Antitrust Chronicle

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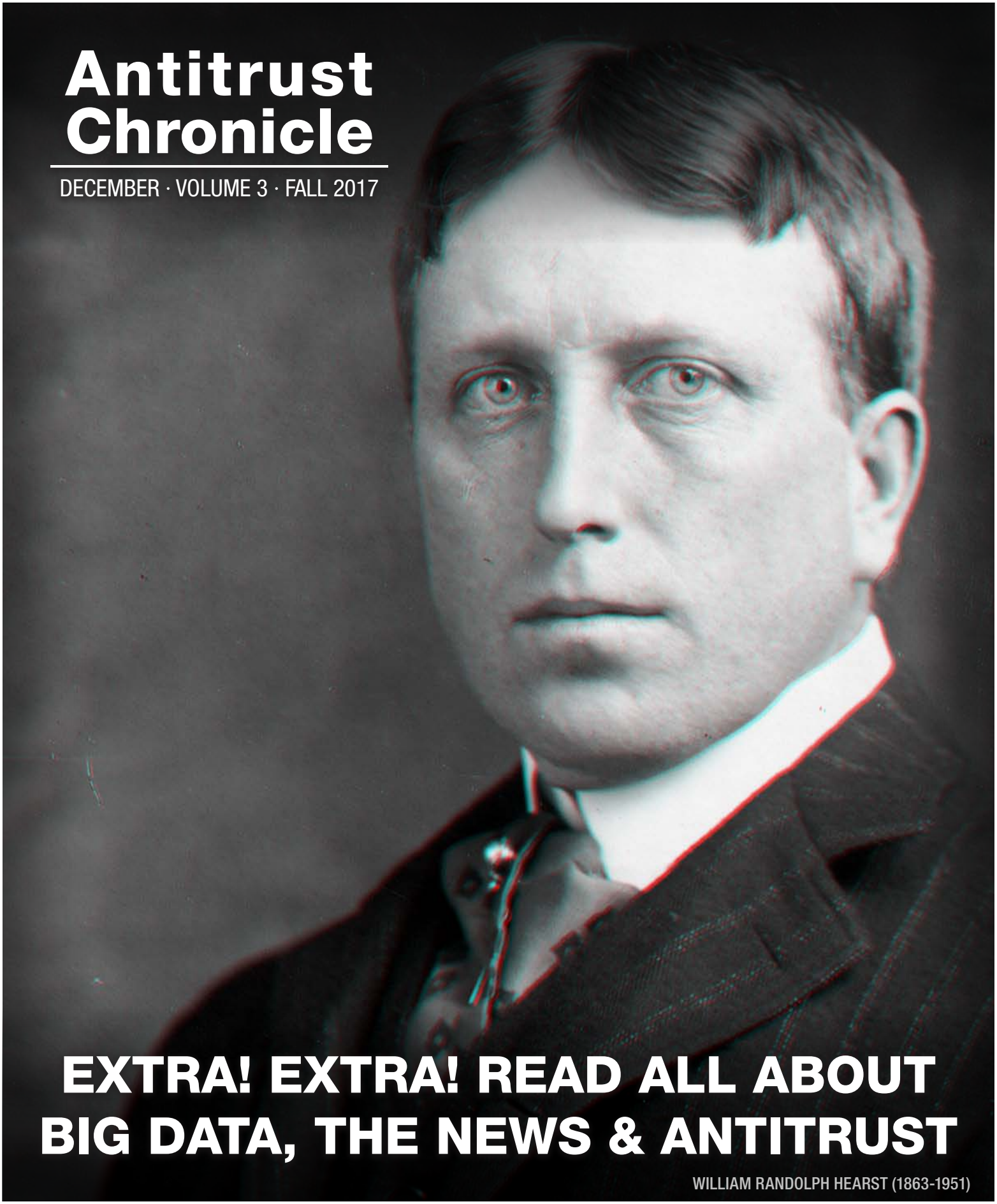

EXTRA! EXTRA! READ ALL ABOUT BIG DATA, THE NEWS & ANTITRUST

WILLIAM RANDOLPH HEARST (1863-1951)

CPI COMPETITION POLICY INTERNATIONAL

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LETTER FROM THE EDITOR

Dear Readers,

"Fake news" is nothing new. A century after William Randolph Hearst built what was then the largest international media empire – at times critiqued for its brand of yellow journalism, questionable sources and abuse of political influence – the topic of fake news is again in the spotlight and also part of today's antitrust discussion. Our December 2017 Antitrust Chronicle addresses these debates.

There was a time when we received our news from broadsides, news pasted on walls in public spaces. Later newspapers surpassed broadsides. The catchphrase "Extra! Extra! Read all about it!" came about from street vendors selling newspaper "extras" when there was breaking news. Eventually the radio and television brought serious competition to newspapers as a legitimate source of news.

Today, the Internet and social media are the modern day broadsides, instantly sending out news to the masses, and the shouts of "Extra! Extra! Read all about it!" are coming at us from more and more directions and in louder and more diverse voices, some of them hawking fake news stories.

Put simply, the way we get our news is changing. A significant percent of the U.S. population gets its news "free" from Facebook and Google. Some authors argue that in exchange for free access readers hand over control of their data, which has an impact on traditional newsmakers and future innovators using Artificial Intelligence methods that are highly reliant on this Big Data. Are these novel news outlets "killing news" and does antitrust have a role to play? Or should this scoop be crumpled up and left on the newsroom floor?

We hope you enjoy the debate of this hot topic in this month's CPI Antitrust Chronicle.

As always, thank you to our great panel of authors.

Sincerely,

CPI Team

SUMMARIES I. CONTENT AS A COMPETITION PROBLEM?

Is "Fake News" A Competitive Problem?

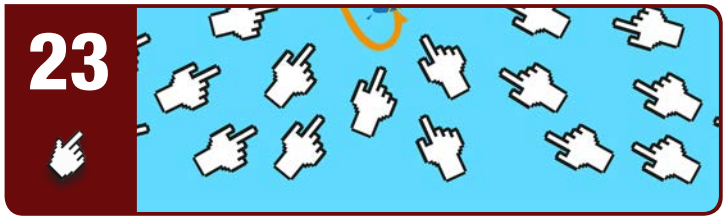
By Allen Grunes

The article starts by putting fake news into historical context. Because fake news primarily takes written form, it then discusses the decline of the U.S. newspaper industry after the appearance of Craigslist and the subsequent inability of newspapers to capture a significant share of online ad revenue. Turning to the question of whether fake news is a competitive problem, the article offers two competing views. The first is that fake news is the standard background radiation of our media diet and does not present a competitive problem. The second is that the prevalence of fake news is evidence that the online firms that enable its distribution have significant market power.

Fake News Is A Real Antitrust Problem

By Sally Hubbard

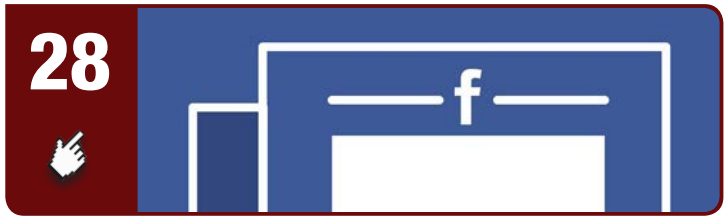
This essay will explore two primary reasons why fake news is an antitrust problem. First, Facebook and Google compete against legitimate news publishers for user attention, data and advertising dollars. The tech platforms' business incentives run counter to the interests of legitimate news publishers, and the platforms pull technological levers that harm publishers' business models and advantage their own. Second, Facebook and Google lack meaningful competition in their primary spheres of social media and online search, respectively. The platforms have an outsized impact on the flow of information worldwide and do not face competitive pressure to stem the spread of fake news.



Online Platforms And The Commoditization Of News Content

By Jonathan Kanter & Brandon Kressin

As news content moves online, consumers are beginning to view articles as fungible commodities rather than unique offerings from differentiated publishers. Dominant online platforms have an incentive to encourage this "commoditization" of news, because it makes both consumers and publishers more reliant on the platforms. At the same time, however, news commoditization also allows for the spread of low-quality, duplicative content and Fake News by making it easier for less scrupulous actors to masquerade as legitimate publishers. At the end of the day, this is an antitrust issue — the deterioration of news quality is a consumer harm that results directly from dominant online platforms' exercise of market power.



Fake News Is Not An Antitrust Problem

By Seth B. Sacher & John M. Yun

Recently, there have been prominent calls to use antitrust enforcement to achieve objectives beyond that of protecting the competitive process. Adding to this increasing litany is an appeal to use antitrust to regulate the distribution of "fake news." Specifically, there is an assertion that Facebook competes with and is responsible for speeding the demise of "legitimate" news sites by offering a favorable platform for "fake news." In this article, we address this allegation in a standard monopolization and dominance framework. Ultimately, we find that fake news is not an antitrust problem and question whether fake news can or should be regulated — in the form of antitrust or otherwise.

Fake News's Not-So-Real Antitrust Problem: Content Remains King

By Gus Hurwitz

The contemporary problem of fake news is urgent but difficult to address. Fake news propagates across social media platforms, competing with better sources of information ("real news") for consumer attention. As social media platforms have grown over the past decades from myriad small discussion forums to dominant platforms traditional news media have experienced catastrophic declines in revenue and readership. It is easy to conflate these two trends, linking the monopoly-like growth of social media platforms and their control over consumer attention with the decline in the traditional media's ability to command such attention. But such conflation is inapposite to rise of fake news and decline of real news. Fake news is not an antitrust problem – it is something far more serious and difficult.

SUMMARIES II. TRADITIONAL ANTITRUST ANALYSIS IN MEDIA MARKETS

The Achilles Heel To Newspaper Mergers: Product Market Definition

By Veronica Roberts & Alex White

The newspaper industry has been suffering serious structural decline for more than a decade, due to ever increasing competition from online and other sources of media. But attempts to rationalize costs in the industry through consolidation have often been stymied by competition authorities' reluctance to widen traditional product market definitions to take account of new competitive constraints. Considering recent cases in the UK, as well as other jurisdictions, this article shows that competition authorities have all too often taken an overly cautious and formalistic approach focused on static, short term assessments. A more pragmatic and dynamic approach that places greater weight on reasonably foreseeable market developments is long overdue.

Artificial Intelligence, Incentives To Innovate, And Competition Policy

By Samuel Himel & Robert Seamans

Artificial intelligence ("AI") relies on the use of large datasets to train AI algorithms. Access to such data is therefore a critical resource, the lack of which may create barriers to entry for both AI startups and established firms developing AI technologies. We describe how existing and new competition policies may be appropriate for addressing these barriers to entry. We focus particular attention on how policies differ with respect to whether they encourage competition for the market or in the market. Potential new competition policies include temporary data monopolies, data portability, and the use of blockchain and trusted third parties.

WHAT'S NEXT?

To start off the New Year, our January 2018 Antirust Chronicle will address issues related to **Private Equity and Antitrust**. Given the increasing importance for private equity entities, what are some of the complexities of the antitrust and merger control laws in the United States, Europe and other jurisdictions?

ANNOUNCEMENTS

ROUNDING THE BEND OF 2017

CPI wants to hear from our subscribers. For this last month of 2017, we will be reaching out to members of our community for your feedback and ideas. Let us know what you want (or don't want) to see, at: antitrustchronicle@competitionpolicyinternational.com.

CPI ANTITRUST CHRONICLE FEBRUARY 2018 & MARCH 2018

The February 2018 Antitrust Chronicle will be part two of our series focusing on the **Digital Economy – Mergers.**

Our topic for the March 2018 will focus on issues related to **China – Year of the Dog.**

Contributions to the Antirust Chronicle are about 2,500 – 4,000 words long. They should be lightly cited and not be written as long law-review articles with many in-depth footnotes. As with all CPI publications, articles for the CPI Antitrust Chronicle should be written clearly and with the reader always in mind.

Interested authors should send their contributions to Sam Sadden (ssadden@competitionpolicyinternational.com) with the subject line "Antitrust Chronicle," a short bio and picture(s) of the author(s).

The CPI Editorial Team will evaluate all submissions and will publish the best papers. Authors can submit papers in any topic related to competition and regulation, however, priority will be given to articles addressing the abovementioned topic. Co-authors are always welcome.

I. CONTENT AS A COMPETITION PROBLEM?

IS "FAKE NEWS" A COMPETITIVE PROBLEM?

BY ALLEN GRUNES[1]

1 Co-Founder, The Konkurrenz Group, Washington, D.C. I am particularly grateful to Professor Jack Kirkwood for his many helpful comments and criticisms of earlier drafts. I have also benefitted from the insights and helpful comments of Randall Mikkelsen.

I. INTRODUCTION

"Fake news" is nothing new. It has been with us at least since the appearance of the "penny press" in the 1830s.[2] Nineteenth century examples of fake news include stories about life on the moon, a transatlantic balloon voyage, man-eating trees of Madagascar, animals escaping from the Central Park Zoo and running wild in New York and plans to tear down portions of the Great Wall of China.[3] It persisted during the twentieth century despite the rise of professional journalism, journalistic codes of ethics and the separation of the editorial and advertising functions by news organizations.[4] Twentieth century authors of fake news have ranged from reporters out for a drink and a little bit of fun on a slow news day through award-winning journalists like H.L. Mencken, Ben Hecht, Walter Duranty and Janet Cooke, among others. Mencken, when confronted by another reporter after one of his fakes, apparently responded by saying "It made a good story, didn't it?"[5] Fake news cost Janet Cooke her Pulitzer Prize.

Notwithstanding its long and sometimes colorful history, fake news is getting more attention these days. What is different now is that the Internet and social media create opportunities for instant and ubiquitous reach and a psychological trigger to act by sharing. Fake stories circulated widely on social media in the months leading up to the U.S. presidential election of 2016, including false reports that the Pope had endorsed Donald Trump and that an FBI agent suspecting of leaking Hillary Clinton's emails had been murdered.[6] The probability that some of these fakes were state-sponsored efforts to spread misinformation in the U.S. is troubling.[7]

But fake news does not only appear in the run-up to an election. It is a more widespread and persistent problem. Although in many cases it is quickly exposed as false or a hoax, it also seems to be getting harder to avoid. Within hours of a significant newsworthy event, multiple fake stories masquerading as news make their way into Facebook's news feed, Google search results, and Twitter, among others.[8] Some of these fake stories quickly achieve distribution on a scale that would make the old newspaper moguls jealous if they were alive today.

II. THE RISE OF THE MACHINES

Because fake news primarily takes written form (occasionally spiced up with doctored images), we briefly consider the impact a handful of Internet firms have had on another written medium, namely newspapers. If Napster and Apple changed the music industry, Amazon changed the publishing industry, and Netflix and others are changing the video industry, then Craigslist, Facebook and Google are the names that come to mind when it comes to newspapers.

Even before the rise of the Internet, newspapers were facing an aging readership and declining circulation. But the basic business model, in which advertising subsidized much of the cost of producing a newspaper, remained intact.

2 Starr, The Creation of the Media: Political Origins of Modern Communications 133 (2004).

3 Shafer, "Don't Fret About Fake Political News," Politico Magazine (Nov. 16, 2016), http://www.politico.com/magazine/story/2016/11/fake-news-media-facebook-214459.

4 Id.; see also McChesney & Nichols, "The Rise of Professional Journalism," In These Times (Dec. 7, 2015), http://inthesetimes.com/article/2427.

5 Shafer, supra note 3.

6 Oremus, "Russia Used Fake News to Influence the Election, Says U.S. Intelligence Chief," Future Tense (Jan. 5, 2017), http://www.slate.com/blogs/future_tense/2017/01/05/russia_used_fake_news_to_influence_the_election_james_clapper_says.html.

7 Jacobs, "US senators warn of 'fake news' threat from Russia and urge tech giants to act," The Guardian (Nov. 1, 2017), https://www.theguardian.com/technology/2017/nov/01/us-senators-russia-fake-news-threat-russia.

8 See, e.g. Rose, "After Las Vegas Shooting, Fake News Regains Its Megaphone," New York Times (Oct. 2, 2017), https://www.nytimes.com/2017/10/02/business/las-vegas-shooting-fake-news.html.

And then Craigslist came along. Before Craigslist, classified advertising had accounted for 30-40 percent of a typical metropolitan daily newspaper's total revenues.[9] In other words, classified advertising was a big part of what made most daily newspapers profitable and able to produce quality news. Craigslist successfully unbundled classified advertising from the newspaper bundle. The classified advertising revenue metropolitan daily newspapers lost between 2000 and 2007 has been estimated to be about $5 billion.[10] Craigslist, of course, is not in the news business.

Another major development was the growth of digital advertising spending and the inability of newspapers to capitalize on the change. By the end of 2010, more people were getting their news from the Internet than from newspapers.[11] Much of this news still originated from traditional news media sources, although it came through online intermediaries.

Digital ad spending started small but then grew rapidly, with revenues hitting more than $72 billion in 2016. Meanwhile, newspaper advertising revenue declined from about $60 billion in 2000 to less than $20 billion in 2015.[12] The lion's share of the digital ad revenue growth has been captured by two companies, Google and Facebook, neither of which runs a newsroom.[13] As the Pew Research Center put it last year, "It has been evident for several years that the financial realities of the web are not friendly to news entities, whether legacy or digital only. There is money being made on the web, just not by news organizations."[14] Or in the words of the *Wall Street Journal's* editorial board, "Craigslist killed classified ads, and Facebook and Google have swallowed up digital advertising, profiting off the work of newsrooms they don't own or run."[15]

As a result of advertising revenue losses, many newspapers entered what has been called a "death spiral." Newspapers are two-sided businesses that cater to both advertisers and readers. Declines on the advertising side result in readers bearing more of the costs of producing a newspaper. If readers will not pay higher prices, or will do so only up to a point, cuts are made and quality diminishes. Both higher prices and declining quality result in declines on the reader side. Declines on the reader side result in further declines on the advertiser side because the medium reaches fewer people and becomes less valuable to advertisers. The result is a vicious cycle. Newspapers shrank and many disappeared.[16]

The decline of newspapers has been accompanied by massive, and often repeated, lay-offs of journalists, editors and other staff. Between the peak year of 1989 and 2014, the number of full-time professional newsroom employees at newspapers shrank by about 40 percent.[17] And this, of course, is a key point. The tech firms that disrupted the newspaper business are not in the business of producing news, so many of these jobs were simply lost and not replaced.

It is against this background that we turn to the question whether fake news is a competitive problem and, if so, whether antitrust law has any relevance. The balance of the article lays out two competing views. One view is that the answer is "no." The other view is that the answer is "yes" to the first part of the question and "maybe" to the second part.

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9 Fallows, "How to Save the News," The Atlantic (June 2010), https://www.theatlantic.com/magazine/archive/2010/06/how-to-save-the-news/308095.

10 Bercovici, "Sorry Craig: Study Finds Craigslist Took $5 Billion From Newspapers," Forbes (Aug. 14, 2013), https://www.forbes.com/sites/jeffbercovici/2013/08/14/sorry-craig-study-finds-craigslist-cost-newspapers-5-billion.

11 O'Dell, "For the First Time, More People Get News Online Than From Newspapers," Mashable (Mar. 14, 2011), http://mashable.com/2011/03/14/online-versus-newspaper-news.

12 McKinnon & Hagey, "FCC to Ease Limits on Local Media Ownership," Wall Street Journal ((Oct. 25, 2017), https://www.wsj.com/articles/fcc-to-ease-limits-on-local-media-ownership-1508958037.

13 Ingram, "How Google and Facebook Have Taken Over the Digital Ad Industry," Fortune (Jan. 4, 2017), http://fortune.com/2017/01/04/google-facebook-ad-industry/; Baysinger, "Digital ad spend jumps 22 percent to $72.5 billion in 2016: report," Reuters (Apr. 26, 2017), https://www.reuters.com/article/us-digital-advertising/digital-ad-spend-jumps-22-percent-to-72-5-billion-in-2016-report-idUSKBN17S2V3.

14 Edmonds, "Newspaper declines accelerate, latest Pew Research finds, other sectors healthier," Poynter (June 15, 2016), https://www.poynter.org/news/newspaper-declines-accelerate-latest-pew-research-finds-other-sectors-healthier.

15 Editorial Board, "New Rules for More Media Competition," Wall Street Journal (Oct. 27, 2017), https://www.wsj.com/articles/new-rules-for-more-media-competition-1509144835.

16 See, e.g. Evans & Schmalensee, Matchmakers: The New Economics of Multisided Platforms 99-100 (2016).

17 Pew Research Center, State of the News Media 2016 (June 15, 2016), http://assets.pewresearch.org/wp-content/uploads/sites/13/2016/06/30143308/state-of-the-news-media-report-2016-final.pdf at 4.

III. BACKGROUND RADIATION AND THE GOLDEN AGE OF NEWS

Jack Shafer, an editor at *Politico* who defines fake news as "deliberately erroneous reports" as opposed to "journalistic mistakes and miscues," has an article in which he calls fake news "the standard background radiation in our media diet." Like background radiation, he suggests that it is unavoidable.[18]

Viewed in this light, an online story in 2016 about Hillary Clinton belonging to a satanic cult is just the modern day equivalent of a newspaper story in 1844 that presidential candidate James Polk used a branding iron on his slaves.[19] Both stories were attention-grabbing efforts to paint a candidate in the worst possible light before an election. This sort of mud-slinging is not new. It is, for better or worse, part of the American political tradition. As Gary Wills famously wrote, "running men out of town on a rail is at least as much an American tradition as declaring unalienable rights."[20]

If there is nothing new about fake news other than the fact that it arrives on a mobile phone or computer screen these days instead of on the driveway or at a newsstand, there is probably nothing much that anyone can do about it. As Shafer puts it:

> If you regard fake news as standard background radiation in our media diet that's so inexorable that it can evade those fabled New Yorker fact-checkers, the current spate of fake stories seems less dire. Not to be a Pollyanna about it, but fake news hasn't killed us yet, so should we expect Internet-era fake news will spell our destruction?[21]

Just like background radiation, fake news has persisted and will continue to persist regardless of how news gets made, how it gets distributed, and how it gets consumed. Therefore, as Shafer suggests, maybe we shouldn't fret too much about it. News sources obviously need to check their facts before publication. Independent third-parties can act as an additional safeguard after publication by exposing fakes. But "[t]he largest responsibility will always belong to news consumers who need to read and view critically before they share stories."[22]

Randall Mikkelsen, a managing editor at Thomson Reuters who has given several presentations about fake news in his home state of New Hampshire, is a bit less optimistic. "The sobering conclusion is that even though fake news has always existed, internet economics, political rhetoric and state propaganda are challenging the news consumer like never before."[23]

Mikkelsen agrees with Shafer that consumers need to read and view the news critically, although he emphasizes that this presents real challenges in the current environment:

> As news consumers, we have to set limits and be selective. We have to control our social media feeds and be responsible when sharing. We have to balance the desire to be open to alternative perspectives with a need to avoid doubting every news story we encounter.[24]

He also offers an interesting observation. He notes that after the 2016 presidential election there was a surge in paid subscriptions at news outlets considered to be the most credible and professional. This is another possible consumer response to fake news: spend money to get higher quality news. "We have to pay for it," Mikkelsen suggests, "We get what we pay for."[25]

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18 Shafer, supra note 3.

19 "The Roorback Hoax," Museum of Hoaxes, http://hoaxes.org/archive/permalink/the_roorback_hoax.

20 Wills, Inventing America xiii (1978).

21 Schafer, supra note 3.

22 Id.

23 Mikkelsen, "Fake News: Be Selective and Responsible," News-Decoder (Apr. 3, 2017), https://news-decoder.com/2017/04/fake-news-selective-responsible.

24 Id.

25 Id.

Two economists, Hunt Allcott and Matthew Gentzkow, have identified several factors that may be contributing to the increase in fake news. In several important ways, they track Mikkelsen's views. They note that the Internet has lowered some of the entry barriers into the media industry, so that it is possible for individuals or very small companies to get a piece of advertising revenue that previously belonged exclusively to large media companies. They also note the growth of social media which seems to be particularly well-suited for fake news dissemination, the continuing decline of trust in mainstream media to report the news fully, accurately and fairly, and political polarization.[26]

Viewing these thoughts through a lens that sees markets as robust and market failures as few, we could come away with a couple of conclusions. First, if fake news is inevitable and something we shouldn't worry about too much, why should we think there is a competition problem? After all, some consumers have been buying tabloids at supermarket checkouts for years with obviously fake stories about aliens and celebrities. If they enjoy those stories – if they find them amusing or titillating – then those tabloids are not a competition problem. In fact, the market is giving consumers what they want. Second, even if fake news is a growing problem because of the growth of social media, consumers are not powerless. There are online tools that can be used, and there is a choice already being supplied by the market – namely, start paying for your news.[27] In the jargon of "revealed preferences," the fact that people do not pay for news may show that they do not value it very highly.

It is also possible, for those so inclined, to take this way of thinking a step further. Thanks to the Internet, there are more places than ever for consumers to get news and information. That seems indisputable. To be sure, the Internet has disrupted the old business models and has led to plenty of journalists being laid off. But from the consumer's standpoint we may be living in "the golden age of news," as former *New York Times* editor Bill Keller put it a few years ago:[28]

> Yes, there are fewer experienced correspondents out there, but I can now access all of them without leaving my desk, and most of this feast will be free. When auto-translate software gets better, I'll even have access to news sources in Persian and Mandarin.[29]

Or, as blogger and journalist Matthew Yglesias put the same idea in an article entitled "The Glory Days of American Journalism": "American news media has never been in better shape. That's just common sense. Almost anything you'd want to know about any subject is available at your fingertips."[30]

In the same article, Yglesias suggests that what is plaguing the traditional media is not *too little* competition, but *too much*:

> A traditional newspaper used to compete with a single cross-town rival. *Time* would compete with *Newsweek*. *Time* doesn't compete with *Newsweek* anymore: Instead it competes with every single English-language website on the planet. It's tough, but it merely underscores the extent of the enormous advances in productivity that are transforming the industry.[31]

The multiplicity of sources means that the old daily newspaper and weekly news magazine are facing competition from multiple sources, many of them cheaper to distribute and quicker to update.

And what about fact checking? We can imagine a similar story. These days fact-checking is still done by employees of news organizations, as was true in the past. But there are also algorithms trained to detect fake news. Over time, those algorithms will only get smarter, and may eventually outperform their human peers. And there are dedicated websites like Snopes and FactCheck.org that rapidly expose fakes. So maybe we are also living on the cusp of a "golden age of fact-checking."

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26 Allcott & Gentzlow, "Social Media and Fake News in the 2016 Election," 31 Journal of Economic Perspectives 211 (Spring 2007), https://web.stanford.edu/~gentzkow/research/fakenews.pdf.

27 Note, however, that this does not necessarily imply there is no competition issue. News delivered by Facebook and a subscription to *The New York Times* are likely in different relevant antitrust markets.

28 Keller, "It's the Golden Age of News," The New York Times (Nov. 3, 2013), http://www.nytimes.com/2013/11/04/opinion/keller-its-the-golden-age-of-news.html.

29 Id.

30 Yglesias, "The Glory Days of American Journalism," Slate (Mar. 19, 2013), http://www.slate.com/articles/business/moneybox/2013/03/pew_s_state_of_the_media_ignore_the_doomsaying_american_journalism_has_never.html.

31 Id.

To sum up: thanks to the Internet, consumers have more choices when it comes to news and information than has been true at any time in history. If there is a competitive "problem," it is that there is too much competition. Numerous sources of news compete for a person's attention. There may be more fake news than before, but there is also much, much more real news available than ever – and most of it is free.

One flaw with this type of argument is that it is not really an antitrust argument even though it sounds like one. It suggests that consumers may be substituting "every single English-language website on the planet" for something they used to pay for, like *Time* magazine. But that is unlikely to be true. It is not much different from saying that air travel faces competition from all other forms of transportation, including riding a bicycle or walking, and the airline industry is more competitive than ever because more people are riding bicycles and taking long walks. Competition in an antitrust sense means something different. We still need to define markets. And, at least at present, we do not think of an antitrust market as one in which market share is based on the share of a consumer's time or attention something gets.

The less aggressive form of this argument seems to me to be more plausible. One can construct a story that just as the penny press helped establish fake news by significantly lowering the per-copy cost of a newspaper while increasing the importance of generating advertising revenue, the advent of Google, Facebook and Twitter (all of which are "free" and may be viewed as advertising-supported media) are aiding and abetting its growth. There is probably some relationship between how much consumers are willing to pay for the news and the quality of the news they get. This was a criticism of television news long before the arrival of the Internet. The Internet may have made it simpler for those so inclined to create and distribute fake news and even make some money in the process. But that does not make fake news a competitive problem.

IV. FAKE NEWS AND MARKET POWER

But there is another side to the story, which is captured very well in a recent observation by Professor Yochai Benkler about the persistence of fake news on Facebook: "Facebook has become so central to how people communicate, and it has so much market power, that it's essentially immune to market signals."[32]

Market power here is not about price. It is about non-price effects. Economists and antitrust agencies recognize that market power can be manifested in non-price terms and conditions that adversely affect customers, including reduced product quality, reduced product variety, reduced service, or diminished innovation. As the 2010 Horizontal Merger Guidelines suggest, "Such non-price effects may coexist with price effects, or can arise in their absence."[33] In other words, there can be market power even when something is "free." It can arise in dimensions such as quality. Leaving aside the shoppers who happily pay for the *National Enquirer* and similar tabloids, fake news can be thought of as news with zero – or even negative – quality.

There are both technical and economic reasons why fake news is a persistent problem. In an article in the *The Atlantic* called "Google and Facebook Failed Us," staff writer Alexis Madrigal focuses on how the fake news problem continues to persist at both Google and Facebook and discusses some of the technical issues associated with allowing algorithms to be responsible for screening news.[34] It appears that algorithms do better with more data and worse when something new pops up and there is little to go on. Madrigal illustrates with an example. Shortly after the recent Las Vegas shootings took place, a group called "Las Vegas Shooting/Massacre" appeared on Facebook purporting to be a source of investigative journalism:

> The group is run by Jonathan Lee Riches, who gained notoriety by filing 3,000 frivolous lawsuits while serving a 10 year prison sentence after being convicted for stealing money by impersonating people whose bank credentials had been phished. Now, he calls himself an "investigative journalist" with Infowars, though there is no indication he's been published on the site, and given that he also lists himself as a former male underwear model at Victoria's Secret, a former nuclear scientist at Chernobyl, and a former bodyguard at Buckingham Palace, his work history may not be reliable.[35]

32 Mims, "Facebook Is Still In Denial About Its Biggest Problem," Wall Street Journal (Oct. 1, 2017), https://www.wsj.com/articles/facebook-is-still-in-denial-about-its-biggest-problem-1506855607.

33 United States Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines (2010), § 1.

34 Madrigal, "Google and Facebook Failed Us," The Atlantic (Oct. 2, 2017), https://www.theatlantic.com/technology/archive/2017/10/google-and-facebook-have-failed-us/541794.

35 Id.

As Madrigal points out, the problems with surfacing this man's group to Facebook users "is obvious to *literally any human*. But to Facebook's algorithms, it's just a fast-growing group with an engaged community."[36] He continues:

> Imagine a newspaper posting unverified rumors about a shooter from a bunch of readers who had been known to perpetuate hoaxes. There would be hell to pay—and for good reason.[37]

There is a competitive dimension here. Competitive pressure acts as an external check on the distribution of fake news by the major traditional news outlets. If a major news organization repeatedly published deliberately false news reports or unverified rumors, there would be significant reputational damage which likely would also result in financial loss. Some number of consumers would likely shift to other competitively close alternatives. In this respect, a small but significant decrease in quality is conceptually similar to a small but significant increase in price.

But these competitive pressures do not seem to be constraining the major online news intermediaries. In this environment, "market signals" do not appear to be working. If you want to switch away from the dominant social media services, which is where about two-thirds of Americans are reportedly getting at least some of their news,[38] where do you go? To be fair, it is not that the online social media and search giants do not care at all about information quality. They undoubtedly take steps both before and after the fact to prevent bad actors from gaming them. Without competitive pressure, however, the market is not forcing their hand. In antitrust terms, as Benkler says, this may be evidence of significant market power.

One would probably want to test the market power hypothesis by looking for other evidence. For example, one might look at the bargaining between online firms and traditional news organizations. One might look at the consumer response to repeated instances of exposure to fake news.

Assuming the market power hypothesis holds up (and I suspect it will), it is reasonable to conclude that there may be a competition problem. Fake news would be a competition problem if most consumers don't want it but media markets provide it anyway. In that situation, a purveyor must have market power, at least to disseminate fake news repeatedly. Otherwise, most of its customers would leave. Technically, the firm would have the ability to reduce quality below the competitive level without losing so many sales that its conduct (the fake news) is unprofitable.

However, merely being in possession of market power is not an antitrust violation in the U.S. So the additional question needs to be asked whether the market power arose, was maintained, or was enhanced as a result of anticompetitive conduct such as a prior anticompetitive merger.

So is fake news an antitrust problem? Not to date, so far as we can tell. But it could be, and there we need to be vigilant.

Professors Emily Bell and Taylor Owen have suggested that "[U]niversal access to accurate information is at the heart of a well-functioning democracy, and that access is now shaped by the enormously powerful and largely unaccountable technology companies of Silicon Valley."[39] For better or worse, that seems to be a reasonable conclusion. One consequence may be that we need to think about online firms not only as technology companies but also as news and information media and do more careful scrutiny of their mergers and conduct because of their importance to the "marketplace of ideas." This is an idea that Maurice Stucke and I developed in the context of traditional media mergers.[40] Given the importance of data to the success of online advertising, we may need to think somewhat differently about mergers and conduct than we are accustomed to.

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36 Id.

37 Id.

38 Wagner, "Two-thirds of Americans are now getting news from social media," Recode (Sept. 7, 2017) (citing Pew Reearch Center data), https://www.recode.net/2017/9/7/16270900/social-media-news-americans-facebook-twitter. "As far as the platforms go, Facebook still dominates: Forty-five percent of all American adults say they get some news from Facebook. YouTube is the next on the list, with 18 percent of U.S. adults getting news there. Eleven percent of U.S. adults get news from Twitter."

39 Bell & Owen, "The Platform Press: How Silicon Valley Reengineered Journalism," Tow Center for Digital Journalism, Columbia Journalism School (2017), http://towcenter.org/wp-content/uploads/2017/04/The_Platform_Press_Tow_Report_2017.pdf.

40 Stucke & Grunes, "Antitrust and the Marketplace of Ideas," 69 Antitrust Law Journal 249 (2001), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=927409.

It may be that Google, Facebook or others will decide on their own to take on the full responsibilities of traditional news organizations and move away from their current role of being primarily aggregators and distributors of others' content while simultaneously avoiding (among other things) libel laws. This change would entail that the online firms responsible for how people actually get the news hire professional editors and journalists and create newsrooms. Taking this step would arguably be the most effective remedy for the fake news problem. I don't think it is outside the realm of possibility.[41]

V. CONCLUSION

In conclusion, fake news is a real problem, and it is a serious one on multiple levels. Antitrust law tends to be something of a blunt instrument. We are justifiably reluctant to use this blunt instrument unless we have to. But the explosion of fake news does suggest a competitive problem and we cannot rule out the possibility that there may be a role for antitrust at some point.

41 Whether Google should be able to buy *The New York Times*, or Facebook should be able to buy Gannett, is another question. There is increasing reason to believe that online firms can strategically weaken real or perceived rivals by virtue of having much greater access to data. See Seetharaman & Morris, "Facebook's Onavo Gives Social-Media Firm Inside Peek at Rivals' Users," Wall Street Journal (Aug. 13, 2017), https://www.wsj.com/articles/facebooks-onavo-gives-social-media-firm-inside-peek-at-rivals-users-1502622003; see also Stucke & Grunes, Big Data and Competition Policy (2016) at 285-87. Weakening major news sources and then buying them is not a good solution, and carries its own baggage.

FAKE NEWS IS A REAL ANTITRUST PROBLEM

BY SALLY HUBBARD[1]

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I. INTRODUCTION

The public and political outcry over fake news — and what to do about it — has generated abundant commentary. Yet few commentators have focused on how concentrated market power in online platforms contributes to the crisis. This essay expands on my view, originally set forth in *Washington Bytes* in January, that fake news is, in part, an antitrust problem.[2]

Fake news can be challenging to define. In this essay, fake news means stories that are simply made up for profit or propaganda without using trained journalists, conducting research or expending resources. Articles written according to journalistic practices from a particular political perspective or containing factual errors do not meet the definition of fake news used here.

This essay will explore two primary reasons why fake news is an antitrust problem. First, Facebook and Google compete against legitimate news publishers for user attention, data and advertising dollars. The tech platforms' business incentives run counter to the interests of legitimate news publishers, and the platforms pull technological levers that harm publishers' business models and advantage their own. Such levers keep users within Facebook's and Google's digital walls and reduce traffic to news publishers' properties, depriving publishers of the revenue essential to fund legitimate journalism and to counter fake news.

Second, Facebook and Google lack meaningful competition in their primary spheres of social media and online search, respectively. As a result, their algorithms have an outsized impact on the flow of information, and fake news purveyors can deceive hundreds of millions of users simply by gaming a single algorithm. Weak competition in social media platforms means Facebook can tailor its news feed to serve its financial interests, prioritizing engagement on the platform over veracity. Lack of competition in online search means Google does not face competitive pressure to drastically change its algorithm to stem the spread of fake news.

Consumers and advertisers unhappy about the spread of fake news on Facebook and Google, or publishers dissatisfied with the two platforms' terms of dealing, have limited options for taking their business elsewhere. If eliminating fake news were necessary to keep users, advertisers and content creators from defecting to competitive platforms – if profits were at stake – Facebook and Google would find a way to truly fix the problem.[3]

Facebook and Google, like all corporations, have fiduciary duties to maximize profits for their shareholders. Distinguishing content based on quality or veracity runs counter to the platforms' profit motives because any content they cannot advertise around is a lost revenue opportunity. And because fake news is more likely to gain attention and foster engagement, it better serves both platforms' advertising-based business models.

The problem is not that Facebook and Google are bad corporations, as corporations are designed to place profits over socio-political concerns, even democracy. The problem rather is that the normal checks and balances of a free, competitive market do not constrain Facebook and Google from pursuing profits to democracy's detriment. Regulators and antitrust enforcers have also not meaningfully constrained the two firms, at least not yet.

II. FAKE NEWS AND MARKET POWER

Two corporations have an outsized control on the flow of information worldwide. Google accounts for roughly 80 percent of global Internet searches, and its search market share exceeds 90 percent in most European countries.[4] Facebook dwarfs all other social networks, with two billion active monthly users.

Both Google and Facebook are also giants when it comes to the distribution of news. As of 2016, two thirds of Facebook's then 1.7 billion U.S. users received news from the platform, according to Pew Research.[5] Because Facebook reaches 66 percent of U.S. adults, 44 percent of the

2 "Why Fake News Is An Antitrust Problem," (Jan. 2017) https://www.forbes.com/sites/washingtonbytes/2017/01/10/why-fake-news-is-an-antitrust-problem/#7d93d93d30f1.

3 See Transcript of The Capitol Forum Conference Call with Professor Scott Galloway Vol. 5 No. 371, November 6, 2017. ("When big tech starts making noises that old media and the government seems to buy into that something would be impossible, that's Latin for we would be less profitable if we did this.").

4 See Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service, European Commission Press Release (June 2017).

5 "News Use Across Social Media Platforms," (May 2016) http://www.journalism.org/2016/05/26/news-use-across-social-media-platforms-2016/.

U.S. population gets news from Facebook. With Google's high online search market share, searching for news on the web means using Google. A Google representative thus proudly touts, "Globally we send over 10 billion queries a month to news publishers."[6]

Facebook and Google control what content reaches Internet users with every tweak of their algorithms, and they make huge profits from that content without having to pay the content creators or invest in content creation themselves. The two firms form a digital advertising duopoly and last year accounted for 99 percent of growth in digital advertising revenues in the United States, according to one analyst's estimates.[7] On the low end, an executive from the Interactive Advertising Bureau ("IAB"), of which Facebook and Google are both members, estimated that the two firms accounted for 69 percent of growth.[8]

In 2016 alone, the year of the U.S. presidential election and the Brexit vote, Facebook *doubled* its ad revenue to almost $8 billion. Both Facebook and Google have teams that work closely with political campaigns to help them influence election results using digital advertising.[9]

III. FACEBOOK AND GOOGLE COMPETE AGAINST REAL NEWS

While on the one hand acting as gatekeepers for the flow of information worldwide, Facebook and Google on the other hand compete against legitimate news companies for user attention, user data and ad dollars. Google and Facebook both have incentives to keep users within their digital walls, engaging with content on the Facebook platform or on Google search pages, web properties and apps, rather than on news publishers' properties.

Focusing on Facebook, the more outrageous content is, the more it elicits likes, shares, comments and clicks, collectively called "engagement." Facebook profited from the engagement generated by the fake news story claiming Pope Francis endorsed Donald Trump for president more than it would profit from the average real news story; the story got 960,000 combined likes, shares, comments and clicks on Facebook.

Facebook's goal is to keep users engaged with content on its platform as much and as long as possible. The more time users spend on Facebook's platform, the more data it collects, the more ads it shows, and the more money it makes. On Facebook's first quarter 2016 earnings call, CEO Mark Zuckerberg announced that users spend on average more than 50 minutes per day using Facebook, Instagram and Messenger, up ten minutes from the number reported in 2014.[10]

Google arguably has less incentive than Facebook to hoard users on its platform, since the purpose of online search is to direct users to the sources they seek. But about 70 percent of Alphabet's total 2016 revenue came from the ads that the company sells on its own digital properties, including Google web search pages, YouTube and other Google apps.[11] Google thus has the incentive to steer search users to its own properties. Google has integrated into search verticals like reviews, maps and comparison shopping, and has been accused of degrading its search quality results in order to prioritize its own verticals or content that keeps users on Google search pages.[12] YouTube benefits from top placement in Google search results, and, like Facebook, makes more revenue the more people engage with content on its platform.

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6 See "Poll: 42 Percent of U.S. Adults Seek Out News on Facebook Several Times a Day," (July 2017) https://morningconsult.com/2017/07/19/poll-42-percent-access-facebook-news-several-times-day/.

7 "Facebook and Google completely dominate the digital ad industry," (April 2017) http://www.businessinsider.com/facebook-and-google-dominate-ad-industry-with-a-combined-99-of-growth-2017-4.

8 "Google and Facebook Account For Nearly All Growth in Digital Ads," (April 2017) http://fortune.com/2017/04/26/google-facebook-digital-ads/.

9 Technology Firms Shape Political Communication: The Work of Microsoft, Facebook, Twitter, and Google With Campaigns During the 2016 U.S. Presidential Cycle, Kreiss & Mcgregor, Political Communication, available at: http://www.tandfonline.com/doi/abs/10.1080/10584609.2017.1364814.

10 See "Facebook Has 50 Minutes of Your Time Each Day. It Wants More." (May 2016) https://www.nytimes.com/2016/05/06/business/facebook-bends-the-rules-of-audience-engagement-to-its-advantage.html.

11 See "Google Has a Chink in its Ad Armor," (Jan. 2017) https://www.bloomberg.com/gadfly/articles/2017-01-27/google-s-high-powered-ad-juggernaut-has-a-weak-spot.

12 See Luca, Wu, Couvidat, Frank & Seltzer, "Does Google Content Degrade Google Search? Experimental Evidence," Harvard Business School Working Paper, No. 16-035, September 2015, (Revised August 2016); "Google Has Picked An Answer For You—Too Bad It's Often Wrong," (Nov. 2017) https://www.wsj.com/articles/googles-featured-answers-aim-to-distill-truthbut-often-get-it-wrong-1510847867.

Facebook's and Google's business models are built on maximizing users' engagement with their platforms, and the platforms use content created by others as free fodder for that engagement. Dow Jones CEO Will Lewis accused Google and Facebook of "killing news" this way.[13] "The digital advertising revenue that we (news organisations) had all been forecasting has been 'half-inched' by Facebook and Google," Mr. Lewis told Drum Magazine, adding, "They have taken the money to advertise around our content." Completely "killing" news would be against both firms' business interests because Facebook and Google require some form of news for fuel. But the platforms have little financial interest in preserving the quality of news, and the lowest quality news often generates the most engagement, particularly on Facebook and YouTube.

Those who disagree with Mr. Lewis counter that news companies are failing to innovate, clinging to a business model that Google and Facebook have disrupted. As explained below, an antitrust lens shows that, arguably, anticompetitive conduct has aided and exaggerated that disruption.

IV. CASE STUDY: FACEBOOK INSTANT ARTICLES

A look at Facebook Instant Articles ("FBIA") sheds light on the ways tech platforms can pull technological levers to disadvantage their publishing rivals in the contest for user eyeballs. In Facebook's early days, publishers and Facebook made a bargain: Publishers would fuel Facebook's platform with free high-quality content, and in return Facebook would provide publishers with user traffic. Over time, Facebook has adjusted its product design to keep more and more of that traffic for itself.

Facebook has implemented product changes that deter users from clicking away from its platform and onto publishers' sites. In 2014, Facebook defaulted users to an in-app browser for clicking on external links, rather than sending users to an external browser. But the in-app browser is slow. On iOS, for example, Facebook does not use the fastest in-app browser that Apple makes available. In a test by *The Capitol Forum*, Facebook's in-app browser on iOS loaded on average three seconds slower than regular Safari.[14] A study by Google shows that 53 percent of mobile users abandon websites that take more than three seconds to load.[15]

As publishers grew frustrated by slow load times, Facebook presented FBIA as a purported solution. Facebook claims that Instant Articles are not prioritized in the news feed, but their faster load times increase engagement and thus bring prioritization. According to Facebook, users click on Instant Articles 20 percent more than other articles, and they share Instant Articles 30 percent more than mobile web articles on average.[16]

Prioritizing content that is either native to Facebook's platform or that does not require clicks to publishers' sites resembles conduct at issue in the European Commission's Google Shopping decision. The EC determined that Google abused its dominance in search by prioritizing its own comparison shopping service in its search results, to the detriment of rival shopping services. The EC fined Google 2.4 billion euro and required Google to treat its competitors equally as it treats its own shopping services.

Because Instant Articles are housed on Facebook's platform, publishers that adopt the format lose the web traffic that supports their advertising revenue. The granular user data publishers collect via cookies on their sites will cede to whatever basic data Facebook chooses to provide. Publishers further cannot verify the accuracy of the data Facebook does provide them. Indeed, Facebook has reported several times in recent months that its metrics were wrong.[17]

Antitrust enforcers are beginning to understand that data confers competitive advantage. At a September 9, 2016, data ethics event on Data as Power, EC Commissioner Margethe Vestager stated that it is important to "keep a close eye on whether companies control unique data, which no one else can get hold of, and can use it to shut their rivals out of the market," adding, "That could mean, for example, data that's been collected through a monopoly."

13 "Dow Jones chief accuses Google and Facebook of 'killing news,'" (Dec. 2016) http://www.thedrum.com/opinion/2016/12/01/dow-jones-chief-accuses-google-and-facebook-killing-news.

14 "The Capitol Forum Tested Facebook Browser Load Times; Facebook's Slow Load Times for In-app Browser Likely Push Users Towards Instant Articles and Native Content, Raising Antitrust Concern in EU," (Nov. 22, 2016) http://createsend.com/t/j-0618B67563654AE1.

15 See "The need for mobile speed: How mobile latency impacts publisher revenue," (Sept. 2016) https://www.doubleclickbygoogle.com/articles/mobile-speed-matters/.

16 Facebook Instant Articles advertisement, available at: https://fbookmedia.files.wordpress.com/2016/04/ia-infographic-final_1x.jpg.

17 "Facebook's Latest Ad Measurement Error Comes At the Worst Possible Time," (May 2017) http://fortune.com/2017/05/17/facebook-measurement-error/.

As for advertising, Facebook promises to give publishers 70 percent of ad revenue served up in Instant Articles through the Facebook Audience Network. But if publishers widely adopt the format and users grow accustomed to it, Facebook easily could change that split in its favor in the future. Once dependent on a dominant tech platform, publishers lack bargaining power to protest changes because they cannot credibly threaten to abandon the platform.

In contrast to the impact on legitimate news publishers, Facebook's tactics to keep users on its platform do not financially impair fake news purveyors because fake news costs very little or nothing to produce. If a fake news article generates 100,000 "likes" on Facebook and only 50 users manage to venture off of Facebook to the fake news website, its creator has made a profit. In contrast, if 100,000 people "like" a *New York Times* article on Facebook but only 50 visit NYTimes.com, the *New York Times* has not recouped the money it paid to journalists to write and research the piece.

And because the *New York Times* article is not incendiary or outrageous, it may not lead to 100,000 "likes" on Facebook. With less engagement, Facebook will not make as much money from the *New York Times* article as it would from the article claiming the Pope had endorsed Donald Trump, and hence its algorithm will give the *New York Times* article lower priority.

FBIA is just one example of the ways that tech platform business models conflict with those of legitimate news publishers. Google has also been accused of "nativizing" content, which means taking publishers' and other creators' content and rendering it native to Google's search pages. Getty Images has filed complaints in the EU accusing Google of nativizing Getty's photos within its digital walls,[18] an accusation Google denies. Both Facebook and Google give priority placement to nativized content in their search results and news feeds, respectively, lessoning consumers' interactions with publishers' websites.

By aggregating legitimate and fake news in the same place and refusing to distinguish content based on quality, both platforms have arguably commoditized news.[19] When an article by the *New York Times* appears side by side with an article by a fake news outlet and has the same appearance, users have a harder time distinguishing the fake from the real. Aggregation also means quality journalism does not earn the spoils of its labor. Journalists quickly find their scoops replicated en masse and the copies aggregated on equal footing with the original.

Publishers have also accused Facebook and Google of interfering with their subscription-based models, which would render that content unavailable for their platforms. When, for example, the *Wall Street Journal* limited access to Google's "first click free" program, it experienced a 44 percent drop in referrals from Google.[20] At time of writing, Google has given publishers control over how many clicks, if any, they choose to give away for free before showing a pay wall, and Facebook has announced it will support subscriptions in Facebook Instant Articles. As long as the market structure is unfazed, however, such changes are half-measures unlikely to significantly stem legitimate news companies' loss of revenue to Facebook and Google.

V. GOOGLE AND FACEBOOK LACK MEANINGFUL COMPETITION

The second main reason fake news is an antitrust problem is that Google and Facebook lack competitive discipline from other search engines and social networks, respectively. Having two dominant algorithms controlling the flow of information enables deception on a massive scale, meaning that the concentration of the search and social markets is directly related to the scope of fake news' damage.

If, hypothetically, five social networks and five search engines all had comparable market shares and competed against one another to have the best algorithm, a purveyor of fake news would need to exploit the differing weaknesses of more algorithms to do drastic damage. And consumers could have the option of choosing the social network or search engine that does not enable the proliferation of fake news, perhaps even a competitor that prioritizes the veracity of news over engagement.

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18 By incorporating Getty Images in Google image search, Google has "diverted users away from source sites and siphoned traffic from Getty Images, other media organizations and image creators," says Getty. http://press.gettyimages.com/getty-images-files-competition-law-complaint-against-google/.

19 Facebook and Google impose rules that "have commoditized the news and given rise to fake news, which often cannot be differentiated from real news." https://www.newsmediaalliance.org/release-digital-duopoly/ See also https://www.forbes.com/sites/washingtonbytes/2017/10/18/what-to-do-about-facebook/ ("Facebook is effectively commodifying all news, making it impossible for a user to separate fact from fake.").

20 "WSJ Ends Google Users' Free Ride, Then Fades in Search Results," (June 2017) https://www.bloomberg.com/news/articles/2017-06-05/wsj-ends-google-users-free-ride-then-fades-in-search-results

Legitimate news companies could even block their content from those social networks and search engines that speed their financial demise. News companies currently lack bargaining power against Facebook and Google because they lack alternatives for reaching large numbers of users. In 2009, Rupert Murdoch accused Google of stealing media content and threatened to withdraw his media companies' articles from Google search, but he could not viably follow through on the threat. Hence, Facebook and Google are constantly changing terms and adjusting their algorithms, and publishers have little choice but to adapt and accommodate regardless of how the changes may negatively affect their own profitability.

Some commentators argue competition in online search and social media is not possible and that Facebook and Google are natural monopolies because of network effects – their services' value to the user increases as the number of users of the product grows. A related argument is that Facebook and Google are dominant simply because they are the best. But the assumptions that dominance is inevitable and has been achieved only through merit are worth questioning.

Acquisitions of competitive threats, for example, have helped both firms amass and retain market power. Instagram built a thriving social network with 27 million users on iOS alone, centered around sharing images.[21] Then Facebook bought it. WhatsApp succeeded in getting the attention of 450 million users and was also acquired by Facebook. Facebook even reportedly has its own app to detect new apps that could be competitive threats, so that it can build its own version.[22] DoubleClick was the leader in display advertising, and then Google bought it. Together Facebook and Google have bought nearly 300 companies.

For those companies that Facebook cannot buy, Facebook can coopt their most popular features. Facebook has systematically copied Snapchat's innovations, for instance, and rolled them out to its 2 billion monthly users.

Neither has Google competed purely on the merits, according to the EC *Google Shopping* decision finding an abuse of dominance.[23] The EC is also investigating Google for allegedly requiring phone manufacturers to install a suite of apps on Android phones as a condition of installing the must-have Google Play app, allegations that mirror conduct in the *Microsoft* antitrust cases regarding Internet Explorer. The contracts also allegedly prohibit manufacturers from preinstalling competing search engines and other competing apps in Android phones, helping Google maintain its monopoly in search as the world moved to mobile. Android has approximately an 86 percent global market share.

If, alternatively, one accepts the argument that network effects mean there will always be one dominant social network and one dominant search engine, and that Facebook and Google are natural monopolies, then governments around the world are likely to label them utilities and regulate them.

For example, when U.S. policymakers accepted that robust competition in broadband was not likely, they passed utility-style net neutrality regulation to prevent broadband companies from acting as gatekeepers who decide what content reaches users.[24] The U.S. Federal Communications Commission similarly understood that weak cable competition means content creators lack options for program carriage and created a framework for content companies to sue cable providers for discrimination.[25] In the absence of competition, policymakers impose neutrality, non-discrimination, and equal access regulations.

An alternative to a non-discrimination regulatory regime is antitrust enforcement. Antitrust enforcers can also pursue non-discrimination remedies, like the EC's equal treatment remedy in *Google Shopping*. Enforcers serious about promoting tech platform competition will likely bolster their merger enforcement, moving beyond the formulaic and narrow analysis that cleared deals like *Facebook/Instagram* and *Google/DoubleClick*.

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21 "Facebook Buys Instagram For $1 Billion; Turns Budding Rival Into Its Standalone Photo App," (April 2012) https://techcrunch.com/2012/04/09/facebook-to-acquire-instagram-for-1-billion/.

22 "Facebook's Willingness to Copy Rivals' Apps Seen As Hurting Innovation," (Aug. 2017) https://www.washingtonpost.com/business/economy/facebooks-willingness-to-copy-rivals-apps-seen-as-hurting-innovation/2017/08/10/ea7188ea-7df6-11e7-a669-b400c5c7e1cc_story.html.

23 See European Commission press release, supra note 4.

24 Note, the current FCC Chairman Ajit Pai is expected to repeal Title II, but opponents will likely litigate the agency reversal under the Administrative Procedures Act. See Khan, *Amazon's Antitrust Paradox*, Yale Law Journal, Vol. 126 No. 3, January 2017 (explaining that two options for policymakers who are concerned about Amazon's market power are reforms to antitrust principles or utility-style non-discrimination regulation).

25 See Section 616 of the U.S. Communications Act; See also What to Do About Google? (Sept. 2017) https://www.forbes.com/sites/washingtonbytes/2017/09/08/what-to-do-about-google/#266818a67001 (Economist Hal Singer advocates for the application of a non-discrimination framework like Section 616 to both broadband companies and edge providers like Facebook and Google).

Like legal precedent governing mergers, Sherman Act Section 2 legal precedent is making it difficult for antitrust enforcers to promote competition in the digital economy. The U.S. Department of Justice brought its case against Microsoft 18 years ago, and the dearth of enforcement in the meantime is partly attributable to legal precedent that imposes high bars for prevailing on monopolization claims. Legal precedent involving monopoly, monopoly leveraging, attempted monopoly, tying and bundling all require adaptation for Section 2 to optimally serve its purpose of preventing monopolization. Even under existing U.S. law, however, antitrust enforcers have the tools to combat illegal conduct and are beginning to gain the political will as well.

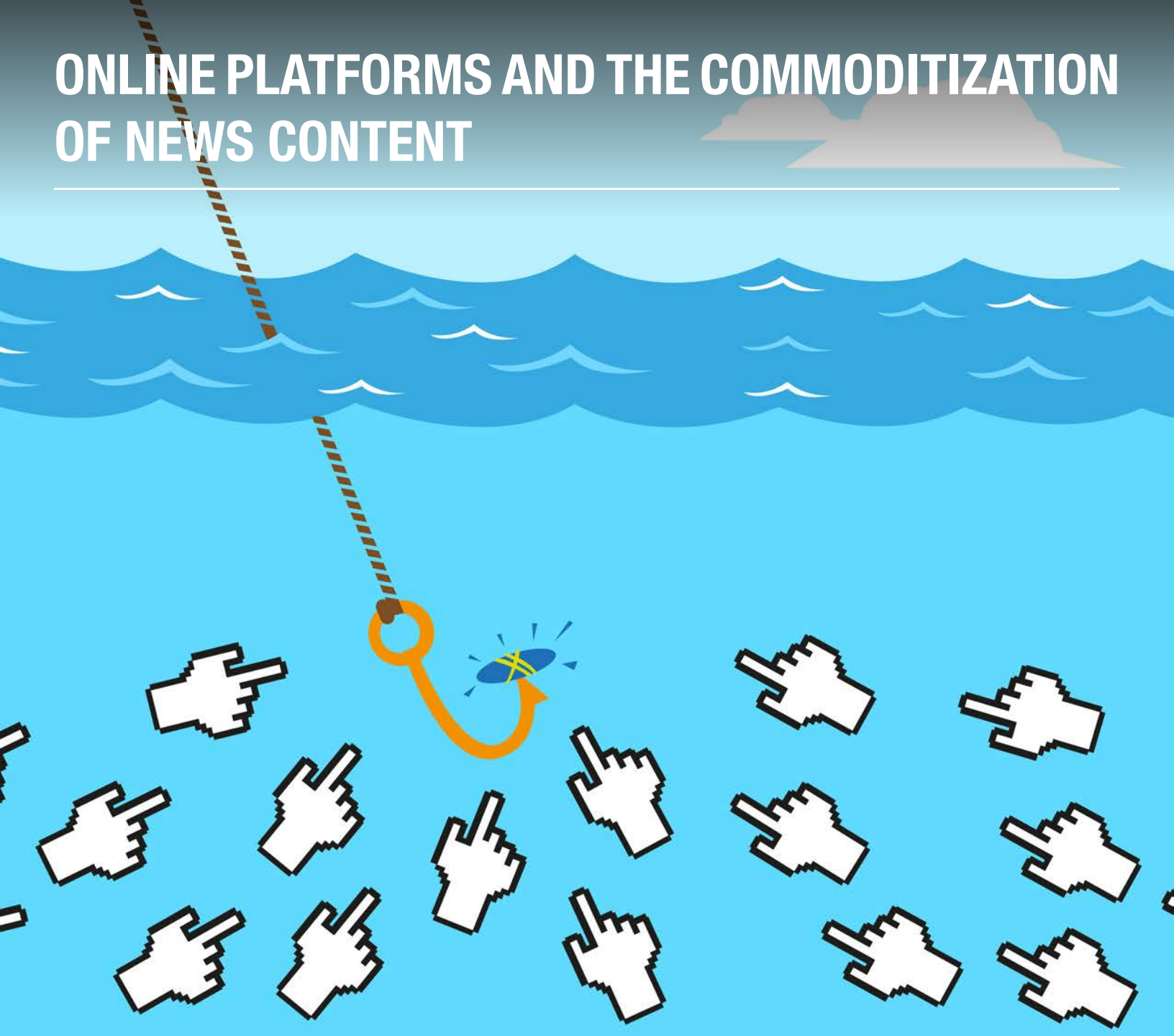
VI. CONCLUSION

To sum up, fake news is an antitrust problem because Facebook and Google are not just aggregators of news but also competitors to publishers, competing for ad dollars, user attention and data. Their business incentives run counter to the interests of legitimate media companies, and they pull technological levers that harm media companies' business models and advantage their own. To provide counter speech to fake news, legitimate news companies must be strong and well-financed.

Because they lack meaningful competition, Facebook and Google – and the fake news purveyors who game their algorithms – have an outsized impact on the flow of information. The two firms can tailor their algorithms to serve their financial interests, rather than making profit-reducing changes to combat fake news. Without choice and lacking bargaining power, consumers, advertisers and content creators who want legitimate news prioritized instead of fake news have limited ability to take their business elsewhere.

The current situation is not sustainable, and either a non-discrimination regulatory regime or stronger antitrust enforcement is inevitable. Measures that do not alter market structure or provide competitive pressure to combat fake news will face limits.

ONLINE PLATFORMS AND THE COMMODITIZATION OF NEWS CONTENT



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I. INTRODUCTION

Before the advent of the Internet, customers got their news from corner newsstands, convenience stores and supermarket checkout lanes. Carefully positioned racks displayed leading newspaper front pages and magazine covers, each vying for customers' attention. Customers browsing the racks could see the latest issue of *The New York Times, The Wall Street Journal* and *The Economist* alongside tabloids like *Weekly World News*. But there was never any risk of them confusing headlines like "Man laughs head off – AND HAS SCARS TO PROVE IT" for real news. Customers could easily distinguish between different publications, and they understood that some publications were trustworthy and others were not. Knowing this, publishers worked hard to build and maintain their reputations for quality and trustworthiness.

Today, the news racks are still there, but most of us now get our news online. The rapid transition towards the Internet becoming the primary distribution channel for news content has, in many ways, been a boon for consumers. Never before have we had so many news sources to choose from. But it also has a dark side. The Internet changed the way we interact with news content, making it harder to distinguish between real news and misinformation. Exacerbating this problem is the fact that online news distribution is now controlled by a small clique of dominant online platforms, such as Google. As we shall explain below, these companies have commercial incentives to accelerate the commoditization of news content and to ignore the problems that result. Ultimately, how to address this problem is an important question for antitrust law, but it is not one that antitrust enforcers have thus proved themselves willing to address.

II. HOW THE INTERNET OPENED THE DOOR FOR THE "COMMODITIZATION" OF NEWS

Back when customers got their news from newsstands, they bought physical copies of newspapers and magazines. In doing so, they engaged with all of that publisher's content. Now, users engage with individual articles (and often, just the headlines). They click to an article from Google or Facebook, and then they click back. Customers used to see a difference between an article published by *The New York Times* and *The Wall Street Journal*. Both were viewed as completely different from an article by *Weekly World News*. Now, however, many don't even notice the name of the publisher that generated the article they are reading. News content has become divorced from the publishers who create it. This phenomenon has been referred to as the "commoditization" of news — users increasingly viewing news articles as fungible, homogenous commodities.

The commoditization of news has severe consequences, both for publishers and for society. First, it has made it extremely difficult for publishers to benefit from their investments in journalism, which is part of the reason that publisher revenues have declined precipitously over the past several years.[2] It used to be that a publisher that broke a news story could enjoy at least a short window of exclusivity and a reputational boost as a result. Now, within minutes of publishing a story, that publisher must compete against dozens (or even hundreds) of "copycat" articles popping up on other sites. This is a problem that publishers have recognized for years, and it is partially attributable to the lack of intellectual property protection for facts that appear in a publisher's story. But it is also attributable to the commoditization of news and the fact that users consume individual articles rather than complete publications. In many instances, consumers have little or no relationship to an article's publishers. Instead, users rely on search engines and other platforms to curate articles based on relevance and quality. As a result, competition among publishers has devolved from investing in original, high-quality journalism to investing in search engine optimization. Increasingly, journalist write articles for algorithms instead of readers.

Another major consequence of news commoditization — and one with more far-reaching implications — is the explosion of Fake News. While the term has been bandied about and coopted for political purposes over the past year, "Fake News" originally referred to unscrupulous publishers who posted spurious or outright false news articles online. Usually, such articles are designed to be incendiary or salacious, and they often target the biases of particular audiences the publisher is trying to influence. At its core, the commoditization of news is about erasing distinctions between news sources, which makes it easier for Fake News sites to flourish by masquerading as legitimate publications. Users can no longer distinguish between *Weekly World News* and *The New York Times*.

2 Vranica & Marshall, "Plummeting Newspaper Ad Revenue Sparks New Wave of Changes," Wall St. J. (Oct. 20, 2016), https://www.wsj.com/articles/plummeting-newspaper-ad-revenue-sparks-new-wave-of-changes-1476955801.

III. NO COMMERCIAL INCENTIVES TO RESIST COMMODITIZATION OF NEWS

The most obvious candidates to fight the negative effects of news commoditization are the dominant online platforms, which now act as the gatekeepers between users and online news. They have the technical means to promote quality, original content, and to demote — or at least identify — content from unreliable or untrustworthy sources. Unfortunately, the major online platforms' commercial interests and incentives run in the opposite direction, and their monopoly power lets them pursue those commercial interests at the expense of consumers.

The major online platforms do not have an incentive to counteract the trend towards news commoditization, nor even to fight specific ills caused by commoditization, such as Fake News. The reason stems from the fact that the major online platforms, especially Google, are advertising companies first and foremost. Google reports that 89 percent of its revenue comes from advertising, and along with Facebook it accounts for more than 63 percent of online advertising revenue in the U.S.[3] For Google, that revenue comes not only from selling ads on its own sites (e.g. Google Search, YouTube, etc.), but also from serving ads on third-party sites through its ad intermediation technology, such as DoubleClick. Through their ad intermediation services, the platforms can take an outsized share of ad revenue generated on third parties' sites, including those belonging to news publishers. This explains why advertising revenue for news publishers has fallen to a third of its 2006 levels, despite the fact that digital audiences continue to grow steadily.[4]

Dominant platforms like Google are thus in the position of not only steering users towards particular news sites, but also profiting from ads displayed on those sites. In this position, Google has a strong economic incentive to pursue two goals: (1) keeping them coming back to its platform and (2) steering them to sites where Google can profit from ads. Resisting news commoditization would run counter to both goals.

A key characteristic of commoditized news content is that, from a consumer perspective, all content is indistinguishable. This situation favors the intermediary because instead of navigating directly to a publication's website, users navigate to the platform to search for news. In contrast, if news publishers can differentiate themselves, then they can build more direct relationships with consumers. Through these relationships, publishers might successfully encourage consumers to navigate directly to their sites or even sign up for subscription content. Direct navigation and digital subscriptions are thus the modern equivalents of a customer subscribing for home delivery of a newspaper. And in the same way that home delivery disintermediated the newsstand, direct navigation and digital subscriptions disintermediate the online platforms. Commoditization of news content, however, makes disintermediation less likely. Commoditization of news increases dependence dominant platforms and algorithms curate content and steer users.

News commoditization also serves the online platforms' advertising interests. News publishers that cannot differentiate their content are unable to monetize that content through subscriptions, because few customers will pay for content they think they can get elsewhere for free. Many publishers thus have to rely on advertising, which means more revenue for the ad intermediation sides of the online platforms' businesses.

Major online platforms such as Google thus have few incentives to halt news commoditization. Nor do they have an incentive to fight specific problems caused by commoditization, which explains the rash of recent incidents involving major platforms prominently featuring Fake News articles.[5] As with the general trend towards commoditization, the growth of Fake News actually helps the major platforms resist disintermediation and maximize advertising revenues.

With respect to disintermediation, Fake News sites benefit platforms like Google because, unlike higher quality news sources, they do not threaten to attract future traffic away from the platform by establishing direct relationships. Fake News purveyors offer little in the way of quality content on their sites. As a result, users do not linger long on those sites, and they are unlikely to navigate there directly for future news content. In contrast, a high-quality news publisher has a higher likelihood of becoming a users' first stop for news content, thereby disintermediating the platform.

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3 Google 10-K; Marketer, "Google and Facebook Tighten Grip on US Digital Ad Market" (Sept. 21, 2017), https://www.emarketer.com/Article/Google-Facebook-Tighten-Grip-on-US-Digital-Ad-Market/1016494.

4 Barthel, "Despite subscription surges for largest U.S. newspapers, circulation and revenue fall for industry overall," Pew Research Center (June 1, 2017), http://www.pewresearch.org/fact-tank/2017/06/01/circulation-and-revenue-fall-for-newspaper-industry/; Pew Research Center, Newspapers Fact Sheet (June 1, 2017), http://www.journalism.org/fact-sheet/newspapers/.

5 See, e.g. Ehrenkranz, "Google's Top Stories Promoted Misinformation About the Las Vegas Shooting From 4Chan," Gizmodo (Oct. 2, 2017), https://gizmodo.com/googles-top-stories-promoted-misinformation-about-the-l-1819053288; Entous et al., "Russian Facebook ads showed a black woman firing a rifle, amid efforts to stoke racial strife," Washington Post (Oct. 2, 2017), https://www.washingtonpost.com/business/technology/russian-facebook-ads-showed-a-black-woman-firing-a-rifle-amid-efforts-to-stoke-racial-strife/2017/10/02/e4e78312-a785-11e7-b3aa-c0e2e1d41e38_story.html?utm_term=.9ee8723aca89.

Fake News also benefits the platforms' advertising businesses. While the primary motive of some purveyors of Fake News is often described as political, most also have an economic motive, and they monetize their content almost exclusively through online advertising. Fake News sites are thus heavy users of Google's ad intermediation services, meaning that when they make money, so does Google. Moreover, Fake News publishers' incendiary headlines attract clicks, and in the world of online advertising, more clicks mean more ad impressions.

Google and similarly situated platforms thus have little economic incentive to crack down on Fake News sites. Indeed, their revenue would suffer if they took on Fake News. For this reason, when we see major platforms in the news claiming that they are serious about finding a solution to Fake News, they likely are not doing so out of genuine concern, but rather in response to political pressures. Once those political pressures evaporate, so too will the platforms' concerns over Fake News.

IV. INTENTIONALLY OR NOT, ONLINE PLATFORMS EXACERBATE THE PROBLEMS

Given that news commoditization benefits dominant online platforms, it is not surprising that some might take steps to accelerate the trend. While a full exploration of the ways that platforms encourage news commoditization is beyond the scope of this article, examples include platforms scraping publishers' content and displaying it directly on their own sites, undermining publishers' subscription-based business models and using the threat of demotion to force publishers' acquiescence to abusive policies. Most recently, Google has introduced a practice that is particularly noteworthy, which it calls the Accelerated Mobile Pages ("AMP") project. AMP is perhaps the paradigmatic example of a dominant online platform imposing a policy on publishers that forces them to further the commoditization of their content.

Google created AMP as a standard for creating streamlined mobile webpages.[6] At its most basic level, AMP is a set of rules for coding HTML pages that eschew certain tags and JavaScript functionality to make pages load faster. While faster page load times are a worthy goal, Google's AMP protocols elevate that goal above everything else, including publishers' ability to differentiate their content and brands.

The ability to control the presentation of content has always been a key way that publishers differentiate themselves in the minds of consumers, but Google's strict HTML protocols make publishers' webpages look formulaic. Publishers can no longer implement custom JavaScript elements that let users interact with information in innovative ways. Instead, they have to use Google's JavaScript library. Publishers are also limited in their ability to create menus or other navigation elements designed to guide users deeper into their sites. The result is that each AMP page looks like every other AMP page.

Making matters worse for publishers, Google stores AMP webpages on its own servers, from which it loads them into an "AMP News Carousel" on its search results page.[7] In the AMP News Carousel, users can flick left and right on the screen to switch between similar articles, encouraging them to think of the articles as homogenous, easily interchangeable substitutes. The AMP News Carousel thus discourages engagement with any particular publisher's content and brand, while at the same time giving Google valuable data about how users interact with the page.

Many publishers would resist Google's calls for AMP implementation if they could, but Google makes doing so incredibly costly. Google favors the AMP News Carousel on its mobile search results page, meaning that publishers that refuse to implement AMP miss out on vital search traffic. Many thus have no choice but to endure the further commoditization of their content in order to maintain the flow of search traffic.

Even if online platforms like Google are not consciously pushing the news industry towards commoditization, their choices of where to focus their innovation efforts can have the same effect. For example, online platforms innovate heavily with respect to the user experience of engaging with online news content. Google's AMP is a good illustration of those efforts: Google devoted considerable resources to finding ways to reduce page load times by a few milliseconds and to make it easier for users to swipe through a stream of similar articles. But none of the major online platforms has invested meaningfully in innovations that might better the *quality* of the content presented to consumers. Despite pleas from the publishing community, the platforms have devoted virtually no resources to finding ways to highlight original, high-quality content or to flag duplicative or untrustworthy content. The result is that users' ability to interact with news content is constantly evolving, but the quality of that content is deteriorating.

6 Accelerated Mobile Pages, https://www.ampproject.org/.

7 Google, Inc., AMP on Google – Google AMP Cache (last accessed Dec. 13, 2017), https://developers.google.com/amp/cache/.

V. NEWS COMMODITIZATION IS A COMPETITION PROBLEM

Less competition means that dominant platforms can afford to decrease the quality of news and/or underinvest in quality control without risk of losing enough users to make the behavior unprofitable. As described above, news commoditization ultimately hurts users because it suppresses high-quality, original content and promotes Fake News. Yet the commercial consequences are *de minimis*. If dominant online platforms had to compete in their respective markets, then they could not afford to be ambivalent to the societal harms caused by news commoditization. But each of the dominant platforms understands that customers have few — if any — credible alternatives in the markets in which they operate, so they fail to address this very real consumer need. News commoditization is thus not a natural consequence of the shift to online news distribution, but a consumer harm resulting from lack of competitive pressure. To the extent that dominant platforms engage in exclusionary behavior to maintain their platform dominance, the conduct and resulting harm to users and publishers should be actionable under the antitrust laws.

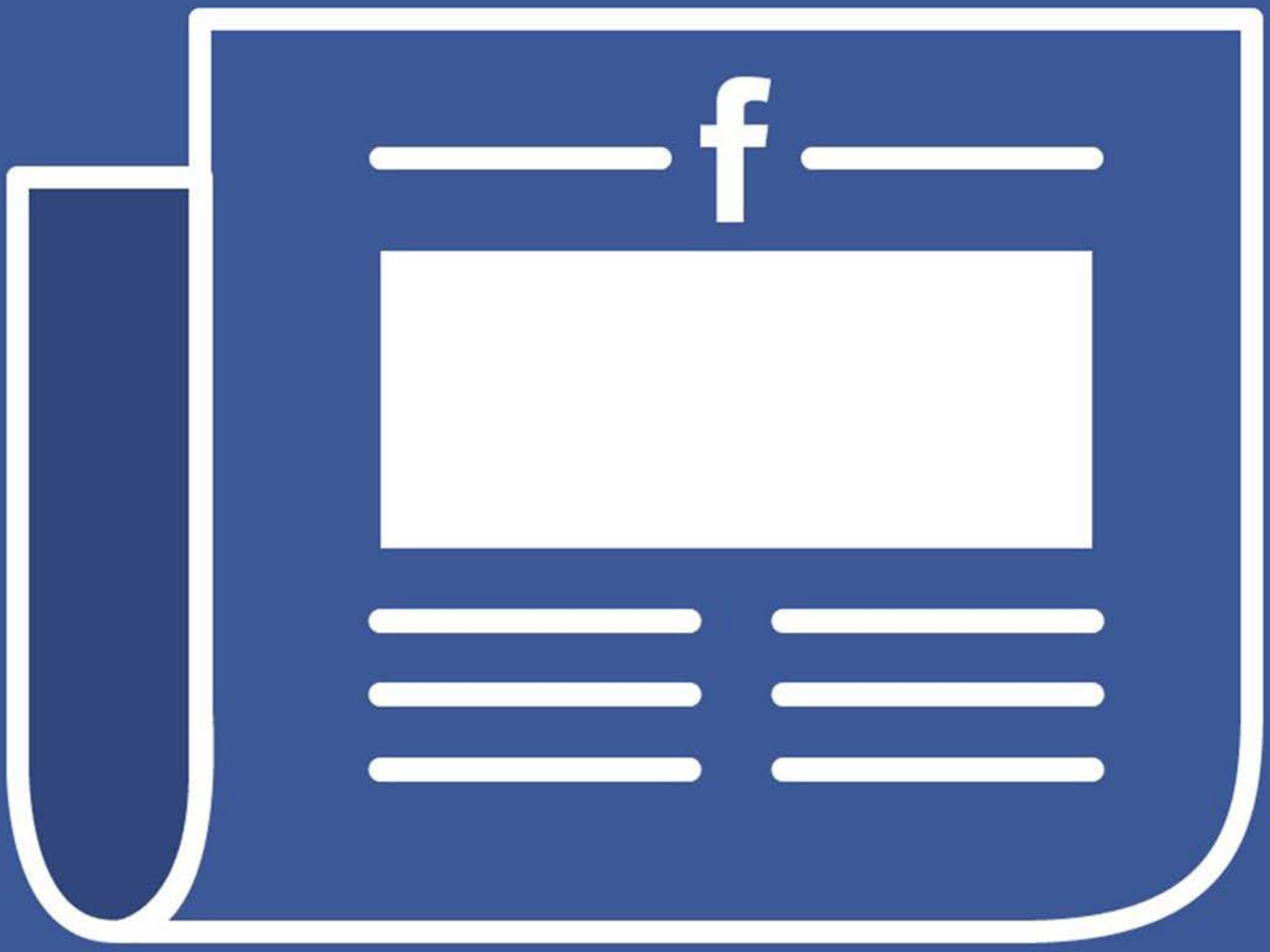
Unfortunately, antitrust enforcers tend to have a blind spot when it comes to non-price-related consumer harms stemming from exercises of market power.[8] This lapse is becoming an increasingly serious problem in an age of major tech platforms that monetize their consumer-facing services through advertising and data rather than direct fees. The risk is that regulators are giving a pass to some types of anticompetitive conduct merely because the harm that results is not price-related. As the above discussion illustrates, the concern is not merely hypothetical. Dominant online platforms have control over the mix of news sources that are presented to consumers, and they have an incentive to alter that mix to benefit themselves. The end result is a deterioration in the quality of news content available to consumers and the spread of misinformation. Both of these are consumer harms with real world consequences, but there is a risk that regulators will give such non-quantifiable harms less weight compared to the price-related consumer harms with which they are more familiar.

Finally, there is another sense in which news commoditization is a competition concern. The most obvious players with a stake in this issue are the publishers, but each is too small to influence the major online platforms. Their only hope would be to band together to push the platforms to address the problem, but the antitrust laws prevent them from doing so. This situation has led to calls for a limited antitrust safe harbor for publishers to bargain with dominant online platforms over these types of issues.[9] Until such an exemption is granted, however, we will continue to have the incongruous situation in which antitrust enforcement is too weak to address consumer harm by dominant online platforms but strong enough to prevent collective action by publishers that might remedy the harm.

8 While both U.S. and European competition authorities formally acknowledge the possibility of consumer harms that go beyond price increases — such as quality decreases or reductions in innovation — they tend to de-emphasize such harms in practice. For an incisive discussion of the problems associated with a price-centric focus on consumer harm and its implications for data-related markets. See Stucke & Grunes, *Big Data and Competition Policy,* 107-26 (2016).

9 Rutenberg, "News Outlets to Seek Bargaining Rights Against Google and Facebook," N.Y. Times (July 9, 2017), https://www.nytimes.com/2017/07/09/business/media/google-facebook-news-media-alliance.html.

FAKE NEWS IS NOT AN ANTITRUST PROBLEM



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I. INTRODUCTION

The current, well-grounded objective of U.S. antitrust laws is to protect the competitive process as measured through its impact on consumer welfare.[2] In doing so, antitrust excludes other objectives such as protecting small businesses, protecting competitors generally, or redistributing income. It also rejects naive rules of thumb such as "big is bad." Recently, there have been prominent calls to use antitrust enforcement to achieve objectives beyond that of protecting the competitive process.[3] Adding to this increasing litany is an appeal to use antitrust to regulate the distribution of "fake news." Specifically, Sally Hubbard has proposed that fake news is an antitrust problem.[4] Her primary target is Facebook; although, her push to reorient antitrust has implications beyond Facebook. Hubbard asserts that Facebook competes with and is responsible for speeding the demise of "legitimate" news sites by offering a favorable platform for "fake news."

In this article, we argue that notwithstanding the lack of clarity regarding the actual definition of fake news, there is a real question of whether antitrust laws are capable or well-suited to combat the production and dissemination of fake news, presuming this is even accepted as a policy goal. The article is organized as follows. First, we delineate the key elements of Hubbard's thesis. We then consider the foundational question of how to classify news as "fake" versus "legitimate." Next, we assess Facebook's putative role in enabling and contributing to the success of fake news sites to the detriment of mainstream news organizations. Finally, through a standard monopolization and dominance framework, we address the allegation that Facebook, is promoting its own features and properties at the expense of rivals — in this case mainstream news organizations, which leads to anticompetitive outcomes. We find that fake news is not an antitrust problem and question whether fake news can or should be regulated — whether in the form of antitrust or otherwise.

II. HUBBARD'S CRITIQUE

At the heart of Hubbard's critique of Facebook is "Facebook's design features that deter users from clicking to legitimate news publishers' sites," since, from "an antitrust lens, news publishers are Facebook's competitors." Hubbard asserts that Facebook discourages users from "clicking away" from its platform by defaulting them to an "in app" browser when they attempt to click through to other websites. This "in app" browser is allegedly "slow" in connecting to outside sites, which discourages users from leaving Facebook.[5] This theory is similar to the allegation investigated by the U.S. Federal Trade Commission and the European Commission that Google Search prioritized, without merit, its own search results over more relevant third-party links in an effort to keep users on Google and starve competitors of user traffic.[6] Acknowledging this, Hubbard states, "Prioritizing content that is either native to Facebook's platform or that does not require clicks to competitors' sites looks a lot like what led to antitrust charges against Google."

2 See Bork, *The Antitrust Paradox: A Policy at War with Itself*, (1978) at 244 ("[c]onsumer welfare is the only legitimate goal of antitrust, not because antitrust is economics, but because it is law"); Hovenkamp, *The Antitrust Enterprise: Principle and Execution*, (2005) at 2 ("only articulated goal of the antitrust laws is to benefit consumers"). See also *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) ("Congress designed the Sherman Act as a 'consumer welfare prescription'"); *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 107 (1984) ("A restraint that has the effect of reducing the importance of consumer preference in setting price and output is not consistent with this fundamental goal of antitrust law").

3 For instance, a Congressional proposal to create a "better deal" in antitrust seeks to introduce, *inter alia*, provisions to protect competitors (see: http://www.democraticleader.gov/wp-content/uploads/2017/07/A-Better-Deal-on-Competition-and-Costs.pdf). Some academics have suggested the need for a policy debate on issues such as incorporating income inequality with antitrust (see, e.g., Baker & Salop, 2015, "Antitrust, Competition Policy, and Inequality," *Georgetown Law Journal* 104, pp. 1-28).

4 See Hubbard (January 10, 2017), "Why Fake News is an Antitrust Problem," Forbes.com (https://www.forbes.com/sites/washingtonbytes/2017/01/10/why-fake-news-is-an-antitrust-problem) and Forbes (January 16, 2017), "Is Fake News an Antitrust Problem?," Forbes.com (https://www.forbes.com/sites/washingtonbytes/2017/01/16/is-fake-news-an-antitrust-problem).

5 If Facebook is forcing its users to access those sites through a slower web browser, it would affect all links equally including fake news and legitimate news — unless Facebook is purposely and discriminately slowing links to different sites at different rates.

6 See Statement of the Federal Trade Commission Regarding Google's Search Practices, In the Matter of Google Inc., FTC File Number 111-0163 (January 3, 2013); http://europa.eu/rapid/press-release_IP-15-4780_en.htm.

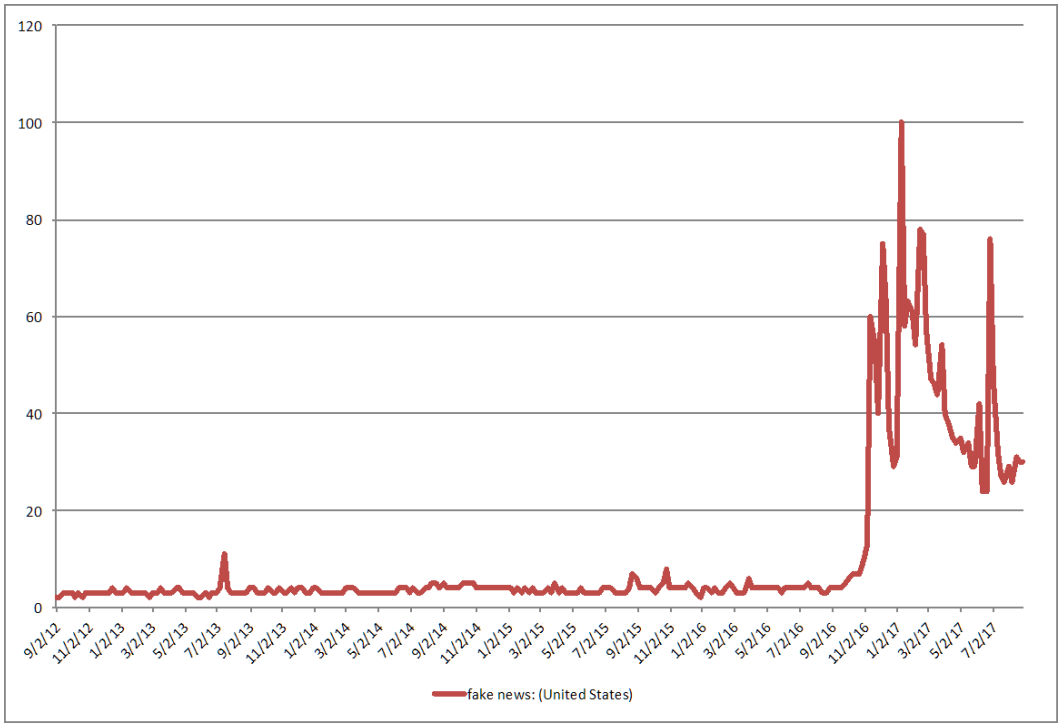
It is the advent of fake news that Hubbard claims makes this strategy successful by creating content that has "high engagement" within the Facebook platform.[7] This strategy is allegedly a low-cost way to foreclose purported Facebook competitors — in this case traditional media organizations. Thus, she states that, "While traditional media organizations need to recoup their investment in quality news by capturing web traffic, fake news organizations have no such overhead. Their minimal costs of production mean they need only coax a small percentage of those who interact with their articles on Facebook to click outside of the platform."

III. WHAT IS "FAKE NEWS?"

Before evaluating Hubbard's hypothesis, it is necessary to define "fake news" and to consider whether it is possible to distinguish it from "legitimate news." According to a Merriam-Webster article, "Fake news is, quite simply, news ('material reported in a newspaper or news periodical or on a newscast') that is fake ('false, counterfeit')."[8] More pointedly, fake news is a story that is *intentionally* false. Why generate fake news? Motivations could range from generating "info-tainment" in order to increase web traffic to a manipulation of public thought on political issues. Fake news, however, is not news that is, in and of itself, inconvenient or biased. Fake news is not an editorial, satire or propaganda. Arguably, fake news is not even speculative news, i.e., rumors — although this is open to some legitimate debate.[9]

According to Google Trends, the use of the search term "fake news" has spiked since the election of President Donald Trump in November 2016; although, its use appears to be waning after peaking in February 2017.

Figure 1: **Google Trends for the search term "fake news" over the past 5-years in the U.S.**



While use of the term "fake news" has spiked, it is not a new phenomenon. Figure 2 indicates that the frequency of the term "fake news" in books written in English and scanned by Google spiked in 1940 and also more markedly in 2008 (which is the end of the sample).[10]

7 It is not entirely clear what Hubbard means by "high engagement." We presume it is capturing the idea of keeping users on Facebook's site or app longer, which increases the probability the user will be monetized at some point during the visit.

8 See: https://www.merriam-webster.com/words-at-play/the-real-story-of-fake-news.

9 Simple factual errors would not meet this definition of fake news, although this too is debatable to the extent the errors reflect a bias on the part of the reporter to be more lax in checking certain aspects of a story that comports with his or her world view as opposed to those that might conflict with it. Some would argue that the increased use of so-called "anonymous sources" is blurring the distinction between fake and legitimate news.

10 Figure 2 is only broadly informative since it is an aggregation of all types of books including fiction and non-fiction. Google Books Ngram Viewer normalizes the data by the total number of books published in a year. See: https://books.google.com/ngrams/info.

Figure 2: **Google Books Ngram Viewer for the term "fake news" from 1800-2008**

Corroborating Figure 2, according to a Merriam-Webster article, the term fake news began to enjoy "general use at the end of the 19th century."[11] The generation and distribution of intentionally false stories is not a new phenomenon even if it went under different names such as "false news" or even outright "lies." For instance, in Figure 3, we compare the frequency of the phrase "fake news" and "false news" in English books.

Figure 3: **Google Books Ngram Viewer for the term "fake news" and "false news" from 1800-2008**

Thus, Figure 3 suggests the problem of "fake news" and "false news" is not a new one. Before the rise of the Internet, tabloids publishing outlandish claims have fueled conspiracy theories for decades (e.g., assertions the Apollo moon landings were fake; Elvis sightings). Importantly, it is not clear that fake news is having any greater or more harmful impact today than in previous times.

Who generates fake news and is it identifiable? Certainly, there are publishers whose primary purpose is to disseminate intentionally false news stories. On the other hand, there are publishers that engage in thorough vetting and fact checking of stories. One problem with classifying publishers or articles as fake or legitimate is that authenticity exists in a continuous spectrum. In addition to publishers that solely disseminate fake or actual news, there may be publishers that circulate a mixture of fake and actual news. Similarly, while some content is undeniably fake, in many instances the distinction between fake and legitimate news is likely to be in the eye of the beholder rather than objectively identifiable, such

11 https://www.merriam-webster.com/words-at-play/the-real-story-of-fake-news.

as news that, while not intentionally false, through speculation and bias is intended to sway public opinion. Therefore, while it may be possible to define fake news, actually identifying it and its purveyors is likely to be fraught with difficulties and perhaps subject to abuse in its own right, with possibly chilling effects on free speech.

IV. FACEBOOK AND THE DISTRIBUTION OF FAKE NEWS

We start from the premise that intentionally false news that is not satirical or speculative provides no positive social value in terms of net total welfare.[12] Additionally, to the extent that fake news makes it more difficult to identify legitimate news, then fake news could lower overall welfare by increasing search costs.[13] This seems to be the crux of Hubbard's argument regarding the role of Facebook — i.e., that Facebook enables the distribution of fake news which increases the noise surrounding all news and lowers total welfare.

One incentive that Facebook faces, which Hubbard rightly points out, is to promote content that has high engagement value. Hubbard argues that this is a characteristic of some or most fake news. Consequently, Facebook has an incentive to disseminate and enable fake news. Hubbard asserts, "A lot of the fake news sites were custom built for Facebook, taking into account the biases of its newsfeed algorithm." The importance of Facebook's role in distributing fake news is that, according to Hubbard, "In news distribution, Facebook's share is big indeed. 66% of Facebook's 1.71 billion (sic) US users receive news from the platform, according to Pew Research. Since Facebook reaches 67% of US adults, 44% of the US population gets news from Facebook."

It is important to clarify what these Pew statistics do and do not tell us. First, according to the cited Pew Research study, Facebook is not unique in the percentage of users who consume news while on the given social media platform.[14] For instance, both Twitter (59 percent) and Reddit (70 percent) have similar levels of news readership among their users.

Importantly, the statistic that 44 percent of the U.S. population gets news from Facebook is not a market share in any sense. For example, it ignores "multi-homing," that is the patronizing of more than one platform. Specifically, the Pew Research study finds that 39 percent of Facebook users also get news from local television, 25 percent from cable television, 23 percent from network nightly television, 33 percent from news websites and apps, 23 percent from radio and 15 percent from print newspapers. Thus, the 44 percent statistic tells us very little about Facebook's market power in terms of news distribution — let alone its ability to foreclose mainstream news organizations. Allcott & Gentzkow (2017) report that "only 14 percent of American adults viewed social media as their 'most important' source of [2016] election news."[15]

Moreover it is unclear how "engaged" Facebook users are with news delivered by social media as opposed to other forms of news delivery. Thus, the Pew Research study also notes that the majority of Facebook readers happen upon the news "when they're doing other things online" (62 percent) rather than "because they're looking for it." This would appear to be a key metric before assessing the impact of fake news.

Hubbard also highlights that Facebook wants to increase the number of users on its platform and the amount of time they spend there. Presumably, this is what most multisided platforms want. The problem, according to Hubbard, is that Facebook discourages users from "clicking away" from its platform by defaulting them to an "in app" browser when they attempt to click through to other websites. This "in app" browser is

12 This may be a strong assumption since consumers may view so-called fake news similarly to the way they view tabloid "journalism." That is, basically as a source of "info-tainment" that nobody in their right mind takes too seriously. Further, this assertion may be a departure from mainstream economic and antitrust thinking. In general, economists and antitrust practitioners only rank "states of the world" in terms of consumer welfare. To the extent a good or service increases consumer welfare, economists and antitrust practitioners usually refrain from making value judgments regarding the nature of that welfare increase. A possible example of this overriding philosophy has been the government's recurring role in preventing combinations in the tobacco industry (See Federal Trade Commission Complaint and Statement in the Matter of Reynolds American Inc., and Lorillard, Inc., July 31, 2015; Federal Trade Commission B.A.T. Industries P.L.C., *et al.*, Proposed Consent Agreement with Analysis to Aid Public Comment, January 11, 1995). This is not to say that there are no reasons to believe that the quality of the experience of consuming legitimate news is in some sense "better" than that of consuming fake news, only that economists and antitrust practitioners in general do not have particular expertise in making such distinctions. Decisions on such issues are best left to other professionals if they are to be adjudicated at all.

13 It is possible, however, to conceive of scenarios where the opposite is true. Suppose that some purported mainstream publishers propagate news stories that exhibit extreme bias or are poorly fact-checked. If so, then the increase in "noise" engendered by fake news could actually result in less biased consumption of news since the public will increasingly distrust all news and hence view the biased or poorly fact checked articles of mainstream news organization with a more critical eye. According to Gallup, the question of whether Americans trust the media "to report the news fully, accurately and fairly" has reached new lows (see: http://www.gallup.com/poll/195542/americans-trust-mass-media-sinks-new-low.aspx).

14 See: http://www.journalism.org/2016/05/26/news-use-across-social-media-platforms-2016/.

15 Allcott & Gentzkow (2017), "Social Media and Fake News in the 2016 Election," *Journal of Economic Perspectives* 31, pp. 221-236 at 212.

allegedly "slow" in connecting to outside sites, which discourages users from leaving Facebook. However, the impact of "slowing" links to other websites in terms of increasing user-time is ambiguous. On the one hand, it may make users that are currently using a platform more reluctant to click away. On the other hand, it may reduce the desirability of using the platform or specific features of the platform by reducing the quality of the user experience.

Similarly, Hubbard argues that Facebook's Instant Articles hurts publishers since Facebook keeps the data collection associated with users of this app. Instant Articles is a feature that allows publishers to tailor articles to the Facebook platform.[16] In developing this feature, Facebook appears to have received feedback from publishers.[17] Consequently, the concern would appear to be that Facebook is reneging on contractual commitments made with publishers (either explicit or implicit) regarding information sharing, revenue sharing, or load times. Such an allegation, however, would appear to be a matter for contract or consumer protection laws rather than antitrust. Extending antitrust enforcement into areas beyond the purview of competition can be problematic.[18]

Moreover, there are a number of indications that Facebook is not withholding information or engaging in other deleterious practices with publishers that use Instant Articles. For example, Instant Articles appears to be compatible with a number of tracking tools, including publishers' own tools.[19] Also, Facebook does not appear to be engaging in any actions to withhold advertising revenue from publishers obtained through Instant Articles. Specifically, publishers can keep 100 percent of the ad revenue if they sell the ads, and Facebook gets its standard 30 percent cut if it sells the ads.[20] Other sources report that publishers are monetizing Instant Articles at similar rates to clicks on their own sites.[21]

In addition to the contention that Facebook is not sharing information obtained from Instant Articles with publishers, Hubbard also appears to be concerned that because of Instant Articles' fast load times, publishers will become more dependent on it, allowing Facebook to change the rules of the game. This assertion would appear to be a throwback to efficiency "offense" arguments (i.e., the idea that a particular practice or transaction, while lowering costs or increasing customer satisfaction, should be viewed anticompetitively since it would create or strengthen a dominant position).[22] Therefore, Facebook cannot win — first it is criticized for having load times that are too slow (for its in-app browser), and then it is being criticized for load times that are too fast. Finally, it is not clear that publishers are becoming dependent on Instant Articles as there are reports that some publishers are abandoning the feature.[23] Those that remain may simply do so because they profit from the application.

V. IS FACEBOOK FORECLOSING MAINSTREAM NEWS ORGANIZATIONS?

There are two key components for a charge of "monopolization" or "abuse of dominance." First, a firm must possess monopoly power in a relevant market. Second, the firm's monopoly power must be gained or maintained through improper conduct rather than merely having a better product, superior management or historic accident.[24]

The first issue is the relevant product market. In which market are Facebook and mainstream news sites competing? Even if such a market could be properly identified, what is Facebook's market share in this market? As noted in the previous section, there are issues of multi-homing and distinguishing mere "page views" from actual engagement. Hubbard appears to rely upon outdated arguments that Facebook's mere

16 For more on Instant Articles, see: https://contently.com/strategist/2015/05/13/7-things-you-need-to-know-about-facebook-instant-articles.

17 See: https://techcrunch.com/2015/05/12/facebook-instant-articles.

18 See: Abbott & Sacher (2013), "Avoiding the 'Robin Hood Syndrome' in Developing Antitrust Jurisdictions," in *William E Kovacic: An Antitrust Tribute Liber Amicorum.*

19 Marshall (April 5, 2016), "Facebook Instant Articles Now Working With Medium, Other Publishing Tools. Publishing software Medium will soon allow publications to post directly to Facebook," *The Wall Street Journal*.

20 See: https://developers.facebook.com/docs/instant-articles/monetization; https://www.wsj.com/articles/facebooks-instant-articles-advertising-fixes-win-over-publishers-1455218551.

21 See: https://www.wsj.com/articles/facebooks-instant-articles-advertising-fixes-win-over-publishers-1455218551.

22 See Kolasky & Dick (2003), "The Merger of Guidelines and the Integration of Efficiencies into Antitrust Review of Horizontal Mergers," *Antitrust Law Journal*, pp. 207-251, at 211-212.

23 See: https://digiday.com/media/facebook-faces-increased-publisher-resistance-instant-articles/.

24 *United States v. Grinnell Corp.,* 384 U.S. 563 (1966).

size is problematic.[25] Antitrust distinguishes between mere size and market power.[26] Basing antitrust violations on size is a regression to a much earlier and largely discredited period of antitrust.[27]

Even if a properly defined antitrust market could be identified, has Facebook engaged in anticompetitive actions that would disadvantage rivals? The key "bad act" of which Hubbard accuses Facebook appears to be its practice of filtering clicks through an in-app browser that slows click-through speeds. It is the advent of fake news that Hubbard claims makes this strategy successful. As a factual matter, there does not appear to be any evidence that users are less likely to click through regarding fake news than other types of content. However, even taking this contention as given, and also taking as given Hubbard's contention that users of Facebook must connect to legitimate outside sites through an in-app browser that has slower connection speeds, her thesis is still problematic. Clearly antitrust could only deal with this issue if there were an antitrust violation. Such a violation would likely require that Facebook anticipated that it could rely on fake news to bolster its anticompetitive in-app connection strategy. To the extent the putative growth of fake news was incidental to their use of an in-app browser, this breaks the causal link between Facebook's in-app browser and its alleged anticompetitive scheme to foreclose traditional news sites.[28] Indeed, it seems that Facebook would want to avoid having a reputation as a purveyor of fake news, which further calls into question the hypothesis that it anticipated the growth of fake news in its product design. Finally, it is not clear why Facebook even has an incentive to foreclose legitimate news sites since it is not a generator of news content. This makes it unlike the Google matter, where Google arguably had an incentive to prioritize its search results because doing so encouraged consumers to click toward Google-provisioned products which would have the effect of increasing Google's revenues.

While harm to customers is the standard for evaluating whether there is an antitrust violation, a monopolization strategy would not be successful unless it results in the elimination or restriction of actual or potential competition. Hubbard points to the considerable evidence that news organizations of all forms are declining. There is no denying the news industry is in decline. These trends began long ago, however.[29] Connecting this decline to fake news on Facebook is dubious at best. In evaluating whether fake news makes this strategy successful, one question is whether fake news makes up a large percentage of Facebook's user's engagement with the site and whether that has grown over time.[30] In other words, fake news could not be a means for keeping users on the site if only a small percentage of users' time on the site is spent engaging with fake news.[31] Further, there is no evidence that consumers are consuming fake news in lieu of legitimate news.

Does Facebook even have the *ability* to foreclose mainstream news organizations? The mere fact that Facebook users read news stories, whether fake or legitimate, while on Facebook does not establish the ability to foreclose. First, as noted above, Facebook users multi-home and do not rely solely on Facebook for news.[32] Second, what percentage of traffic is Facebook actually responsible for to mainstream news organizations as a whole — and not just to a specific news site (since foreclosure requires *market* control not the elimination of specific competitors *per se*)?

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25 For example, Hubbard states, "When a digital platform with huge market share competes against companies that depend on the platform for distribution, the fight is hardly a fair one."

26 That being said, the broad presumption for finding substantial market power is shares above 50 percent and likely higher. See Areeda & Hovenkamp (2002), *Antitrust Law*, 2nd edition, ¶ 801a, at 319 ("Although one cannot be too categorical, we believe it reasonable to presume the existence of substantial single-firm market power from a showing that the defendant's share of a well-defined market protected by sufficient entry barriers has exceeded 70 or 75 percent for the five years preceding the complaint. Most recent cases dismiss claims as a matter of law where the defendant's market share is less than 50 percent").

27 See Sokol & Comerford (2016), "Antitrust and Regulating Big Data," *George Mason Law Review* 23, pp. 1129-1161 at 1130 ("'Big is bad' has been a bogeyman of antitrust since the time of *Standard Oil*. However, bigness is not an antitrust offense. Rather, antitrust focuses on consumer welfare loss and there has not been a decided merger or litigated conduce case that has said otherwise for at least a generation.").

28 To the extent Facebook did not anticipate the growth of fake news, this suggests there may be other explanations for the use of an in-app browser. Indeed, the causality may run in reverse. The growth of fake news and possibly harmful websites (e.g., sources of viruses and malware) may make Facebook cautious about linking to other sites. The in-app browser may also reflect a desire to create a *smoother* online experience that would allow users to quickly go back to their Facebook feed, a feature that Facebook must have assumed consumers value at least enough to compensate for any reduction in the speed of the browser.

29 See Sacher (2011), "Antitrust Issues in Defining Markets in the Newspaper Industry," available at SSRN: http://ssrn.com/abstract=1967667.

30 For instance, according to the Pew study, while 62 percent get news (of all types) on social media, only 18 percent "do so often" (http://www.journalism.org/2016/05/26/news-use-across-social-media-platforms-2016/), which is not consistent with a high level of engagement.

31 A BuzzFeed article quotes a Facebook spokesman who tells them that the top stories do not reflect overall engagement on the platform: "'There is a long tail of stories on Facebook,' the spokesman said. 'It may seem like the top stories get a lot of traction, but they represent a tiny fraction of the total.' He also said that native video, live content, and image posts from major news outlets saw significant engagement on Facebook" (https://www.buzzfeed.com/craigsilverman/viral-fake-election-news-outperformed-real-news-on-facebook).

32 See: http://www.journalism.org/2016/05/26/news-use-across-social-media-platforms-2016. Similarly, in an earlier Pew study, only 4 percent of Facebooks users "say it is the most important way they get news" (http://www.journalism.org/2013/10/24/the-role-of-news-on-facebook).

For instance, according to one source, Facebook accounts for 20 percent of traffic to the New York Times' website,[33] which is likely insufficient to cause foreclosure — even if Facebook foreclosed the *entire* 20 percent of traffic.[34] Allcott & Gentzkow find top U.S. news sites received only 10.1 percent of their traffic from social media.[35] Moreover, these percentages do not indicate what percentage of this traffic is for news articles as opposed to other traffic such as for society pages, crosswords, opinion pieces and other such content. Even if Facebook accounts for a higher percentage of traffic to other mainstream news sites, Facebook users could switch to other methods to reach these news sites including via other social networks, horizontal and vertical search engines and direct bookmarks. Finally, it is unclear why legitimate news sites could not take advantage of Facebook's newsfeed algorithm in the same manner which Hubbard accuses fake new sites of doing.

Relevantly, Hubbard concedes that Facebook has *increased* traffic to news sites "in spades, with its referral traffic exceeding that of Google in 2015." Along the same line, BuzzFeed acknowledges that:

> It's important to note that Facebook engagement does not necessarily translate into traffic [for fake news sites]. This analysis was focused on how the best-performing fake news about the election compared with real news from major outlets on Facebook. It's entirely possible—and likely—that the mainstream sites received more traffic to their top-performing Facebook content than the fake news sites did.[36]

In other words, even if Facebook does favor fake news, it has likely increased the distribution of all news including actual news — but perhaps disrupting market shares. The problem would then appear to be that, while Facebook has increased traffic to publishers of actual news, these publishers would have an even higher level of traffic *but for* Facebook's design choices. Of course, there is no evidence for this.

VI. CONCLUSION

In sum, we find that fake new is not an antitrust problem. First, the evidentiary bases for many of Hubbard's allegations are thin at best. For example, it is not clear that fake news has had a negative impact on actual news publishers, either in terms of traffic or the ability of publishers to monetize that traffic. To the extent Facebook is reneging on contractual obligations or engaging in misrepresentations to publishers, these are matters for contract or consumer protection law, not antitrust.

Second, viewing the allegations in a standard monopolization and dominance framework raises questions regarding whether Facebook has a dominant position in a well-defined antitrust market; whether it has the ability — or incentive — to actually foreclosure mainstream news sites; and whether there is any causal link between Facebook's in-app browser and the decline of traditional news. Finally, identifying fake news is extremely difficult and potentially subject to abuse, with a possibly chilling effect on free speech. This not only calls into question whether antitrust has a role to play in attenuating the dissemination of fake news, but whether the regulation of fake news should be a policy objective at all.

Hubbard's arguments are only the latest in a long line of efforts to turn antitrust away from its well-grounded objective of protecting the competitive process. Hubbard's calls to involve antitrust in what appear to be matters of speech and expression would appear to be pushing competition enforcement in particularly questionable directions.

33 See: http://www.poynter.org/2016/facebook-referrals-are-crucial-for-traffic-to-hyperpartisan-and-fake-news-sites/440132.

34 In terms of the current legal standard to find foreclosure, while there is no definitive percentage, it seems foreclosure rates of at least 30 percent are needed. See Jacobson (2009), "Towards a Consistent Antitrust Policy for Unilateral Conduct," *The Antitrust Source*, pp. 1-7 at 6 ("No case has been decided in a plaintiff's favor in over twenty years involving foreclosure of less than 30 percent").

35 Allcott & Gentzkow (2017), "Social Media and Fake News in the 2016 Election," *Journal of Economic Perspectives* 31, pp. 221-236 at 222.

36 https://www.buzzfeed.com/craigsilverman/viral-fake-election-news-outperformed-real-news-on-facebook.

FAKE NEWS'S NOT-SO-REAL ANTITRUST PROBLEM: CONTENT REMAINS KING

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I. INTRODUCTION

Concern about both fake news and the size of Internet mega-platforms like Facebook is popular these days. In each case the concern is intuitively obvious yet the pathway by which it manifests into tangible harm ambiguous. There are clear examples of "fake news" being used for illegitimate purposes, as well as examples of platforms engaging in (or facilitating) alarming behavior – but it is challenging to draw a clean line between such problematic conduct and other non-problematic or even desirable conduct. Better understanding these delineations is a pressing task.

Fake news is largely distributed via social media platforms like Facebook. Indeed, the more malicious of such news is often designed specifically to take advantage of these platforms. It is reasonable to think that the concerns that we have about each may therefore be related – that fake news is a Facebook problem. This is the approach put forth in recent work by Sally Hubbard, who argues that fake news is an antitrust problem. Her basic thesis is that platforms with substantial market-share, such as Facebook, have pushed quality news organizations out of the market and that those news organizations would be better able to compete for consumer attention if there were more competition between platforms like Facebook.

It is a clever and provocative argument. But it is ultimately not a compelling one. Facebook isn't what's killing quality news – the Internet did that, and Facebook (and other social media) are merely the deformed phoenices that arose from the traditional media's online ashes. Facebook and its ilk may be "killing news," but it is not because these mega-platforms are harming competition – rather, the problem is that traditional media simply cannot effectively compete with social media in the winner-take-all marketplace for consumer attention. This may be a problem – it is certainly an issue that we as a society are and will continue to consider from law and policy perspectives – but it is not an antitrust problem.

I address these issues in more depth in the following three parts. I start by reviewing the evidence about what is killing the news (it's not Facebook!). I then look at competition in the information economy and at the horizontal and vertical relationships between Facebook and the news media. I then turn the argument on its head, looking at how the problem we face – both with too little quality news and too much fake news – may be better addressed with less competition rather than more.

Throughout this discussion I will treat two recent articles as urtext: Hubbard's piece in Forbes in which she explains "Why Fake news Is An Antitrust Problem,"[2] and a follow-up interview on the topic that she did with Vox.[3] I also note that throughout I will follow Hubbard's lead and use Facebook as the poster-example of a significant social-media platform – though both she and I recognize that other tech platforms operate in this space. Indeed, the fact that Facebook, Twitter, and Google are all important platform-sources of news (fake and otherwise) demonstrates the most basic concern with the argument, that there is no lack of competition for information, true or otherwise.

II. WHAT'S KILLING THE NEWS?

Facebook is not killing the news. Traditional media of all sort have been facing economic hardship at least since the advent of the Internet.

As documented by Pew in 2004[4] – the year that Facebook was launched and two years before Twitter – Americans were spending less time with news from almost every media, with the notable exception of spending more time online:

> One of the few upward trends in media consumption in recent years has been the percentage of Americans who turn to Internet sources for news. As the public has moved away from traditional news sources – local and network television news, newspapers and, to a lesser extent, radio – online news consumption has increased dramatically.

Without doubt this trend has increased substantially in recent years. But its origins predate the modern understanding of social media, let alone the existence of platforms with scope and market power comparable to that of Facebook.

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2 Hubbard, "Why Fake News Is An Antitrust Problem." Forbes, Washington Bytes, January 10, 2017, available at: https://www.forbes.com/sites/washingtonbytes/2017/01/10/why-fake-news-is-an-antitrust-problem/#43bcea3830f1.

3 Illing, "Why "fake news" is an antitrust problem," Vox, September 23, 2017, available at: https://www.vox.com/technology/2017/9/22/16330008/facebook-google-amazon-monopoly-antitrust-regulation.

4 Pew Research Center, June 8, 2004, available at: http://www.people-press.org/2004/06/08/i-where-americans-go-for-news/.

There are two sides to the decline in traditional news. The first, most obvious, is reduced consumption. Fewer readers are reading, viewers are viewing, and subscribers are subscribing to traditional media sources. Across most traditional media, this leads to a direct decrease in revenue, both in terms of what consumers and distributors pay to access this contents, and in terms of advertising revenue that is tied to overall viewership. The other side also relates to reduced ad revenue: as consumers spend more time online and with the advent of targeted advertising, advertisers have shifted more of their ad spend to online platforms.

The net result has been devastating to much of the news industry. Newspapers across the country have closed their doors.[5] This has affected both local and even some national papers. According to BLS statistics, the number of reporters and editors employed by newspapers has decreased by about 40 percent in the past decade. Similar trends are affecting other parts of the traditional media marketplace. Local TV news viewership, in particular, has decreased by between 12 and 31 percent[6] depending on the time of day. Cable and network news,[7] however, have seen only modest declines in viewership (indeed, even increased viewership during the last election cycle) and increased revenues (modest for network news, substantial for marque cable news networks).

The even bigger change for traditional media, however, has been a change in its status. In the pre-Internet era, the traditional media was largely a vertically-integrated gatekeeper for access to information. It gathered, produced, and distributed "the news." Firms competed along all three dimensions. Relevant to contemporary concerns, competition over production – the quality of the news product offered to consumers – is particularly important. Firms generally attempted to distinguish themselves by offering the highest quality curation of the news. Journalistic norms and ethics rewarded quality and shunned what we think of today as "fake news."

The traditional media is no longer the gatekeeper for information in the Internet age. Today, "news" can be gathered (or fabricated) and distributed by almost anyone. Perhaps more important, in the Internet age the production and curation functions are far less important. This is because the news media is no longer competing primarily among news peers along the qualitative dimension of news production – today they are competing as much in the generalized market of attention along the quantitative dimensions of minutes or clicks. You get what you measure – when you measure attention you produce material whose primary attribute is that it captures and holds attention. Sad!

Contrary to Hubbard's portrayal, Facebook is not dominant in how Americans get news. She cites statistics suggesting that 44 percent of the U.S. population gets news from Facebook. This makes it sound as though Facebook is where nearly half of Americans get their news (which, of course, even if true is far from a monopoly in the market). Pew's most recent data[8] tells a more cautious and interesting story. As an initial point, significant portions of users who report getting news from social media also report getting news from one or more traditional pathways to news. While 67 percent of Americans now report getting *some* news from social media, only 20 percent report to doing so often, and another 27 percent report doing so sometimes. Perhaps more important, 26 percent of Americans now report getting some news from *multiple* social media websites. While Pew's data is not granular enough to say for certain, it is likely that more than half of Facebook users who get news from Facebook also get news from other social media sources; and it is likely that almost *all* Americans who get a significant amount of news from social media rely on multiple sources of news.

This last point brings us to the real problems facing traditional news media today, of which Facebook and social media are only symptoms.

III. NEWS COMPETITION IN ABUNDANCE

A central aspect of Hubbard's thesis is that Facebook and news compete with one another and that, in light of this, Facebook is using its dominant position in various markets to harm the news media. This argument is important in order to bring the thesis into an antitrust framework. If Facebook isn't abusing a dominant market position – if there is no harm to the competitive process – then we are not operating in the realm of antitrust. But while Facebook competes in the "news" market, as discussed above it is far from dominant. It arguably competes in the more generalized "attention" market, but it is not dominant there, either. News is an input into the social media market. But Facebook has no incentive to harm news producers if they are creating a valuable input. And while Facebook's significant share of the online advertising market has

5 Lee, "Print newspapers are dying faster than you think," Vox, November 2, 2016, available at: https://www.vox.com/new-money/2016/11/2/13499004/print-newspapers-dying.

6 Pew Research Center, "Local TV News Fact Sheet," July 13, 2017, available at: http://www.journalism.org/fact-sheet/local-tv-news/.

7 Pew Research Center, "Cable News Fact Sheet," June 1, 2017, available at: http://www.journalism.org/fact-sheet/cable-news/; Pew Research Center, "Network News Fact Sheet," June 16, 2017, available at: http://www.journalism.org/fact-sheet/network-news/.

8 Shearer & Gottfried, "News Use Across Social Media Platforms 2017," Pew Research Center, September 7, 2017, available at: http://www.journalism.org/2017/09/07/news-use-across-social-media-platforms-2017/.

certainly harmed the traditional news industry, Facebook has little incentive to use that power to further harm the industry. In other words, neither horizontal nor vertical theories of harm present concerns about Facebook's relationship with the traditional news media.

The best way to see the problems with Hubbard's argument is to start with her proposed solution. Generally, she advocates a need for more competition between big tech platforms. She presents a hypothetical in which "there were five Facebooks and five Googles, all with different algorithms." She posits that this would make it more difficult for purveyors of fake news to game the algorithms (because it is more costly to game ten than two, a reasonable assumption) and that consumers would reward the platform that developed the best algorithm with their patronage. She goes on to argue that, because consumers would reward platforms that sent them to higher quality news sources, those news sources would be in a better bargaining position against the platforms so they could negotiate more favorable deals with the platforms that returned higher-quality results.

This hypothetical points to a serious problem in how Hubbard imagines competition in social media – and in much of the modern news industry – works. Consumers do not reward the platform that provides them the best information any more than they reward fast food restaurants that have the best fruits and vegetables or dentists that provide the most thorough tooth cleaning. Changing the assumption from one in which consumers reward news providers and platforms for providing high quality news content to one in which they provide attention-grabbing reverses the outcome of Hubbard's hypothetical: competitive platforms will work to develop the most attention-grabbing content, eschewing quality for that which grabs the most attention at the lowest cost. Their algorithms do not need to be "gamed" in order for fake news to outperform real news. They are designed precisely to ensure this outcome. And, in turn, purveyors of quality news will be in a *weaker* bargaining position, both in absolute terms and compared to those purveyors of attention.

Antitrust law is about protecting the process of competition. It is therefore important to understand what that process looks like in a given market. It turns out that competition doesn't always yield pretty results in media markets – an idea to which we will return below. The consumer is the *sine qua non* of competition – the process of competition caters to maximizing what consumers what. The basic problem of fake news isn't that a lack of competition causes the market to under-produce the high quality information that consumers want. It's that consumers prefer interesting, attention-grabbing, simple to understand, entertaining fake news. Competition is causing the market to produce exactly the fake news that consumers do want.

There is no concern about a lack of horizontal competition driving this process. Rather, in the social media market – the market for attention – the platforms are rewarding, and the traditional news media is increasingly producing, a low-quality product because this is what the marginal consumer wants. This is a process that is driven by horizontal competition. Facebook competes with news producers for the attention of consumers; and Facebook competes with other social and search platforms to provide consumers attention-drawing content. High quality news is too costly and insufficiently interesting for the marginal consumer, so the market produces and directs consumers to something else. That's no more Facebook's fault than the decline of cobblers is the fault of industrial-scale shoe manufacturing.

Nor are there vertical – or to use the antitrust newspeak, platform – concerns driving the problem of fake news. Facebook is a platform-based distributor of information, including news. This means that news is (one of many) inputs into Facebook. Hubbard suggests that Facebook's gatekeeper position allows it to harm the traditional media in an effort to keep people on Facebook's own site. She points, in particular, to Facebook's use of its proprietary in-app browser and Instant Articles feature, arguing that Facebook uses these to lock users in to Facebook's platform, denying third-party news sites valuable analytics and advertising revenue, and making it more difficult for users to navigate away from Facebook.

As an initial matter, in-app browsers have become common. Facebook, Twitter, and Google News all use them. This suggests that they have been implemented to address a technological problem – to make the mobile browsing experience better for users of each platform. And, indeed, this is the case. Websites that have not been redesigned specifically for mobile platforms often do not work well. Even websites that do have mobile versions often do not work particularly well. The user experience between those websites is often non-standard, which inconveniences users and may encourage them to discontinue their use of both that website and the platform that sent them there. By using an in-app browser – and especially by offering a standardized format for presenting news content across sites in that browser – platforms can (at least in principle – I will not defend the quality of many in-app browsers, with the recognition that they are a new and improving technology) offer users a superior experience. This means that they will make more use of a platform, yes, benefitting, for instance, Facebook – but it also means that they will consume more content via that platform, benefitting, for instance, media outlets.

Importantly, mobile browsing, where we see these in-app browsers, is different from browsing in a desktop environment. When a user is sent to a website for an article on a mobile device, they are unlikely to stay on that website once they are done with the article. Rather, they are likely to exit out of the browser, which sends them back to whatever source sent them to the website initially. This means that users are "locked in" to the Facebook platform no matter whether it uses an in-app or external browser.

Hubbard is exactly right that in-app browsers and Instant Articles are an effort to keep users engaged with the Facebook platform. But the alternative is *not* users engaging more with news outlets' platforms. The alternative is users getting frustrated with news outlets' mobile experiences and finding more enjoyable ways to spend their time than waiting for poorly-rendered webpages to load. Facebook knows that if they can make articles quick and easy to access, more people will spend more time on their phones. This is why Facebook is willing to offer content providers a significant share of ad revenue. And, to the extent that publishers of any sort continue to produce content that Facebook users want to engage with, those publishers will continue to be able to demand such a share of revenue. Facebook has no incentive to deny its users access to content linked to via Facebook. To the contrary, it has every incentive to get them seamless access to that content, and is willing to pay to do so.

IV. SOMETIMES, LESS COMPETITION IS BETTER COMPETITION

"More competition is better" is a good general rule. But it is not always true. It is understandable how one can look at our contemporary problems with fake news and the large market shares of the platforms by which fake news is most often accessed and conclude that more competition between platforms would lead to better news content being distributed by those platforms. The media industry, however, is one of the prime examples where more competition does not always lead to better outcomes.

The basic problems are well understood. Most consumers, at best, are more interested in entertainment than information or cannot meaningfully differentiate between high quality and low quality information. And most media is paid for indirectly by advertisers who care about audience size and characteristics more than the quality of the media that draws that audience. And this is exacerbated by the fact that high quality media of all sorts is generally more costly to produce than low quality media.

Media markets have been characterized by these issues since well before the advent of the Internet. From the regulatory and legal perspective, this was perhaps most colorfully discussed by Judge Posner in his *Schurz Communications* opinion,[9] in which he explains why "It has long been understood that monopoly in broadcasting could actually promote rather than retard programming diversity." The basic reason is that firms will compete first for the largest audience segments (those who generally prefer low-quality, high-entertainment, content) and not turn to competing for more discerning audience segments until they have sufficiently diminished the returns to competing for the larger segments. The less competition a platform faces in reaching the larger segment, the more attention and resources it will be able to devote to reaching the other segments.

Similarly, the more competition a platform faces, the more its competitive efforts will be defined by the preferences of the consumers for whom it is competing. That is, the more the firm is a price taker, as opposed to a price setter. This means that in an intensely competitive market, a platform will need to cater to the preferences of the lowest-common-denominator of consumer preferences (that is, low-cost, high-entertainment, information), *even if* that platform would prefer to offer a higher-quality product that appeals to more discerning audiences.

In other words, Facebook is subject to the same competitive pressures that have been killing the traditional news media over the past twenty years. Today, consumer attention, and therefore ad revenue, is captured by platforms like Facebook. But content is king. If new platforms come along that provide consumers with content that better captures consumers' attention, Facebook will need to place that content front and center.

In the end, fake news is not a problem that can, or should, be considered through a competition lens. If anything, its success is predicated upon weaknesses in our capitalist democracy. It weaponizes and monetizes the competitive pressures that push firms to cater to the demands of consumers – consumers who are not necessarily interested in, and sometimes are unable to distinguish between, having high quality real news compared to more entertaining fake news.

Hubbard's thesis that platforms with substantial market-share, such as Facebook, have pushed quality news organizations out of the market and that those news organizations would be better able to compete for consumer attention if there were more competition between platforms like Facebook fails to recognize the more fundamental dynamics of these markets. If the concern is about saving the traditional news industry, there is little that Facebook can do to either harm or save it. If the concern is staving off the contemporary fake news problem, we need to look far outside of competition law to find solutions.

9 *Schurz Communications, Inc. v. Federal Communications Commission*, 982 F. 2d 1043 (7th Cir. 1992).

II. TRADITIONAL ANTITRUST ANALYSIS IN MEDIA MARKETS

THE ACHILLES HEEL TO NEWSPAPER MERGERS: PRODUCT MARKET DEFINITION

BY VERONICA ROBERTS & ALEX WHITE[1]

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I. INTRODUCTION

For more than a decade, the traditional newspaper business model has been under threat, with an ever rising exodus of readers and advertisers to online and other sources of media. Print copy and advertising revenues have plummeted and, while seeking to embrace the digital era, newspapers have generally struggled to make a profit. Added to their woes, however, is that merger control regimes have proved highly reluctant to accept any widening of the traditional definition of the product market in which they operate, maintaining high barriers to merger clearance and thus frustrating attempts by newspaper groups to rationalize costs through consolidation. This article takes a critical look at the approach of competition authorities to date, focusing on the UK.

Section II provides further background on the challenges facing the newspaper industry; Section III provides background on the UK's newspaper merger control regime and considers the most recent newspaper merger cases; Section IV considers select recent examples of newspaper cases in other jurisdictions; and Section V concludes with some suggestions on the way forward.

II. A BRAVE NEW WORLD

For much of the 20th century, the newspaper industry enjoyed a privileged status as a primary source of news and advertising. Competition primarily came from within and not outside the industry. The growth of alternative media began to change this, and by the mid-2000s at an accelerated rate.[2] The primary driver for this decline is not in dispute. Over the past decade, internet connectivity has exploded, and has become an ever popular source of news. Nearly half (48 percent) of all adults in the UK now use the internet for news.[3] It has also been highly attractive for advertisers, using data and algorithmic tools to target advertising in a far more precise way than printed newspapers could ever achieve.

Newspapers have sought to adapt and establish their own digital presence, but digital has not made up for the loss of print revenues. The internet has blurred the boundaries between traditional platforms, with online broadcasters and newspapers increasingly competing against one another for audiences' attention. The internet has presented new ways to source, share and monetize news, in particular through intermediaries and social media. Facebook, Google, YouTube, Twitter and Google News now make up five of the top ten most widely used online news sources in the UK. Furthermore, while newspapers' digital readers are growing, there has been no step-by-step growth in advertisers. Estimates indicate that Facebook and Google capture up to 90 percent of digital advertising display growth in the UK and globally,[4] while classified advertising has diversified among major players and a range of specialist sites.

Local and regional newspapers have been hardest hit. Quality nationals have had some success with pay walls, with readers increasingly willing to pay for quality news in a new era of "fake" news. But the regional and local press have had fewer opportunities. They operate on smaller scales, have had to fight for relevance in an increasingly globalized news world (despite the important democratic platform they provide in many localities), and have been particularly affected by the loss of classified advertising, on which many have traditionally relied. In response, publishers have increasingly sought to reduce costs, either through staff reductions, closing titles (since 2005 there has been a net loss of around 200 local newspaper titles in the UK)[5] and consolidation.

2 See Rt Hon Lord Justice Leveson, *The Leveson Inquiry: An Inquiry into the Culture, Practices and Ethics of the Press (Leveson Inquiry)*, November 2010, page 94. Between 1990 and 2011, circulation of national daily titles fell 37 percent and local and regional titles more than 40 percent. Between 2010 and 2016, national daily circulation has fallen a further 37 percent (Ofcom, *News consumption in the UK: 2016*, June 29, 2017 (*Ofcom News consumption Survey 2016*), page 26), and regional dailies have seen accelerated year-on-year decreases, most recently by 12.5 percent in 2016 (*Press Gazette*, "UK regional dailies lose print sales by average of 12.5 per cent: Wigan Post and The National are biggest fallers," February 23, 2017, http://www.pressgazette.co.uk/uk-regional-dailies-lose-print-sales-by-average-of-12-5-per-cent-wigan-post-and-the-national-are-biggest-fallers/). American newspapers have also lost 40 percent of their daily circulation over the last two decades (The Economist, "The Future of journalism: Funnel vision," October 28, 2017).

3 Ofcom, *News consumption Survey 2016*, page 7.

4 Enders Analysis, *News brands: Rise of membership as advertising stalls*, January 2017; The Economist, "Publishers are wary of Facebook and Google but must work with them," November 11, 2017.

5 Press Gazette, "New research: Some 198 UK local newspapers have closed since 2005," December 19, 2016, http://www.pressgazette.co.uk/new-research-some-198-uk-local-newspapers-have-closed-since-2005/.

III. UK NEWSPAPER MERGER CONTROL: FRIEND OR FOE?

A. The UK's Newspaper Merger Control Regime

Newspaper mergers have never been particularly straightforward in the UK. Up until 2003, newspaper proprietors required prior consent from the Secretary of State for Trade and Industry (as then was) before acquiring a newspaper (or newspaper assets) where the total daily paid-for circulation of the newspapers concerned would be 500,000 or more. In such cases the Secretary of State was obliged to refer the proposed acquisition to the Competition Commission ("CC") (as then was)[6] for a detailed review under a broad public interest test, before making a decision.

There were some exceptions to this rule, where the newspaper being purchased was not economic as a going concern or had de minimis circulation. Nevertheless, it resulted in a large number of often regional newspaper mergers being considered in detail by the competition authority only to be cleared with limited or no remedies.

The Communications Act 2003 overhauled the system of prior consent. Newspaper mergers would instead be reviewed principally on competition grounds, subject to the same jurisdictional and substantive tests as any other merger, in accordance with the Enterprise Act 2002. Newspaper mergers therefore would only be notifiable where the UK turnover of the acquired company exceeds £70 million or the transaction resulted in a market share of 25 percent or more. With merger control under the Enterprise Act being a voluntary regime, a purchaser could complete a newspaper transaction without any prior regulatory approval and take the risk of the deal being called in for review up to four months post-completion.

The Communications Act still reserved power to the Secretary of State to intervene, albeit on a narrower "specified" newspaper public interest consideration (accurate presentation of news, free expression of opinion and/or a sufficient plurality of views in newspapers). The power only arises where a merger meets the above jurisdictional tests (or where just one of the parties has a 25 percent or more share of a market in a substantial part of the UK, under the "special" public interest regime), and to date the Secretary of State has not in fact exercised this power to intervene in any merger.

The above changes helped to streamline the regime, but before long new concerns arose, regarding the application of the regime to local and regional newspaper mergers. With the rapid growth of digital media, concerns arose about the competition authorities applying too formalistic an approach to market definition and not taking sufficient account of new competitive constraints. This was brought to a head by the Government's 2009 interim *Digital Britain Report* which called on the OFT to review the regime as applicable to local and regional media mergers.[7] While recognizing that the industry was facing very significant structural challenges, the OFT ultimately concluded that the regime was "evidence-based and is therefore already capable of reflecting market developments," as well as being "flexible" enough to take into account efficiencies and any failing-firm arguments.[8] Nevertheless, the OFT recommended introducing a process to enable it to ask Ofcom to provide a Local Media Assessment ("LMA") in any case where a local media merger raised *prima facie* competition issues so it could draw on Ofcom's greater specific sectoral knowledge.

B. Recent Newspaper Mergers

How reflective of market developments and flexible has the UK's newspaper merger regime proved to be? Since 2009, there have been four local/regional newspaper merger reviews by the UK competition authorities.[9] We consider three of those below.[10]

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6 On April 1, 2014 the CC and the Office of Fair Trading ("OFT") merged to form the Competition and Markets Authority ("CMA").

7 BERR/DCMS, *Digital Britain: The Interim Report*, January 2009.

8 OFT, *Review of the local and regional media merger regime: final report*, June 2009.

9 There have also been two decisions concerning national newspapers during this period but neither contain any meaningful product market definition analysis due to an absence of competition concerns: *Completed acquisition by Northern & Shell Network Limited of CLTUFA Holdings*, November 19, 2010, and *Anticipated acquisition by Nikkei Inc. of The Financial Times Group*, November 16, 2015.

10 In the fourth case - Trinity Mirror plc's acquisition of the regional newspaper titles of Guardian Media Company plc (May 24, 2010) – due to an absence of competition concerns, the parties did not submit any evidence on the constraint posed by online and other media, and the decision does not contain any meaningful product market definition analysis, so we do not consider it here.

Kent Messenger Limited/Northcliffe Media Limited (2011).[11] The first case under the OFT's revised regime was Kent Messenger Limited ("KML")'s proposed acquisition of seven local weekly titles in Kent from Northcliffe Media Limited. The parties argued that non-print media should be included in the product frame of reference, on the basis of internal documents, examples of switching and independent reports indicating that advertising revenue in local newspapers had declined while online advertising had increased. Ofcom's LMA also supported this view, finding that other sources of media may be regarded as substitutes, the constraint from online in particular may have increased, and would likely become even stronger in the future.[12]

The OFT, however, did not consider the evidence to be "sufficiently compelling."[13] Third party responses did not "fully support" the parties' submissions, and the examples of switching, "though directionally helpful – were not sufficient in number or detail." On a cautious basis, the OFT decided not to widen the frame of reference beyond the supply of local weekly newspapers and advertising space.

On the basis of that narrow frame of reference, the merger would result in a monopoly in six local government areas of Kent. Finding that the parties were each other's closest competitors and that alternatives, including those outside of the frame of reference, would not pose a sufficiently close constraint on KML post-merger, the OFT considered that the merger gave rise to a realistic prospect of a substantial lessening of competition ("SLC") and consequently referred the merger to the CC for an in-depth review.[14]

The parties had sought to resist that conclusion by arguing that the relevant counterfactual should take into account the likelihood that, but for the merger, a number of titles concerned might close. The parties also sought to argue that any SLC would be outweighed by efficiencies. Both arguments received some support from Ofcom. Ofcom considered that there was a certain foreseeability that titles may exit in the future. Ofcom also acknowledged that the "merger may provide the opportunity to rationalise costs, maintain quality and investment, and provide a sounder commercial base from which to address long-term structural change."[15] But the OFT was not swayed by either argument. The OFT said that it was "unable to merely consider that the wider structural challenges facing the market, in and of themselves, indicate with a sufficient degree of certainty that any of the specific titles will exit the market."[16] The parties needed to provide specific evidence supported by financial and/or strategic plans that exit would be imminent, which they had not. As for efficiencies, the OFT did not consider that the parties' evidence was sufficiently compelling that any efficiencies would outweigh the SLC. The OFT also had regard to the fact that, in accordance with its decisional practice, "efficiencies will almost never justify a merger to monopoly."[17]

Within one month of the OFT's referral decision, Northcliffe announced the closure of two of the titles concerned in the merger, and soon after KML announced it was abandoning the proposed acquisition. According to KML, "[t]he costs and time required for a full Competition Commission review would be completely unreasonable for a business of our size and a deal of this scale."[18] The outcome of the case was severely criticized in the 2012 *Leveson Inquiry*, which recommended the Government to "look urgently as [to] what action it might be able [to] take to help safeguard the ongoing viability of this much valued and important part of the British press,"[19] although no formal steps were taken by the Government in response.

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11 OFT, *Anticipated acquisition of seven local weekly newspaper titles by Kent Messenger Limited from Northcliffe Media Limited*, October 18, 2011 (*KML/Northcliffe*).

12 Ofcom, *Proposed acquisition by Kent Messenger Group of seven newspaper titles from Northcliffe Media Local Media Assessment* (*KML/Northcliffe LMA*), para. 4.30.

13 *KML/Northcliffe*, paras. 34-47.

14 Ibid. para. 139.

15 *KML/Northcliffe LMA*, para. 5.55

16 *KML/Northcliffe*, para. 17.

17 Ibid. para. 125.

18 The Guardian, "Newspaper group withdraws takeover bid because of referral," October 18, 2011, https://www.theguardian.com/media/greenslade/2011/oct/18/local-newspapers-mediabusiness.

19 *Leveson Inquiry*, page 152.

Northcliffe Media Limited/Topper Newspapers Limited (2012).[20] *KML/Northcliffe* was closely followed by Northcliffe's proposed acquisition of Topper Newspapers, a free weekly newspaper distributed in Nottingham. In this case, the OFT decided not to request an LMA from Ofcom, primarily because Northcliffe said that it would provide its own views/evidence on the application of the relevant customer benefits exception directly to the OFT. Part of Northcliffe's submissions on market definition referred to the internet making significant incursions in all key advertising categories, especially given the ability of online alternatives to offer targeted searches, including by location. Northcliffe also provided details of the competitive set in each category in the Nottingham area, as well as switching data.

However, as with *KML/Northcliffe*, the OFT proceeded cautiously and concluded that the evidence put forward was not sufficient to support widening the market definition: "in assessing the evidence put forward, the OFT has been unable to isolate such an effect from broader cyclical and structural factors such as the recession or a permanent "one-way" shift to greater use of the internet."[21] The OFT found that views from readers and advertisers were mixed. It also carried out a comparative yield analysis and concluded that online media did not appear to have impacted Northcliffe's yield data.

Yet the OFT did take online media into account in the competitive assessment, and in contrast to *KML/Northcliffe*, considered that online media, together with other factors, would provide a sufficient constraint to resolve any competition concerns from an otherwise concentrative transaction. Somewhat in contradiction with its market definition, the OFT said that "from a demand-side, there does appear to be a degree to which…local newspapers and other media may be considered substitutes."[22] The OFT also considered that demand-side substitutability with online media would be heightened by the indirect network effects arising from the two-sided nature of newspaper markets.[23] As a result the OFT had sufficient comfort to clear the transaction without referral for an in-depth review being required.

Daily Mail General Holdings Limited/the trustees of the Iliffe Settlement/Trinity Mirror plc (2013).[24] A year later, in 2013, the OFT reviewed a completed joint venture between Daily Mail General Holdings Limited, the trustees of the Iliffe Settlement and Trinity Mirror plc. As with *KML/Northcliffe*, Ofcom submitted an LMA, which re-emphasized the growing constraints from alternative media sources as substitutes to local newspapers, with such constraint likely to increase as online technologies evolve and the take up of mobile devices and smartphones in particular continues to increase.[25]

The parties also provided evidence (a handful of internal documents are quoted in the decision) to show that online media constrained their behavior. Again, however, the OFT recognized that there was some constraint, but concluded that it had not been provided with sufficient evidence to include online media in its market definition. As it did not find a competition issue, even on the narrow basis of print titles, the OFT did not consider it necessary to assess the extent of the constraint imposed by other media as part of the competitive assessment, and cleared the transaction.

Conclusions. The OFT has certainly demonstrated a commitment to an evidence-based approach. Yet the stringency of the evidential standard applied prevented future market developments – which are inherently harder to substantiate than current market conditions – from being fully taken into account. The closure of titles following *KML/Northcliffe* provides a clear example of the OFT getting it wrong. While more weight was attached to online subsequently, the OFT remained reluctant to set a precedent.[26] The fact that there have only been four local/regional newspaper merger reviews to speak of since 2009, and none in almost five years despite the continued worsening of market conditions in the industry, also suggests that the OFT's overly cautious approach may well have had a chilling effect on subsequent merger activity in the UK.

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20 OFT, *Anticipated acquisition by Northcliffe Media Limited of Topper Newspapers Limited*, June 1, 2012.

21 Ibid. para. 36.3.

22 Ibid. para.119.

23 Ibid. paras. 10 and 124.

24 OFT, *Completed joint venture between Daily Mail General Holdings Limited, the trustees of the Iliffe Settlement and Trinity Mirror plc*, June 28, 2013.

25 Ofcom, *Local World: Local Media Assessment*, April 11, 2013.

26 Similar reluctance has also been displayed in closely related fields. See e.g., CC, *Review of undertakings given by hibu plc (formerly Yell Group plc) in relation to its Yellow Pages printed classified directory advertising services business*, March 15, 2013. Hibu plc's Yellow Pages printed classified advertising directory had been subject to some form of price cap and related undertakings since 1996. In 2013 the CC finally decided to remove the undertakings in view of competition from online services. While acknowledging that online services are regarded as a "good substitute" from the advertiser's point of view (para. 5.17), the CC resisted drawing any formal conclusions on expanding the market definition.

IV. APPROACH IN OTHER JURISDICTIONS

The question whether print markets should be widened to include online and other media has been the focus of debate in a number of recent newspaper mergers around the world, giving rise to diverging approaches. We consider a number of the most recent cases below.

Tribune Publishing Company and Freedom Communications Inc. (2016).[27] In 2016, Tribune, the publisher of the *LA Times*, successfully bid to acquire Freedom Communications, the publisher of the *Register* in Orange County and the *Press-Enterprise* in Riverside County, in the context of a bankruptcy auction. The DOJ filed a civil antitrust lawsuit against the Tribune to prevent the sale from proceeding. According to the DOJ the acquisition would give the Tribune a monopoly in markets, in respect of both readers and advertisers, for local daily newspapers in Orange and Riverside counties.

The Tribune lambasted the DOJ for "living in a time capsule, with a framework that predates the arrival of iPhones, Google, Facebook, and modern media outlets that are killing the traditional newspaper industry. It wasn't competition from the L.A. Times that forced the Register into bankruptcy. It was the Internet and related technology."[28]

The DOJ's market definition, however, was upheld by the Central District Court of California, on the basis that the Tribune had not sufficiently demonstrated that consumers consider online content or advertising reasonably interchangeable with print newspapers. Yet notably, the DOJ had not provided any specific evidence to substantiate its market definition approach either, other than to make general references to the different product characteristics of print and online news sources.[29]

Seven West Media/Sunday Times and Perthnow.com.au (2016).[30] In 2016 the Australian Competition and Consumer Commission ("ACCC") unconditionally cleared the acquisition by Seven West Media ("SWM" – owner of various print and online media in Western Australia, including a paid daily, a paid Saturday paper and a free online news site) of a paid Sunday newspaper and free online news site in Western Australia from News Corporation.

The ACCC left open whether print and online news were part of the same market on the consumer side, but considered them to be separate on the advertiser side. Nevertheless, the ACCC considered online and other alternative media on both sides of the market as part of the competitive assessment.

On the advertiser side, the ACCC considered that, in view of the responses from advertisers, while no one single alternative form of advertising would replace the constraint News Corporation's media imposed on SWM, the range of advertising alternatives including TV, radio, as well as online, would "collectively" impose sufficient constraint. On the reader side, while finding that the parties' newspapers were close competitors, the ACCC considered that online, radio and TV would give a sufficient range of news choices for Western Australians. The ACCC also considered that new advertising opportunities on the advertising side of the market would discipline SWM on the consumer side: "in the face of growing competition from alternative advertising opportunities, the need for SWM to maintain readership levels in order to ensure advertising revenues would constrain SWM and likely limit its ability to increase prices to consumers or decrease quality as a result of the transaction."

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27 See Complaint, *United States v. Tribune Publishing Company*, No. 16-CV-01822 (CD Cal March 17, 2016), and Order, *United States v. Tribune Publishing Company*, No. 16-CV-01822 (CD Cal March 18, 2016).

28 Los Angeles Times, "U.S. files suit to block Tribune purchase of O.C. Register parent," March 17, 2016, http://www.latimes.com/business/la-fi-freedom-tribune-auction-20160317-story.html.

29 The DOJ's formalistic approach also appears to have prevented the tie-up of the Chicago Sun-Times and tronc Inc. (owner of Chicago Tribune) in May 2017. The DOJ required Chicago Sun-Times to seek alternative purchasers through a public sale process in view of the fact that a sale to tronc Inc. would raise "significant antitrust concerns." See further DOJ, "Department of Justice Statement on the Closing of Its Investigation into the Possible Acquisition of Chicago Sun-Times by Owner of Chicago Tribune", July 12, 2017, https://www.justice.gov/opa/pr/department-justice-statement-closing-its-investigation-possible-acquisition-chicago-sun-times.

30 ACCC, *Seven West Media Limited - proposed acquisition of The Sunday Times publication and website from News Limited*, September 15, 2016, http://registers.accc.gov.au/content/index.phtml/itemId/1198464/fromItemId/751046; and Statement of Issues, August 4, 2016.

News Corporation/APN's Australian Regional Media Division (2016).[31] In 2016 the ACCC also reviewed News Corporation's proposed acquisition of APN's Australian Regional Media Division. Both parties were the largest newspaper publishers in Queensland and Northern New South Wales, overlapping in the supply of paid regional and free community newspapers and their associated websites.

The ACCC left the market definition open on the consumer side as it had done in the *SWM* case. On the advertiser side, however, the ACCC did not expressly state a conclusion. Taking into account the results of an extensive consultation with readers and advertisers (including more than 600 small businesses and advertising agencies that advertised in the parties' publications), the ACCC ultimately cleared the transaction, on very similar grounds to the *SWM* case, in view of the "collective" constraint posed by TV, radio and online.

Particularly notable about the ACCC's approach, in contrast with the UK cases discussed above, is its readiness to draw on general market trends, whether or not fully substantiated by specific evidence, concerning, in particular, the growth of digital media at the expense of print media, and the prospect that "where an industry is growing rapidly, this may facilitate new entry and expansion and erode the market shares of established incumbents."[32]

NZME/Fairfax (2017).[33] The New Zealand Commerce Commission ("NZCC")'s approach in the proposed merger of Fairfax and NZME contrasts markedly with the above ACCC cases. The NZCC prohibited the transaction in view of the fact that the parties would together control nearly 90 percent of daily print newspaper circulation in New Zealand. While accepting that there "was a real chance the merger could extend the lifespan of some newspapers and lead to significant cost savings," the NZCC did not consider this would outweigh the adverse effects of the merger on advertisers or on the quality and plurality of news in a "modern liberal democracy."[34]

The NZCC's views on the appropriate level of media plurality fit for a modern liberal democracy are a focal point of the parties' ongoing appeal, which they consider amounted to unlawful institutional mission creep.[35] Also subject to the appeal and a lynchpin to the NZCC's monopoly finding, is its market definition approach.[36] The NZCC refused to depart from the traditional approach of defining separate markets for print and online advertising and news services. Its primary grounds for doing so were the different characteristics of online and print platforms and that "suppliers of advertising inventory on the same platform are likely to have a stronger constraining effect on each other than those on a different platform," which also held true on the reader side of the market.[37]

We consider that such an approach is questionable. The relevant question for the purposes of a market definition assessment is not the *relative* strength of a constraint *per se*, or whether two products simply have different characteristics, but whether the constraint provided by a product is sufficient to meet the SSNIP test. It also stands in noticeable contrast with the ACCC's approach, which readily appreciated, at least on the advertising side of the market, that "modes of delivery which superficially look very different may nonetheless be viewed as alternative advertising options for advertisers."[38]

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31 ACCC, *News Corporation - proposed acquisition of APN News & Media Limited's Australian Regional Media division – ARM*, December 8, 2016, http://registers.accc.gov.au/content/index.phtml/itemId/1200083/fromItemId/751046, and Statement of Issues, October 6, 2016.

32 Statement of Issues, para. 27.

33 NZCC, *Determination: NZME Limited and Fairfax New Zealand Limited* [2017] NZCC 8 (*NZME/Fairfax*).

34 Ibid. para. X43.

35 Mlex, "Comment: Decision on media concentration prompts democratic soul-searching by New Zealand's regulator," October 23, 2017, http://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=930346&siteid=202&rdir=1.

36 Notice of Appeal, *NZME Limited v. Commerce Commission*, May 26, 2017.

37 *NZME/Fairfax*, paras. 241-243, and 534 et seq.

38 *SWM*, para. 51. During the course of the NZCC's investigation, the parties brought the aforementioned ACCC cases to the NZCC's attention, but the NZCC ultimately dismissed them as turning on different facts.

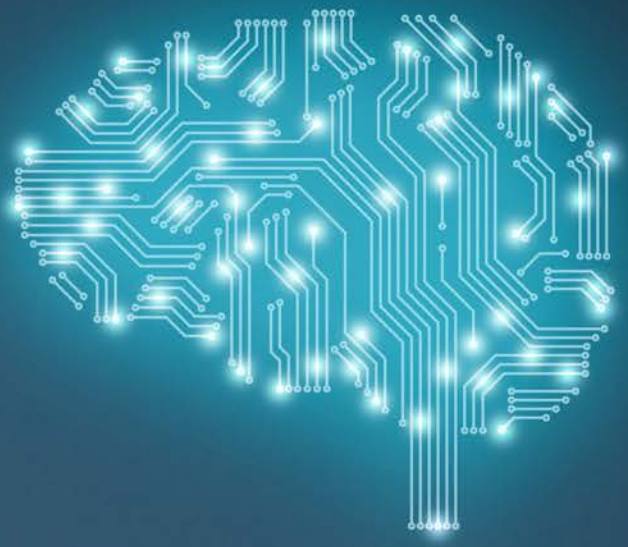
V. CONCLUSION

The European Commission has recently urged competition authorities, in the context of examining digital markets, to move away from a purely "static, short-term" approach and to more fully embrace a "dynamic perspective" taking into account "longer-term effects, potential effects, and counterfactual effects."[39]

Newspaper mergers and the assessment of the competitive constraints posed by online and other media are a case in point. The above cases indicate that competition authorities, not just in the UK, have tended to take an overly-cautious and formalistic approach, all too ready to jump on the high market shares to which the traditional market definitions give rise. While the rigorously evidential approach of the UK competition authorities in particular, is commendable, the stringency of its evidential standard has meant that in practice the increasing popularity of online media has not been taken into account directly in the competition assessment. A more pragmatic approach that places greater weight on reasonably foreseeable market developments – especially in the case of an industry that has now evinced the inexorability of certain structural trends for more than a decade – is long overdue.

39 Johannes Laitenberger, Director-General for Competition, European Commission, speech: "EU competition law in innovation and digital markets: fairness and the consumer welfare perspective," October 10, 2017, http://ec.europa.eu/competition/speeches/text/sp2017_15_en.pdf.

ARTIFICIAL INTELLIGENCE, INCENTIVES TO INNOVATE, AND COMPETITION POLICY



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I. INTRODUCTION

The role of artificial intelligence ("AI") in our economy and our society is growing rapidly and is affecting a variety of business services — including consumer advertising, financial advice, and insurance — as well as government functions such as law enforcement and criminal sentencing.[2] Large datasets are a critical input for firms that want to create or use AI systems. Even the best AI algorithms are useless without an underlying large-scale dataset, because large datasets are needed for the initial training and fine-tuning of these algorithms.

As a result, the growing importance of data has been highlighted recently by *The Economist* (among others), which has likened its value today to that held by oil for much of the past century.[3] Antitrust enforcement officials have already recognized that challenges may arise when large incumbent firms control the vast majority of such data. For example, FTC Commissioner Terrell McSweeny has noted, "It may be that an incumbent has significant advantages over new entrants when a firm has a database that would be difficult, costly, or time consuming for a new firm to match or replicate."[4]

If firms face high barriers to accessing such datasets, then they may opt not to enter a market that requires large datasets as inputs, leading to less competition in that market. Both startups and existing firms may forgo entry because of this difficulty, and so competition would decline in both new and established markets. In general, a lack of competition hurts consumers, in some cases via higher prices and in other cases via a reduction in the number of improved features, new products or other innovations.[5] While there has historically been some debate as to whether a decline in competition leads to higher or lower levels of innovation — a debate we briefly recap below — current evidence suggests we are in an era of low competition in a number of economic sectors, and hence more competition is likely to lead to more innovation and ultimately be beneficial to consumers.[6] Moreover, even if one were to assume that the evidence is equivocal regarding the overall relationship between competition and innovation, increased competition is likely to improve innovation in those key markets affected by AI development.

To this end, new enforcement policies and regulatory strategies may be needed to ensure that both incumbent and potential entrant firms have access to the datasets they need to innovate in the AI domain. In the latter scenario, this effort will enable entry — what is sometimes referred to as competition *for* the market — and in the former one, it will increase the level of competition among incumbent firms *in* the market. In both settings, we expect the associated broader access to data to foster more innovation.

In the rest of this piece, we discuss how antitrust enforcers might address these issues, while highlighting two challenges with such approaches: the length of time necessary for resultant remedies to take effect, and the difficulty of handling non-price transactions, which have become more frequent due to an increase in the prevalence of firms operating in two-sided markets. We also describe several novel policy and regulatory solutions for potential future consideration, including provisions that would institute temporary data monopolies, data portability regimes, the use of trusted third parties, and blockchain-enabled technological solutions. We discuss how several of these approaches are complementary to each other. We also contrast the ways in which each approach differs in its ability to safeguard consumer data and privacy, incentivize incumbent behavior, enable competition between incumbent firms, and facilitate entry by startup firms.

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2 Campolo et al., AI Now 2017 Report 3 (Selbst & Barocas, eds., 2017).

3 *Fuel of the Future. Data is Giving Rise to a New Economy. How Is It Shaping Up?*, The Economist, May 6, 2017, https://www.economist.com/news/briefing/21721634-how-it-shaping-up-data-giving-rise-new-economy.

4 Commissioner Terrell McSweeny, Opening Remarks for a Panel Discussion, "Why Regulate Online Platforms?: Transparency, Fairness, Competition, or Innovation?" at the CRA Conference in Brussels, Belgium, at 5 (Dec. 9, 2015), https://www.ftc.gov/system/files/documents/public_statements/903953/mcsweeny_-_cra_conference_remarks_9-12-15.pdf.

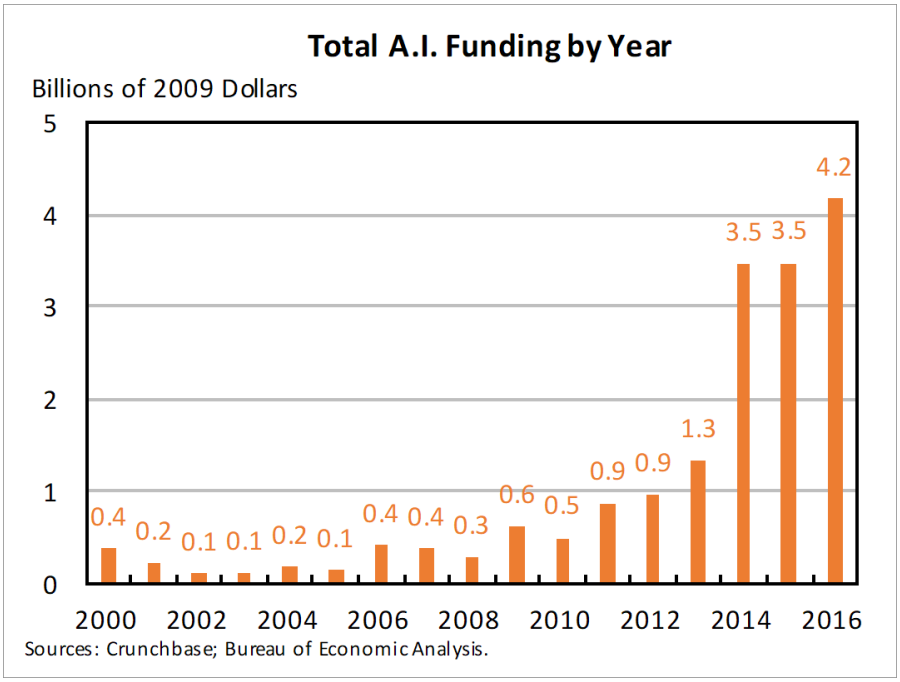
5 Council of Econ. Advisers, Benefits of Competition and Indicators of Market Power 2, (May 2016), https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160502_competition_issue_brief_updated_cea.pdf [hereinafter "CEA Report"].

6 Id.; this conclusion follows from the notion that the relationship between competition and innovation may appear uncertain because innovation is concave in competition. See Aghion et al., *Competition and Innovation: An Inverted-U Relationship*, 120 The Quarterly J. of Econ. 701, 701-02 (2005).

II. THE GROWING IMPORTANCE OF AI TO THE ECONOMY AND SOCIETY

The news media regularly provides updates on advances in AI, including its ability to defeat humans in complex games such as chess, go and poker. As tracked by the Electronic Frontier Foundation, AI systems are rapidly approaching or surpassing human expertise at a number of other tasks.[7] A number of firms are now using AI to enhance existing products or to offer brand new ones. For example, AI-enabled virtual assistants like Apple's Siri now come bundled in an iPhone, and Amazon's Alexa is available for purchase at Whole Foods Markets.

By many measures, investment in AI has also rapidly increased. Much of this investment appears to be done by established firms. The McKinsey Global Institute ("MGI") estimates that established firms spent between $18 and $27 billion on internal corporate investment in AI-related projects in 2016.[8] Such firms also spend money on AI-related investments in the form of acquisitions. Facebook, Google, Amazon and Apple have bought up hundreds of innovative startups over the past decade, including ones that focus on AI or AI-related technologies.[9] MGI also notes that established firms spent $2 to $3 billion on AI-related M&A in 2016 alone.[10] While less in dollar value, investment in AI-related startups has also been increasing — our analysis of Crunchbase data indicates an increase in such funding that begins in around 2012 and then accelerates sharply in 2014 (Figure below). This observation corroborates a recent report by McKinsey Global Institute that venture capital investment in AI startups grew by 40 percent between 2013 and 2016.[11]



The important role of data as an input to this growing market for AI — combined with the potential economic implications of the fact that a small number of firms control large datasets on consumers and their prior purchasing behavior — has given rise to calls to update existing antitrust frameworks to address these issues. The challenge for litigation, policy and regulation in this area is the need to advance multiple objectives, particularly the safeguarding of consumer data and consumer privacy while incentivizing firms to innovate and compete for consumers' benefit. In the remaining sections, we first describe the relationship between competition and innovation as it pertains to data and AI. We then highlight how existing litigation strategies could be applied to achieve these goals while protecting consumers. Finally, we discuss additional, more novel policy and regulatory solutions that could complement an enforcement approach in the future.

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7 *AI Progress Measurement*, Electronic Frontier Found., https://www.eff.org/ai/metrics.

8 Bughin et al., Artificial Intelligence: The Next Digital Frontier? 10 (McKinsey Global Inst., June 2017), http://www.mckinsey.com/business-functions/mckinsey-analytics/our-insights/how-artificial-intelligence-can-deliver-real-value-to-companies [hereinafter "MGI Report"].

9 Tech Platforms Weekly: A Closer Look at Amazon's Conduct in the Book Market; More Claims of Search Bias; Facebook, Apple, and Net Neutrality Updates; The Myspace Myth, The Capitol Forum (Jan. 20, 2017) http://thecapitolforum.cmail2.com/t/ViewEmail/j/91CFEB1924D56C52/45A74A929A973E10E663AB054A538FBA.

10 MGI Report, supra note 8, at 10.

11 Id.

III. THE RELATIONSHIP BETWEEN COMPETITION AND INNOVATION

Broadly speaking, economists and legal academics have not settled on a consensus regarding an overarching relationship between competition and innovation that holds true economy-wide.[12] The evidence has alternately suggested that a decline in competition in a particular market will increase, decrease or have no effect on innovation levels. This uncertainty is often known as the Arrow-Schumpeter debate. Economist Kenneth Arrow is seen as espousing the view that competition is more conducive to innovation than monopoly, while economist Joseph Schumpeter championed the notion that monopolies promote innovation and naturally give rise to R&D investments.[13] While the federal antitrust enforcement authorities have in their *Horizontal Merger Guidelines* indicated qualified support for the theory that a reduction in competition may be harmful to innovation, the possibility of harming innovation alone is typically insufficient to justify government antitrust intervention.[14]

Nevertheless, a variety of considerations suggest that when it comes to AI, policymakers should treat the relationship between competition and innovation as more closely representing Arrow's view than Schumpeter's. As an initial matter, recent empirical evidence points to a multi-sector decline in competition and an increase in concentration that may be associated with a variety of economic trends, such as reduced firm dynamism, increased firm age, decreased labor mobility and lower total factor productivity growth.[15] More specific to AI, there may be reason to believe that monopolists are less likely to adopt highly disruptive innovations, such as those that give rise to entirely new markets, in order to retain their position.[16] In such settings, competition would thus be more conducive to innovation than monopoly.

Moreover, given the current state of AI technologies, we argue that the most relevant market for regulators and enforcers to consider at the present time from a competition policy perspective is the market for data inputs to AI research and development. Competition in this market takes place "in the market" (i.e. among incumbents who are trying to maintain a competitive advantage, not only for AI inputs but also for the broader array of transactions they conduct that require such data), as well as "for the market" (i.e. among both entrants and incumbents who will be trying to succeed in future markets for AI technologies).[17] Any set of solutions geared towards removing barriers to AI development would focus on bolstering both forms of competition. As noted above, absent competition, incumbents have less incentive to adopt highly disruptive innovations, while entrants to this particular market by definition cannot innovate without access to datasets as inputs to production. Our proposed solutions aim to address competition for large datasets both among incumbent firms and entrants who wish to access such data. These solutions attempt to account for the possibility that the prospect of obtaining a dataset monopoly may provide a key private incentive for investment in the kinds of platforms that generate the large datasets on which AI development will depend.

IV. POTENTIAL LITIGATION STRATEGIES

Antitrust litigation may provide one avenue by which to mitigate deleterious effects on innovation that result from a lack of competition among firms that exchange or collect large quantities of data. Such litigation would aim to use a range of legal claims sounding in antitrust law to increase competition among these firms. That is to say, it would not necessarily focus on legal theories that mention AI exclusively or explicitly. Nevertheless, while this strategy could potentially benefit consumers and firms in a wide range of scenarios — including those far removed from the AI context — its ultimate goal would be to prevent datasets that are crucial for the development of new technologies like AI from being controlled by only a handful of firms.

12 See, e.g. Baker, *Beyond Schumpeter vs. Arrow: How Antitrust Fosters Innovation*, 74 Antitrust L.J. 575, 577-88 (2007); Lao, *Ideology Matters in the Antitrust Debate*, 74 Antitrust L.J. 649, 659-62 (2014); Katz & Shelanski, *"Schumpeterian" Competition and Antitrust Policy in High-Tech Markets*, 14 Competition 47 (2005).

13 Baker, supra note 12, at 577; Clement, *Creative Disruption*, Fed. Res. Bank of Minneapolis (Sep. 1, 2008), https://www.minneapolisfed.org/publications/the-region/creative-disruption.

14 U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines 23-24 (2010), available at: www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf [hereinafter "Merger Guidelines"].

15 See Furman & Orszag, Presentation at "A Just Society" Centennial Event in Honor of Joseph Stiglitz at Columbia University: A Firm-Level Perspective on the Role of Rents in the Rise in Inequality 3-6, 9-13 (Oct. 16, 2015), https://obamawhitehouse.archives.gov/sites/default/files/page/files/20151016_firm_level_perspective_on_role_of_rents_in_inequality.pdf; CEA Report, supra note 5, at 2; *A Lapse in Concentration*, The Economist, Sep. 29, 2016; Joshua Wright and Matt Stoller, *Should the Government Bring Back Trust-Busting?*, NY Times, Nov. 14, 2016; Asher Schechter, *Economists: "Totality of Evidence" Underscores Concentration Problem in the U.S.*, ProMarket (Mar. 31, 2017), https://promarket.org/economists-totality-evidence-underscores-concentration-problem-u-s/.

16 Clement, supra note 13, at 8 (summarizing the conditions under which the Gilbert-Newbery model does not produce results favoring the Schumpeterian view).

17 Evans & Schmalensee, *Some Economic Aspects of Antitrust Analysis in Dynamically Competitive Industries*, *in* Innovation Policy and the Economy, Volume 2 1, 1 (Jaffe, Lerner & Stern, eds., 2002).

The downsides to using litigation as a tool for increasing innovation in AI are that it is inflexible, expensive, and requires a substantial amount of time to bring about results. Regardless of whether a private party or government enforcer brings a case, litigation may take too long to benefit the innovative process meaningfully. While the key era in AI development is rapidly approaching, it could take years or even decades for these cases to conclude, especially if they involve complicated industries or especially novel legal theories.

A key aspect of the online markets in which these firms operate is the lack of an explicit or clearly measurable price in many cases, owing to the two- or multi-sided nature of an increasing number of these firms' business models. Such firms serve distinct groups of customers on each side of their markets, thus facilitating direct interaction among them. For example, Google connects web searchers to advertisers and eBay connects end-customers to sellers. A key feature of these markets is the indirect network effect between these two sides, which may be asymmetric in some cases.[18] Thus, the greater the number of customers there are on one side of the market (e.g. web searchers), the more customers there will be who will be willing to pay on the other side of the market (e.g. advertisers). This feature can lead firms to set prices very low, even at zero, on one side of the market, so as to increase the number of customers on that side, because this will drive revenue even higher on the other, "paying" side of the market.[19] Such low or "zero" prices can be observed on many consumer-facing digital platforms; for example, the price paid to Google for each search result is zero, as is the price paid to Twitter for joining and using its social network. However, even though the price paid by an end-user to Google or Twitter may be zero, the end-user may still "pay" by giving personal data to these companies or via time spent viewing and scrolling through lower quality content and advertisements.[20]

The fact that the market price is zero gives rise to a substantial obstacle for government authorities and private parties seeking to bring antitrust claims. Although evidence of non-price effects tends to get some degree of credit in U.S. antitrust law from the enforcement authorities and from the courts,[21] Stucke and Grunes note that "the agencies' merger review has migrated towards assessing what is measurable."[22] Firms in multisided markets that lack clear prices for some of their transactions may thus make for challenging antitrust litigation targets.[23]

The response to this challenge from commentators who favor increased antitrust scrutiny of big technology firms has been to suggest that government agencies and the courts move beyond just considering price-based harm to consumers and increase their focus on non-price effects, including features of product variety and quality such as privacy.[24] This recommendation is broadly consistent with calls for courts and enforcers to consider more than just "consumer welfare" (a broad way of construing the current standard).[25] Such a move would in some ways amount to a return to the pre-Chicago School era in antitrust thinking when a greater variety of firm arrangements, behaviors and market effects received antitrust scrutiny.[26]

This solution, however, should only comprise one part of a more comprehensive legal strategy to increase competition among big technology firms. It could be complemented by more conventional, conduct-based litigation theories that would treat a large dataset as a product or service in an intermediate market.[27] Harm on the basis of price could also be alleged by analyzing multisided platform markets in unconventional ways.

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18 See Parker & Van Alstyne, *Two Sided Network Effects: A Theory of Information Product Design*, 51 Mgmt. Sci. 1494, 1495-96 (2005); Schmalensee & Evans, *The Industrial Organization of Markets with Two-Sided Platforms*, 3 Competition Pol'y Int'l 151, 151-56 (2007); Seamans & Zhu, *Responses to Entry in Multi-Sided Markets: The Impact of Craigslist on Local Newspapers*, 60 Mgmt. Sci. 476 (2014). .

19 See Rochet & Tirole, *Platform Competition in Two-Sided Markets*, 1 J. of the European Econ. Ass'n 990, 1015 (2003); Rochet & Tirole, *Two-Sided Markets: A Progress Report*, 35 The Rand J. of Econ. 645, 659 (2006).

20 While two-sided markets appear to be more prevalent now, they are not new, nor are the non-price effects we are describing. For example, radio and TV are clear examples of two-sided markets. In the latter two cases, end users did not traditionally pay a price directly to the radio or TV station but did need to "pay" via time spent watching or listening to ads.

21 Such non-price effects include product quality and dynamic effects on the incentives for innovation. See, e.g. Merger Guidelines, supra note 14, at 23; Khan, *Amazon's Antitrust Paradox*, 126 Yale L.J. 710, 721-22 (2017); Stucke & Grunes, Big Data and Competition Policy 114-115 (2016).

22 Stucke & Grunes, supra note 21, at 107.

23 See generally id. at 69-104.

24 See, e.g. Khan, supra note 21, at 721-22.

25 Id. at 716.

26 See generally Rubenfeld, *On the Foundations of Antitrust Law and Economics*, in How the Chicago School Overshot the Mark, The Effect of Conservative Economic Analysis on U.S. Antitrust 51, 52-56 (Pitofsky ed. 2008) (summarizing how antitrust thinking has evolved over the last half century).

27 See, e.g. Patterson, Antitrust Law in the New Economy 15-16 (2017).

Finally, focusing on one of the key non-price parameters on which some observers have suggested bringing cases — namely, privacy — would not necessarily lead to improvements in the availability of data for AI innovators, and indeed it could even have the opposite effect.[28] While it may improve consumer protection commitments made by incumbents in the realm of privacy, antitrust litigation brought on a theory of privacy harm may even restrict the ability of non-incumbent innovators to access platform companies' large datasets. Remedies for privacy harm would likely expand privacy protections, thus necessarily barring individuals and other firms from accessing personal data — the very AI inputs that innovators require.[29]

A. Two Related Kinds of Conduct on Which Legal Claims Could be Brought: Refusal to Supply and Refusal to Deal

One type of case that enforcers could pursue under existing frameworks would involve alleging that platform companies' conduct with respect to their datasets amounts to an impermissible "refusal to supply."[30] In general, as the Federal Trade Commission notes, "a seller has the right to choose its business partners."[31] In other words, firms can sell to whomever they like, provided that "the refusal is not the product of an anticompetitive agreement with other firms or part of a predatory or exclusionary strategy to acquire or maintain a monopoly."[32] While it would admittedly be difficult to argue that a given technology firm's refusal to share its data with consumers, its content providers or its advertisers was part of such a strategy, there is U.S. Supreme Court precedent for treating data as an input to final products or services.[33] The enforcement agencies have also been willing to do so recently.[34] Thus, there is nothing that is so distinct about these markets that would prevent an enforcement agency or private plaintiff from bringing a refusal to supply case; the principal obstacles in such litigation are the same as they are in more conventional settings. Moreover, preventing their competitors from accessing or using their datasets could be interpreted as part of a firm's strategy to restrict competition, although these firms would likely raise either of the defenses discussed at the end of this section. Such a claim would also be able to gain traction only if the datasets involved are unique or in some way otherwise impossible to reproduce with sufficient speed by other firms further down the supply chain.

A second type of case that would similarly focus on a firm's conduct with regard to other firms is based on its "refusal to deal" with its horizontal competitors, when the dataset(s) involved is impossible or difficult to reproduce.[35] Just as is true in the "refusal to supply" context, firms have no general duty to deal with competitors. As enforcers acknowledge, doing so may even itself be an antitrust violation.[36] Antitrust liability, however, may exist if the firm that is refusing to deal with its competitors is itself a monopolist or has previously done business with its competitors and now stops.[37] Here again, however, the principal conceptual innovation that courts and enforcers must be willing to accept is to see a dataset as a product or service with the potential to be transacted from one firm to another.[38]

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28 See generally id. at 163-181 (arguing for the treatment of privacy as a "good" and positing that competition on privacy could be evaluated by antitrust authorities); Stucke & Grunes, supra note 21, at 141-154 (highlighting the difficulty that competition enforcers face in balancing privacy concerns with other issues).

29 To be sure, this litigation strategy may still be worth pursuing if one believes that the benefits of consumer privacy protection outweigh the forgone benefits of AI innovation. See Calo, *Artificial Intelligence Policy: A Primer and Roadmap* 19, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3015350 ("[P]rivacy ultimately governs the set of responsible policy outcomes that arise in response to the data parity problem").

30 *Refusal to Supply*, Fed. Trade Comm'n, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/dealings-supply-chain/refusal-supply.

31 Id.

32 Id.

33 See *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 461 (1986) ("dentists'…refusing to supply the requested [patient X-ray] information [to dental insurers] was an unreasonable restraint of trade."). See also Stucke & Grunes, supra note 21, at 263; Patterson, *supra* note 27, at 15-16. This framework would get substantially more complicated, however, if data are viewed as intellectual property. See, e.g. U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Guidelines for the Licensing of Intellectual Property, available at: https://www.ftc.gov/sites/default/files/attachments/competition-policy-guidance/0558.pdf.

34 See, e.g. McSweeny, supra note 4, at 4 ("In the mergers involving big data that the FTC has investigated and challenged, the data is either a key input or the good or service itself").

35 *Refusal to Deal*, Fed. Trade Comm'n, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/single-firm-conduct/refusal-deal.

36 Id.

37 Id.

38 Patterson, supra note 27, at 165 (noting Acting FTC Chairman Maureen Ohlhausen's past articulated support for treating data as both an input and an asset).

B. Impacts on "Price" in the Market for Online Advertisements

A more novel antitrust litigation approach to improving access to the datasets on which AI development will depend might involve focusing on the portion of platform companies' business that engages with advertisers. The focus of such a strategy would be to allege that a lack of competition among large Internet platform companies harms consumers by increasing the quantity of advertising they must endure when accessing Internet content. This approach would admittedly take enforcers far afield from simply considering the competitive effects of lack of access to data. Nonetheless, the end result of disrupting platform company monopolies in this manner could still end up being a reduced foreclosure of dataset availability for competitors and entrants.

A simplified characterization of these markets is that firms purchase advertisements from platforms in much the same way as they do in conventional contexts (e.g. magazines or billboards). This characterization, however, is incomplete, owing to the two-sided or even multi-sided nature of these markets. The online advertising market instead occurs *across* the platform among consumers of the platform's content, the content providers and advertising firms. In such a conception, consumers receive desired content on the platform from the content provider, whom the advertiser is ultimately funding in exchange for consumers' time and attention to the advertising content as well as the relinquishing of their personal data to the platform company. While providing personal data has been described as the price of platform access in the past, consumer time and attention can also be thought of as part of the "price" paid for access to desired content.[39] Thus, when platform companies operate as monopolists, one might think that the amount of advertising endured by consumers would increase as well. In addition, quality of content and advertisements might diminish, as highlighted by the recent outcry over "fake news."[40]

Presumably, consumers derive value from content access at a level that exceeds the amount of disutility they get from enduring advertisements, otherwise they would not visit websites hosting such content. This "revealed preference" idea, however, does not mean that these markets are achieving a first-best outcome without welfare losses such that no intervention is needed. Consumers routinely purchase goods and services from monopolists or other sellers operating in settings characterized by market failure, and yet there may still be a need for antitrust enforcement in such scenarios.[41]

Admittedly, firms would only continue to purchase advertisements on these platforms if a sufficient subset of consumers then makes purchases after having viewed these advertisements. For this subset of consumers, the benefits derived from the advertising market are obviously not limited to the content they can access as a result of having viewed the advertisements. The harm arising from a monopolized advertising market thus primarily falls on the consumers for whom the advertisement is simply to be endured or ignored. Although the benefits for these consumers of viewing desired content (e.g. search results or news stories) exceed their private costs of viewing advertisements, an online advertisement market that is lacking in platform company competition may fail to internalize fully these consumers' time costs of viewing advertising.

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39 See, e.g. Gentzkow, *Trading Dollars for Dollars: The Price of Attention Online and Offline*, 104 Am. Econ. Rev.: Papers & Proc. 481 (2014); Teixeira, *The Rising Cost of Consumer Attention: Why You Should Care, and What You Can Do About It* 1 (Harvard Business School, Working Paper No. 14-055, 2014) http://www.hbs.edu/faculty/Publication%20Files/14-055_2ef21e7e-7529-4864-b0f0-c64e4169e17f.pdf ("the cost of attention has increased dramatically (seven- to nine-fold) in the last two decades").

40 Hubbard, *Fake News Is A Real Antitrust Problem,* Antitrust Chronicle (December 2017); Grunes, *Is "Fake News" A Competitive Problem?,* Antitrust Chronicle (December 2017).

41 This characterization may be especially apt if we acknowledge that access to some online services (e.g. e-mail, job search websites, online bill payment, etc.) is a non-negotiable feature of modern life, and viewing advertisements is required to gain access, unlike looking at billboards or reading a particular magazine. And if one were to argue that the market would simply provide websites with fewer or different advertisements if consumers wanted them, then that further reinforces the need to examine whether there is sufficient competition among major technology platforms, since they serve as the conduit that controls the terms by which both advertisers and content providers reach consumers. See also Stucke & Grunes, supra note 21, at 58-61 (highlighting additional problems with reliance on revealed preference arguments to justify the levels of quality in certain online markets).

The costs of enduring more advertising of course do not take the form of direct financial harm — as in a conventional antitrust product market — but instead increase the amount of time consumers must spend accessing essential online services.[42] In order for this kind of case to succeed, however, courts would have to be willing to accept the idea of treating attention or time as resources that can be measurable or at least construed as part of a theory of harm.[43] The difficulty in quantifying such effects may make courts more reluctant to embrace such a theory in spite of the academic literature's ability to do so.[44]

C. Firms' Defenses: Privacy and Network Effects

Large platform companies might raise two defenses against any claim that the lack of competition in the market for large datasets is a violation of the antitrust laws. The first type of defense involves privacy. Firms could argue that they declined to share their data with competitors or potential downstream customers because of concerns that these entities would gain improper access to customers' data to which consumers never consented. While such a position appears to favor a greater degree of privacy protection for consumers, firms have no problem contracting around this limitation; firms often do so when it is in their interests by securing permission from consumers in a user agreement for their data to be shared.

A second argument that platform companies might make is that monopolies over these large datasets give rise to efficiencies for both other firms and consumers by virtue of network effects. These positive externalities make it so that the value of the firm's data increases with the size of the dataset; it is not only the individual observations that generate value but also the broader context in which they are situated.[45] Consumers benefit from having access to a wide range of data about themselves as well as other consumers. Other firms — from advertisers to content providers — benefit from being able to know as much as possible about a single individual. While this argument explains why it is beneficial for one firm to have large portions of the data that are available about an individual — rather than have it be allocated across firms — network externalities alone fail to fully justify why a single firm should be able to refrain from making data interoperable or portable among firms. Firms may make the additional argument here that this monopoly is their hard-earned reward for creating and maintaining a platform that benefits such a large volume of individuals. But in a market where the relationship between competition and innovation more closely matches Arrow's account than Schumpeter's, this argument also does not provide a justification for preventing other firms from having access to this data; enabling competition would not be expected to reduce the incentives for innovation.

V. POTENTIAL POLICY AND REGULATORY SOLUTIONS

In this section, we describe a variety of proposals that aim to ultimately increase the amount of innovation being done by AI firms. The ideas vary as to whether they help to increase competition *for* the market by encouraging new entrants into the market, or whether they help to increase competition *in* the market by enabling customers to more easily switch between existing firms.

A. Deferred Data-Sharing Requirement: Temporary Data Monopolies Followed by Complete Data Availability

One potential regulatory solution to the lack of competition among platform companies with large datasets would be a data-sharing requirement for datasets above a certain size that would presumptively go into effect after a fixed amount of time from the date on which the data were first collected. Prior to that date, firms would be free to restrict access to their data, but any unlawful dealings with other firms — either by refusing to share datasets or sharing them inappropriately — would still be litigable under the antitrust laws. Such a solution is analogous to the data exclusivity provisions for biologic pharmaceuticals, which under current law last for 12 years as specified under the Biologics Price Competition and Innovation ("BPCI") Act of 2009.[46]

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42 These costs are bound to be borne both by consumers of lower sophistication — who may be unable to afford subscription, ad-free services or do not employ ad-blocking software — and by consumers of higher sophistication whose time costs are higher because of their intrinsically higher wages.

43 See generally Wu, The Attention Merchants, The Epic Scramble to Get Inside Our Heads (2016) (treating human attention as a commodity that firms are competing to attract).

44 See Teixeira, supra note 40, at 1.

45 Stucke & Grunes, supra note 21, at 23 ("[I]n some industries, simple algorithms with lots of data will eventually outperform sophisticated algorithms with little data.").

46 Biologics Price Competition and Innovation Act of 2009, 42 U.S.C. § 262(k)(7)(A).

The idea behind such a solution is that by maintaining an individual firm's ability to secure a temporary monopoly, it would preserve a key incentive for investment. At the same time, the eventual sharing requirement would — just like finite patent and copyright terms[47] — provide other AI innovators with the ability to freely access and use the raw material of innovation in the long run. This setup would be particularly useful for prospective or recent entrants into the marketplace, as they would be less likely to be able to benefit from the blockchain-based solution described below, in contrast with their incumbent firm counterparts.

The difficult part in designing and administering such a measure involves setting the right time horizon. If the amount of time until the sharing requirement is activated is too short, then the incentives for investment are dampened. There may also be privacy concerns if certain datasets are made public too quickly. On the other hand, if the time horizon is too long, these data may no longer even be useful to innovators.[48] Setting the time horizon will likely be the result of a stakeholder engagement process that weighs the competing concerns of many constituencies, as was the case with the BPCI Act.

In addition to setting an appropriate time horizon, it would probably also be necessary to determine a carve-out or waiver process by which data-owning firms can demonstrate that their holdings should be exempt from an automatic disclosure requirement, especially on either privacy or trade secret grounds. Another way of handling such sensitive datasets would be to design the requirement such that there is an intermediate level of disclosure available, e.g. disclosure to a third-party repository that the general public is unable to access but that is open to innovators who apply and are vetted (the use of third parties is described in detail in the next section).

B. Data Portability and the Use of Trusted Third Parties

Another possible solution is the use of a data portability mechanism.[49] Under such a model, a customer would maintain possession of some core data about herself that she could then take from one company to a rival, in much the same way that a phone customer can take her phone number from one provider to another. In principle, this measure should help increase competition between established firms *in* the market, because any potential customer could easily shift her data from one established firm to another. However, it is unlikely that data portability alone would increase competition *for* the market. Startups that want to enter a market need access to large datasets to train their AI algorithms, and it seems impractical to expect a startup to assemble such a dataset by relying on individual users porting their data to the startup in a piecemeal fashion.

Another issue with data portability is where the customer's data would reside, which has implications for the data's security. One possibility is for the data to reside with a trusted third party, such as an educational institution, or perhaps an organization created via a public-private partnership. A key role for a third party is to protect the privacy and security of the data, while allowing for other parties to access it conditional on approval. An appealing feature of a trusted third party is that once the data are anonymized, they could potentially be combined with other data for use by entrants to train their AI, with the result that these datasets are not assembled piecemeal. A common technique currently used by entrants to overcome the lack of customer data is to train their AI on publicly available datasets. But if these datasets are biased in some way, then the resulting AI algorithms will reflect the bias. The worry is that if many entrants use similarly biased datasets, then bias quickly propagates.[50] Tom Mitchell and Erik Brynjolfsson argue for the collection and integration of AI-related data from diverse sources, a trusted broker to summarize and protect the privacy and security of the data, and normalization of the data where possible to address any different skews and biases across different datasets.[51] They hope that, combined with existing measures, this information infrastructure can provide a comprehensive picture of the true effects of technological advancement, thus allowing decision-makers to respond effectively.

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47 This analogy is imperfect, however. In both the patent and copyright contexts, other innovators can usually at least see and examine the protected work from the beginning. By contrast, in the market for data, simply viewing a dataset would almost always enable its use, so in order for this solution to be practicable, both viewing and using can only take place at the same time after the sharing requirement kicks in.

48 Stucke & Grunes, supra note 21, at 21 ("[T]he older the data, the less valuable it is.").

49 Several officials and observers have suggested versions of this approach recently. See, e.g. Pegoraro, *Web Companies Should Make It Easier to Make Your Data Portable: FTC's McSweeny*, USAToday, https://www.usatoday.com/story/tech/columnist/2017/11/12/web-companies-should-make-easier-make-your-data-portable-ftcs-mcsweeny/856814001/ (highlighting FTC Commissioner Terrell McSweeny's calls for such measures).

50 Levendowski, *How Copyright Law Can Fix Artificial Intelligence's Implicit Bias Problem*, Wash. L. Rev. (forthcoming).

51 Mitchell & Brynjolfsson, *Track How Technology is Changing Work*, 544 Nature 290-91 (2017).

There are several good examples of educational institutions working together to house data for use by other researchers, including ICPSR, IRIS and NORC. Educational repositories of data serve multiple purposes, notably the ability of researchers to replicate each other's studies, or to combine data in creative ways to answer new, complex questions.[52] Traditionally, educational consortia have not been used to house private party data, but the infrastructure and expertise is there. In short, the use of trusted third parties lowers the costs for entrants to access good training data, which should increase the quantity and quality of entrants, thereby leading to more innovation. However, this type of solution does not provide any control over data to customers.

C. Data Portability and Blockchain

Blockchain has been described as a distributed public ledger — a chronological list of transactions that is verified at regular intervals by shared users.[53] Christian Catalini and Joshua Gans, among others, have suggested that blockchain may have promising applications when it comes to consumer data. For example, Catalini and Gans write that:

> [f]rom a privacy perspective, the ability to license out subsets of personal information for limited amounts of time and to seamlessly revoke access when necessary has the potential to not only increase security, but also to enable new business models where customers retain greater control over their data and firms can dynamically bid for access.[54]

Thus, in the future, blockchain could lower the costs for customers to control and trade their data, which should increase competition between incumbent firms *in* the market, leading to benefits for consumers and potentially more innovation. However, while such a solution likely improves upon security and portability of data relative to a trusted third party, it may not be helpful at increasing entry by startups. As with other data-portability solutions, unless the startup is able to assemble a really large dataset that it can use to train its AI, these solutions are of limited value when it comes to increasing competition *for* the market.

VI. CONCLUSION

Artificial intelligence is already having a dramatic impact on our economy and society. Like any other technology, competition between AI firms can lead to many new and useful innovations that benefit consumers, but the need for datasets to enable AI firms may be a barrier to entry. If so, and if current antitrust approaches are not able to address these barriers for the ultimate benefit of future AI consumers, then creative policy and regulatory solutions are needed. We have attempted to lay out a few of these solutions above, while discussing some of the tradeoffs inherent in each of them.

52 Lane, Uses of Micro-data, Keynote Speech at the Conference of European Statisticians (June 12, 2003), https://www.unece.org/fileadmin/DAM/stats/documents/ces/2003/crp.2.e.pdf.

53 Halaburda & Sarvary, Beyond Bitcoin: The Economics of Digital Currencies (2015); Watkins & Rodriguez, *WTF is Blockchain?!*, OZY, http://www.ozy.com/fast-forward/wtf-is-blockchain-inside-the-most-disruptive-tech-since-the-internet/81567.

54 Catalini & Gans, *Some Simple Economics of the Blockchain* 22 (Nat'l Bureau of Econ. Research, Working Paper No. 22952, 2016).


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