

Three Theories of Ratings

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STRONG BUY



16th



Food: 25

Decor: 16

Service: 22

Baa1

In this talk

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

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: ratings are facts

- ✦ E.g., this restaurant's kitchen is clean (A)
- ✦ 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: ratings are opinions

- ✦ E.g., *Street Fight* is a good movie (★★★★★)
- ✦ To rate is to create
- ✦ Raters are subjective critics
- ✦ The goal is aesthetic 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 future events
 - ✧ The probability that Obama will be reelected is ...
- ✧ Courts are rarely careful about keeping the two straight

Theory 3: ratings are 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

How ratings shape reality

- ✦ Three effects:
 - ✦ Audience cut off their investigations early
 - ✦ Ratings are inherently reductive
 - ✦ Ratings are focal points for coordination
- ✦ These can be good or bad or both, depending

Copyright doctrine

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

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.”
- ✦ Process theory leads to copyright in individual ratings

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

Copyright policy

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

Opinions

- ✦ If ratings are created, access argument is attenuated
- ✦ *Maclean 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

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
- ✦ Copyright theory becomes wholly indeterminate

Reconstructing ratings

Factual aspects of ratings

- ✧ Ratings start from factual *observations*
 - ✧ Sight-unseen book review = book review fail
- ✧ Ratings make factual *predictions*
 - ✧ This person will or will not pay her debts
 - ✧ Even subjective ratings can be predictive
 - ✧ E.g. the Netflix Prize

Enter opinion

- Some ratings contain *value judgments*
 - E.g. Movieguide rates movies for Christian values
 - This is liberal diversity for its own sake
- It is a fact whether that opinion is *actually held*
 - E.g., “I liked the new *Star Trek*” is a lie
- Predictions are *guesses* about what will happen
 - This is the instrumental diversity of many minds

Fact and opinion in processes

- The *choice of a process* is a meta-opinion about the best way in general to predict
 - Further opinion may enter in a specific application
- An original process need not produce original ratings
 - ★★★★★ by itself is unoriginal
 - Cf. a creative photograph taken with the lens cap on
- That a given process was *actually applied* is itself a fact

The role of prophecy

- ✦ Fact and opinion speak to the production of a rating
- ✦ Self-fulfilling prophecy speaks to the rating's reception
 - ✦ How does the audience react to and act on it?
 - ✦ How does their response feed back to the subject?
- ✦ *Contra Theflyonthewall*, this doesn't make them facts
 - ✦ Argument 1: supports fair use defense
 - ✦ Argument 2: supports functionality-ish merger defense

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

One more thing ...

On beyond copyright

- ✦ There are two great problems for ratings:
 - ✦ Encouraging their production
 - ✦ This is the domain of intellectual property
 - ✦ Holding raters accountable
 - ✦ This is the domain of tort, regulation, First Amendment, etc.
- ✦ The three theories speak to the latter problem as well

Consider, say, CDO ratings

- ✦ If these ratings are statements of fact, then they can lead to liability and regulation when they are false
- ✦ If these ratings are subjective opinions, then the First Amendment provides near-absolute protection
- ✦ If these ratings are self-fulfilling prophecies, then they're conduct, not speech, and can be regulated freely
- ✦ What else? Search rankings, consumer credit scores, Yelp local business reviews, Avvo lawyer scores, etc.

Questions and discussion