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

BY GUS HURWITZ[1]

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.

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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.

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."

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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/.

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/.

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 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.

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/.

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).