infra* Part IV.

¹⁷³ *Computer Reservations System (CRS) Regulations*, 62 Fed. Reg. 47,606, 47,607 (1997).

¹⁷⁴ *Fair Displays of Airline Services in Computer Reservations Systems (CRSs)*, 61 Fed. Reg. 42,197, 42,208 (1996).

systems from offering biased displays and non-CRS-owning airlines did not have the power to keep the systems from biasing their displays.¹⁷⁵ The CAB found the prejudice unacceptable. "In 1982, the Board [CAB], along with the Justice Department's Antitrust Division, had, at the request of a Congress besieged with complaints from travel agents and from airlines that do not own computerized reservation systems, begun to investigate biasing, price discrimination, and related practices."¹⁷⁶

In 1984, due in part to the CAB and Justice Department findings from the investigation requested by Congress, the CAB promulgated regulations for airline-owned and travel agent used CRS. The CAB found "evidence that the owners of computerized reservation systems had engaged in price discrimination and other practices symptomatic of monopoly or market power."¹⁷⁷

The CAB was abolished in October of 1984.¹⁷⁸ "Congress . . . was very concerned to preserve (in the Department of Transportation) authority to enforce section 411."¹⁷⁹ Now, the authority to enforce these regulations lies with the Department of Transportation.

3. DOT Takeover of CAB Authority and New Regulations

After the DOT takeover, the CRS regulations stayed substantially the same. In 1985, the Department of Justice found that CRS owners still possessed substantial market power and that the pricing practices continued to be discriminatory.¹⁸⁰ The DOT announced that it would review the allegations of abuse. In 1992, the DOT promulgated more stringent regulations.¹⁸¹ Again in the late 1990s, the DOT began to get complaints from smaller air carriers.¹⁸² This has prompted a call for another revi-

¹⁷⁵ Carrier-Owned Computer Reservation Systems, 49 Fed. Reg. 32,540, 32,547-548 (1984).

¹⁷⁶ *United Airlines, Inc. v. Civil Aeronautics Bd.*, 766 F.2d 1107, 1110 (7th Cir. 1985).

¹⁷⁷ *Id.* at 1117.

¹⁷⁸ Civil Aeronautics Board Sunset Act of 1984, Pub. No. L. 98-443, §§ 3, 7, 98 Stat. 1703, 1706 (1984).

¹⁷⁹ *United Airlines*, 766 F.2d at 1112.

¹⁸⁰ See Leaming, *supra* note 4, at 478.

¹⁸¹ See *id.* These are the regulations that are currently in force.

¹⁸² These carriers include: Alaska Airlines, Frontier Airlines, Midwest Express, American West, and Delta. See generally Computer Reservations System (CRS) Regulations, 61 Fed. Reg. 42,197 (1996); Fair Displays of Airline Services in Computer Reservations Systems (CRSs), 61 Fed. Reg. 42,208 (1996); Computer Reser-

sion of the rules. In fact, there is currently an open comment period regarding yet another change in the regulations.¹⁸³

IV. CURRENT REGULATIONS

A. COVERAGE OF THE RULES

The regulations governing activity by CRS are actually quite broad, covering most all areas of CRS usage and marketing. The rules prohibit the CRS owners from biasing their display screens based on the identity of the carrier.¹⁸⁴ The CAB and later the DOT mandated that each CRS charge the same booking fee for each airline listed.¹⁸⁵ The regulations also cover contracts between CRS vendors and participating airlines,¹⁸⁶ participation levels by owners and subscribers,¹⁸⁷ the use of hardware and software,¹⁸⁸ and finally, marketing and booking information.¹⁸⁹

The stated purpose of the regulations is to "prevent unfair, deceptive, predatory, and anticompetitive practices in air transportation."¹⁹⁰ The regulations also state that compliance does not exempt persons from antitrust statutes, i.e. the Clayton

variations System (CRS) Regulations, 62 Fed. Reg. 60,195 (1997); Fair Displays of Airline Services in Computer Reservations Systems (CRSs), 62 Fed. Reg. 63,837 (1997); Complaint of Delta Airlines, Inc. against American Airlines, Inc. and SABRE Associates, Inc., Order 96-10-48, 1996 WL 628193 (D.O.T.) (1996).

¹⁸³ See Computer Reservations System (CRS) Regulations (Part 255), 63 Fed. Reg. 3491 (1998).

The Department regulates computer reservations systems owned by airlines or airline affiliates that are used by travel agencies. The current rules are designed to prevent the systems from unreasonably prejudicing the competitive position of other airlines and to ensure that travel agencies can provide accurate and unbiased information to the public. The Department is reexamining its rules to see whether they should be readopted and, if so, whether they should be changed. As part of this action, a small entities review under 5 U.S.C. § 610 will be included.

Unified Agenda, 63 Fed. Reg. 22,304, 22,305-06 (1998).

¹⁸⁴ Note, *The Legal and Regulatory Implications of Airline Computer Reservation Systems*, 103 HARV. L. REV. 1930, 1932 (1990) (footnotes omitted).

¹⁸⁵ See *id.*

¹⁸⁶ See Carrier-Owned Computer Reservations Systems, 14 C.F.R. § 255.6 (1998).

¹⁸⁷ See *id.*

¹⁸⁸ See *id.*

¹⁸⁹ See *id.*

¹⁹⁰ *Id.* § 255.1.

Act.¹⁹¹ Applicability of the regulations is also broad. This rule applies to air carriers that “own, control, operate, or market computerized reservations systems.”¹⁹² In addition, the regulation states that the responsibility for compliance with these regulations lies with the CRS owners.¹⁹³

In addition to applicability of the regulations to companies, the regulations also explicitly state what types of systems are subject to the regulations. The DOT defines “system” as “computerized reservations system offered by a carrier or its affiliate to subscribers for use in the United States that contains information about schedules, fares, rules or availability of other carriers and provides subscribers with the ability to make reservations and to issue tickets, if it charges any other carrier a fee for system services.”¹⁹⁴ This definition has definite implications for the applicability of the regulations to Internet usage.

As discussed earlier, participation in a CRS is vital for most airlines. With a few exceptions, every major U.S. airline participates in a CRS system. The DOT requires that “[i]n ordering the information contained in an integrated display, systems shall not use any factors directly or indirectly relating to carrier identity.”¹⁹⁵ This is helpful for the smaller carriers. In addition, the DOT states that “[s]ystems shall not use any factors directly or indirectly relating to carrier identity in constructing the display of connecting flights in an integrated display.”¹⁹⁶ As a check on the systems, the regulations are written to allow anyone to request and receive information about the criteria and weights used in ordering flights that are displayed.¹⁹⁷

Another problem identified by the CAB and the DOT is that CRS vendors often delayed the posting of fare change, flight availability, and other information. This can cause reduced bookings on smaller air carriers who may otherwise attempt to take advantage of “sales” and “special pricing.” In order to deal with this situation, the regulations require that “[e]ach system shall apply the same standards of care and timeliness to loading information concerning participating carriers as it applies to the

¹⁹¹ See *id.* § 255.1(b). The Clayton Act is a statute that imposes liability on those companies who attempt to monopolize.

¹⁹² See *id.* § 255.2.

¹⁹³ See *id.* § 255.2.

¹⁹⁴ *Id.* § 255.3.

¹⁹⁵ *Id.* § 255.4(b).

¹⁹⁶ *Id.* § 255.4(c).

¹⁹⁷ See *id.* § 255.4(b)(3).

loading of its own information or the information of a system owner."¹⁹⁸

The final problem identified in Part II was that of discriminatory fees. These can be particularly disastrous for smaller carriers. The regulations require that "[n]o system may discriminate among participating carriers in the fees for participation in its system, or for system-related services. Differing fees to participating carriers for the same or similar levels of service shall be presumed to be discriminatory."¹⁹⁹ In addition, participation cannot be dependent on the purchase of any equipment, such as terminal, computers, printers, etc.²⁰⁰ This is important because before the regulations use of a CRS required that the user purchase hardware from the CRS vendor. This made it very difficult for travel agents to change CRS vendors because each change meant more money invested in computer hardware.

As this brief description of the current rules shows, the problems identified by both the CAB in the early 1980s and the DOT in the late 1990s have been addressed through regulation. Unfortunately, problems still exist as evidenced by complaints and the continuation of the regulation.²⁰¹ The DOT does not actively enforce these regulations. The legal system is the main venue for challenging CRS vendor's actions. There is a disagreement with courts (like the Ninth Circuit who found that CRS are not essential facilities) and the DOT (who claims that CRS are essential facilities). This conflict restricts potential party access to the courts because they know that most courts will not apply the essential facilities doctrine to CRS vendors and no other legal doctrine seems to apply.

B. ARE THE REGULATIONS STILL NEEDED?

"The industry's dependence on SABRE and Apollo has resulted in American's and United's domination of the air transportation market. American and United control the agency ticket distribution system and thus are able to manipulate the economics of the current market while controlling the development of new markets."²⁰²

¹⁹⁸ *Id.* § 255.4(d).

¹⁹⁹ *Id.* § 255.6.

²⁰⁰ *See id.* § 255.6.

²⁰¹ *See, e.g.,* Complaint of Delta Airlines, Inc. against American Airlines, Inc. and SABRE Associates, 1996 Order 96-10-48, WL 628193 (D.O.T.) (1996).

²⁰² Paul V. Mifsud, *Computer Reservations Systems and Automated Market Distribution in a Deregulated Aviation Industry*, 1 J.L. & TECH. 143, 146 (1986).

In 1984, when considering the regulations, the CAB found three distinct problem areas.²⁰³ First, display bias seemed prevalent in the industry.²⁰⁴ Second, they felt that the charges for smaller non-owning airlines for access to the CRS were discriminatory.²⁰⁵ Finally, they found that the CRS gave owners a potential advantage over other competitors.²⁰⁶ There have been, in the very recent past, more complaints about the operation of CRS. These complaints revolve around both the booking fees and level of service offered.²⁰⁷ However, the question remains, are regulations from a branch of the federal government still needed? The answer to this question deals with which better serves the customer: regulation or free market competition.

The DOT believes that regulation is the path to a better-served customer. It sees the problems with CRS as a market failure.²⁰⁸ The DOT believes that the market forces are insufficient to promote consumer welfare.²⁰⁹ Before regulation, the problems were many; unfortunately, many of the same problems still exist.

Display bias was prevalent before regulation (and some argue continues today). This, in the eyes of many, is proof of the market failure. The DOT found that "[b]ecause travel agents are busy, they usually booked a flight from the first screen of the display and often booked the first flight displayed As a result, travel agents often booked consumers on less suitable flights because the best flight was in a lower position on the first screen or was on a later screen."²¹⁰ Some observers question whether this is true.²¹¹ It seems illogical that travel agents, in trying to serve their customers, would not scroll to the next screen to find the best deal, if indeed the CRS were biased. Customers may "shop around" to other travel agents or to the In-

²⁰³ See Carrier-Owned Computer Reservations Systems, 49 Fed. Reg. 11,644, 11,645 (1984).

²⁰⁴ See *id.* at 11,645.

²⁰⁵ See *id.*

²⁰⁶ See *id.*

²⁰⁷ See generally Computer Reservation System (CRS) Regulation, 62 Fed. Reg. 60,195 (1997); Fair Displays of Airline Services in Computer Reservations Systems (CRS), 61 Fed. Reg. 42,208 (1996).

²⁰⁸ See Computer Reservations System (CRS) Regulations, 62 Fed. Reg. 47,606, 47,607 (1997).

²⁰⁹ See Boudreaux & Ellig, *supra* note 21, at 576.

²¹⁰ Computer Reservation System (CRS) Regulations, 56 Fed. Reg. 12,586, 12,608 (1991).

²¹¹ See Boudreaux & Ellig, *supra* note 21, at 577.

ternet to find the best price. The argument that a travel agent would not be willing to look through several screens for the best match for the customer does not carry much weight.

The second problem addressed is the idea that the market cannot adequately regulate the CRS market. The main concern is display bias. Again, this is when an owner CRS displays its flights more prominently than the flights of the subscribers. This problem, too, could be controlled through market forces. Market forces would be more efficient than regulation. One suggestion is that the CRS vendor could charge more for the higher priority slots.²¹² It seems that many airlines would pay high prices for their flights to appear in the highest slot.²¹³ This would allow the airlines that value the highest spot to purchase it. The CRS vendor would simply "sell" it to the highest bidder, even if the owner itself were the highest bidder. In this way, the market would serve both competition and the consumer more efficiently than regulation.

Another problem with regulation is that it interferes with innovation.²¹⁴ Because of the concern surrounding algorithms used and possible display bias, any CRS vendor that attempts to vary its methods may be subject to DOT complaints and further regulation.²¹⁵ Choice of algorithms drives the bias; innovation in this area could possibly solve many of the problems. Without the freedom to experiment, the federal government may indeed need to continue regulation.

The airlines have not fully considered a free speech argument. The Competitive Enterprise Institute attempted to intervene in many of the initial suits but courts denied its motions.²¹⁶ The CRS regulations can be seen as speech of an electronic nature, "where a party profiting from the customers attracted by the information supplied the medium for communication."²¹⁷ This argument had been raised regarding the OAG in earlier suits. There, the FTC argued that because the OAG was an essential facility, restrictions on normal freedom of speech were

²¹² See *id.*

²¹³ This rests on the assumption that the travel agent will not take the few extra seconds necessary to find a flight that fits the customers exact preferences for price, service, connections, etc.

²¹⁴ This is true in many areas, not just in the Airline Computer Reservation System arena.

²¹⁵ See Note, *supra* note 185, at 1946.

²¹⁶ See Fred L. Smith, *The Case for Reforming the Antitrust Regulations (If Repeal is not an Option)* 23 HARV. J.L. & PUB. POL'Y 23, 36 (1999).

²¹⁷ *Id.*

justified.²¹⁸ However, the DOT considers CRS essential facilities, the single court to examine the issue found that CRS were not essential facilities.²¹⁹ This argument may be viable in any challenge to the regulations.

Finally, competition in the CRS industry is currently not possible. An unbiased CRS may be more popular than the current CRS on the market. Unfortunately, current regulation stifles development. Travel agents may pay more in the beginning for a CRS that claims to be unbiased and not affiliated with any airline. The market for an objective would be the best method for regulation, not government imposed rules.²²⁰

V. APPLICATION OF DOT REGULATIONS TO INTERNET USE

Therefore, having discussed the development and operation of CRS, the concerns regarding CRS, and current regulations, the question now turns to the future. As in many areas of modern life, the Internet is the medium of the future. E-commerce is a new and developing area of law. The current federal regulations in many areas have not kept up with our emerging electronic reality. As discussed in Part I, CRS have entered the Internet Age and are on-line.²²¹ Users are able to purchase everything from audio equipment to clothing on-line; airline tickets are no exception. By using CRS, home users may not only find airline tickets and learn about their availability, they can actually use their credit cards to purchase the tickets. This has potential impacts for consumers. How would the current regulations apply to CRS usage on the Internet? Do they currently apply? Will the DOT ever regulate Internet usage of CRS? These are important questions to answer in the age of instant information.

A. APPLICATION OF CURRENT REGULATIONS TO INTERNET CRS

There are many obstacles to overcome if the current regulations are to apply to Internet usage of CRS.²²² The purpose of the regulations is to "set forth requirements for the operation

²¹⁸ See *id.*

²¹⁹ See *Alaska Airlines, Inc. v. United Airlines, Inc.* 948 F.2d 536, 549 (9th Cir. 1991).

²²⁰ See Note, *supra* note 185, at 1946.

²²¹ The CRS on-line are the same as those offered to travel agents (APOLLO, SABRE, etc.)

²²² Note: This is a very new area of the law. As a consequence, there are no cases that deal with Internet CRS.

by air carriers and their affiliates of computer reservations systems *used by travel agents* so as to prevent unfair, deceptive, predatory, and anticompetitive practices in air transportation.”²²³ This section could be a serious impediment to regulation of Internet use. Most people who will use the Internet systems to find and book flights will not be travel agents. Therefore, the Internet systems may not fall under the regulation because of this fact.²²⁴ The DOT has explicitly stated that the regulations will not apply to “systems used by persons other than travel agencies.”²²⁵ The DOT also states that “we will not make our rules applicable to systems available to home computer users.”²²⁶ It reasons that there is no proof of prejudice to airline competition.²²⁷ The main question in these statements is whether the DOT envisioned in 1992 that the Internet would become a daily part of most American’s lives. The DOT has begun to examine the impact of the Internet on CRS regulations. It will be a significant part of the study in determining whether to continue and expand the regulations.²²⁸

The regulations also only purport to regulate “air carriers and foreign air carriers that themselves or through an affiliate own, control, operate, or market computer reservations systems *for travel agents*”²²⁹ Again, as in the previous discussion, the regulation specifically states that the rules apply only to computer reservation systems for travel agents. This section, though, is seemingly less restrictive than the previous section. Because of the limitation on owning, controlling, operating, or marketing the systems this could apply to Internet systems. This is especially true if the same company owns a travel agent CRS

²²³ Carrier-Owned Computer Reservations Systems, 14 C.F.R. § 255.1 (1998) (emphasis added).

²²⁴ One clear exception to this will be Worldspan, who in its website makes it clear that the reservations are made through Tampa Travel Service, Inc. See Worldspan, *Dates & Destinations* (visited Apr. 14, 2000) <<http://www.worldspan.net>>.

²²⁵ Computer Reservations System (CRS) Regulations, 57 Fed. Reg. at 42,794.

²²⁶ *Id.* at 42,794-95.

²²⁷ See *id.*

²²⁸ See Second Extension of Computer Reservations Systems Regulations, 64 Fed. Reg. 15,127, 15,128 (1999).

²²⁹ Carrier-Owned Computer Reservations Systems, 14 C.F.R. § 255.2 (1998) (emphasis added). It is important to note that Computer Reservation Systems operated and owned independently of air carriers are also not regulated under this section. This could possibly negate the argument in the previous section about the development and marketing of an unbiased system that would be more attractive to travel agents.

and operates an Internet CRS. The difference here is the use of the word "for" rather than the phrase "used by." In addition, there is no addition of the word "exclusively." One could argue that either of these regulations could apply to Internet CRS. Because of the specific requirement that the regulations cover only CRS owned in part by an airline, Sabre, since its spin-off from American Airlines, is no longer covered by these regulations.

The definition section of the regulation makes it fairly clear that Internet CRS will not be regulated under the current rules. First, the regulations refer to computer reservations systems as "systems." System is defined as a "computerized reservations system offered by a carrier or its affiliate to subscribers for use in the United States that contains information about schedules, fares, rules or availability of other carriers and provides subscribers with the ability to make reservations and to issue tickets, if it charges any other carrier a fee for system services."²³⁰ This section nearly defines Internet CRS out of regulation. First, the emphasis on not only making reservations but also on issuing tickets. Currently, Internet users are not able to issue their own tickets. Second, the definition discusses "subscribers." This section defines this term as well. "Subscriber means a ticket agent, as defined in 49 U.S.C. section 1301(40) that holds itself out as a neutral source of information about, or tickets for, the air transportation industry and that uses a system."²³¹ The definition seems to preclude Internet users from being a "subscribers" and the program used on the Internet as a "system." In addition, the DOT states that "our proposed rule would not apply to instances where CRS's [sic] are used by ticket agents who hold themselves out as agents of selected carriers, nor does it apply to CRS's [sic] used by persons other than ticket agents."²³²

The rules themselves seem to regulate only CRS owned by *airlines* or affiliated with them and used by human *travel agents*. Both of these terms restrict the regulations and do not allow the rules to regulate systems used on-line. The DOT has also stated that it is not attempting to regulate Internet systems.²³³ In promulgating the original regulations the DOT explicitly stated "[w]e propose to regulate only carrier-owned systems, and only those used by travel agents as that term is commonly understood

²³⁰ *Id.* § 255.3.

²³¹ *Id.*

²³² Carrier-Owned Computer Reservations Systems, 49 Fed. Reg. 11,644, 11,668 (1984).

²³³ *See id.* at 11,658.

today"²³⁴ This language seems to imply that any system or user outside this mandate is not covered. Hence, the regulations do not cover Internet use.

Air carriers have also voiced opinions on this topic. The Association of Asia Pacific Airlines has stated that "[t]o the extent that certain parties may want to propose that airline reservation systems offered through the Internet be subject to the CRS regulations, we believe that airline reservation systems do not constitute a 'system' as defined in the U.S. CRS rules, and, hence, should not be covered by them."²³⁵

B. WILL THE DOT REGULATE INTERNET CRS?

As seen from the previous section, the current regulations probably do not apply to Internet usage of CRS. There have been no cases or official rulings on this point. When Internet users log on to the Internet CRS, they may not realize that the system is closely affiliated with an airline. This is the problem of deception recognized by the Ninth Circuit in the *Alaska Airlines* case.²³⁶ The CRS could feasibly bias the displays to enhance the matches for their airline affiliate.²³⁷

The question remains: Will the DOT regulate the Internet? Moreover, if so, how will they accomplish the regulation? The DOT recognizes the importance of the Internet but to date has not specifically regulated Internet CRS usage.²³⁸ In 1997, they stated that "relatively few consumers currently book airline travel through the Internet."²³⁹ Many airlines have appealed to the DOT to resolve the issue. Some have called for increased regulation expanded to include Internet CRS. According to the DOT: "The growth of Internet booking sites has led to requests that we extend the coverage of at least some of our rules to such booking sites."²⁴⁰ The Association of Asia Pacific Airlines

²³⁴ *Id.*

²³⁵ *Asia/Pacific Carriers Target Internet, Abusive CRS Bookings*, AEROSPACE DAILY, Dec. 10, 1997, at A25.

²³⁶ See *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536 (9th Cir. 1991).

²³⁷ Admittedly, this would be a difficult task. Any CRS with on-line connections, would have to produce two entirely different algorithms for use on its system. This seems to be a costly venture only to obtain a few more seats.

²³⁸ See *Fair Displays of Airline Services in Computer Reservations Systems (CRSs)*, 62 Fed. Reg. 63,837, 63,842 (1997).

²³⁹ *Id.*

²⁴⁰ Computer Reservations System (CRS) Regulations, 62 Fed. Reg. 47,606, 47,607 (1997).

(AAPA) has called for the DOT to examine Internet booking.²⁴¹ In addition, "Amadeus (supported by Continental) urges us [DOT] to regulate the displays offered by on-line computer services and Internet sites."²⁴²

The DOT does seem willing to consider regulating Internet usage. The idea has come up in many of its recent publications regarding the CRS rules.²⁴³ The Department has issued a call for public comment on the topic. They also note that "[t]he impact of the Internet, however, is an issue that we intend to consider in detail in our upcoming examination of the CRS rules."²⁴⁴

If the DOT does decide to regulate Internet usage of CRS, how may they go about it? There have been many suggestions on how this could occur. US Airways suggests that "companies providing Internet booking ability be given the option of complying with anti-bias rules or notifying consumers that they do not."²⁴⁵ This would be an information requirement. A regulation dealing with this may mandate that companies at least tell users which company owns and controls the CRS. A second possibility would be for the DOT to require that all CRS use the same algorithm. This would be an extreme solution because it would force all CRS into a single mold, possibly stifling innovation.

One problem is encountered with the above mentioned solutions. The goal of the current regulations is to enhance competition and allow the consumer to have an unbiased answer to his travel questions. When a person calls a travel agent, he assumes that the travel agent is working for him, finding him the best flight to meet his needs. With an Internet CRS, the same may or may not be true. Without the human contact, the expectation may be lower. There may or may not be the expectation that the system is working for the individual and is unbiased.

²⁴¹ See *Asia/Pacific Carriers Target Internet, Abusive CRS Bookings*, AEROSPACE DAILY, Dec. 10, 1997, at A25.

²⁴² Fair Displays of Airline Services in Computer Reservations Systems (CRSs), 62 Fed. Reg. at 63,846.

²⁴³ See generally Fair Displays of Airline Services in Computer Reservations Systems (CRS), 62 Fed. Reg. 63,837 (1997); Computer Reservations System (CRS) Regulations, 62 Fed. Reg. 59,313 (1997); Fair Displays of Airline Services in Computer Reservations Systems (CRSs), 62 Fed. Reg. 63,837 (1997).

²⁴⁴ Fair Displays of Airline Services in Computer Reservations Systems (CRSs), 62 Fed. Reg. at 63,842-43.

²⁴⁵ *US Airways Warns of Continued Upward Spiral in CRS Fees*, AVIATION DAILY, Jan. 12, 1998, at 48.

VI. CONCLUSION

Coming to a conclusion in situations such as this is often difficult. As a society, we are coming into a new age of human existence. The Internet has become and will continue to be the medium of the future. The federal and state governments will soon have to address concerns regarding the Internet. For example, Who owns the Internet? Can it be taxed? How do the Internet and the First Amendment intertwine? The Department of Transportation, too, is currently examining questions about CRS and the Internet.

Society was changing rapidly in the mid-1970s. After deregulation many more airlines formed to serve passengers. Schedules became more intricate to deal with the ever-increasing number of airline passengers. CRS were developed to adapt to this changing society. Information about airline reservations was too voluminous to be adequately controlled by manual operation. It only took a decade before these new systems designed to deal with complicated information developed into an industry itself.

CRS quickly became indispensable in controlling airline information. Because of this importance and dependence on CRS, problems began to arise. Biasing, limiting available information, and providing incentives for travel agents soon began to interfere in fair competition.

Society has now entered yet another era. The 1960s and 1970s saw the beginning of the computer era. The 1990s have become the Internet era. There are many questions about who will "control" or regulate the Internet. This is a special concern for CRS. As it stands now, the DOT regulations do not seem to apply to Internet use by non-travel agent individuals. The definitions in the regulations seem to preclude application to Internet use. There have been many antitrust situations involving CRS in the past. This will probably continue into the future unless the DOT addresses the problem quickly. In the realm of the CRS industry, there is great potential for abuse. Either the government or private party actions will soon determine how much abuse the market can withstand. The DOT, however, will probably be better equipped to deal with the situation found in the travel industry.

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