

UIC John Marshall Journal of Information Technology & Privacy Law

Volume 10
Issue 1 *Computer/Law Journal - Winter 1990*

Article 1

Winter 1990

Divestiture as a Legislative Solution to the Anti-Consumer Effects of Airline Ownership of Computer Reservation Systems, 10 Computer L.J. 1 (1990)

John Evans

Follow this and additional works at: <https://repository.law.uic.edu/jitpl>



Part of the [Computer Law Commons](#), [Internet Law Commons](#), [Privacy Law Commons](#), and the [Science and Technology Law Commons](#)

Recommended Citation

John Evans, Divestiture as a Legislative Solution to the Anti-Consumer Effects of Airline Ownership of Computer Reservation Systems, 10 Computer L.J. 1 (1990)

<https://repository.law.uic.edu/jitpl/vol10/iss1/1>

This Article is brought to you for free and open access by UIC Law Open Access Repository. It has been accepted for inclusion in UIC John Marshall Journal of Information Technology & Privacy Law by an authorized administrator of UIC Law Open Access Repository. For more information, please contact repository@jmls.edu.

DIVESTITURE AS A LEGISLATIVE SOLUTION TO THE ANTI-CONSUMER EFFECTS OF AIRLINE OWNERSHIP OF COMPUTER RESERVATION SYSTEMS

By JOHN EVANS*

TABLE OF CONTENTS

I.	INTRODUCTION	3
II.	BACKGROUND	4
	A. ORIGINS OF THE REGULATION OF AIRLINES	4
	B. DEREGULATION	4
	C. THE FAILURE OF CONTESTABILITY IN THE DEREGULATED AIRLINE INDUSTRY AND RESULTANT MARKET CONCENTRATION	6
	D. THE COMPUTER RESERVATION SYSTEM	8
	E. ANTI-COMPETITIVE BEHAVIOR OF THE CRS AIRLINES	8
	1. <i>Display Bias</i>	9
	2. <i>Booking Fees</i>	9
	3. <i>Oppressive Contracts with Travel Agents</i>	9
	4. <i>Misuse of Market Data</i>	10
	5. <i>Commission Overrides</i>	10
	F. NEGATIVE EFFECTS OF ABUSES OF CRSs	11
	G. ATTEMPT BY NON-CRS AIRLINES TO DEVELOP A NEUTRAL BOOKING SYSTEM	11
III.	ADMINISTRATIVE ATTEMPTS TO REMEDY ANTI- COMPETITIVE EFFECTS OF AIRLINE OWNERSHIP OF CRS	12
	A. CAB RULEMAKING	12

* J.D. 1988, Arizona State University. Mr. Evans is currently an associate at Lewis & Roca in Phoenix, Arizona. Mr. Evans was an intern member of the legal staff of Senator John McCain in 1987, with responsibility for transportation issues. The views in this Article are those of the author and not necessarily those of Senator McCain.

B.	CONTROVERSY OVER COMPLIANCE WITH THE CAB RULES BY CRS AIRLINES	14
C.	STUDY BY DOJ	16
D.	STUDY BY THE GENERAL ACCOUNTING OFFICE	19
E.	DOT ACTION AFTER THE SUNSET OF CAB	19
IV.	CONGRESSIONAL ATTEMPTS TO REMEDY THE ANTI- COMPETITIVE EFFECTS OF AIRLINE-OWNED CRSs AND TO SPUR ADMINISTRATIVE ACTION.....	20
A.	HOUSE OF REPRESENTATIVES.....	20
1.	<i>Airline Computer Reservation Systems Arbitration Act</i>	21
2.	<i>Airline Passenger Protection Act</i>	22
B.	SENATE.....	22
1.	<i>Airline Passenger Protection Act</i>	22
2.	<i>Hearings Before the Senate Antitrust Subcommittee</i> .	23
V.	ANALYSIS.....	23
A.	CRITICISM OF DOJ REPORT	23
B.	CRITICISM OF DOT FAILURE TO PROTECT THE PUBLIC INTEREST, CONVENIENCE, AND NECESSITY, AND TO ENFORCE ANTITRUST LAWS IN THE AIRLINE INDUSTRY ...	25
1.	<i>Adequate Low Price Service</i>	25
2.	<i>Unfair and Deceptive Practices</i>	25
3.	<i>Predatory Practices</i>	26
4.	<i>Market Concentration</i>	26
5.	<i>Regulatory Environment to Encourage Innovation and Expansion</i>	27
6.	<i>Antitrust Violations</i>	27
7.	<i>Incipient Antitrust Violations</i>	31
C.	CRITICISM OF THE HOUSE RESPONSE.....	32
1.	<i>Airline Computer Reservation Systems Arbitration Act</i>	32
2.	<i>Airline Passenger Protection Act</i>	32
D.	CRITICISM OF THE SENATE RESPONSE	33
1.	<i>Airline Passenger Protection Act</i>	33
2.	<i>Legislation From the Senate Antitrust Subcommittee</i>	34
E.	OPTIONS OPEN TO CONGRESS	34
1.	<i>Regulation</i>	34
2.	<i>Informal Negotiation</i>	35
3.	<i>Divestiture</i>	35
a.	<i>Congressional power to legislate divestiture, and policy arguments in favor of divestiture</i>	35
b.	<i>The example of the AT&T divestiture</i>	39
F.	POSSIBLE CONSTITUTIONAL OBJECTIONS TO DIVESTITURE AS A LEGISLATIVE REMEDY	43

1. *Taking* 43
 2. *Due Process* 45
 VI. CONCLUSION 46

I. INTRODUCTION

Consider the following situation. A relative of yours suddenly announces that she is getting married and invites you to her wedding, which is to be held out of state in one week. You call your travel agent and request a flight on your favorite airline, only to find that the airline has gone out of business. You then ask the agent about a bargain fare that you remember hearing advertised by a well-known airline, but the agent tells you that the fare is not available, and quotes you a price of \$450.00 instead. This is expensive, but you realize that, because you are buying the ticket with only a week's notice, the bargain fare must be unavailable.

A week later, during the flight, you strike up a conversation with the woman sitting next to you. She tells you she bought her ticket two days ago for only \$99.00. You also learn that two other airlines fly to your destination, but your travel agent did not inform you of their existence, even though you requested a bargain fare.

Why has your travel agent misled you, and how can the airline you are flying be allowed to advertise a low price fare, and then not deliver? The answer lies in the development of airline-owned computer reservation systems, and the Department of Transportation's unwillingness and inability to remedy competitive abuses of the systems.

This Article begins with a discussion of the development of computer reservation systems (CRSs) and their detrimental effect on competition and consumer interests after deregulation of the airline industry.¹ It then surveys the attempts of the Department of Transportation (DOT), the Department of Justice (DOJ), and Congress, to remedy the anti-consumer effects that have resulted from airline ownership of CRSs, and criticizes those attempts as being ineffective.² Finally, this Article concludes that, in the face of administrative and congressional failure to remedy the anti-consumer effects of airlines' ownership of CRSs, Congress should pass legislation that would restructure the airline industry by requiring airlines to divest their CRSs.³

1. See *infra* text accompanying notes 52-102.
 2. See *infra* text accompanying notes 103-389.
 3. See *infra* text accompanying notes 390-515.

II. BACKGROUND

A. ORIGINS OF THE REGULATION OF AIRLINES

Although the federal government regulated aspects of the airline industry as early as the 1920s,⁴ it did not impose full-scale regulation until the Civil Aeronautics Act (CAA) of 1934.⁵ Congress passed the CAA in response to the destabilizing affects of competition in the industry and the perception that the Great Depression was caused, in part, by a failure of the free market.⁶ The CAA created the Civil Aeronautics Board (CAB) and granted it the authority to regulate fares and entry into the industry.⁷ The economic regulation of the industry that began with CAA, remained virtually unaltered under The Federal Aviation Act⁸—the successor to the CAA. Under CAB regulation, national routes were awarded by the CAB to “trunk line” airlines, and smaller airlines flew on regional routes.⁹

Under regulation, the airline industry thrived and expanded for forty years.¹⁰ However, academics and leaders of the airline industry began to question the efficiency of regulation;¹¹ consensus grew that the industry would be more efficient without government regulation.¹²

B. DEREGULATION

Encouraged by successful airline deregulation at the state level in Texas and California,¹³ Congress began to investigate the possibility of deregulating the airline industry.¹⁴ The House and Senate held hearings from 1970 to 1977.¹⁵ In 1978, the House and the Senate each passed airline deregulation bills.¹⁶ After a conference, Congress enacted compromise legislation, the Airline Deregulation Act (ADA),¹⁷ which was designed to end government regulation of routes, fares, and entry into the airline industry, and to create new administrative standards to pro-

4. See, e.g., Air Mail Act, Pub. L. No. 68-359, 43 Stat. 128 (1925).

5. Pub. L. No. 73-308, 48 Stat. 466 (1934).

6. Levine, *Airline Competition in Deregulated Markets: Theory, Firm Strategy, and Public Policy*, 4 YALE J. ON REG. 393 (1987) [hereinafter *Airline Competition*].

7. *Id.* at 398.

8. Pub. L. No. 85-726, 72 Stat. 731 (1958); Murphy, *Airline Deregulation and Antitrust*, 50 ANTITRUST L.J. 381 (1981).

9. *Airline Competition*, *supra* note 6, at 425-26.

10. *Id.* at 398.

11. *Id.* at 408.

12. *Id.*

13. *Id.* at 401.

14. *Id.* at 394.

15. S. REP. NO. 631, 95th Cong., 1st Sess. 1 (1978).

16. H.R. CONF. REP. NO. 1779, 95th Cong., 1st Sess. 53-56 (1987).

17. Pub. L. No. 95-504, 92 Stat. 1705 (1978).

tect public interest, convenience, and necessity.¹⁸ The new standards included a variety of adequate low price services;¹⁹ the absence of unfair and deceptive practices;²⁰ a maximum reliance on market forces and competition to provide needed air service;²¹ a sound regulatory environment responsive to the needs of the public;²² the absence of predatory practices;²³ the absence of unreasonable industry concentration;²⁴ the presence of competition or potential competition to encourage innovation and low prices;²⁵ and an environment that encourages new entry into, and expansion of, the air transportation market.²⁶

The Act was intended to create a smooth transition from regulation to deregulation.²⁷ Thus, the regulatory functions of the CAB were phased out over a period of six years.²⁸ The CAB's authority over domestic routes ended on December 31, 1981,²⁹ and the CAB's authority over domestic fares ended on January 1, 1983.³⁰ Finally, the CAB itself disbanded in 1985.³¹ However, some functions of the CAB, such as the protection of the public interest, convenience, and necessity, with regard to air transportation for small communities, were transferred to DOT.³²

Deregulation was beneficial to both airlines and consumers. In 1986, Brookings Institute conducted a study of the economic effects of deregulation in the airline industry. The study concluded that deregulation had resulted in a \$2.5 billion increase in annual profits to the airline industry, and an annual increase to the welfare of travelers worth \$6 billion.³³

18. H.R. REP. NO. 1211, 95th Cong., 2d Sess. 4-5, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 3737, 3740-41.

19. 49 U.S.C. § 1302(a)(3) (1982 & Supp. V 1987).

20. *Id.*

21. *Id.* § 1302(a)(4).

22. *Id.* § 1302(a)(5).

23. *Id.* § 1302(a)(7).

24. *Id.*

25. *Id.* § 1302(a)(9).

26. *Id.* § 1302(a)(10).

27. S. REP. NO. 631, 95th Cong., 1st Sess. 52 (1978).

28. 49 U.S.C. § 1551(a)(1) (1982 & Supp. V 1987).

29. *Id.*

30. *Id.* § 1551(a)(2).

31. *Id.* § 1551(a)(3).

32. *Id.* § 1551(b)(1)(A).

33. S. MORRISON & C. WINSTON, *THE ECONOMIC EFFECTS OF AIRLINE DEREGULATION* 1-2 (1986) [hereinafter MORRISON].

C. THE FAILURE OF CONTESTABILITY IN THE DEREGULATED AIRLINE INDUSTRY AND RESULTANT MARKET CONCENTRATION

Despite an overall increase in profits for the airline industry, some individual airlines fared poorly, and eventually either failed or merged with larger airlines, creating a trend towards concentration.³⁴

Opponents of deregulation had predicted that, initially, deregulation would generate fare wars, but that when the fare wars ended, both new entrants into the industry, and inefficient airlines, each of whom could have benefitted from the protection of regulation, would fail, and market concentration would occur.³⁵ Supporters of deregulation had contended that, even if competition led to market concentration, prices would remain competitive, under the theory of contestability.³⁶

The theory of contestability asserts that, even in markets with few competitors, prices can be kept competitive if there is the threat of entry into the market by new firms; should prices rise too high,³⁷ new firms would be motivated to enter the market. In order for the theory of contestability to apply to a market, a number of conditions must exist: (1) potential entrants must have the same access to technology as the occupants of the market; (2) new entrants must be able to enter and exit the market without large costs; and (3) they must be able to benefit from the prices in the market for a reasonable amount of time after entry.³⁸

Traditional industrial organization analysis focuses on physical barriers to entry, capital mobility, set up costs, and economies of scale.³⁹ Because airplanes can be moved easily, and because a small airline, with the ability to expand, can enter the market with several airplanes, proponents of deregulation thought that the airline industry was an ideal proving ground for the theory of contestability.⁴⁰ However, deregulation proponents failed to consider the costs of communicating information to consumers about services and fares;⁴¹ the costs of developing a name and a reputation;⁴² and the costs of persuading travel agents to book flights.⁴³ Therefore, proponents of deregulation and the theory of contestability relied in their estimations on outmoded models of the airline industry, and failed to consider new technological developments, in-

34. *See id.* at 72-73.

35. *Airline Competition, supra* note 6, at 406.

36. *Id.* at 403-04.

37. *Id.* at 404.

38. *Id.*

39. *Id.* at 421.

40. *Id.*

41. *Id.* at 418.

42. *Id.* at 419.

43. *Id.*

cluding the development of computer reservation systems.⁴⁴

The need for airlines in the deregulated airline industry to convey information about themselves to consumers led to a greater role for travel agents in the deregulated industry.⁴⁵ It also became increasingly important for the travel agent to pass the airlines' information on to the consumer effectively.⁴⁶ To meet the needs of both the airlines and travel agents, the agents began to use CRSs.⁴⁷ However, the CRSs were owned by the dominant carriers in the industry,⁴⁸ and the carriers used the systems "to adversely affect airline competition."⁴⁹ One way the carriers took advantage of their position was to implement biased display screens.⁵⁰ The systems presented schedules and fares in a manner that made it "much easier for a travel agent to find and use services of the system-owning airline . . . than those of [the owning airline's] competitors."⁵¹ Thus, the theory of contestability failed, and market concentration occurred.

44. *Id.* at 421.

45. *Id.* at 414-15.

46. *Id.*

47. *Id.* at 460.

48. *Airline Computer Reservation Systems: Hearing Before the Senate Subcomm. on Antitrust, Monopolies, and Business Rights of the Comm. on the Judiciary*, 100th Cong., 1st Sess. 142 (1987) [hereinafter *Senate Hearing*] (prepared statement of M.V. Scocozza). The CRS industry in the United States consists of five major systems. American Airlines owns the SABRE system; the Covia Corporation, a subsidiary of the Allegis Corporation, which owns United Airlines, markets APOLLO; SystemOne Holdings, a subsidiary of the Texas Air Corporation, which owns Eastern Airlines and Continental Airlines, owns SystemOne; the PARS Marketing Corporation, owned by Trans World Airlines and Northwest Airlines, owns and markets PARS; and Delta Airlines owns the DATAS II SYSTEM. U.S. DEP'T OF TRANSPORTATION, PUB. NO. DOT-P-37-88-2, STUDY OF AIRLINE COMPUTER RESERVATION SYSTEMS 1 (1988) (available upon request from the Department of Transportation) [hereinafter DOT STUDY]. Recently, Allegis announced plans to sell 50% of APOLLO to USAir, British Airways, Swissair, KLM, and Alitalia. *Id.* at 1 n.1. SABRE is the largest CRS vendor, and APOLLO is the second largest. *Id.* at 20.

Prepared statements and testimony of the following Senate Hearing speakers will be referred to *infra*: *Edward R. Beauvais*, Chairman of the Board, America West Airlines, Inc., Tempe, Ariz.; *Carl L. Bryant*, President, Mid-America Chapter, American Society of Travel Agents, Columbus, Ohio; *Michael A. Buckman*, President, SABRE Travel Information Network, American Airlines, Dallas, Tex.; *Michael E. Levine*, General George Rogers Clark Professor of Management, Yale University, New Haven, Conn.; *A.B. Magary*, Executive Vice President for Marketing, Northwest Airlines, Minneapolis, Minn.; *Senator Howard M. Metzenbaum*, Chairman of the Senate Subcommittee on Antitrust, Monopolies, and Business Rights, Ohio/Washington, D.C.; *Richard E. Murray*, President, SystemOne Corp., Texas Air Corp., Houston, Tex.; *Matthew V. Scocozza*, Assistant Secretary for Policy & International Affairs, U.S. Department of Transportation; and *David A. Swankin*, Consumer Federation of America, Washington, D.C.

49. *Senate Hearing*, *supra* note 48, at 142 (prepared statement of M.V. Scocozza).

50. *Id.* at 145.

51. *Id.*

D. THE COMPUTER RESERVATION SYSTEM

A CRS consists of a central processing unit and terminals linked to the unit by telephone lines.⁵² Travel agents maintain terminals in their offices and make reservations for their customers through the terminals.⁵³ The agents then issue the tickets through printers located in their office.⁵⁴ The processing unit lists flights for the airline that owns the CRS—the CRS airline—as well as the flights of other airlines.⁵⁵ The CRS airline charges a booking fee to the airline whose flights are booked on the CRS,⁵⁶ and charges a subscription fee to the travel agent.⁵⁷

Computer reservation systems were first developed while the airline industry was regulated.⁵⁸ The entire industry began to develop an industry-wide booking system,⁵⁹ but the effort failed,⁶⁰ and some airlines began to develop their own independent systems.⁶¹ After deregulation, American's APOLLO system and United's SABRE system emerged as the dominant systems in the market,⁶² although Continental's SystemOne eventually gained a moderate share of the market.⁶³

The CRSs provided many benefits to consumers, travel agents, and airlines. Tickets were issued at a lower cost and at a greater volume than under the prior manual system. Before computerized systems were introduced, the travel agent would look up a fare in a book that contained fare information, and then phone the chosen airline to book the flight.⁶⁴

E. ANTI-COMPETITIVE BEHAVIOR OF THE CRS AIRLINES

Despite the actual and potential benefits of the CRS to the airline industry, due to its exploitation by American and United, the CRS had a number of detrimental effects on competition. American and United exploited their ownership of CRSs by: (1) programming the CRSs to

52. *Id.* at 141.

53. *Id.*

54. *Airline Competition*, *supra* note 6, at 415.

55. *Senate Hearing*, *supra* note 48, at 145 (prepared statement of M.V. Scocozza).

56. U.S. DEP'T OF JUSTICE, 1985 REPORT OF THE DEPARTMENT OF JUSTICE TO CONGRESS ON THE AIRLINE COMPUTER RESERVATION SYS. INDUS. 50 (available upon request from the Department of Justice) [hereinafter DOJ REPORT].

57. *Id.* at 50-51.

58. *Airline Competition*, *supra* note 6, at 459.

59. *Id.* at 459-60.

60. *Senate Hearing*, *supra* note 48, at 246 (testimony of A.B. Magary).

61. *Airline Competition*, *supra* note 6, at 460.

62. *Id.* at 415.

63. *Senate Hearing*, *supra* note 48, at 106 (prepared statement of R.E. Murray).

64. *Airline Competition*, *supra* note 6, at 458.

discriminate against non-CRS airlines by limiting the display information that travel agents viewed, (2) charging high booking fees to non-CRS airlines, (3) entering into oppressive contracts with travel agents, (4) misusing market data, and (5) manipulating travel agents through the use of commission overrides.⁶⁵

1. *Display Bias*

Travel agents locate potential flights for consumers by entering the customer's time and destination requests into the CRS.⁶⁶ After the information is entered, the available flights appear on the travel agent's computer screen.⁶⁷ The screen displays only eight flights at a time.⁶⁸ In order to view additional flights, the agent must enter a command into the computer.⁶⁹ As a result, travel agents are likely to book consumers on one of the flights listed on the first display.⁷⁰

CRS airlines listed all of their own flights on the first display and relegated the flights of other airlines to lower listings.⁷¹ Consequently, travel agents using CRSs would book CRS airlines' flights more frequently than those of non-CRS airlines.⁷²

2. *Booking Fees*

The cost to a CRS airline of booking a non-CRS airline flight is between \$0.33 and \$0.66.⁷³ The CRS airlines charged booking fees of up to \$3.50,⁷⁴ charging the highest fees to direct competitors.⁷⁵ The CRS airlines then, as an incentive to book the flights of the CRS airlines,⁷⁶ used booking profits to pay override commissions to travel agents.⁷⁷

3. *Oppressive Contracts with Travel Agents*

Travel agents and the CRS airlines had unequal bargaining power;⁷⁸ therefore, CRS airlines were able to dictate the contract terms under which the agents subscribed to the CRSs.⁷⁹ The contracts con-

65. *Id.* at 415.

66. *See United Air Lines, Inc. v. C.A.B.*, 766 F.2d 1107, 1110 (7th Cir. 1985).

67. *See id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Senate Hearing, supra* note 48, at 245 (testimony of A.B. Magary).

74. DOJ REPORT, *supra* note 56, at 44.

75. *Id.*

76. *Senate Hearing, supra* note 48, at 207 (testimony of M.E. Levine).

77. *Id.*

78. *Id.* at 257 (prepared statement of C.L. Bryant).

79. *Id.* at 257-58. *But see In re "Apollo" Air Passenger Computer Reservation Sys.*

tained liquidated damages clauses that, in effect, locked the travel agents into the contracts,⁸⁰ denying the agents the opportunity to subscribe to the CRSs of new entrants into the CRS market.⁸¹

4. *Misuse of Market Data*

CRS airlines processed raw data gained from the CRSs to track the performance of competitors.⁸² CRS airlines also obtained immediate information on the sales of rival airlines by accessing the data banks of the central processing unit of the CRS.⁸³ The CRS airlines calculated discount ticket sales on the basis of the sales of rivals.⁸⁴ For example, if a CRS airline and a non-CRS airline both had bargain fares from City A to City B, the CRS airline monitored the sales of the non-CRS airline, and matched the rate of the non-CRS airline only until the non-CRS airline had sold all of its bargain seats. After the bargain seats of the non-CRS airline were sold, the CRS airline then raised the price of its bargain seats.⁸⁵

Moreover, CRS airlines monitored the booking patterns of travel agents,⁸⁶ and pressured them to book CRS airline flights in preference to non-CRS airline flights.⁸⁷

5. *Commission Overrides*

CRS airlines paid commission overrides to travel agents in order to induce the agents to book the flights of CRS airlines rather than those of competitors.⁸⁸ Commission overrides worked similarly to frequent flyer bonuses for consumers.⁸⁹ If a travel agent booked a certain number of flights on the CRS airline, she received monetary bonuses and other benefits, such as free trips.⁹⁰ Because of these overrides, the

(CRS), 720 F. Supp. 1061, 1064 (S.D.N.Y. 1989) (travel agents and CRS airlines not of such unequal bargaining power as to deprive travel agents of freedom of choice).

80. *Senate Hearing, supra* note 48, at 257 (prepared statement of C.L. Bryant). *But see* United Air Lines, Inc. v. Austin Travel Corp., 867 F.2d 737, 740-41 (2d Cir. 1989) (liquidated damages clauses in APOLLO contracts reasonable and enforceable); *Apollo*, 720 F. Supp. at 1063-64 (S.D.N.Y. 1989) (liquidated damages clause in APOLLO contract not unconscionable).

81. *Senate Hearing, supra* note 48, at 258 (prepared statement of C.L. Bryant).

82. *Id.* at 112-13 (prepared statement of R.E. Murray).

83. *Id.* at 269 (testimony of D.A. Swankin).

84. *Id.*

85. *Id.*

86. *Id.* at 113 (prepared statement of R.E. Murray).

87. *Id.*

88. *Airline Competition, supra* note 6, at 456-57.

89. *Id.* at 457.

90. *Id.*

agents provided slanted advice to consumers,⁹¹ who did not know that they were receiving information from a biased source.⁹²

F. NEGATIVE EFFECTS OF ABUSES OF CRSS

The abuses by CRS airlines led to serious losses to rival airlines and to consumers,⁹³ because non-CRS airlines were effectively barred from some markets by the practices,⁹⁴ and because consumers were deprived, by travel agents, of information on the lowest fares and the most convenient flights available.⁹⁵

G. ATTEMPT BY NON-CRS AIRLINES TO DEVELOP A NEUTRAL BOOKING SYSTEM

Alarmed by the dominance that the CRS airlines were exerting over both the CRS industry and the airline industry, the International Air Transportation Association formed the Neutral Industry Booking System (NIBS) interest group in June 1985.⁹⁶ Thirty United States and foreign airlines⁹⁷ formed the group to develop an unbiased CRS that could compete with the systems of United and American.⁹⁸ The Department of Justice noted the formation of the NIBS project⁹⁹ and expressed hope that the project could erode the dominance exercised by United and American in the CRS industry.¹⁰⁰ However, the NIBS project was unsuccessful,¹⁰¹ and United and American continued to dominate the industry.¹⁰²

91. *Id.*

92. *Senate Hearing, supra* note 48, at 211 (testimony of M.E. Levine).

93. *See* MORRISON, *supra* note 33, at 69.

94. *Id.*

95. *Id.*

96. Mifsud, *Computer Reservations Systems and Automated Market Distribution in a Deregulated Aviation Industry*, 1 J.L. & TECH. 143, 151 (1986).

97. *Id.*

98. *Id.*

99. DOJ REPORT, *supra* note 56, at 28-31.

100. *Id.*

101. *Senate Hearing, supra* note 48, at 246 (testimony of A.B. Magary). Earlier attempts to market a neutral industry-wide CRS also failed. Between 1967 and 1976 the Donnelly Official Airline System, the Automated Travel Agency Reservation System, the Joint Industry Computerized Reservation System, and the MAARS Systems all failed. 54 Fed. Reg. 38,871 (1989).

102. *Senate Hearing, supra* note 48, at 246 (testimony of A.B. Magary).

III. ADMINISTRATIVE ATTEMPTS TO REMEDY ANTI-COMPETITIVE EFFECTS OF AIRLINE OWNERSHIP OF CRS

A. CAB RULEMAKING

In the early 1980s, complaints by non-CRS airlines and travel agents about the behavior of CRS airlines began to deluge Congress.¹⁰³ Congress directed DOJ and CAB to investigate the complaints.¹⁰⁴ CAB announced a rulemaking, and invited comments. On July 27, 1984, CAB issued its final rules, accompanied by an opinion.¹⁰⁵

In the opinion, CAB found that CRS airlines had market power over the CRS industry,¹⁰⁶ and that they were using the market power to restrain competition in the airline industry.¹⁰⁷ CAB reasoned that the CRS airlines had charged booking fees to non-CRS airlines that were not based on the cost of service,¹⁰⁸ CRS airlines had engaged in display bias,¹⁰⁹ and had intentionally manipulated air competition.¹¹⁰ These were all examples of the exercise of market power.¹¹¹

The opinion also found that the CRS airlines had engaged in monopoly leveraging¹¹² by using power in the CRS market to gain an advantage in the air transportation market.¹¹³ Further, the opinion found that barriers to entry existed in the CRS market¹¹⁴ because CRS airlines earned incremental revenues through the use of display bias.¹¹⁵ Because independent CRS companies were not able to earn such incremental revenues, they were unable to compete.¹¹⁶

The opinion found that the relevant product market was CRS information services,¹¹⁷ and not airline ticket distribution services,¹¹⁸ because the CRSs were more efficient than other ticket booking methods,¹¹⁹ and were more desirable to the public than non-computer-

103. *United Air Lines, Inc. v. C.A.B.*, 766 F.2d 1105, 1110 (7th Cir. 1985).

104. *Id.*

105. *See* 49 Fed. Reg. 32,540 (1984).

106. *Id.* at 32,542.

107. *Id.*

108. *Id.* at 32,543.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 32,546.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* at 32,544.

118. *Id.*

119. *Id.*

ized systems.¹²⁰ Furthermore, the opinion found the relevant geographic market was regional, not national,¹²¹ because few sales were made by a CRS outside of its dominant regional market,¹²² and because CRS airlines perceived their markets to be regional.¹²³

The CAB noted that the CRS airlines controlled an essential facility,¹²⁴ and that under the Essential Facility Doctrine, the CRS airlines were obligated to share the CRSs with non-CRS airlines on a reasonable and non-discriminatory basis.¹²⁵

The CAB also held that display bias was an unfair and deceptive practice¹²⁶ within the meaning of section 411 of the Federal Aviation Act.¹²⁷ Display bias injured consumers by depriving them of opportunities to take advantage of lower fares¹²⁸ and by causing them to take less convenient flights.¹²⁹ Bias deceived consumers,¹³⁰ who expected to receive neutral information from travel agents.¹³¹

Although CAB did not pass any rules prohibiting liquidated damages clauses in contracts between CRS airlines and travel agents,¹³² CAB noted that it found the clauses troubling.¹³³ Nevertheless, it decided against passing any rules on this issue,¹³⁴ noting that it would be difficult to devise a liquidated damages formula that would be appropriate for all contracts,¹³⁵ and that courts were better suited to this task than the CAB.¹³⁶ The CAB also reasoned that the rules against exclusivity clauses and contracts that lasted more than five years would offset any negative consequences that resulted from liquidated damages clauses.¹³⁷

CAB also considered divestiture.¹³⁸ CAB rejected this option,¹³⁹

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 32,546.

125. *Id.*

126. *Id.* at 32,547.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 32,548.

131. *Id.*

132. *Id.* at 32,556.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* at 32,560.

139. *Id.*

noting that divestiture would involve time-consuming adjudication,¹⁴⁰ and would involve greater government intervention than was desirable.¹⁴¹ It also reasoned that vertical integration of CRS services into airline companies might create an efficiency not otherwise attainable.¹⁴²

In its rules, the CAB imposed four major prohibitions on the CRS airlines. First, CRS airlines were prohibited from displaying flights on CRS screens in a format that created bias based on carrier identity.¹⁴³ Second, CRS airlines were prohibited from charging discriminatory booking fees to non-CRS airlines.¹⁴⁴ Third, CRS airlines were prohibited from entering contracts with travel agents that lasted for more than five years,¹⁴⁵ or that required exclusive use of the CRS by the travel agent.¹⁴⁶ Finally, CRS airlines were prohibited from maintaining market data that they did not make available to non-CRS airlines.¹⁴⁷

United contested the rules in federal court,¹⁴⁸ challenging the CAB's statutory authority to promulgate rules,¹⁴⁹ contending that the CAB's antitrust analysis was arbitrary and capricious,¹⁵⁰ and charging that the CAB had violated procedural provisions of the Administrative Procedure Act.¹⁵¹ The Seventh Circuit Court of Appeals, in a decision by Judge Posner, upheld the rules despite all of United's challenges.¹⁵²

After the demise of CAB in 1985, DOT assumed jurisdiction for enforcement of the rules.¹⁵³

B. CONTROVERSY OVER COMPLIANCE WITH THE CAB RULES BY CRS AIRLINES

Shortly after CAB promulgated the rules in 1984,¹⁵⁴ CRS airlines soon were accused of developing means to avoid the letter and spirit of the CAB rules. CRS airlines discontinued overt CRS display bias,¹⁵⁵ but began to underestimate the projected elapsed flying times of their

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at 32,563 (codified at 14 C.F.R. § 255.4 (1984)).

144. *Id.* (codified at 14 C.F.R. § 255.5 (1984)).

145. *Id.* (codified at 14 C.F.R. § 255.6 (1984)).

146. *Id.*

147. *Id.* (codified at 14 C.F.R. § 255.8 (1984)).

148. *United Air Lines, Inc. v. C.A.B.*, 766 F.2d 1005 (7th Cir. 1985).

149. *Id.* at 1111.

150. *Id.* at 1116.

151. *Id.*

152. *Id.* at 1122.

153. 49 U.S.C. § 1302 (1982 & Supp. V 1987).

154. 49 Fed. Reg. 32,540 (1984).

155. *Senate Hearing, supra* note 48, at 101 (prepared statement of R.E. Murray).

flights.¹⁵⁶ Because the priority of the flight on the CRS display was determined by shortness of flying time,¹⁵⁷ the flights of the CRS airlines again appeared at the top of the screens.¹⁵⁸ CRS airlines also were accused of giving preference on the screens to their own connecting flights,¹⁵⁹ refusing to display all classes of service offered by rival airlines,¹⁶⁰ and biasing the display to favor their hubs.¹⁶¹

The CRS airlines' responses to the rules against price discrimination for booking fees was to raise the booking fees for all non-CRS airlines.¹⁶² The new booking fee charged was set at well above cost.¹⁶³

The CRS airlines were accused of avoiding the prohibition against contracts with travel agents lasting for more than five years by using "rollover clauses."¹⁶⁴ These clauses stated that the contract was to be renewed each time that a travel agent acquired a new piece of equipment from a CRS airline.¹⁶⁵ Thus, if a travel agent three years into a contract ordered a new printer for her CRS, the contract would automatically be renewed for another five years. The CRS airlines avoided the rule against exclusivity clauses in contracts with travel agents by adopting minimum use clauses.¹⁶⁶ The minimum standard for agent use of a CRS was high enough to act as a de facto exclusivity clause.¹⁶⁷

As required by the CAB rules, CRS airlines shared market data with non-CRS airlines.¹⁶⁸ However, the CRS airlines provided the data only in the form of raw computer tapes,¹⁶⁹ which the non-CRS airlines claimed were difficult and expensive for the non-CRS airlines to process.¹⁷⁰ Also, non-CRS airlines accused the CRS airlines of continuing to monitor the sales of rivals on a minute-by-minute basis through the CRS data banks, something the non-CRS airlines lacked the ability to do.¹⁷¹

Despite the concern expressed by the CAB opinion about the ef-

156. *Id.* at 101-02.

157. *Id.* at 101-02.

158. *Id.* at 102.

159. *Id.* at 213 (testimony of M.E. Levine).

160. DOJ REPORT, *supra* note 56, at 33-34.

161. *Senate Hearing, supra* note 48, at 213 (testimony of M.E. Levine).

162. *Id.* at 186-87 (testimony of E.R. Beauvais).

163. *Id.* at 188.

164. *Id.* at 104 (prepared statement of R.E. Murray).

165. *Id.*

166. *Id.* at 261 (prepared statement of C.L. Bryant).

167. *Id.*

168. *Id.* at 218 (prepared statement of M.E. Levine).

169. *Id.*

170. *Id.*

171. *Id.*

fects of liquidated damages clauses,¹⁷² the CRS airlines used even more oppressive liquidated damages clauses in their contracts with travel agents.¹⁷³ Under the new clauses, if a travel agent wished to switch to another CRS, liquidated damages consisted not only of future rental fees and removal costs, but also of lost booking revenue to the CRS airline over the remainder of the contract term.¹⁷⁴ The damages under this formula amounted to as much as \$450,000,¹⁷⁵ which was more than most travel agents could pay.¹⁷⁶ Some travel agents, asserting that the clauses were unenforceable because they imposed penalties rather than an approximation of actual damages,¹⁷⁷ challenged the legality of the clauses in court.¹⁷⁸ However, travel agents complained that, due to the unequal economic power of the travel agents and the CRS airlines,¹⁷⁹ the agents were unable to litigate the issue to a full resolution.¹⁸⁰

The CRS airlines vehemently denied the accusations aimed at them, contending that they had complied in full with the rules, and that they were charging reasonable booking fees to non-CRS airlines. The CRS airlines also denied that they were accessing CRS data banks in order to monitor the sales of rivals. Nonetheless, the fact remained that the CAB rules did little to erode the position of United and American either in the airline market or in the CRS market.

C. STUDY BY DOJ

DOJ undertook a study in 1985¹⁸¹ to determine whether the CAB rules had remedied the anti-competitive effects of airline ownership of CRSs.¹⁸² In its report, DOJ found that the rules had not been effective,¹⁸³ and that the CRS airlines continued to possess market power over the CRS industry.¹⁸⁴

On the other hand, the report also found that the changes in entry

172. 49 Fed. Reg. 32,540, at 32,556 (1984).

173. *Airline Competition*, *supra* note 6, at 488.

174. *Id.*

175. *Senate Hearing*, *supra* note 48, at 261 (testimony of C.L. Bryant).

176. *Id.* at 263.

177. *See id.* at 261.

178. *Id.*

179. *Id.* at 167 (testimony of A.B. Magary). *But see In re "Apollo" Air Passenger Computer Reservation Sys. (CRS)*, 720 F. Supp. 1061 (S.D.N.Y. 1989).

180. *Senate Hearing*, *supra* note 48, at 107-09 (prepared statement of R.E. Murray). On the other hand, some travel agents defended to a conclusion suits brought by CRS airlines to enforce liquidated damages clauses and lost. *See United Air Lines, Inc. v. Austin Travel Corp.*, 867 F.2d 737 (2d Cir. 1989); *Apollo*, 720 F. Supp. 1061.

181. DOJ REPORT, *supra* note 56, at 2.

182. *Id.*

183. *Id.*

184. *Id.*

conditions caused by the CAB rules improved the prospects for entry of an independent CRS company,¹⁸⁵ because the rules had prohibited: (1) bias on the display screens of the CRSs,¹⁸⁶ (2) contracts of more than five years between agents and CRS airlines,¹⁸⁷ and (3) exclusivity agreements.¹⁸⁸ Even so, the report indicated that the possibility of entry into the CRS industry by an independent company, although improved, was still uncertain.¹⁸⁹ The report further noted that: (1) airline-owned CRSs contained the most reliable information about the CRS airline,¹⁹⁰ (2) liquidated damages clauses discouraged travel agents from changing to systems of new entrants,¹⁹¹ and (3) the costs of developing a new CRS were high.¹⁹²

The report also noted that the CRS airlines may have reintroduced bias into their CRSs¹⁹³ by refusing to display all classes of service offered by non-CRS airlines,¹⁹⁴ by favoring the hubs of CRS airlines,¹⁹⁵ by favoring CRS airline connecting flights over the flights of non-CRS airlines,¹⁹⁶ and by shaving flying times in order to gain listings at the top of the CRS screens.¹⁹⁷ Even so, the report concluded that new rules should not be promulgated by DOT,¹⁹⁸ and that bias could be controlled through enforcement of the existing rules.¹⁹⁹

The report discussed complaints from non-CRS airlines charging that CRS airlines did not provide market data in a timely fashion,²⁰⁰ that they provided data in raw form that took too long to process,²⁰¹ and that the CRS airlines were able to monitor the activities of their rivals by accessing the CRS data banks.²⁰² However, the report concluded that the abuses did not constitute a competitive problem²⁰³ because access to marketing data was not essential for an airline to

185. *Id.* at 15.

186. *Id.*

187. *Id.* at 19.

188. *Id.* at 20.

189. *Id.* at 21.

190. *Id.*

191. *Id.* at 22.

192. *Id.* at 27.

193. *Id.* at 32.

194. *Id.* at 33-34.

195. *Id.* at 36.

196. *Id.* at 35.

197. *Id.* at 37.

198. *Id.* at 38.

199. *Id.*

200. *Id.* at 40.

201. *Id.* at 42.

202. *Id.* at 50.

203. *Id.* at 42.

compete,²⁰⁴ and because airlines had alternate sources of information.²⁰⁵

The report discussed the possibility that the booking fees charged to non-CRS airlines could have anti-competitive effects.²⁰⁶ The report concluded that it was unclear whether CRS airlines charged supra-competitive fees,²⁰⁷ although it noted that because CRS airlines possessed large market shares of the CRS industry,²⁰⁸ and because barriers to entry existed,²⁰⁹ the fees possibly were supra-competitive.²¹⁰ However, the report indicated that DOJ preferred new entry into the CRS industry as a remedy to supra-competitive booking fees,²¹¹ rather than regulation of the fees.²¹² The report argued that it would be impossible to determine a competitive price for the fees,²¹³ and that fee regulation would require extensive supervision.²¹⁴

The report also discussed divestiture as an option.²¹⁵ The report indicated that divestiture would break down entry barriers to the CRS market²¹⁶ and would end unwarranted advantages that CRS airlines may have attained in the airline market through the use of CRSs.²¹⁷ However, the report also listed many factors that could make divestiture costly, noting that divestiture would result in duplication of software,²¹⁸ hardware,²¹⁹ data bases,²²⁰ staffs,²²¹ programmers²²² and telecommunications lines.²²³ The report also noted that there would be no benchmark by which to compute fair compensation to the CRS airlines for the CRSs,²²⁴ and that even if independent companies acquired the CRSs, travel agents, in order to receive commission overrides, might seek systems biased toward the dominant carrier in the travel agent's

204. *Id.*

205. *Id.* at 42-43.

206. *Id.* at 43.

207. *Id.* at 46.

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.* at 55.

212. *Id.*

213. *Id.* at 59.

214. *Id.* at 55.

215. *Id.* at 64.

216. *Id.*

217. *Id.* at 64-65.

218. *Id.* at 70.

219. *Id.* at 69.

220. *Id.* at 71.

221. *Id.* at 73.

222. *Id.*

223. *Id.* at 72.

224. *Id.* at 75.

market.²²⁵ Therefore, the report did not recommend divestiture.

D. STUDY BY THE GENERAL ACCOUNTING OFFICE

In response to a congressional request, the General Accounting Office (GAO) also conducted a study to examine the effects of airline-owned CRSs on competition in the airline industry.²²⁶ The GAO found that the booking fees charged by CRS airlines might be anti-competitive,²²⁷ and that the profit reports received from CRS airlines were of poor quality.²²⁸ The GAO also found evidence that the CRS airlines had market power over the CRS industry.²²⁹ GAO urged DOT to study further the possible anti-competitive effects of airline-owned CRSs in the airline industry²³⁰ and to enforce or strengthen rules governing CRSs.²³¹

E. DOT ACTION AFTER THE SUNSET OF CAB

After the sunset of CAB in 1985,²³² DOT took over CAB's authority to protect the public interest, convenience, and necessity,²³³ and to prevent actual, incipient, and policy violations of the antitrust laws.²³⁴

Despite the recommendations of DOJ and GAO that DOT rigorously enforce the CAB rules, DOT took a non-interventionist stance regarding regulation of the airline industry. DOT completed its own study of the CRS industry in 1988,²³⁵ which concluded that economies of scale and scope that CRS airlines enjoyed made new entrants into the CRS industry unlikely;²³⁶ that the booking fees charged by CRS airlines far exceeded cost;²³⁷ that non-CRS airlines had little ability to influence the level of booking fees;²³⁸ and that CRS airlines made very large profits from computer reservation systems.²³⁹ Despite its conclusions, DOT did little to prevent anti-competitive behavior by the CRS airlines. Although DOT promulgated some rules, such as a prohibition

225. *Id.* at 45.

226. U.S. GENERAL ACCOUNTING OFFICE, NO. GAO/RCED-86-74, AIRLINE COMPETITION: IMPACT OF COMPUTERIZED RESERVATION SYSTEMS (1986).

227. *Id.* at 12.

228. *Id.* at 13.

229. *Id.*

230. *Id.* at 14.

231. *Id.*

232. 49 U.S.C. § 1553 (1982 & Supp. V 1987).

233. *Id.* § 1302.

234. 14 C.F.R. § 224 (1984).

235. DOT STUDY, *supra* note 48.

236. *Id.* at 27.

237. *Id.* at 105.

238. *Id.* at 90.

239. *Id.* at 88.

against listing false flying times,²⁴⁰ DOT failed to prevent display bias,²⁴¹ failed to prohibit rollover clauses and minimum use clauses in contracts between CRS airlines and travel agents,²⁴² and failed to prevent misuse of market data by the CRS airlines.²⁴³ Under pressure from the House Aviation Subcommittee, which held a hearing on airline ownership of CRSs on September 14, 1988,²⁴⁴ DOT initiated a rulemaking to review the CAB rules on September 21, 1989.²⁴⁵ DOT's rulemaking, however, offered little hope that DOT would act to remedy anti-competitive conditions caused by airline ownership of CRSs. Representatives of DOT indicated at the House Aviation Subcommittee hearing that DOT did not have immediate plans or target dates to remedy the anti-competitive aspects of airline ownership of CRSs that it had noted in its 1988 study of the CRS industry.²⁴⁶

IV. CONGRESSIONAL ATTEMPTS TO REMEDY THE ANTI-COMPETITIVE EFFECTS OF AIRLINE-OWNED CRSs AND TO SPUR ADMINISTRATIVE ACTION

A. HOUSE OF REPRESENTATIVES

In 1983, shortly before the CAB rulemaking,²⁴⁷ the House Aviation Subcommittee held hearings on the issue of airline ownership of CRSs.²⁴⁸ Afterwards, the leadership of the subcommittee wrote a letter to CAB requesting rules to prohibit anti-competitive uses of CRSs by CRS airlines.²⁴⁹ The subcommittee remained dissatisfied, even after the

240. *Id.*

241. *Senate Hearing, supra* note 48, at 185-86 (prepared statement of E.R. Beauvais).

242. *Id.* at 257 (prepared statement of C.L. Bryant).

243. *Id.* at 269 (prepared statement of D.A. Swankin).

244. *Airline Computer Reservation Systems: Hearing before the Subcomm. on Aviation of the Comm. on Public Works and Transportation, House of Representatives*, 100th Cong., 2d Sess. (1988) [hereinafter *House Hearing*].

245. 54 Fed. Reg. 38,870 (1989).

246. *House Hearing, supra* note 244, at 103. Representatives of DOT stated that immediate action to remedy the anti-competitive aspects of airline ownership of CRSs was not warranted for a number of reasons. First, DOT stated that there was intense competition for travel agents CRS vendors. *Id.* at 83 (testimony of Hon. Robert L. Pettit, Associate Deputy Secretary of the Department of Transportation). Second, there was a trend toward CRS ownership by former non-CRS airlines. *Id.* at 84. Third, DOT had been unable to determine the net revenue that CRS airlines obtained from CRSs, because of the complexity of the cost transactions between CRS airlines and CRS customers. *Id.* at 87-89. Mr. Mineta, Chairman of the House Aviation Subcommittee, was unpersuaded by DOT's reasoning, and indicated "a degree of frustration" with DOT's inaction. *Id.* at 105 (statement of Hon. Norman Y. Mineta).

247. H.R. REP. NO. 293, 100th Cong., 1st Sess. 8 (1987).

248. *Id.*

249. *Id.*

promulgation of the CAB rules in 1984.²⁵⁰ Later, the members of the House Public Works Committee wrote to DOT requesting action.²⁵¹ However, DOT did not take any action in response to the request,²⁵² and, as a result, two bills were subsequently introduced in the House to deal with DOT's inaction.²⁵³

1. *Airline Computer Reservation Systems Arbitration Act*

Representatives Mineta, Hammerschmidt, and Gingrich introduced the Airline Computer Reservation Systems Arbitration Act²⁵⁴ on February 24, 1987. The bill was intended to require arbitration of disputes involving CRS contracts.²⁵⁵

The bill established a procedural mechanism for the arbitration of a CRS contract clause, if the clause affected at least one-third of the travel agents or one-third of the non-CRS airlines which had contractual relationships with CRS airlines.²⁵⁶ If a travel agent submitted a petition to the Federal Mediation and Reconciliation Service (FMCS) to rule on the enforceability of a contract clause, the CRS airline was to be given thirty days to inform FMCS of the number of travel agents affected by the clause.²⁵⁷ If either one-third of the travel agents affected by the clause or one hundred travel agents—whichever was lower—petitioned FMCS for arbitration of the clause, the clause was to be submitted for binding arbitration to determine whether the contract clause was consistent with normal business practice, or whether it was in force as a result of monopoly power exercised by the CRS airline.²⁵⁸ If a non-CRS airline submitted a petition, airlines that accounted for one-third of the yearly domestic scheduled passenger miles for the industry were required to join the petition in order to trigger arbitration.²⁵⁹ The FMCS was to set the ground rules for the arbitration and to appoint the

250. *Id.* at 8-9.

251. *Id.* at 8.

252. *Id.*

253. *Id.* at 8-9. The House Aviation Subcommittee also met on September 14, 1988, to consider the Department of Transportation's May 1988 report on the airline computer reservations systems industry, and on whether any action was needed to follow up on the DOT report. At the 1988 hearing, the Aviation Subcommittee did not consider any legislation. *House Hearing, supra* note 244, at 2.

254. H.R. 1217, 100th Cong., 2d Sess. 1, 133 CONG. REC. E570-71 (1987). Earlier versions of the bill were introduced in 1986 and 1985. See 132 CONG. REC. E2967-69 (daily ed. Aug. 15, 1986); 132 CONG. REC. H6432 (daily ed. Aug. 15, 1986).

255. 133 CONG. REC. E571 (1987) (daily ed. Feb. 24, 1987) (statement of Mr. Mineta).

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.*

arbitrators.²⁶⁰ The Airline Computer Reservations Systems Arbitration Act attracted little support and was not considered by any committee in the House.

2. *Airline Passenger Protection Act*

On October 5, 1987, the Airline Passenger Protection Act²⁶¹ was introduced by Representative Mineta and forty-six co-sponsors. The House version of the bill (1) prohibited the use of elapsed flying time to determine the order-of-flight display on CRS screens;²⁶² (2) prohibited liquidated damages clauses in contracts between CRS airlines and travel agents, allowing damages only for remaining lease fees and removal costs of CRS airlines;²⁶³ (3) prohibited rollover clauses;²⁶⁴ and (4) limited booking fees to the costs of collecting and displaying information.²⁶⁵

The bill passed the House and was received in the Senate.²⁶⁶ The Senate insisted on substantial amendments and requested a conference.²⁶⁷ However, the House disagreed with the Senate amendments, and Congress was unable to reach a compromise before it recessed in December 1987.

B. SENATE

1. *Airline Passenger Protection Act*

The Senate passed its own version of the Airline Passenger Protection Act in October 1987.²⁶⁸ The main provisions of the Senate bill required airlines to report information about airline flight delays and baggage complaints to consumers.²⁶⁹ However, the bill also contained provisions requiring the Secretary of Transportation to develop a formula for computing the average elapsed flying time for each flight displayed on a CRS,²⁷⁰ and required that no airline list a flight time shorter than the one formulated by DOT.²⁷¹ Further, the bill required that CRSs display the on-time performance of each flight listed on a

260. *Id.* at 3-4.

261. H.R. 3051, 100th Cong., 2d Sess. 16, 133 CONG. REC. H8113 (daily ed. Oct. 5, 1987).

262. *Id.* at 18, 133 CONG. REC. H8115-16.

263. *Id.* at 18, 21, 133 CONG. REC. H8117.

264. *Id.*

265. *Id.*

266. 133 CONG. REC. H8125 (daily ed. Oct. 5, 1987) (passed the House); *id.* at S15427 (daily ed. Oct. 5, 1987) (received in the Senate).

267. *Id.* at S15534 (statement of Sen. Ford).

268. S. 1485, 100th Cong., 2d Sess., 133 CONG. REC. S15530 (daily ed. Oct. 30, 1987).

269. 133 CONG. REC. S15527 (daily ed. Oct. 30, 1987) (statement of Sen. Metzenbaum).

270. S. 1485, 100th Cong., 2d Sess. 13, 133 CONG. REC. S15530-31 (daily ed. Oct. 30, 1987).

271. *Id.*, 133 CONG. REC. S15530.

CRS,²⁷² and that CRS-airlines charge reasonable fees for loading this information into the CRS.²⁷³

2. *Hearings Before the Senate Antitrust Subcommittee*

On December 19, 1987, the Senate Subcommittee on Antitrust, Monopolies and Business Rights held a hearing, chaired by Senator Metzenbaum, on the issue of airline ownership of CRSs.²⁷⁴ Options discussed at the hearing were: (1) legislative prohibition of liquidated damages clauses;²⁷⁵ (2) mandatory disclosure by travel agents to consumers of commission overrides;²⁷⁶ (3) informal negotiation between DOT and the CRS airlines;²⁷⁷ and (4) enforced divestiture by airlines of CRSs.²⁷⁸ The subcommittee did not consider any legislation at the hearing.²⁷⁹

V. ANALYSIS

Since the disbanding of CAB, the response of DOJ and DOT to the anti-competitive effects of airline ownership of CRSs has been sporadic and has resulted in ineffectual regulation. The response of Congress has been to carp at the agencies from time to time and to introduce occasional legislation to compensate for agency inaction.

These approaches are doomed to fail. DOT has proved unwilling to engage in close supervision of the CRS industry. Even if it were willing, it would probably be unable to regulate quickly enough to stay abreast of new technological developments.²⁸⁰ Congress is also ill-equipped to regulate the CRS industry.²⁸¹ There is only one way to protect the consumer from the CRS airlines and from the costs of ineffectual regulation. Congress must restructure the airline industry, through divestiture.

A. CRITICISM OF DOJ REPORT

The DOJ report, which studied the effectiveness of the CAB rules passed in 1984 to remedy anti-competitive abuses of the CRS by CRS-airlines, concluded that the rules had been ineffective, and that the

272. *Id.* at 13-14, 133 CONG. REC. S15530-31.

273. *Id.*

274. *See Senate Hearing, supra* note 48.

275. *Id.* at 263-64 (prepared statement of C.L. Bryant).

276. *Id.* at 219 (prepared statement of M.E. Levine).

277. *See id.* at 151 (prepared statement of M.V. Scocozza).

278. *Id.* at 2 (opening statement of Sen. H.M. Metzenbaum).

279. *Id.*

280. *See id.* at 218 (prepared statement of M.E. Levine).

281. *See id.*

CRS-airlines continued to possess market power in the CRS industry. Despite this finding, DOJ failed to recommend action to remedy the anti-competitive effects of airline ownership of CRSs. DOJ's inaction stemmed from erroneous conclusions about conditions in the airline industry.

First, DOJ underestimated the anti-competitive effects that resulted from the CRS airlines' superior access to market data. CRS airlines have used the data to develop strategies that maintain their dominance in the airline market as well as in the CRS market.²⁸² True, this data is available to the non-CRS airlines, but only at a high price and in raw form.²⁸³ Further, the non-CRS airlines do not have the same ability as the CRS airlines to develop the computer capabilities to effectively process the data.²⁸⁴ The CRS airlines have also exploited their ability to obtain immediate information on the sales of their rivals through the CRS central processing unit.²⁸⁵ The CRS airlines use the information to adjust their own fares from minute to minute, according to how many seats are available on the non-CRS airline.²⁸⁶ The non-CRS airline must set a definite number of seats to be sold at discount rates because they do not have the means to monitor the sales of rival airlines.²⁸⁷ Not only does this put non-CRS airlines at a great disadvantage,²⁸⁸ but it also disadvantages consumers because they cannot depend on obtaining advertised low fares from CRS airlines.²⁸⁹

Second, the report failed to recognize that booking fees charged by CRS airlines are probably supra-competitive. The report concluded that it was not clear whether booking fees were supra-competitive,²⁹⁰ and that the answer to this question would depend on the methodology used to compute the costs of booking the flights.²⁹¹ However, DOJ's finding that the CRS airlines possessed market power in the CRS industry should have led them to recommend a rulemaking by DOT on the issue of the competitiveness of booking fees. DOJ's reliance on new entrants into the CRS market as a remedy for booking fees that DOJ suspected were supra-competitive was naive, in view of its findings that new entry into the market was uncertain.

282. *Id.* at 207.

283. *Airline Competition, supra* note 6, at 461.

284. *Id.*

285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.*

289. *Senate Hearing, supra* note 48, at 172 (prepared statement of D.A. Swankin).

290. DOJ REPORT, *supra* note 56, at 46.

291. *Id.* at 52.

B. CRITICISM OF DOT FAILURE TO PROTECT PUBLIC INTEREST,
CONVENIENCE, AND NECESSITY, AND TO ENFORCE ANTITRUST
LAWS IN THE AIRLINE INDUSTRY

In debates on the Senate floor, Senator Kennedy, summarizing the congressional intent behind the Airline Deregulation Act (ADA), indicated that Congress intended the bill to implement regulation that would allow market forces to act unimpeded:

The bill itself is complex and technical, but the theme is simple: Open the air transportation industry to the rigors of competition and benefits will flow to the carriers, the consumer, and the taxpayer. This is achieved by creating a regulatory policy framework that relies on competitive market forces to provide lower fares and better air service, and by specifically allowing the carriers for the first time ever to compete in price and to gain easier entry into markets.²⁹²

However, DOT has proved unwilling to promulgate regulations that effectuate the purpose of the ADA, and DOT has ignored the pro-consumer policies that were behind Congress' passage of the ADA. Moreover, DOT has failed to enforce the CAB rules which were promulgated in order to prevent anti-competitive abuse of the CRS by the CRS-airlines. DOT has thus failed to implement the congressionally mandated standards for the public interest, convenience, and necessity, as set forth in the ADA.²⁹³

1. *Adequate Low Price Service*²⁹⁴

The ADA demonstrates Congress' intent that the market determine the level of prices and services for the consumer, in an atmosphere of fair competition.²⁹⁵ However, DOT has failed to prevent the CRS airlines from monitoring the sales of rivals²⁹⁶ and then offering low fares only until rivals sell out their discount fares.²⁹⁷ Therefore, the consumer is not able to rely on consistent availability of advertised low fares from CRS airlines.

2. *Unfair and Deceptive Practices*²⁹⁸

DOT has allowed display bias to continue,²⁹⁹ which, according to

292. 124 CONG. REC. 37,418 (1978) (statement of Sen. Kennedy).

293. 49 U.S.C. § 1302 (1982 & Supp. V 1987).

294. *Id.* § 1302(a)(3).

295. H.R. REP. NO. 1211, 95th Cong., 2d Sess. 4-5, 55, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 3737, 3740-41, 3774.

296. *Airline Competition*, *supra* note 6, at 463.

297. *Id.* at 462.

298. 49 U.S.C. § 1302(a)(7) (1982 & Supp. V 1987).

299. *See Senate Hearing*, *supra* note 48, at 101-03 (prepared statement of R.E. Murray).

the now defunct CAB, is an unfair and deceptive practice.³⁰⁰ For example, DOT has tolerated CRS airlines' refusal to display all classes of service available on rival airlines.³⁰¹ DOT has also allowed CRS airlines to bias screens towards CRS-airline connecting flights, even if the flight of a rival airline would provide a shorter layover time to the consumer.³⁰² Although the DOJ report indicated that these practices probably violate the CAB rules,³⁰³ DOT has failed to implement enforcement proceedings.

3. *Predatory Practices*³⁰⁴

A further violation of congressional policy which has gone unremedied by DOT is the unreasonable increase in booking fees. The legislative history of the ADA indicates that predatory behavior should be remedied by DOT.³⁰⁵ However, DOT has not attempted to remedy the CRS airlines' predatory behavior of charging unreasonably high booking fares as a result of their market power.

4. *Market Concentration*³⁰⁶

Market concentration in the airline industry has occurred, in part, because of the advantages that certain airlines gain by using CRSs.³⁰⁷ The legislative history of the ADA indicates that DOT was supposed to regulate the airline industry in order to prevent market concentration.³⁰⁸ However, DOT has, on the contrary, tolerated anti-competitive exploitation of the CRS by the two dominant carriers in the airline industry, American and United.³⁰⁹ As a result, for the period of time DOT has been responsible for regulation of the airline industry, the industry has become even more concentrated.³¹⁰

300. 49 Fed. Reg. 32,540, at 32,548 (1984).

301. DOJ REPORT, *supra* note 56, at 33-34.

302. *Id.* at 35.

303. *Id.* at 38.

304. 49 U.S.C. § 1302(a)(7) (1982 & Supp. V 1987).

305. H.R. REP. NO. 1211, 95th Cong., 2d Sess. 9, 98, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 3737, 3745, 3808.

306. 49 U.S.C. § 1302(a)(7) (1982 & Supp. V 1987).

307. *Airline Competition*, *supra* note 6, at 464.

308. H.R. REP. NO. 1211, 95th Cong., 2d Sess. 5-6, 55-56, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 3737, 3740-41, 3774-75.

309. *Senate Hearing*, *supra* note 48, at 246 (prepared statement of A.B. Magary).

310. 133 CONG. REC. S15527 (daily ed. Oct. 30, 1987) (statement of Sen. Metzenbaum).

5. *Regulatory Environment to Encourage Innovation and Expansion*³¹¹

DOT has also tolerated a business environment that reduces incentives for innovations in the CRS industry. Because the CRS airlines have market power over the CRS industry, possible new entrants lack incentive to develop the technology of the product.³¹² Moreover, new air carriers hesitate to enter the air transportation market because to do so is perilous without the benefit of CRS ownership.³¹³ In addition, independent CRS companies also hesitate to enter the CRS market because they are unable to gain incremental revenue through the use of display bias, as do the CRS airlines.³¹⁴ Consequently, without cross-subsidization from airline profits, an independent CRS company cannot compete with the CRS airlines in the CRS market.

6. *Antitrust Violations*

CAB is empowered to prevent violations of antitrust laws in the airline industry,³¹⁵ violations of the policies behind the laws,³¹⁶ and incipient violations of the laws.³¹⁷

An exhaustive antitrust analysis of the CRS industry would be outside the scope of this Article. Moreover, a private antitrust suit against the CRS airlines is pending in federal district court.³¹⁸ However, a prima facie argument can be made, by applying relevant case law to CAB findings of fact, that DOT has tolerated violations of the antitrust laws by the CRS airlines. Although the CAB factual findings rested on "substantial evidence,"³¹⁹ rather than the more rigorous "pre-

311. 49 U.S.C. § 1302(a)(9), (10) (1982 & Supp. V 1987).

312. DOJ REPORT, *supra* note 56, at 21.

313. *Id.* at 10.

314. *Id.* at 19.

315. *Pan Am. World Airways v. United States*, 371 U.S. 296, 304 (1963).

316. *Id.* at 307.

317. *Id.*

318. *In re Air Passenger Computer Reservations Sys. Antitrust Litig.*, No. MDL 667 (C.D. Cal. 1986). When this Article was published, the case was still pending, although some issues have been resolved by motion. *See, e.g., In re Air Passenger*, 727 F. Supp. 564 (C.D. Cal. 1989) (plaintiffs have standing to bring monopolization claim under section 2 of the Sherman Act but do not have standing to bring attempted monopolization claim; plaintiffs' motion to reconsider denied); *In re Air Passenger*, 724 F. Supp. 744 (C.D. Cal. 1989) (American Airlines obligated to pay Air Cal's attorneys' fees); *In re Air Passenger*, 1988-2 Trade Cas. (CCH) ¶ 68,216 (C.D. Cal. 1988) (defendants granted summary judgment on plaintiffs' claims under section 1 of the Sherman Act); *In re Air Passenger*, 694 F. Supp. 1443 (C.D. Cal. 1988) (defendants granted summary judgment on essential facilities and monopoly leveraging theories; genuine issue of material fact existed concerning allegations of monopolization and attempted monopolization); *In re Air Passenger*, 116 F.R.D. 390 (C.D. Cal. 1986) (plaintiffs' motion to compel granted).

319. 49 Fed. Reg. 32,540, at 32,542 (1984).

ponderance of the evidence" test,³²⁰ and were made for the purpose of prospective rulemaking rather than adjudication,³²¹ nonetheless, the findings support such a prima facie case.

The CRS airlines may be monopolizing the CRS industry under section 2 of the Sherman Act.³²² In order to monopolize under the Act, a firm must possess monopoly power in the relevant market³²³ and must exercise the monopoly power.³²⁴ The opinion that accompanied the 1984 CAB rules stated that the airlines did not necessarily have a monopoly with regard to the national CRS market.³²⁵ However, the opinion stated that the market to look at was the regional market,³²⁶ and that the regional market was more concentrated than the national market.³²⁷ Although the CAB did not analyze the CRS airlines' regional market shares, it seems probable, based on the CAB opinion, that the CRS airlines possess monopoly power in the regional markets.³²⁸

Antitrust case law suggests that the CRS airlines' behavior indicates that they possess monopoly power. In *United States v. General Electric Co.*,³²⁹ General Electric Corporation (GE) engaged in industrial surveillance of its rivals in the lamp market. GE believed that its rivals were infringing GE patents, and accordingly, inspected its rivals' plants. However, GE gathered additional information unrelated to patent infringement.³³⁰ GE aggressively sought data regarding their rivals that had only been available to government agencies.³³¹ In addition, GE recorded the number of lamp bases the competitors had bought from GE³³² in order to predict how many lamps the rivals would put into the market.³³³ GE gathered all of its data at a central point in order to de-

320. *See id.*

321. *Id.*

322. 15 U.S.C. § 2 (1978).

323. *United States v. E.I. Du Pont De Nemours & Co.*, 118 F. Supp. 41, 195 (D. Del. 1953).

324. *Id.* at 50.

325. 49 Fed. Reg. 32,540, at 32,544 (1984). The report states:

DOJ's national market statistics show that SABRE agents account for 43 percent of all domestic travel agent revenues, while APOLLO agents account for another 27 percent. These shares are lower than those courts generally recognize as indicating monopoly power. Nevertheless, given the nature of competition in CRS and air transportation markets, the national shares suggests that the leading vendors have significant market power.

Id.

326. *Id.*

327. *Id.*

328. *Id.* at 32,545.

329. 82 F. Supp. 753 (D.N.J. 1949).

330. *Id.* at 901.

331. *Id.*

332. *Id.*

333. *Id.*

termine strategy that would enable GE to continue dominating the lamp market.³³⁴ The court found that the behavior of GE was a manifestation of monopoly power.³³⁵

The CRS airlines have engaged in behavior similar to that of GE. They have engaged in industrial surveillance through the CRSs—gathering immediate information on the ticket sales of rivals.³³⁶ They have gathered raw data on computer tapes and collected the tapes at a central point in order to track the performances of non-CRS airlines. CRS airlines have not made the computer tapes readily accessible to non-CRS airlines because the tapes are difficult to process. The CRS-airlines have used the immediate data and the computer tape data to develop strategies that will enable them to continue dominating the CRS market. This behavior indicates monopoly power by the CRS airlines.

In order to exercise monopoly power under section 2 of the Sherman Act, a firm must willfully maintain the monopoly power—as distinguished from realizing growth attributable to a superior product, business acumen, or historic accident.³³⁷ CRS airlines have probably committed the exclusionary acts toward competition—an exercise of monopoly power under section 2 of the Sherman Act—by engaging in illegal price squeezing. An example of illegal price squeezing is provided by *United States v. Aluminum Co. of America*³³⁸ (*Alcoa*).

In *Alcoa*, an aluminum company imposed a price squeeze on its competitors by selling raw aluminum at a relatively high price, and by selling its own processed aluminum at a relatively low price.³³⁹ In this way, it denied independent aluminum processors the ability to obtain a reasonable profit.³⁴⁰ The Second Circuit held that this was an illegal price squeeze.³⁴¹

CRS airlines are imposing a price squeeze on the independent CRS market by charging low subscription prices to travel agents³⁴² in order to gain enhanced ticket sales through the use of display bias and commission overrides.³⁴³ Part of the profit that the CRS airlines gain is derived from ticket sales attributable to control of the CRS market.³⁴⁴ Profit from ticket sales is unavailable to independent CRS compa-

334. *Id.*

335. *Id.*

336. *Senate Hearing, supra* note 48, at 216-17 (prepared statement of M.E. Levine).

337. *Marnell v. United Parcel Serv. of Am.*, 260 F. Supp. 391, 412 (N.D. Cal. 1966).

338. 148 F.2d 416 (2d Cir. 1945).

339. *Id.* at 437.

340. *Id.* at 437-38.

341. *Id.* at 438.

342. *Airline Competition, supra* note 6, at 460.

343. *Id.*

344. *Id.* at 462.

nies.³⁴⁵ Therefore, as in *Alcoa*, the CRS airlines are using their position in one industry (airlines) to squeeze out independent operators in another industry (CRSs). Moreover, the CRS airlines use their resultant market power in the CRS industry to gain further monopoly leverage over the airline industry through display bias, commission overrides, and industrial surveillance.³⁴⁶

In order to constitute a section 2 offense, the monopoly must exist in the relevant market.³⁴⁷ The CAB opinion found that the relevant product market was CRS services and not airline ticket distribution services.³⁴⁸ It also found that the relevant geographic market was regional and not national.³⁴⁹ CRS airlines probably possess regional monopolies within the product market of CRS services.³⁵⁰

The CRS airlines may also be monopolists under the essential facility doctrine.³⁵¹ If a facility is essential in order to compete in a given market, the owners of the facility are obligated to provide access to the facility on a reasonable basis.³⁵² The CAB opinion found that CRSs are an essential facility³⁵³ and promulgated new rules partially in response to this finding.³⁵⁴ However, the CRS airlines have not provided reasonable access to the non-CRS airlines.³⁵⁵ They have charged booking fees that are well above cost³⁵⁶ and have granted themselves superior access to immediate market data obtainable through CRSs.³⁵⁷

345. *Id.*

346. *Senate Hearing, supra* note 48, at 212-17 (prepared statement of M.E. Levine). *But see In re Air Passenger Computer Reservations Sys. Antitrust Litig.*, 694 F. Supp. 1443, 1472-75 (C.D. Cal. 1988) (defendant granted summary judgment in antitrust suit against CRS airline alleging monopoly leveraging through use of CRS). The court stated that, even though there was evidence indicating monopoly leveraging, "summary judgment on the monopoly leveraging claim would be appropriate because the theory is inconsistent with the requirements of section 2 [of the Sherman Antitrust Act]." *Id.* at 1475.

347. *Alcoa*, 148 F.2d at 429.

348. 49 Fed. Reg. 32,540, at 32,544 (1984).

349. *Id.*

350. Cohen, *The Antitrust Implications of Airline Deregulation*, 28 ANTITRUST BULL. 131, 152-53 (1983).

351. 49 Fed. Reg. 32,540, at 32,546 (1984).

352. *Southern Pac. Communications v. A.T. & T.* 556 F. Supp. 825, 973 (D.D.C. 1983).

353. 49 Fed. Reg. 32,540, at 32,546 (1984). *But see In re Air Passenger Computer Reservations Sys. Antitrust Litig.*, 694 F. Supp. 1443, 1452-56 (C.D. Cal. 1988) (SABRE CRS not an essential facility because there are other computer reservation systems competing with SABRE).

354. 49 Fed. Reg. 32,540, at 32,546 (1984).

355. DOJ REPORT, *supra* note 56, at 13-14.

356. *Senate Hearing, supra* note 48, at 207 (testimony of M.E. Levine).

357. *Id.* at 211.

7. *Incipient Antitrust Violations*

Even if the CRS airlines are not committing actual violations of the antitrust laws, they are violating the policy behind the laws. The policy behind the antitrust laws is to preserve competition and to protect the consumer against monopolies.³⁵⁸ DOT has the authority not only to prohibit incipient violations of the antitrust laws, but also to prohibit violations of the policies behind the laws.³⁵⁹

Section 411 of the FAA Act³⁶⁰ is analogous to section 45 of the Federal Trade Commission (FTC) Act,³⁶¹ which enables the FTC to prevent incipient antitrust violations.³⁶² The FTC has found that practices similar to those engaged in by CRS airlines are incipient antitrust violations.

In *FTC v. Texaco*,³⁶³ the Goodrich Tire Company paid commissions to Texaco in exchange for Texaco's efforts to induce its service station franchisees to sell Goodrich tires, batteries, and accessories.³⁶⁴ The FTC held that Texaco's practice violated section 5 of the FTC Act.³⁶⁵ The Supreme Court upheld the FTC's decision,³⁶⁶ reasoning that Texaco exercised dominant market power over its franchisees,³⁶⁷ and that Texaco's use of its market power to induce the franchisees to buy Goodrich tires, batteries, and accessories foreclosed the market to independent distributors of tires, batteries, and accessories.³⁶⁸ The Court held that the standard under section 5 was not whether Texaco had violated the antitrust laws, but whether Texaco's actions "unfairly burdened competition for a not significant volume of commerce."³⁶⁹

The CRS airlines' payments of commission overrides to travel agents is analogous to Goodrich's payment of commissions to Texaco. CRS airlines use profits from their increased ticket sales (which result from CRS display bias) to pay commission overrides to agents.³⁷⁰ In do-

358. H. HOVENKAMP, *ECONOMICS AND FEDERAL ANTITRUST LAWS* 50-51 (Lawyer ed. 1985).

359. See, e.g., 49 Fed. Reg. 32,540, at 32,542 (1984).

360. 49 U.S.C.A. app. § 1381 (West 1989).

361. Federal Trade Commission Act, 15 U.S.C.A. § 45 (West 1989); see also CAB Rulemaking on Carrier-owned Computer Reservation Systems, 49 Fed. Reg. 32,540, at 32,542 (1984) "Section 411 [FAA Act], like section 5 [FTC Act] was meant to supplement other antitrust statutes by stopping in their incipiency those methods of competition which fall within the meaning of the word 'unfair.'" *Id.*

362. 15 U.S.C. § 45.

363. 393 U.S. 223 (1968).

364. *Id.* at 227.

365. *Id.* at 225.

366. *Id.* at 223.

367. *Id.*

368. *Id.* at 229.

369. *Id.* at 230.

370. *Airline Competition*, *supra* note 6, at 460.

ing so, they foreclose the CRS market to independent CRS companies, who are unable to gain incremental revenue from airline ticket sales.³⁷¹ But, despite this existence of a prima facie case of antitrust violation against the CRS airlines, and despite the fact that CRS airlines have clearly violated the policies behind the antitrust laws, DOT has not brought an antitrust action against the CRS airlines.

C. CRITICISM OF HOUSE RESPONSE

1. *Airline Computer Reservation Systems Arbitration Act*

The Airline Computer Reservation Systems Arbitration Act contradicts the policy behind the Airline Deregulation Act, by reintroducing extensive government regulation into the airline industry. Moreover, mandatory arbitration might deter DOT enforcement of the policies of the ADA. DOT would be less likely to enforce or promulgate rules concerning the CRSs in the midst of a government-enforced arbitration concerning CRS contracts, for fear of inconsistent outcomes. For example, FMCS and DOT could develop—in separate proceedings—different standards for the acceptable level of use that a CRS-airline could require of a travel agent under a minimum use clause of a contract. The confusion resulting from concurrent jurisdiction by DOT and FMCS over CRS contracts would make government regulation even more ineffectual.

2. *Airline Passenger Protection Act*

The House version of the Airline Passenger Protection Act attempts to protect the consumer by prohibiting the use of elapsed flying times to determine the order-of-flight display on CRS screens, and by prohibiting liquidated damages clauses in contracts between CRS airlines and travel agents.³⁷² Although this approach could have benefits, the benefits would only be temporary. CRS airlines would be likely to find other ways to achieve display bias, as they did in order to side step the CAB rules.³⁷³ For example, CRS airlines probably would continue to discriminate against non-CRS airlines' connecting flights.³⁷⁴ Because airline deregulation has given rise to the "hub and spoke system,"³⁷⁵ most air trips involve connections. Therefore, display bias against connecting flights would have a severe economic effect on non-CRS

371. *Senate Hearing, supra* note 48, at 109-10 (prepared statement of R.E. Murray).

372. H.R. 3051, 100th Cong., 2d Sess. 18, 21, 133 CONG. REC. H8115-17 (daily ed. Oct. 5, 1987).

373. MORRISON, *supra* note 33, at 70.

374. *Id.* at 70 n.17.

375. *Airline Competition, supra* note 6, at 411.

airlines.³⁷⁶

Although eliminating liquidated damages clauses would reduce barriers to entry for new entrants into the CRS industry, this approach would be insufficient because barriers to entry would continue to exist as a result of revenues that CRS-owning airlines generate through display bias.³⁷⁷ Further, even if eliminating liquidated damages clauses would enable new airline-owned CRS companies to enter the market,³⁷⁸ the new entrants would have an incentive to engage in display bias.³⁷⁹

D. CRITICISM OF THE SENATE RESPONSE

1. *Airline Passenger Protection Act*

The Senate version of the Airline Passenger Protection Act not only regulates the manner in which CRSs' display information, it also compels all airlines to provide certain information to the consumer.³⁸⁰ For instance, the bill requires that those who book flights from a CRS screen inform consumers of flight delay and other information that would be displayed on the screen.³⁸¹ However, the Senate version of the Act is unlikely to adequately address the anti-competitive problem of airline ownership of CRSs. The bill requires that flight delay information be provided to DOT.³⁸² This "paperwork" requirement could unduly burden small, new entrant airlines which, unlike large airlines, do not keep track of such information in the normal course of business.³⁸³

Furthermore, the bill might create new inefficiencies in the CRS industry.³⁸⁴ The software for CRSs may have to be changed in order to load the information about delayed flights.³⁸⁵ Also, including such information could lead to longer conversations between travel agents and consumers, thus raising personnel costs.³⁸⁶ More importantly, it would be an example of the government requiring a service from private industry that the market may not demand.

376. See MORRISON, *supra* note 33, at 70 n.17.

377. See Senate Hearing, *supra* note 48, at 218-20 (prepared statement of M.E. Levine).

378. *Id.*

379. *Id.*

380. S. 1485, 100th Cong, 2d Sess. 13-15, 133 CONG. REC. S15530-34 (daily ed. Oct. 30, 1987).

381. *Id.* at 6, 13, 133 CONG. REC. S15530.

382. *Id.* at 13, 133 CONG. REC. S15530-31.

383. S. REP. NO. 138, 100th Cong., 1st Sess. 6-7 (1987).

384. *Id.* at 7.

385. *Id.* at 6.

386. *Id.*

2. *Legislation From the Senate Antitrust Subcommittee*

More satisfactory legislation does not appear to be forthcoming from the Senate Subcommittee on Antitrust, Monopolies, and Business Rights. In hearings before the subcommittee, Chairman Senator Metzenbaum indicated that he favors informal negotiation with CRS airlines over a legislative solution.³⁸⁷ However, informal negotiation is unlikely to succeed in the face of the complexities presented by CRS technology, and the large amount of money at stake for the CRS airlines.

Further, Senator Metzenbaum indicated that if he were to introduce legislation, it would be in the form of regulation, such as the prohibition of liquidated damages clauses,³⁸⁸ rather than in the form of enforced divestiture.³⁸⁹ Such regulation would reintroduce government intervention into the airline industry, contrary to the policies behind the Airline Deregulation Act.

E. OPTIONS OPEN TO CONGRESS

In view of DOT's failure to implement the policies of the ADA, and to prevent market manipulation by CRS airlines and the resultant market concentration, Congress must act to protect the consumer. Congress has discussed three available options for remedying the anti-competitive effects of airline ownership of CRSs. Congress may: (1) regulate airline use of CRSs,³⁹⁰ (2) urge DOT to engage in informal negotiation with the CRS airlines,³⁹¹ or (3) pass legislation that would require CRS airlines to divest their CRSs.³⁹² Of these three options, divestiture is the only satisfactory one.

1. *Regulation*

Regulation is not a satisfactory option. Regulation would be contrary to the policy of the Airline Deregulation Act, a major piece of legislation that is only seven years old. Also, regulation would deprive the consumer of some of the benefits of deregulation; deregulation led to customer savings and increased airline efficiency.³⁹³

Further, CRS airlines have been successful in sidestepping regulations. They have avoided CAB rules against display bias through the

387. *Senate Hearing, supra* note 48, at 2 (opening statement of Sen. H.M. Metzenbaum).

388. *Id.* at 151 (testimony of M.V. Scocozza).

389. *Id.* at 248-49 (panel discussion).

390. *See, e.g., id.*, at 2 (opening statement of Sen. H.M. Metzenbaum).

391. *See, e.g., id.* at 152-53 (testimony of M.V. Scocozza).

392. *See, e.g., id.* at 2 (opening statement of Sen. H.M. Metzenbaum).

393. MORRISON, *supra* note 33, at 1-2.

use of misleading devices such as false elapsed flying times.³⁹⁴ In addition, CRS airlines sidestepped the CAB rules forbidding contracts with travel agents lasting more than five years³⁹⁵ by instituting rollover clauses in their contracts.³⁹⁶ The CRS airlines have also avoided the CAB rules against exclusivity clauses in their contracts by instituting minimum use clauses.³⁹⁷ Because the minimum use requirements they imposed were so high, the clauses acted as de facto exclusivity clauses.³⁹⁸

In the face of CRS airlines' efforts to avoid regulatory requirements and the rapid technological developments in the CRS industry, neither DOT nor Congress have the ability to regulate quickly enough or extensively enough to adequately stem the anti-competitive effects of airline ownership of CRSs.³⁹⁹

2. *Informal Negotiation*

Informal negotiation between DOT and the CRS airlines is also not a satisfactory option. The technical complexities of the CRS industry and the ever-expanding capabilities of computers make the issue too complicated to be resolved through informal negotiation.⁴⁰⁰ Further, since the CRS airlines have been successful in avoiding the CAB rules, it is also likely that they would be successful in avoiding any informal agreement entered into with DOT.⁴⁰¹ In view of the large economic interests that the CRS airlines have at stake, and in view of the past behavior of the CRS airlines, good faith negotiation by the CRS airlines seems unlikely.

3. *Divestiture*

a. *Congressional power to legislate divestiture, and policy arguments in favor of divestiture*

Divestiture is the only option open to Congress that is likely to stop the anti-consumer effects of airline-owned CRSs. Although divestiture is a remedy that is most often used by the courts, Congress has the power to require divestiture under the Constitution's Commerce Clause.⁴⁰² Divestiture would be the most cost-effective option, because

394. *Senate Hearing, supra* note 48, at 101-02 (prepared statement of R.E. Murray).

395. *Id.* at 104.

396. *Id.*

397. *Id.* at 261 (prepared statement of C.L. Bryant).

398. *Id.*

399. *Id.* at 193 (prepared statement of E.R. Beauvais).

400. *See id.*

401. *See id.* at 194.

402. U.S. CONST. art. I, § 8, cl. 3.

it would eliminate the continuing need to regulate and supervise the CRS industry against further display bias.⁴⁰³ Independent CRS companies would not have the incentive that CRS airlines have to distort flight information and to charge supra-competitive booking fees;⁴⁰⁴ independent CRS companies would not compete with airlines to sell tickets and to gain market power in the airline industry.⁴⁰⁵ Moreover, consumers would gain substantial benefits because they would have easier access to information regarding any less expensive and more convenient flights offered by non-CRS airlines.⁴⁰⁶ In addition, divestiture would eliminate the competitive advantage that CRS airlines maintain by monitoring the sales of non-CRS airlines and travel agents.⁴⁰⁷

Divestiture would also allow non-airline companies to enter into the CRS market more easily.⁴⁰⁸ Independent CRS companies are currently unable to compete against airline-owned CRS companies because the airline-owned CRS companies, unlike the non-airline companies, are able to exchange lower CRS profits for the higher volume of fare profits that result from display bias.⁴⁰⁹ Divestiture would also reduce barriers that now exist for non-CRS owning airlines, because CRS airlines could no longer gain sales through the use of display bias.⁴¹⁰

Some argue that independent, non-airline-owned, CRS companies would operate at a loss if they charged the same booking fees as existing CRS companies, and would consequently fail—leaving consumers without the benefits of CRS technology.⁴¹¹ This argument is unpersuasive. Although independent CRS companies would not gain incremental revenues from sales of airline tickets,⁴¹² they could raise travel agent subscription rates. These subscription rates would not be supra-competitive because competition between the independent CRS companies would keep the rates down. Travel agents have come to rely on the CRS to serve their customers.⁴¹³ Demand would continue among travel agents for CRS services and independent CRS companies would be able to make a profit.⁴¹⁴ Moreover, increased subscription rates to travel

403. *Airline Competition*, *supra* note 6, at 489.

404. *Senate Hearing*, *supra* note 48, at 208 (testimony of M.E. Levine).

405. *Id.*

406. *See id.* at 185-86 (prepared statement of E.R. Beauvais).

407. *Id.* at 216-17 (prepared statement of M.E. Levine).

408. *Airline Competition*, *supra* note 6, at 488-89.

409. *Id.* at 460.

410. *Id.* at 488-89.

411. *See, e.g.*, 49 Fed. Reg. at 32,560; *Senate Hearing*, *supra* note 48, at 245-47 (panel discussion).

412. *Senate Hearing*, *supra* note 48, at 208 (testimony of M.E. Levine).

413. *Id.* at 212.

414. *Id.* at 245 (panel discussion).

agents should not result in higher costs to consumers.⁴¹⁵ First, competition between independent CRS companies would keep subscription rates reasonably priced.⁴¹⁶ Second, consumers would save money due to their improved access to information with regard to both inexpensive flights and more convenient connecting flights.⁴¹⁷

Opponents of divestiture also argue that the CRS airlines should not be deprived of their CRS systems because they took the risk of developing the CRS.⁴¹⁸ However, the CRS airlines were able to develop the CRS, in part, because of advantages conferred by the government.⁴¹⁹ United and American were granted nationwide routes by the CAB under regulation,⁴²⁰ and, therefore, were among the most profitable regulated airlines.⁴²¹ Because of this economic advantage, United and American had the capital required to develop the CRS.⁴²² Moreover, under regulation, the entire airline industry had started to develop an industry-wide computer reservation system.⁴²³ However, United and American pulled out of the industry effort and developed their own display-biased systems, using the economic advantage conferred on them by the government.⁴²⁴ Because of these circumstances, concern for the consumer should be paramount, and Congress should require divestiture, accompanied by fair compensation to the CRS airlines.

The reasons cited against divestiture in the DOJ report are unpersuasive. Admittedly, divestiture would result in the duplication of software, hardware, staff, and telecommunications lines.⁴²⁵ These duplications could destroy efficiencies that may exist as a result of airline ownership of CRSs. On the other hand, independent companies that own CRSs would have the incentive to develop more efficient software, hardware, and staffing techniques. The airline-owned CRS companies do not seem to have the same incentives—their goal has appeared to be to gain more passengers by manipulating the CRS—and thus might not make the CRS as efficient as an independent company would.⁴²⁶

415. *See id.* at 249-50.

416. *See id.*

417. *See id.*

418. *Id.* at 35 (prepared statement of M.A. Buckman).

419. *Airline Competition*, *supra* note 6, at 459.

420. *Id.* at 426.

421. *House Hearing*, *supra* note 244, at 55-56 (prepared statement of Victor Rezendes, Associate Director, Resources, Community, and Economic Development Division, United States General Accounting Office).

422. *Id.*

423. *Id.* at 459-60.

424. *Id.* at 460.

425. DOJ REPORT, *supra* note 56, at 69.

426. *See Senate Hearing*, *supra* note 48, at 249 (testimony of M.E. Levine).

DOJ argued that divestiture would be impracticable, because there would be no benchmark for competition to the CRS airlines, should they be ordered to divest their CRSs.⁴²⁷ However, DOT could develop a formula for compensation based on the amount of money invested in the CRS, the amount of profit earned by the CRS, and the risk undertaken by the CRS airlines in developing the CRS. Moreover, should compensation be difficult to compute, DOT could require that the independent companies pay residual royalties to the CRS airlines for a specified time.

The DOJ report also argued that the problem of bias might not be solved by divestiture. The report indicated that travel agents might seek biased systems from the independent CRS companies, so that the agents could obtain commission overrides from the dominant airlines in the travel agent's regional market.⁴²⁸ However, this problem could be solved by prohibiting commission overrides.

Divestiture is not unprecedented where vertical integration of powerful corporations has harmed consumers by reducing competition. In *Ford Motor Company v. United States*,⁴²⁹ Ford acquired Autolite, a spark plug company.⁴³⁰ The spark plug industry was concentrated at the time of Ford's entry into the market.⁴³¹ Profits in the spark plug industry were made not through the first sale of a plug to a car manufacturer, but through replacement sales to the buyer of the car.⁴³² The initial sales were made at cost, or below cost, in order to insure replacement sales, on which profits were made.⁴³³ The Supreme Court ordered divestiture,⁴³⁴ reasoning that auto company ownership of a spark plug company created entry barriers to the spark plug market, because the auto company would obtain replacement sales of its spark plugs by installing them in its new cars.⁴³⁵

The Court noted that Ford's entry into the spark plug market denied independent spark plug manufacturers access to Ford as a customer.⁴³⁶ The Court also noted that divestiture was the only effective remedy to restore competition in the spark plug market.⁴³⁷

In *Exxon Corp. v. Governor of Maryland*,⁴³⁸ the Maryland legisla-

427. DOJ REPORT, *supra* note 56, at 75.

428. *Id.*

429. 405 U.S. 562 (1972).

430. *Id.* at 564.

431. *Id.* at 566.

432. *Id.* at 565.

433. *Id.* at 585.

434. *Id.* at 578.

435. *Id.* at 576.

436. *Id.* at 567.

437. *Id.* at 575-76.

438. 437 U.S. 117 (1978).

ture required that national oil products divest themselves of service stations in Maryland.⁴³⁹ The Maryland legislature passed the statute because the oil producers had given their service stations preferential treatment in the distribution of gasoline during the gas shortage of the early 1970s.⁴⁴⁰ Thus, the statute was passed to correct the inequities of distribution,⁴⁴¹ and to preserve competition in the service station industry.⁴⁴²

The policies behind the *Ford* and *Exxon* decisions apply to airline ownership of CRSs as well. Airline ownership of CRSs creates barriers for independent CRS companies wanting to enter the CRS market because the independent companies cannot gain revenues that CRS airlines gain through increased airline bookings.⁴⁴³ Also, given that the dominant air carriers are, themselves, in the CRS industry, independent CRS companies are deprived of the opportunity to serve their largest potential customers.⁴⁴⁴ Airline ownership of CRSs creates other barriers for non-CRS airlines trying to enter the CRS market because non-CRS airlines are unable to gain increased sales through CRS display bias.⁴⁴⁵ Barriers to entry in both of these industries decrease competition and, thus, harm the consumer.⁴⁴⁶

b. The example of the AT&T divestiture.

The divestiture of AT&T provides an example of consumer benefits that can be gained by divesting a monopoly. The AT&T experience can also provide Congress with a map for avoiding possible pitfalls of divestiture.

After a protracted antitrust suit brought by DOJ, AT&T and DOJ entered into a consent decree in 1982,⁴⁴⁷ in which AT&T agreed to divest its regional operating companies—companies that provided local telephone service to consumers.⁴⁴⁸ Under the decree, AT&T split into eight corporate entities.⁴⁴⁹ DOJ had brought the antitrust suit because it believed that AT&T was cross-subsidizing its competitive activities in the long distance market with revenues that it gained in the regulated,

439. *Id.*

440. *Id.*

441. *Id.* at 121.

442. *Id.*

443. *Senate Hearing, supra* note 48, at 146 (statement of M.V. Scocozza).

444. *Id.*

445. *Id.*

446. *Id.* at 276-77 (prepared statement of D.A. Swankin).

447. *United States v. A.T. & T.*, 552 F. Supp. 131 (D.D.C. 1982); *see also* McKenna & Slyter, *The Modification of Final Judgment: An Exercise in Judicial Overkill*, 9 *COMM./ENT. L.J.* 9, 10 (1986).

448. *A.T. & T.*, 552 F. Supp. at 131.

449. McKenna, *supra* note 447, at 10.

monopolistic, local telephone service market.⁴⁵⁰ Therefore, under the decree, AT&T agreed to provide only long distance services and to delegate local service contracts to divested Bell Operating Companies (BOCs).⁴⁵¹

Many predicted that the divestiture would destroy the telephone system and drastically raise the costs of local service.⁴⁵² Others predicted that divestiture would be technologically impossible for the integrated phone system.⁴⁵³ However, the divestiture caused no significant damage to the telephone system.⁴⁵⁴ Admittedly, local rates did increase after divestiture because local companies used divestiture as an excuse for rate increases; however, local rates are expected to decline over time because of advances in technology and the development of the competition that will stem from the divestiture.⁴⁵⁵ Moreover, technological integration did not prevent the divestiture.⁴⁵⁶

The success of the divestiture can be attributed to the planning strategy of AT&T's management.⁴⁵⁷ The consent decree provided for divestiture within two years.⁴⁵⁸ After the signing of the consent decree, high level task groups comprised of executives from AT&T and the local operating companies framed general guidelines for the divestiture, which they called an "assumption set."⁴⁵⁹ They sent copies of the assumption set to experts in various subject matter areas of AT&T;⁴⁶⁰ the experts returned the assumption sets to the high level task groups with recommendations and amendments.⁴⁶¹ After the experts' recommendations had been considered, the high level task force delegated implementation of the assumption set to lower level joint task forces.⁴⁶²

The joint task groups provided guidelines to the BOCs on how to structure themselves as divested companies.⁴⁶³ The guidelines gave directions on how to divide assets between AT&T and the BOCs, and how

450. *A.T. & T.*, 552 F. Supp. at 223.

451. W. TUNSTALL, *DISCONNECTING PARTIES, MANAGING THE BELL SYSTEM BREAK-UP: AN INSIDE VIEW* 16-17 (1985).

452. *Id.* at 110.

453. *Id.*

454. G. FAULHABER, *TELECOMMUNICATIONS IN TURMOIL: TECHNOLOGY AND PUBLIC POLICY* 136 (1987).

455. Greene, *AT&T Divestiture and Consumers*, 5 U. BRIDGEPORT L. REV. 251, 258 (1984).

456. W. TUNSTALL, *supra* note 451, at 161.

457. *Id.*

458. *A.T. & T.*, 552 F. Supp. at 226.

459. W. TUNSTALL, *supra* note 451, at 28.

460. *Id.* at 28.

461. *Id.* at 29.

462. *Id.*

463. *Id.* at 30.

to divide customer accounts.⁴⁶⁴ As the date for divestiture approached, interdisciplinary boards and committees formed to coordinate the efforts of AT&T and the BOCs.⁴⁶⁵ Also, a "restructure implementation board" formed to resolve disputes within the committees.⁴⁶⁶

The high level task force tracked the progress of the divestiture with two central computers and complex charts, located in central management rooms.⁴⁶⁷ Through the process of delegation, the high level task force guided the drafting of a plan of reorganization,⁴⁶⁸ as well as the development of detailed instructions to employees on how to implement the plan; they then held a trial run of the plan.⁴⁶⁹ After addressing the problems that occurred during the trial run, AT&T and the BOCs opened for business as separate corporations on January 1, 1984, as planned.⁴⁷⁰ Thus, despite predictions of disaster, AT&T divested its BOCs without harm to the telephone industry.⁴⁷¹

Divestiture led to many benefits. Consumers were given a wider choice in equipment and service.⁴⁷² Managers in the BOCs had more incentive to excel, because top positions in the smaller BOCs were more accessible in the newly-formed, smaller, independent companies.⁴⁷³ Also, AT&T became free to compete in the computer industry as well as in the long distance telephone industry (which had been prohibited under an earlier consent decree between AT&T and DOJ), making it possible for AT&T to participate in the development of new interdisciplinary technology.⁴⁷⁴

However, the divestiture of AT&T also created some problems. The regulated BOCs used the divestiture as an excuse to request rate hikes for local service.⁴⁷⁵ The quality of long distance service from AT&T decreased for a time because new formalized procedures impeded coordination between AT&T and BOCs which, prior to the divestiture, utilized less formal intercorporation procedures.⁴⁷⁶ Many consumers were unaware that the divestiture had occurred, and they

464. *Id.* at 32.

465. *Id.* at 39.

466. *Id.* at 42.

467. *Id.* at 44-45.

468. *Id.* at 47-48.

469. *Id.* at 76.

470. *Id.* at 185.

471. *Id.* at 19-20.

472. P. TEMIN, *THE FALL OF THE BELL SYSTEM* 362 (1987).

473. *Id.* at 364.

474. Greene, *supra* note 455, at 258-60.

475. MacAvoy & Robinson, *Losing by Judicial Policy Making: The First Year of the AT&T Divestiture*, 2 *YALE J. ON REG.* 225, 236 (1985).

476. *Id.* at 242-43.

continued to expect all phone service to come from one source.⁴⁷⁷ Consumers also became frustrated when they were unable to determine which company (AT&T or one of the BOCs) was responsible for service in a given situation.⁴⁷⁸ Further, despite the assumption of DOJ that the divestiture would lead to less regulation from the FCC, the FCC continued to regulate AT&T in the long distance market.⁴⁷⁹ Moreover, Judge Green's enforcement of the consent decree led to regulation conflicts with the FCC.⁴⁸⁰ The confusion that arose from the conflict in jurisdiction between the district court and the FCC hindered AT&T's attempt to develop new technology in the restructured telecommunications industry.⁴⁸¹ This jurisdictional conflict ended up causing so much confusion that Congress declined to intervene with legislation, for fear of making matters worse and then having to take the blame from constituents.⁴⁸² Thus, although divestiture of AT&T led to some benefits for consumers, it did not provide all the benefits that some had hoped.⁴⁸³

However, the problems that have beset the AT&T divestiture are unlikely to occur in a legislative divestiture of CRSs by CRS airlines for the reasons that follow. First, one of the problems with the AT&T consent decree was that the FCC and Congress were not included in the negotiations between DOJ and AT&T over the consent decree.⁴⁸⁴ Thus, AT&T did not obtain a commitment to deregulation of long distance service in exchange for divesting the BOCs.⁴⁸⁵ On the other hand, in a legislative divestiture of CRSs from CRS airlines, Congress would have control over the entire process. Therefore, Congress could draft a divestiture bill so that conflicts would not arise between the executive and the judicial branches. In addition, the bill would be drafted so that the market, rather than regulation, would determine price and service in the CRS industry. Moreover, because CRS access rates would be determined by the market, and not by state regulatory agencies subject to political pressures, the CRS access rates to travel agents in a divested market would not escalate unreasonably, as did some local telephone rates.

Second, consumer expectations of the CRS industry are less entrenched than consumer expectations of the telephone industry. The CRS is a relatively new device. The telephone, on the other hand, is a

477. *Id.* at 243.

478. *Id.*

479. Nat'l L.J., Dec. 7, 1987, at 1, col. 4, 34, col. 4.

480. *Id.* at 34.

481. *Id.*

482. *Id.* at 36.

483. *Id.*

484. G. FAULHABER, *supra* note 454, at 95.

485. *Id.*

part of the fabric of everyday life, and, before the AT&T divestiture, consumers were used to "one stop shopping" for telephone service.⁴⁸⁶ To be sure, travel agents may by now have come to depend on CRS services that are integrated into airline service. However, the average consumer has not developed a reliance on an integrated airline and CRS industry. Moreover, the confusion that arose in the minds of consumers during the AT&T divestiture about who was responsible for service is less likely to arise in a divested CRS industry, because reservation services are substantially different from airline service.

Thus, as proved by AT&T, divestiture is logistically feasible in large, complex, technological industries. In order to implement a congressionally mandated divestiture, the CRS airlines could imitate the strategies of AT&T. Further, the inefficiencies that arose in the telephone industry because of jurisdictional conflicts between the FCC and the district court would not arise as a result of a legislative divestiture. As a participant in the AT&T divestiture observed, Congress, rather than a court, is better equipped to structure a divestiture plan for the communications industry, in order to avoid such jurisdictional conflicts.⁴⁸⁷

F. POSSIBLE CONSTITUTIONAL OBJECTIONS TO DIVESTITURE AS A LEGISLATIVE REMEDY

Two possible constitutional objections to enforced divestiture exist: (1) enforced divestiture might constitute an unconstitutional taking; and (2) enforced divestiture would be a denial of due process to CRS airlines. Neither of these arguments is persuasive.

1. *Taking*

Under the United States Constitution, the government may not take property without just compensation.⁴⁸⁸ Even if the government provides just compensation, the taking is unconstitutional if it is not for a public purpose.⁴⁸⁹

There is little doubt that divestiture would be a taking, and not a mere regulation, given that a governmental action which is a permanent physical invasion of private property is a per se taking under the Constitution.⁴⁹⁰ Therefore, like a person whose property is taken, the CRS airlines would be entitled to compensation under a statutory divestiture

486. *Id.* at 128.

487. W. TUNSTALL, *supra* note 451, at 194.

488. *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 231 (1984).

489. *Id.*

490. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434-35 (1982).

plan.⁴⁹¹

A divestiture statute would satisfy the "public purpose" test under the Constitution. In *Hawaii Housing Authority v. Midkiff*,⁴⁹² the Supreme Court set forth the criteria for a "public purpose" taking. In *Midkiff*, the Hawaii legislature had exercised its eminent domain power to transfer land from large landowners to non-landowners.⁴⁹³ Before the transfer, seventy-two private landowners owned forty-seven percent of the land, a result of a feudal system that had existed in Hawaii before colonization.⁴⁹⁴ Many attempts had been made over several generations to redistribute the land.⁴⁹⁵ In 1967, the Hawaii legislature declared that concentration of land ownership skewed the real estate market, inflated land prices, and injured the public welfare.⁴⁹⁶ The legislature passed the Land Reform Act of 1967,⁴⁹⁷ which condemned land in the hands of large land owners and transferred it to the tenants of the land.⁴⁹⁸ The large landowners, although compensated for the fair market value of the land,⁴⁹⁹ challenged the Land Reform Act in federal court, contending that the Act was an unconstitutional taking because it was not for a public purpose, but rather transferred property from one private group to another private group.⁵⁰⁰ In an opinion by Justice Douglas, the Supreme Court upheld the Act, indicating that because it was "rationally related to a conceivable public purpose," it was allowable under the state's police power.⁵⁰¹ The opinion declared that courts must impose a narrow review over a legislative determination that a taking is for a public purpose.⁵⁰² The Court also indicated that when a market malfunctions because of oligopoly power, state condemnation of property that has become concentrated in the hands of a few to the detriment of the population is a rational goal.⁵⁰³ The Court noted that "public use" does not require that the government possess and use property at some point during a taking.⁵⁰⁴ A public purpose⁵⁰⁵ may exist even if property is transferred directly from one private owner to another private

491. See *id.*

492. 467 U.S. 229 (1984).

493. *Id.* at 233.

494. *Id.* at 232.

495. *Id.*

496. *Id.*

497. HAW. REV. STAT. § 516 (1985).

498. *Id.* at 233.

499. *Id.* at 234 n.2.

500. *Id.* at 234-35.

501. *Id.* at 241.

502. *Id.* at 242-43.

503. *Id.* at 242.

504. *Id.* at 243-44.

505. *Id.*

owner.⁵⁰⁶

As in *Midkiff*, legislative divestiture would be a public purpose taking. Divestiture is a rational means of protecting the public from the effects of a concentrated airline industry. Just as the Hawaii Legislature reallocated land that had fallen into the hands of a few landowners, Congress should reallocate access to information, an important resource that has fallen into the hands of a small group because of benefits conferred by the government.

Further, the Supreme Court has held that, provided there is a public purpose, the work product of one private owner may be transferred to another private owner as a constitutional taking. In *Ruckelshaus v. Monsanto*,⁵⁰⁷ Congress had passed a statute authorizing the Environmental Protection Agency (EPA) to consider data already filed with the EPA in a registrant's application to market pesticide, provided that, if a later registrant relied in its application on data paid for by an earlier registrant, the later registrant compensated the earlier registrant for use of the data.⁵⁰⁸ *Monsanto* challenged the statute, claiming that it imposed an unconstitutional taking, since the taking was for private rather than public use.⁵⁰⁹ The Supreme Court upheld the legislation,⁵¹⁰ reasoning that the taking was for the public purposes of (1) eliminating barriers to entry for new pesticide companies,⁵¹¹ and (2) streamlining registration procedures so that consumers could receive products more quickly.⁵¹²

Divestiture would involve the transfer of CRSs, which the CRS airlines developed, into the hands of private companies. However, this transfer would be for the public purpose of preserving competition in the airline industry, and, therefore, would be a constitutional taking.

2. *Due Process*

The CRS airlines' rights to contract with travel agents and with non-CRS airlines, as protected by the due process clause, would not be violated by divestiture legislation. Congressional power to legislate cannot be denied merely because of the existence of private contracts.⁵¹³

Moreover, divestiture would not deprive the CRS airlines of sub-

506. *Id.*

507. 467 U.S. 986 (1984).

508. *Id.* at 992.

509. *Id.* at 999.

510. *Id.* at 1020.

511. *Id.* at 1014.

512. *Id.* at 1015.

513. See *United States Trust Co. v. New Jersey*, 431 U.S. 1, 25 (1977); see also *Norman v. Baltimore & Ohio R.R. Co.*, 294 U.S. 240, 307-08 (1935).

stantive due process. In *Exxon Corp. v. Governor of Maryland*,⁵¹⁴ in which the Maryland legislature required national oil producers to divest themselves of service stations in Maryland. The United States Supreme Court disposed of Exxon's substantive due process objections in one paragraph, stating that the Court should not act as a super-legislature to weigh the wisdom of legislation when the legislature was serving a legitimate purpose of controlling the state's gasoline market, and when the statute was reasonably related to the state's program.⁵¹⁵

Exxon will govern any time there is a constitutional challenge to congressionally mandated divestiture of CRSs by CRS airlines. Congress has the legitimate purpose of protecting the consumer from abuse of the CRSs by the CRS airlines, and divestiture would be a reasonable means of achieving the public purpose.

VI. CONCLUSION

Consumers are suffering serious injury because of airline ownership of CRSs. Congress should protect the consumer from exploitation by CRS airlines by enacting legislation which will force CRS airlines to divest themselves of their CRSs. Although a private antitrust suit pending against the CRS airlines could eventually lead to judicially ordered divestiture, such relief may not be forthcoming for many years. Congress should act now. Divestiture would not be an unconstitutional taking, nor would it deny due process to the CRS airlines, provided that the CRS airlines were fairly compensated for their investment. Divestiture would insure that the consumer finally receives the full benefits of airline deregulation.

514. 437 U.S. 117, 124-25 (1978).

515. *Id.*