

# Three Theories of Ratings

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# STRONG BUY



16th



Food:	25
Decor:	16
Service:	22

# Baa1



# In this presentation

- ✦ What are ratings?
  - ✦ Facts
  - ✦ Opinions
  - ✦ Self-fulfilling prophecies
- ✦ Are ratings copyrightable? Should they be?



Description



EVALUATION



Three theories



# What are ratings?

- ✦ OED: “[a]n assessment of a person or thing’s performance, skill, status, etc.”
  - ✦ A rating is an attempt to quantify quality
  - ✦ Rankings are a special case
- ✦ Interesting ratings are scaled and systemic
- ✦ All ratings are communications by a *rater* to an *audience* about a *subject*



# Theory 1: facts

- ✦ E.g., “A” = “The Soup Spoon’s kitchen is clean.”
- ✦ To rate is to discover
- ✦ Raters are objective investigators
- ✦ The goal is conformity to truth
- ✦ Ratings reflect reality
- ✦ Ratings can be right or wrong



# The good that ratings do

- ✦ A better-informed audience makes better choices
  - ✦ Immediate improvement in consumer welfare
- ✦ Ratings subjects face better incentives
  - ✦ Indirect improvement in a market for lemons



# Theory 2: opinions

- ✦ E.g., “★★★★★” = “*Street Fight* is a good movie.”
- ✦ To rate is to create
- ✦ Raters are subjective critics
- ✦ The goal is authenticity
- ✦ Ratings diverge from reality
- ✦ Ratings cannot be right or wrong



# Two kinds of opinions

- ✦ Distinguish:
  - ✦ Subjective reactions to subjective subject matter
    - ✦ The most awesome sports car of all time is ...
  - ✦ Subjective predictions about objective future events
    - ✦ The probability that Obama will be reelected is ...
- ✦ Courts are rarely careful about keeping the two straight



# Theory 3: self-fulfilling prophecies

- ✦ E.g., a *U.S. News* downgrade makes a school worse
- ✦ To rate is to impose
- ✦ Raters are powerful persuaders
- ✦ The goal is consensus
- ✦ Reality reflects the rating
- ✦ “Right” or “wrong” is irrelevant



# WHICH THEORY IS RIGHT?

- They all are: each explains some aspects of ratings
- One or another will be better overall for a given rating
- But the choice is not exclusive: see all three at once



# Copyright law and policy



# *Lumbermen's Credit* (1908)

- Early rating cases uniformly involve credit rating books
- Supreme Court: “the rating and **other** facts contained in defendants’ book” (emphasis added)
- This is not a considered argument that ratings are facts
- Whatever they are, they’re copyrightable in bulk



# *Produce Reporter Co.* (1924)

- “[I]f the rating as finally made is based upon what is copied, rather than upon what is discovered by verification, as the court believes to be the fact here, there has been an infringement.”
  - This is sweat-of-the-brow reasoning
  - Killed by the 1976 Copyright Act
  - Interred by *Feist*



# Post-*Feist* ratings as facts

- Some things called “ratings” are facts:
  - *Lowry’s Reports* (2003): “selling pressure” and “short term buying power” are uncopyrightable facts
  - *RBC Nice Bearings* (2009): load ratings for ball bearings are uncopyrightable facts
- A *compilation* of facts can be copyrightable if it displays original selection and arrangement:
  - *Eckes* (1984): choice of “premium” baseball cards



# FACTS

- First conventional argument: no incentive needed
  - But ratings are expensive to compile in bulk
  - And good ratings improve market efficiency
- Second conventional argument: access is essential
  - More persuasive



# *Maclean Hunter* (1994)

- ✦ But wait! Calling a card “premium” is itself a rating ...
- ✦ *Maclean Hunter* (car prices) takes the next step:
  - ✦ Originality in the taxonomy
  - ✦ And originality in the prices themselves
- ✦ Prices based “not only on a multitude of data sources, but also on professional judgment and expertise”
  - ✦ They are original outputs from a creative process



# CDN v. Kapes (1999)

- Explicitly forswears compilation reasoning ...
  - ... leaving only the creative-process theory
- “[B]oth Maclean and CDN arrive at the prices they list through a **process** that involves using their judgment to distill and extrapolate from factual data. It is simply not a **process** through which they discover a preexisting historical fact, but rather a **process** by which they **create** a price which, in their best judgment, represents the value of an item as closely as possible. ... This **process** imbues the prices listed with sufficient creativity and originality to make them copyrightable.”



# Health Grades (2009)

- RWJ hospital uses its ★★☆☆★ ratings in advertising
  - An unusual ratings case against a rating subject (but the business model arguably depends on it)
- *Held*: infringement based on “copying of five star ratings and clinical excellence designations specifically attributed to Health Grades that are the product of HealthGrades' rating and award system.”



# OPINIONS

- If ratings are created, access argument is attenuated
- *Macleon Hunter* distinguishes:
  - hard ideas “undertake to advance ... understanding”
  - soft ideas “infused with the author’s taste”
- But if ratings are soft ideas, what good do they do?
  - Creates perverse incentives to make ratings arbitrary



# OPINIONATED PROCESSES

- An original process need not produce original ratings
  - ★ ★ ★ ★ ★ by itself is unoriginal
  - *Cf.* a creative photograph taken with the lens cap on
- Incentivizing the process incentivizes pointless work



# Judicial anxiety about ratings

- ✦ The rise of the opinion theory has an undercurrent:
  - ✦ *Maclean Hunter* and adoption into law
  - ✦ *BanxCorp* (2010): “the more acceptance a financial measure obtains (i.e. the more successful it is), the more ‘fact-like’ it becomes.”
- ✦ Concern about ratings that are *too* successful
  - ✦ Merger doctrine gets at some of this concern



# *Theflyonthewall.com*

- ✦ Analyst reports leak via Fly before the market opens
  - ✦ Technically a misappropriation preemption case
  - ✦ But if the ratings are facts, that shapes copyright, too
- ✦ *Held*: Fly is “collecting, collating, and disseminating factual information – the *facts* that Firms and others in the securities business have made recommendations.”
  - ✦ Persuasive only because the ratings are so influential



# SELF-FULFILLING PROPHECIES

- *Theflyonthewall.com* questions the incentives
  - All that analyst ratings do is provide positional gains
- But if so, this calls access into question
  - Fly is also in the business of positional gains
- Utilitarian copyright theory becomes indeterminate



# Questions and discussion