

FAKE NEWS IS A REAL ANTITRUST PROBLEM



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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

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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>.

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 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

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/>.

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>.

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.

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

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-truth-but-often-get-it-wrong-1510847867>.

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>.

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 Margrethe 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."

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, lessening consumers' interactions with publishers' websites.

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/tj-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://fbbookmedia.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/>.

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/>.

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.

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

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>

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/facebook-willingness-to-copy-rivals-apps-seen-as-hurting-innovation/2017/08/10/ea7188ea-7df6-11e7-a669-b400c5c7e1cc_story.html.

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*.

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.

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).