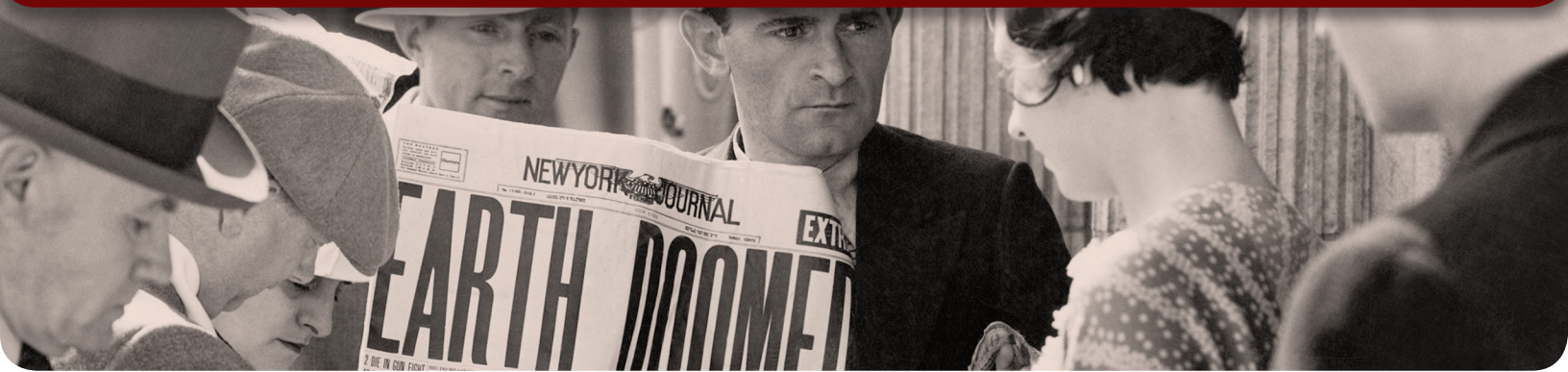


IS “FAKE NEWS” A COMPETITIVE PROBLEM?



BY ALLEN GRUNES¹



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

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.

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>.

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.

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

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>.

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/jeffbervicovici/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>.

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.

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

16 See, e.g. Evans & Schmalensee, *MATCHMAKERS: THE NEW ECONOMICS OF MULTISIDED PLATFORMS* 99-100 (2016).

17 PewResearchCenter, *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.

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.*

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

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

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.

26 Allcott & Gentzkow, “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.

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.”

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.

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

31 Id.

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

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.

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.*

36 *Id.*

37 *Id.*

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.

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

38 Wagner, “Two-thirds of Americans are now getting news from social media,” Recode (Sept. 7, 2017) (citing Pew Research 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.

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.

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.

