SILICON VALLEY RHETORIC: THREE MYTHS DEBUNKED

BY JOHN M. NEWMAN[1]

1 Assistant Professor, University of Memphis Cecil C. Humphreys School of Law.

I. INTRODUCTION

Critics have called Uber many things: "horrible,"[2] "parasitic,"[3] a "never-ending PR disaster."[4] Uber, on the other hand, prefers to call itself a "ridesharing platform," part of the broader "sharing economy."[5] But in December 2017, the European Court of Justice called Uber what it actually is: a transportation-services company.[6]

To a tech outsider, someone not immersed in the constant buzz-speak bubbling out of Silicon Valley, the ECJ's *Uber* decision was a non-event. It was as if a court had declared that General Motors builds cars. But the *Uber* decision *was* an event, one that garnered headlines in the *New York Times*, *Guardian*, and elsewhere across the globe.

What made such a seemingly straightforward decision so newsworthy? It was perhaps the first high-level official rejection of Silicon Valley Rhetoric.[7] Modern tech firms are unrivaled, at least in the business world, in their verbal ability to conceal and disguise what they do. Their self-descriptions, which often traffic in libertarian and techno-utopian tropes, have for years been remarkably successful at insulating tech giants from legal and critical scrutiny.

Take, for example, "ridesharing." Uber scrupulously refers to itself as facilitating "ridesharing" — by my count, more than seventy of its digital press releases include the term. But, as any five-year-old could tell you, Uber's business model has nothing to do with sharing.[8] Drivers charge passengers for rides. Uber charges drivers a percentage of the take. The concept of "ridesharing" was first developed and implemented by small, community-based non-profits.[9] In that context, the term made sense. But when employed by a multibillion-dollar, for-profit entity, it becomes rhetoric — language designed to persuade, not to inform.

Understanding what businesses actually do, instead of what they say they do, is of utmost importance in many areas of law and policy. But perhaps nowhere is the need for clarity more acute than in the fields of antitrust and competition law, tasked as they are with understanding how firms and markets function.

Unfortunately, the antitrust enterprise has not been immune from Silicon Valley Rhetoric. And the oxymoronic "sharing economy" is just the tip of that ugly iceberg. This paper unpacks three more myths crafted by tech giants and the often-breathless reporters and analysts who cover them. They are the Myth of the Garage, the Myth of Free, and the Myth of Constant Disruption. On their own, these myths might seem benign. But when they infect antitrust discourse and decision-making, they have the potential to cause massive societal welfare harms.

---

2 Cracked, *Why Uber Is Terrible* (Sept. 9, 2015), https://www.youtube.com/watch?v=Og3PjvcR1Pc.

3 Bond-Graham, *Uber and Lyft Get a Lot of Hype—But Ridesharing Is a Parasitic Business Model*, CounterPunch (Oct. 22, 2013), https://www.alternet.org/labor/uber-and-lyft-get-lot-hype-ridesharing-parasitic-business-model.

4 LaFrance, *Uber Did What?! A Field Guide to the Company's Ongoing PR Nightmare*, The Atlantic (Apr. 24, 2017), https://www.theatlantic.com/technology/archive/2017/04/ubers-pr-nightmare-a-field-guide/523269/.

5 See, e.g. Uber Newsroom, *Work On-Demand Opportunities Shape Maryland* (Mar. 5, 2016), https://www.uber.com/newsroom/work-on-demand-opportunities-shape-maryland/; Uber Newsroom, *Uber Announces Partnership with ECPAT-USA* (Apr. 20, 2016), https://www.uber.com/newsroom/ecpat-usa/.

6 Press Release No. 136/17, Court of Justice of the European Union, "The Service Provided by Uber Connecting Individuals with Non-professional Drivers Is Covered by Services in the Field of Transport" (Dec. 20, 2017).

7 E.g. Bershidsky, *European Ruling Buries Uber's Platform Myth*, Bloomberg View (Dec. 20, 2017), https://www.bloomberg.com/view/articles/2017-12-20/european-ruling-buries-uber-s-platform-myth.

8 Rampell, *What Preschoolers Can Teach Silicon Valley About "Sharing"*, Wash. Post (May 15, 2014), https://www.washingtonpost.com/opinions/catherine-rampell-paying-for-your-fair-share-in-an-app-based-economy/2014/05/15/007da348-dc66-11e3-8009-71de85b9c527_story.html?noredirect=on&utm_term=.7dcb5e9040fd.

9 Codagnone & Martens, "Scoping the Sharing Economy: Origins, Definitions, Impact, and Regulatory Issues," Inst. for Prospective Tech. Studies Digital Econ. Working Paper 2016/01 (20160).

www.competitionpolicyinternational.com
Competition Policy International, Inc. 2018© Copying, reprinting, or distributing this article is forbidden by anyone other than the publisher or author.

II. THE MYTH OF THE GARAGE

Antitrust scholars have often repeated the blanket claim that digital markets have far lower barriers to entry than their offline analogues.[10] Multiple U.S. courts have done so as well.[11] The narrative — the myth — is that a few hackers working in a garage can quickly, cheaply, and easily disrupt an entrenched digital incumbent. The implications for competition policy are clear: a hands-off approach is best.

Like most myths, this one contains a kernel of truth: Google, Microsoft, Amazon, and others got their start in actual garages.[12] But these firms did not *become* giants in their respective garages. Untold billions of dollars in sunk costs, several years, acquisitions of direct rivals, leveraging of proprietary datasets — the story of their growth is the story of overcoming substantial barriers to entry.[13] Alcoa, a monopolist of an earlier time, likewise started in a garage.[14] It was nonetheless able to dominate an industry for decades. Humble historical origins do not indicate that entry is easy in the present.

Moreover, the proper focus is not merely on whether *any* entry can occur. Antitrust and competition analysts instead focus on the likelihood of entry that would provide a meaningful competitive check on existing market participants.[15] In many digital markets, meaningful entry is quite difficult and uncertain, extremely costly, and surprisingly time-consuming.

Consider, for example, Google Maps, the leading online map application. Google developed Maps over a period of several years by acquiring several smaller firms (at considerable cost) including Waze, a direct horizontal rival with access to a unique treasure trove of self-reported user data; developing and building specially outfitted camera cars; collecting more than twenty petabytes (21.5 billion megabytes) of street-view images from around the world; using computer-vision techniques to transform satellite and aerial imagery into three-dimensional building shapes; combining multiple sources of place data to identify the locations of bars, restaurants, and shops, as well as clustered "areas of interest"; extracting Android users' location data to determine how busy a given bar or restaurant is in real-time and estimate customer wait times; and more.

In theory, a few programmers working in a garage could develop a rudimentary online mapping service using public data that would "compete" in some sense with Google Maps. But would their entry act as a meaningful competitive constraint on Google? Even Apple, with all of its unique competitive advantages, has struggled mightily to gain traction against Google Maps. The shortcomings of Apple Maps are well-recognized, enough so that characters from the sitcom *Silicon Valley* mocked a fictional new product by condemning it as "Apple Maps bad."[16] Four years after Apple Maps was launched, nearly 70 percent of Apple's own smartphone users still identified Google Maps as their preferred map application.[17]

---

10 E.g. Sokol & Ma, *Understanding Online Markets and Antitrust Analysis*, 15 Nw. J. Tech. & Intell. Prop. 43, 48 (2017); Posner, *Antitrust in the New Economy*, 68 Antitrust L.J. 925 (2000).

11 See, e.g. *Am. Library Ass'n v. United States*, 201 F. Supp. 2d 401, 416 (E.D. Pa. 2002), *rev'd on other grounds*, 539 U.S. 194 (2003); Shea *ex rel. Am. Reporter v. Reno*, 930 F. Supp. 916, 929 (S.D.N.Y. 1996).

12 Hendricks, *6 $25 Billion Companies That Started in a Garage*, Inc. (Apr. 2, 2018), https://www.inc.com/drew-hendricks/6-25-billion-companies-that-started-in-a-garage.html.

13 Newman, *The Myth of Free*, 86 Geo. Wash. L. Rev. (forthcoming 2018).

14 Alcoa, *Our History*, http://www.alcoa.com/global/en/who-we-are/history/default.asp.

15 See U.S. DOJ/FTC, Horizontal Merger Guidelines § 9 (2010).

16 Heisler, *HBO's Silicon Valley Reveals the Worst Insult You Can Give a Product: 'Apple Maps Bad'*, BGR (May 19, 2015), http://bgr.com/2015/05/19/silicon-valley-hbo-iphone-4-apple-maps-zune-windows-vista/.

17 Sterling, *New Survey Says Google Maps Favored by Nearly 70 Percent of iPhone Users*, Search Engine Land (June 15, 2016), https://searchengineland.com/new-survey-says-google-maps-favored-nearly-70-percent-iphone-users-251955.

Competition Policy International, Inc. 2018© Copying, reprinting, or distributing this article is forbidden by anyone other than the publisher or author.

Digital markets do not exist outside previous human experience. They are not uniformly more competitive due to uniformly lower entry barriers.[18] Like the term "ridesharing," the Myth of the Garage may have innocent origins — but it has become a rhetorical weapon. It should not be the grounds for Silicon Valley firms to receive uniquely favorable treatment from courts or regulators.

III. THE MYTH OF FREE

For years, firms like Google and Facebook successfully controlled the narrative around their products' cost to consumers. Their message? Facebook's sign-in slogan sums it up nicely: "It's free and always will be."

The modern consensus goal of antitrust law is promoting consumer welfare, the surplus of benefits received over costs incurred. If digital platforms are "free," antitrust scholars and courts have concluded, there can be no harm to consumer welfare.[19] The benefits are infinite in relation to the costs.

Recent months have seen an increasing awareness that consumers do, in fact, pay to use seemingly free digital services. And we pay dearly. As I have argued elsewhere,[20] consumers exchange some of their most valued assets — time, attention, personal information — to gain access to these products.

In public, tech firms reiterate the Myth of Free. But in fine print and in court, they insist on contractual protections that can attach only where each side both gives and receives something of value. Apple's user terms of service, for example, contain the following provision:

> You can acquire Content on our Services for free or for a charge, either of which is referred to as a 'Transaction.' Each Transaction is an electronic contract between you and Apple . . . .[21]

Tech firms regularly insist that courts enforce the onerous provisions buried in such user agreements. YouTube, for example, has successfully persuaded courts to enforce blanket liability waivers, shortened limitations periods, and the like against a number of users.[22] (These users were, for the most part, video uploaders like Nasim Aghdam, the woman who recently opened fire on a crowd at YouTube's California headquarters.) If digital products were truly free, such provisions would be unenforceable for lack of consideration.

Antitrust and competition laws are properly concerned with marketplace exchanges like these.[23] Consumer welfare is not unequivocally increased by zero-price business models.[24] Yet, all too often, antitrust and competition enforcers have behaved as if these business models are nothing but good for consumers. The rare U.S. enforcement actions in digital spaces (for example, the FTC's 2017 lawsuit to block the proposed merger of DraftKings and FanDuel), have generally focused on markets where users pay obvious prices.[25] Tracing back at least to the U.S. DOJ's failure to anticipate consumer-welfare harm following the broadcast-radio merger wave in the late 1990s,[26] enforcement in zero-price markets has been markedly lax. Dominant tech firms have repeatedly been allowed to acquire direct rivals (think Facebook–Instagram, Google–Waze, or

---

18 See Stucke & Grunes, Big Data and Competition Policy § 10.05 (2016) ("The reality is that entry analysis for data-driven markets, as in other markets, will likely be fact-specific.").

19 E.g. *Kinderstart.com, LLC v. Google, Inc.*, No. C 06-2057 JF(RS), 2007 WL 831806 (N.D. Cal. Mar. 16, 2007); Bork, *Antitrust and Google*, Chi. Trib. (Apr. 6, 2012) http://perma.cc/XRB2-W4JE; Manne & Wright, *What's an Internet Monopolist? A Reply to Professor Wu*, Truth on Mkt. (Nov. 22, 2010), http://perma.cc/L4UF-UC7K. For an excellent critique of Bork's rhetoric, see Leslie, *Antitrust Made (Too) Simple*, 79 Antitrust L.J. 917 (2014).

20 See Newman, *s*upra note 13; see also Newman, TED[x] "Free: The World's Most Dangerous Price."

21 Apple Inc., *Apple Media Services Terms and Conditions*, https://www.apple.com/ca/legal/internet-services/itunes/ca/terms.html (last visited April 24, 2018).

22 See, e.g. *Darnaa, LLC v. Google, Inc.*, No. 15-cv-03221-RMW, 2015 WL 7753406 (N.D. Cal. Dec. 2, 2015); *Song Fi, Inc. v. Google Inc.*, 72 F. Supp. 3d 53 (D.D.C. 2014).

23 Newman, *Antitrust in Zero-Price Markets: Foundations*, 164 U. Pa. L. Rev. 149 (2015).

24 See Stucke & Grunes, supra note 18, at § 1.26.

25 Complaint, *In re* DraftKings, Inc., No. 9375 (F.T.C. June 19, 2017).

26 See Newman, *Foundations,* supra note 23 (summarizing empirical findings of post-merger increases in attention costs).

www.competitionpolicyinternational.com
Competition Policy International, Inc. 2018© Copying, reprinting, or distributing this article is forbidden by anyone other than the publisher or author.

Zillow–Trulia). Some of these deals escaped scrutiny in part because the relevant product(s) were supposedly free.[27]

"Free," in this context, is not free in a meaningful sense. It is a myth, another example of Silicon Valley Rhetoric being carefully deployed to mislead legal analysts and decision-makers. Antitrust and competition enforcers would do well to follow the ECJ's lead in its *Uber* decision. Think of these exchanges as "exchanges," and these markets as "markets" — that's exactly what they are.

IV. THE MYTH OF CONSTANT DISRUPTION

Silicon Valley firms — and anti-enforcement scholars — often repeat the refrain that "competition is just a click away." [28] Proponents of this narrative commonly point, for support, to Facebook's "disruption" of MySpace and Google's "disruption" of Yahoo.[29] This vision of constant disruptive innovation traces its roots to Schumpeterian "creative destruction," a favorite notion among the Austrian School. Posner and others invoked it to describe digital markets.[30] Again, the implications for antitrust and competition enforcers are clear: digital markets may appear to be dominated by entrenched monopolists, but the next wave of disruptive innovation is just around the corner. A "hands-off" approach is appropriate, since the market will quickly redress any false negatives.

But is competition really "just a click away" in digital markets? As with the Myth of the Garage, this platitude turns out to be a half-truth at best. In a technical sense, of course a user can click her way from one search engine, social network, or online retailer to the next. But in reality, the cost of that click can be much higher than many antitrust analysts have previously imagined.

Firms like Google, Apple, and Facebook are masters at creating ecosystems that minimize the cognitive costs of switching among different functions — so long as the user remains within the ecosystem. A user may find it relatively easy, for example, to click from Google's search engine to Google's email service (Gmail), then to Google's video-sharing platform (YouTube), then to Google's map application (Google Maps), and so forth. But those are not the "clicks" the anti-enforcement crowd invokes. They are *intra*brand clicks. The sort of click that would matter — an *inter*brand click from one search engine to another — entails a level of cognitive burden that is relatively much higher than what is required to simply click around within Google's ecosystem.[31]

Lack of data portability raises users' switching costs higher still. To illustrate, consider a given social-network user. At the outset, the user makes her choice among the available networks based on a range of quality and price considerations.[32] But once a user starts to use one service, that service becomes a repository for her photos, conversations, status updates, contacts, and more. Unless her data is portable across platforms — and it generally is not — she cannot easily switch to a different social network, even if she otherwise prefers to do so.

And, of course, all of this assumes that viable alternative competitors remain in the market. In some digital markets, antitrust and competition authorities have allowed dominant incumbents to acquire their nearest rivals. After Facebook, the next most popular social network is

---

27 See, e.g. The Economist, *The Techlash Against Amazon, Facebook and Google—and What They Can Do* (Jan. 20, 2018), https://www.economist.com/news/briefing/21735026-which-antitrust-remedies-welcome-which-fight-techlash-against-amazon-facebook-and ("One reason that Britain's Office of Fair Trading was relaxed about Facebook's Instagram purchase was that it saw Instagram as a 'camera and photo-editing app', not a social network, and thus unlikely to ever be 'attractive to advertisers on a stand-alone basis'. Clearly they lacked imagination.").

28 See, e.g. Brody et al., *Here's How Washington Could Really Unfriend Facebook*, Bloomberg Tech. (Apr. 12, 2018), https://www.bloomberg.com/news/articles/2018-04-12/here-s-how-washington-could-really-unfriend-facebook-quicktake ("Google is fond of saying competition is just 'one click away.'"); Manne & Wright, *Google and the Limits of Antitrust: The Case Against the Case Against Google*, 34 Harv. J.L. & Pub. Pol'y 171, 195 (2011) (Google-funded research).

29 See, e.g. Sokol & Ma, supra note 10, at 48 ("Yahoo leapfrogged AltaVista and Google leapfrogged Yahoo."); Swire & Lagos, *Why the Right to Data Portability Likely Reduces Consumer Welfare: Antitrust and Privacy Critique*, 72 Md. L. Rev. 335, 358 (2013) ("MySpace replaced Friendster as the dominant social network, only for Facebook to later usurp MySpace's position as the market leader.").

30 Posner, supra note 10 ("The gale of creative destruction that Schumpeter described . . . may be the reality of the new economy."). In fact, a close reading of Schumpeter suggests that he was not nearly as opposed to government intervention—particularly in the form of competition law—as his adherents tend to be. See Waller, *Antitrust and Social Networking*, 90 N.C. L. Rev. 1771, 1802–03 (2012).

31 Candeub, *Behavioral Economics, Internet Search, and Antitrust*, 9 I/S: J. L. & Pol'y for Info. Soc'y 407, 408 (2014).

32 See Swire & Lagos, supra note 29, at 338 ("[U]sers start to use one service, such as Facebook, and then find it costly or technically difficult to shift to another service, even if they prefer the other service.").

www.competitionpolicyinternational.com
Competition Policy International, Inc. 2018© Copying, reprinting, or distributing
this article is forbidden by anyone other than the publisher or author.

Instagram — which was acquired by Facebook in a deal the FTC cleared without conditions. After Zillow, the next most popular online real-estate portal is Trulia — yet it, too, was acquired in a deal the FTC cleared without conditions.[33]

With all of that in mind, it's worth revisiting the archetypical examples of digital "creative destruction": Facebook and Google.

Facebook did supplant MySpace as the largest social network — in April 2008.[34] Facebook has now occupied its dominant perch for a decade. To put that time period in context, consider that this "disruption" occurred when Lehman Brothers was still a viable entity and Miley Cyrus was able to cause a controversy by merely baring her shoulders in a photo shoot.[35]

Google was already the world's second most popular search provider by 2000.[36] That same year, Yahoo (then the most popular) announced that it would begin using Google as the search engine for Yahoo's web portal,[37] effectively making Google the dominant global search provider. This episode of "disruption" occurred nearly twenty years ago, before iPods, before Enron, before 9/11, before Napster was shut down. There are today legal adults who have never been alive at a time when Google was not the world's largest search provider.

These anecdotes, still cited to support the narrative that digital markets are epicenters of creative destruction, are becoming increasingly creaky with age. Modern digital spaces are often characterized by entrenched and unchecked dominance, not continuous waves of creative destruction. Yet only hardcore cartel activity has drawn serious antitrust scrutiny, and even then civil-enforcement cases have been brought where (arguably) in any other industry criminal charges would have been likely.[38]

V. IT'S TIME FOR REALITY-BASED ANTITRUST

The ECJ's rejection of the "ridesharing" myth was, at long last, a break in the clouds. In other areas of law, courts and scholars have been swept up in the excitement of a new technology, only to eventually gather their wits and realize that the tech industry does not create products outside the realm of previous experience — and therefore not outside the reach of existing law.[39] At one time, for example, serious scholars of conflicts of law (private international law), argued that "cyberspace" was a new and different place that existed beyond the reach of governments. But the modern consensus correctly rejects that view. Interactions among persons and firms occur in the real world, even if facilitated by an Internet connection.[40]

Digital products are exchanged in markets that, just like their offline counterparts, display varying levels of entry barriers and competition. Surprisingly often, barriers to entry are high and competition is feeble. Given the importance of digital markets to modern economies, the relative lack of antitrust and competition in digital oversight in this area is concerning. Antitrust and competition authorities would do well to reject Silicon Valley Rhetoric, in favor of reality-based analysis.

---

33 See generally Newman, *Complex Antitrust Harm in Platform Markets*, CPI Antitrust Chron. (May 2017) (arguing that the *Zillow–Trulia* merger may have harmed competition in the digital real-estate portal market and in local realtor markets).

34 Arrington, *Facebook No Longer the Second Largest Social Network*, TechCrunch (June 12, 2008), https://techcrunch.com/2008/06/12/facebook-no-longer-the-second-largest-social-network/.

35 The world has changed. See generally Spanos, *Miley Cyrus' 10 Biggest Scandals*, Rolling Stone (May 8, 2018), https://www.rollingstone.com/music/lists/miley-cyrus-10-biggest-scandals-w481179.

36 Hormby, *The Rise of Google: Beating Yahoo at Its Own Game*, LowEndMac (Aug. 15, 2013), http://lowendmac.com/2013/the-rise-of-google-beating-yahoo-at-its-own-game/. Google was already the largest search engine in terms of pages indexed. Google, *Google Launches World's Largest Search Engine* (June 2, 2000), http://googlepress.blogspot.com/2000/06/google-launches-worlds-largest-search.html.

37 Google, *Yahoo! Selects Google as Its Default Search Engine Provider*, (June 26, 2000), http://googlepress.blogspot.com/2000/06/yahoo-selects-google-as-its-default.html.

38 See *United States v. Apple Inc.*, 952 F. Supp. 2d 638 (S.D.N.Y. 2013) (holding that Apple and several book publishers conspired to fix the prices of ebooks), *aff'd*, 791 F.3d 290 (2d Cir. 2015); Complaint, *United States v. Adobe Sys., Inc.*, No. 1:10-cv-01629 (D.D.C. Sept. 24, 2010) (alleging that Adobe, Apple, Google, Intel, Intuit, and Pixar conspired to refrain from soliciting employees from one another).

39 See, e.g. Johnson & Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 Stan. L. Rev. 1367 (1996).

40 See, e.g. Andrews & Newman, *Personal Jurisdiction and Choice of Law in the Cloud*, 73 Md. L. Rev. 313 (2013).

www.competitionpolicyinternational.com
Competition Policy International, Inc. 2018© Copying, reprinting, or distributing this article is forbidden by anyone other than the publisher or author.