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Computer Reservations Systems: to Regulate or Not?

Regulation Without Justification?

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The U.S. government has regulated computer reservations systems (CRSs) used by travel agents for almost 20 years.[1] In November 2002, the U.S. Department of Transportation (DOT) issued a notice of proposed rulemaking (NPRM) to consider whether to sunset or extend these rules.[2] (DOT proposes to retain the rules, subject to some significant modifications.) This article addresses two of DOT's tentative findings: first, that DOT has jurisdiction under Section 411 of the Aviation Code[3] to regulate CRSs that are not airline owned; and, second, that the rules are necessary to prohibit CRS vendor conduct that would violate Section 411. On both points, DOT's arguments are unpersuasive.


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Failure to Demonstrate Authority to Regulate

Section 411 authorizes DOT to prohibit unfair and deceptive practices and unfair methods of competition in the sale or provision of air transportation by air carriers (U.S. or foreign) and ticket agents. Although neither Section 411 nor any other statutory provision explicitly authorizes DOT to regulate CRSs, DOT's legal jurisdiction over the systems until relatively recently was not controversial because all four of the major systems were wholly airline owned. That is no longer the case. Today, two of the four systems, Sabre and Galileo, have no airline ownership, and a third, Amadeus, is a public company, majority owned by three European carriers (Lufthansa, Air France, and Iberia) that do not compete in the U.S. domestic market. The fourth system, Worldspan, is being sold by its current owners (Delta, Northwest, and American) to private investors. When Worldspan is sold, no U.S. airline will have an ownership interest in any CRS.[4] The marginalization of airline ownership of the systems raises serious questions about whether DOT has authority to regulate systems that are not airline owned and why, in any event, it should preserve rules that were predicated on airline ownership and adopted to prevent the systems' potential anticompetitive misuse by their airline owners. The NPRM fails to provide a satisfactory answer to those questions.


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In the NPRM, DOT bases its jurisdiction over non-airline-owned CRSs on the assertion that such systems are "ticket agents" directly subject to Section 411. The Aviation Code defines a ticket agent as "a person (except an air carrier, a foreign air carrier, or an employee of an air carrier or foreign air carrier) that as a principal or agent sells, offers for sale, negotiates for, or holds itself out as selling, providing, or arranging for, air transportation."[5] In the NPRM, DOT argues that CRSs are ticket agents because "a system's functions bring it within the definition of ticket agent, since each system 'offers for sale' and 'holds itself out as . . . arranging' air transportation."[6] This argument is unpersuasive for several reasons:

First, DOT ignores the threshold legal requirement that to be deemed a ticket agent, a CRS must act as a principal or an agent in selling or arranging air transportation. By arguing that each CRS vendor offers for sale, and holds itself out as arranging, air transportation, DOT implies that the vendors are agents of the air carriers that participate in their systems. As a matter of law and fact, however, no agency or fiduciary relationship exists between air carriers and CRS vendors or between the vendors and the purchasers of air transportation. The carrier/vendor relationship is one of independent contractors: carriers enter into a written agreement with each system

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Even if a CRS vendor were considered a monopolist and its system an essential facility, the law states that a facility is "essential" only if its control has the power to eliminate competition.

in which they participate, and those agreements specifically disclaim any express or implied agency relationship. The vendors have no legal relationship with airline passengers.

Second, in seeking to characterize vendors as ticket agents, DOT argues that the applicable test is whether the CRSs' functions render them sufficiently "active participants in the sale of air transportation."[7] However, unlike travel agents, the systems do not hold themselves out to the public as agents of the airlines from whom air transportation services may be purchased. The systems are not authorized by the airlines to issue tickets on their behalf; rather, the airlines contract with the CRS vendors for services that enable the airlines to communicate information about their fares, schedules, and seat availability to travel agents who use the systems as a medium for making bookings and issuing tickets to the public on behalf of the airlines. DOT contends that "systems view themselves as responsible for the booking transaction itself, not just for providing a communications link" because they "may require an airline to accept any booking made by a travel agent using the system."[8] Far from denoting any such "responsibility," however, this requirement is nothing more than a way for the vendors to ensure their remuneration for every travel agent booking made using their system.

In sum, DOT's assertion of jurisdiction over non-airline-owned CRSs as ticket agents is unconvincing because such systems do not meet the two key elements of the statutory definition of a ticket agent: they do not act as a principal or agent, nor do they sell or arrange air transportation.

Failure to Demonstrate Violation of Section 411

Even assuming, *arguendo*, that system vendors are ticket agents, DOT has failed to establish in the NPRM that the vendor conduct it proposes to regulate violates Section 411. DOT offers two antitrust theories to support its proposed regulations:[9] first, the essential facilities doctrine, which imposes on the owners of an essential facility an obligation to provide horizontal competitors access to the facility on reasonable terms,[10] and second, the monopoly leveraging doctrine, which holds that "a firm may not illegitimately use its monopoly power in one industry to acquire an unfair competitive advantage in a second industry."[11]

DOT's attempt to apply these antitrust theories to non-airline-owned CRSs inevitably fails because a necessary condition is missing: both the essential facilities and the monopoly leveraging doctrines assume that an upstream monopolist competes in a downstream market, *i.e.,* that the monopolist's conduct harms one or more horizontal competitors. A non-airline-owned CRS, however, does not compete with airlines in the downstream market for air transportation services.[12] Thus, even if such a system were capable of harming competition among airlines, such harm would not impact a competitor.

Essential Facilities Doctrine

DOT's reliance on essential facilities jurisprudence fails for several reasons. First, CRSs do not meet the exacting definition of an essential facility. According to the Ninth Circuit, "[a]s the word 'essential' indicates, a plaintiff must show more than inconvenience, or even some economic loss; he must show that an alternative to the facility is not feasible."[13] The role of CRSs in the distribution arrangements of most carriers may be integral, but it is categorically not "essential." In fact, several of the most successful carriers either do not participate in any system at all (*e.g.*, JetBlue) or do so only to a very limited degree (*e.g.*, Southwest, which for many years was a CRS non-participant and currently participates in only one system, Sabre, at a relatively modest level). Even the larger, network carriers that traditionally have relied most heavily on the systems are finding ways to reduce that reliance by distributing through their own websites. Orbitz, which currently uses Worldspan as its booking engine, has developed "Supplier Link" to bypass the CRSs by directly connecting to airlines' (including American's, Continental's, and Northwest's) internal reservations systems, thereby enabling airlines to avoid paying CRS fees for bookings made on Orbitz.

Second, even if a CRS vendor could be deemed a monopolist and its system an essential facility, antitrust law requires that "[a] facility that is controlled by a single firm will be considered 'essential' only if control of the facility carries with it the power to *eliminate competition in the downstream market.*"[14] There is no evidence—and indeed DOT does not even claim—that any CRS vendor has the power to eliminate any airline from the downstream market by denying that airline an opportunity to participate in its system on reasonable terms. Moreover, CRSs, particularly non-airline-owned systems, have no incentive to eliminate downstream competitors because all that would accomplish is to diminish their actual or potential client base. In short, DOT has failed to demonstrate that any system has the means or incentive to eliminate competition; neither antitrust doctrine nor logic supports DOT's argument.

DOT offers only one case as authority for the proposition that "the essential facility doctrine is applicable when a firm that does not own an essential facility is able to deny reasonable access to its competitors by agreement with the facility's owner."[15] *Hecht v. Pro-Football, Inc.* involved a claim by a group attempting to establish a second football franchise in the Washington, D.C. area that the owners of the only stadium suitable for such purpose refused them access due to a pre-existing exclusive arrangement with the Washington Redskins. The D.C. Circuit found that the trial court should have considered whether the stadium owners had withheld access to an essential facility in violation of Section 2 of the Sherman Act.[16] In a footnote, the court

added that "the essential facility doctrine would also support an allegation that the Redskins' refusal to waive the restrictive covenant [which guaranteed the Redskins' exclusive access to the stadium] constituted illegal monopolization under § 2."[17] DOT's reliance on *Hecht* is misplaced because the case merely stands for the proposition that a firm that controls, and refuses competitors reasonable access to, an essential facility may violate Section 2, even though it does not own the facility. A non-airline-owned CRS vendor, however, is not a monopolist, its system is not an "essential" facility, and, most importantly, it does not compete in the downstream market and thus has no incentive to exclude others from doing so.

Monopoly Leveraging Doctrine

The origin of the monopoly leveraging doctrine is the Second Circuit's decision in the *Berkey Photo* case.[18] Only one other federal appellate court, the Sixth Circuit,[19] has recognized the doctrine as a basis for Sherman Act liability, while the Supreme Court and most other circuits have not addressed it.[20] As DOT fails to note, however, the Ninth Circuit squarely "reject[ed] *Berkey*'s monopoly leveraging doctrine as an independent theory of liability under Section 2" in the specific context of the CRS industry in the *Alaska Airlines* case.[21] The Third Circuit has followed the Ninth Circuit's lead in rejecting the doctrine,[22] and even the Second Circuit has minimized *Berkey*'s authority, referring to its monopoly leveraging discussion as "dicta."[23]

DOT argues that the Fifth Circuit's decision in *LaPeyre v. FTC* supports its monopoly leveraging theory for regulating non-airline-owned CRSs even though such systems do not compete in the downstream market.[24] According to DOT, the *LaPeyre* court found that the Federal Trade Commission (FTC) has authority under Section 5 of the Federal Trade Commission Act[25] to "prohibit practices by a monopolist in one industry that unreasonably restrict or distort competition in the second industry, even if the monopolist does not participate in the second industry."[26] Because DOT's Section 411 authority is analogous to the FTC's Section 5 authority,[27] DOT reasons that it must have similar authority with respect to air carriers and ticket agents.

The *LaPeyre* case, however, is an anomaly that has not been followed by other federal appellate courts[28] or even, as DOT acknowledges, the FTC itself.[29] DOT implicitly recognizes *LaPeyre*'s questionable status when it acknowledges that the Second Circuit, in a directly apposite and more authoritative case, distinguished *LaPeyre*. In *Official Airline Guides, Inc. v. FTC*, the Second Circuit ruled that the FTC lacked jurisdiction to regulate a monopolist publisher of airline schedules on the basis that its refusal to publish the schedules of certain airlines harmed competition in the separate, downstream market for air transportation services because the monopolist did not compete in that market.[30] The *Official Airline Guides* (OAG) court distinguished *LaPeyre* because the defendant in the latter case, a manufacturer of shrimp-peeling machinery, did compete in the downstream shrimp-canning market.[31] The *LaPeyre* defendant also is distinguishable from non-airline-owned CRSs, which, unlike LaPeyre and the OAG are not monopolists, but which, like the OAG, do not compete in the downstream air transport services market.[32]

DOT attempts to contort the *Official Airline Guides* case in its favor by arguing that the Second Circuit endorsed regulation of an upstream monopolist that does not compete in the downstream market if the monopolist "intends to restrain competition in the second market or acts coercively."[33] DOT apparently relies on the court's affirmative statement that "even a monopolist, *as long as he has no purpose to restrain competition* or to enhance or expand his monopoly, and does not act coercively, retains th[e] right" to refuse to deal with other parties.[34] DOT, however, distorts the court's meaning beyond recognition by interpreting this language to imply the reverse as well, i.e., intent to restrain competition is impermissible. In any event, even if DOT's interpretation of selective language from the *Official Airline Guides* case were valid in principle, DOT's argument fails because a non-airline-owned CRS, which does not compete in the downstream market, lacks the means (as well as the incentive) to attempt to monopolize with a "dangerous probability of success," as required under Section 2 of the Sherman Act.[35]

CRS Rules a Problem, Not a Solution

As DOT moves toward finalizing its highly protracted review of the CRS rules, it needs to address the basic questions of whether it has jurisdiction as a matter of law to regulate non-airline-owned or marketed CRSs and whether there is any cognizable basis in law or fact for such regulation. If DOT cannot muster a more compelling rationale for an affirmative response to those questions than it presented in the NPRM, it should recognize the limits of its jurisdiction and abandon its misguided and overreaching attempt to perpetuate and expand the outdated CRS rules, which have become a hindrance to competition and inimical to the public interest.

Notes

1. 14 C.F.R. Part 255 (the CRS rules).
2. Computer Reservations Systems (CRS) Regulations; Statements of General Policy; Notice of Proposed Rulemaking, 67 Fed. Reg. 69366 (November 15, 2002) (Dockets OST-97-2881, 97-3014, 98-4775, and 99-5888).
3. Section 411 of the Federal Aviation Act has been recodified as 49 U.S.C. § 41712.
4. *Worldspan to Be Acquired by Private Equity Firms*, WORLDSPAN PRESS RELEASE, March 4, 2003.
5. 49 U.S.C. § 40102(a)(40).
6. *NPRM*, *supra* note 2, at 69384.
7. *Id.* at 69385.
8. *Id.*
9. *Id.* 69385-87.
10. *Id.* at 69387.
11. *Id.* at 69386-87, *citing* Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 276 (2d Cir. 1979).
12. In fact, the Ninth Circuit has found that those doctrines do not even provide a basis for an antitrust claim against a carrier-owned system. *See* Alaska Airlines, Inc. v. United Air Lines, Inc., 948 F.2d 536 (9th Cir. 1991), *cert. denied*, 503 U.S. 977 (1992).
13. *Alaska Airlines*, 948 F.2d at 544. Even when all of the systems were airline owned and the Internet was not a factor, the Ninth Circuit determined that the systems were not "essential facilities." *Id.*
14. *Id.* (emphasis added).
15. *NPRM*, *supra* note 2, at 69387, *citing* Hecht v. Pro-Football, Inc., 570 F.2d 982 (D.C. Cir. 1977).
16. *Hecht*, 570 F.2d at 993.
17. *Id.* at 993 n.44.
18. Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 276 (2d Cir. 1979).
19. *NPRM*, *supra* note 2, at 69386, *citing* Kerasotes Michigan Theatres, Inc. v. National Amusements, Inc., 854 F.2d 135 (6th Cir. 1988).
20. *See* Advanced Health-Care Services v. Radford Community Hospital, 910 F.2d 139 (4th Cir. 1990); Association for Intercollegiate Athletics for Women v. NCAA, 735 F.2d 577 (D.C. Cir. 1984).
21. *Alaska Airlines*, 948 F.2d at 547.
22. Fineman v. Armstrong World Industries, Inc., 980 F.2d 171, 197-203 (3rd Cir. 1992).

23. Twin Laboratories, Inc. v. Weider Health & Fitness, 900 F.2d 566, 570 (2d Cir. 1990) (characterizing *Berkey* as a tying case, not a monopoly leveraging case); *accord* Virgin Atlantic Airways Ltd. v. British Airways PLC, 257 F.3d 256, 272 (2d Cir. 2001).

24. *NPRM*, *supra* note 2, at 69387, *citing* LaPeyre v. FTC, 366 F.2d 117 (5th Cir. 1966).

25. 15 U.S.C. § 45.

26. *NPRM*, *supra* note 2, at 69387. DOT also cites another Fifth Circuit case in which the court noted in *dicta* that "a monopolist may be required to use uniform and reasonable criteria when dealing with those who compete in an adjacent market." *Id., citing* Fulton v. Hecht, 580 F.2d 1243, 1248 n.2 (5th Cir. 1978). Subsequently, however, the Fifth Circuit distanced itself from the monopoly leveraging doctrine. Eleven Line, Inc. v. North Texas State Soccer Ass'n, Inc., 213 F.2d 198, 206 & n.16 (5th Cir. 2000) ("[w]e decline to endorse and do not rule on the . . . 'monopolistic leveraging' theory of liability . . . based on *Berkey Photo*"). The *Eleven Line* court made no reference to *LaPeyre* or *Fulton*.

27. *See* United Air Lines, Inc. v. CAB, 766 F.2d 1107, 1111 (7th Cir. 1985).

28. *See* USM Corp. v. SPS Tech., Inc., 694 F.2d 505, 512 (7th Cir. 1982); Byars v. Bluff City News Co., Inc., 609 F.2d 843, 857 n.37 (6th Cir. 1979).

29. *NPRM*, *supra* note 2, at 69387.

30. 630 F.2d 920, 926 (2d Cir. 1980).

31. *Id.* In *LaPeyre*, the FTC alleged that the defendant "had improperly attempted to protect its own shrimp canning operations from competition by other canners" by charging those competitors substantially higher prices for its machinery. *Id.*

32. *LaPeyre* also is distinguishable because the defendant's shrimp-peeling machinery was truly essential to the downstream shrimp canners, whereas, as explained above, CRSs are not "essential" to airline distribution.

33. *NPRM*, at 69387, *citing Official Airline Guides*, 630 F.2d at 927-28.

34. *Official Airline Guides*, 630 F.2d at 927-28 (emphasis added).

35. See Alaska Airlines, Inc. v. United Air Lines, Inc., 948 F.2d 536 (9th Cir. 1991), *cert. denied*, 503 U.S. 977 (1992).