# ADVERTISING AS MONOPOLIZATION IN THE INFORMATION AGE

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## I. THE OBSOLESCENCE OF THE INFORMATION FUNCTION OF ADVERTISING

The great irony of the information age is that it has made advertising not only more effective than ever before, but also obsolete as an economically productive tool.[2] For the principal economic justification for advertising is that it provides consumers with useful product information, helping consumers find the products that best suit their preferences.[3] And Google has permanently changed that.

Since the early 2000s, when substantially all important American businesses had achieved a web presence, consumers have had the power to access all of the useful product information they want, at virtually no cost, just by running a Google search and bringing up product information from manufacturer and retailer websites. Consumers no longer need to have advertising thrust upon them in order to learn about the marketplace. And so the information function of advertising, and with it advertising's principal economic justification, is obsolete. Indeed, Internet search offers two distinct efficiency advantages, relative to advertising, as a source of useful product information. Namely, that Internet search allows consumers to choose when to consume product information by choosing when to search, instead of having advertising thrust upon them at times when they would prefer not to consume it, and that Internet search provides access to online product reviews that paint a richer and less biased picture of product quality than advertising can ever provide.

Given the demise of advertising's information function, one might have expected the advertising industry to wither and disappear. And with respect to that part of advertising that is purely focused on providing information, advertising has in fact met its end. Starting with Craigslist in the early 2000s, and continuing today with Facebook Marketplace, the Internet has decimated the traditional classified advertising business of newspapers.[4] Classified advertising, with its austere black boxes of text, seeks mainly to convey product information. The Internet made posting that information almost costless, and costlessly searchable. Classified advertising became obsolete.

2 This article draws heavily from, and indeed restates, many of the arguments in Ramsi A. Woodcock, *The Obsolescence of Advertising in the Information Age*, 127 Yale L.J. 2270 (2018) [hereinafter Woodcock, *The Obsolescence of Advertising in the Information Age*] and Ramsi Woodcock, *Advertising is obsolete – here's why it's time to end it*, The Conversation, http://theconversation.com/advertising-is-obsolete-heres-why-its-time-to-end-it-101639 [hereinafter Woodcock, *Advertising is obsolete – here's why it's time to end it*]. The reader is invited to consult those sources for a fuller picture of the arguments defended herein, as well as for supporting references.

3 See Phillip Nelson, *Advertising as Information*, 82 J. Pol. Econ. 729, 732 (1974). An alternative economic justification for advertising is that advertising itself is a pleasure-enhancing complement to the advertised good. See Gary S. Becker & Kevin M. Murphy, *A Simple Theory of Advertising as a Good or Bad*, 108 Q. J. Econ. 941, 961–63 (1993). For a critique of this view of advertising as a product complement, see Ramsi A. Woodcock, *The Obsolescence of Advertising in the Information Age, supra* note 2, at 2314–15.

4 See Robert G. Picard, *Shifts in Newspaper Advertising Expenditures and Their Implications for the Future of Newspapers*, 9 Journalism Stud. 704, 705, 713 (2008).

But outside of the limited category of classified advertising, the advertising industry has not withered and disappeared. Because advertising can serve not just to inform, but also to carry out the far less economically salutary, but nevertheless highly profitable, function of persuasion. The Internet has certainly not made persuasion obsolete, and so the advertising industry persists, devoted now exclusively to that other function.

## II. PERSUASIVE ADVERTISING AS MANIPULATION

Starting from the inception of modern economics a hundred years ago, economists have questioned the economic value of advertising aimed at persuasion.[5] This economic tradition, which early on was associated with Edward Chamberlin, the father of the theory of monopolistic competition, and later with John Kenneth Galbraith, recognized that persuasive advertising causes consumers to buy products that they do not really prefer.[6] Not through falsehood and deception, but through psychological manipulation.

They argued that brand advertising, for example, manipulates consumers by saturating the lived environment with imagery that creates favorable associations between the brand and the things that consumers care about. Saturating the lived environment with brand imagery encourages consumers to buy products based on familiarity, rather than superiority, and associating the product with emotionally or socially charged imagery, such as Coke with Santa or Louis Vuitton with a celebrity, causes consumers to buy the product because the association, and not necessarily the product, is better than rivals'. This view of advertising as manipulation has received renewed support in recent years from the behavioral economics movement, which has shown that human decision-making is divided between rational and impulsive faculties, making it possible for advertising aimed at exploiting the impulsive faculty to cause consumers to buy products that even consumers themselves would, in a sober moment, agree that they do not really prefer.[7]

Before Google, even persuasive advertising had an information justification. Some economists argued that all persuasive advertising contains an element of useful product information, namely, the information that the firm believes enough in the appeal of its product to invest money in advertising.[8] The Internet has pulled the rug out from under this information justification as well, however, because firms wishing to use spending to signal enthusiasm for a product can donate to charity and declare the donation on their Google-searchable websites. If consumers do indeed find such expenditure signals useful, they will find them online. No advertising campaign is needed.

## III. THE SUPERCHARGING OF PERSUASION IN THE INFORMATION AGE

While the Internet eliminated persuasive advertising's information function, the Internet both supercharged the manipulative power of advertising and simultaneously gave consumers new tools to fight back against manipulation, leading to a fundamental reorganization of the advertising industry, one that is still underway. The vast troves of consumer data released by the Internet made possible a targeting and tailoring of advertising that was unthinkable in the pre-Internet age of billboards and television commercials aimed at large audiences.[9] Now a consumer known to be vulnerable to purchasing a particular product could be shadowed across the Internet by advertising for the product, which now could be made to appear — to that consumer alone — in social network feeds, banner ads on newspaper websites, and even in the paper coupons spewed out by supermarket cash registers at checkout. But the Internet also vastly expanded the size of the community from which the consumer could glean product information via word of mouth, allowing consumers to break the advertising spell by reading product reviews on social media.[10]

The threat posed by online word of mouth to advertising also proved to be an opportunity for advertisers, however, because online word of mouth also exposed to outside influence the social networks that are the most powerful drivers of product adoption, networks that had formerly

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5 See, e.g. Alfred Marshall, Industry and Trade 304–7 (1920).

6 See Edward Hastings Chamberlin, The Theory of Monopolistic Competition: A Re-Orientation of the Theory of Value 119–20 (7th ed. 1956); John Kenneth Galbraith, The Affluent Society 155–56 (1958).

7 See Cass R. Sunstein, *Fifty Shades of Manipulation*, 1 J. Marketing Behav. 213, 227 (2016).

8 See Nelson, *supra* note 3, at 732.

9 See Anja Lambrecht & Catherine Tucker, *When Does Retargeting Work? Information Specificity in Online Advertising*, 50 J. Marketing Res. 561, 561–62 (2013).

10 See Robert Allen King et al., *What We Know and Don't Know About Online Word-of-Mouth: A Review and Synthesis of the Literature*, 28 J. Interactive Marketing 167, 167–68 (2014).

been discoverable only at the dinner table or the office watercooler.[11] As social media rendered consumers more willing to treat strangers as friends, advertisers started to enter friend and family networks directly by paying social media influencers to generate communities and then promote products to them.[12] The tech giants, which turned the platforms upon which they operated their search, social media, and retail services into surveillance tools, were perfectly placed to gather the consumer data required for these new approaches to advertising, and came to dominate the industry.

## IV. PERSUASIVE ADVERTISING AS MONOPOLIZATION

The catch was, again, that the same information superabundance that had transformed the advertising industry had rendered advertising economically useless, if still highly profitable. That is where antitrust comes into the picture, because an advertising that lacks economic justification is an advertising that is anticompetitive. Consider two competitors, one of which offers a better product than the other. In a world in which advertising is informative, the firm that offers the better product will advertise, because the product information provided to consumers will cause consumers to buy that firm's product. In the information age, however, consumers already have access to all relevant product information at their fingertips, and in the absence of manipulation by advertisers, consumers will buy the better product. So the firm that sells the better product no longer has an incentive to advertise.

But in the information age the firm that sells the inferior product retains an incentive to advertise, so long as the advertising is persuasive in function. The firm that sells the inferior product can mitigate its competitive disadvantage by manipulating consumer purchase decisions, causing consumers to buy the inferior product even though consumers do not really prefer it. If the manipulative advertising campaign is successful, then the seller of the inferior product will come to dominate the marketplace, and the seller of the superior product will fail, to the detriment of both competition and consumers.

Of course, firms selling superior products may now want defensively to engage in persuasive advertising in order to neutralize the persuasive advertising of competitors. But it would be a mistake to infer from this that advertising in the information age can sometimes be procompetitive. Defensive advertising leads to competition based on persuasion, rather than based on the socially useful characteristics of price and quality. The expectation of having to engage in competition along this other dimension reduces the willingness of firms to invest in product improvement in the first place, since advertising and not price or product quality will be necessary anyway to get firms across the finish line. Advertising wars may resemble competition, but in syphoning resources away from innovation and price competition, advertising wars are in fact competition's antithesis.

Advertising in the information age is, in short, necessarily anticompetitive. In an information age in which advertising no longer serves an information function, the only thing advertising adds to markets is advertising's manipulative function, which distorts consumer preferences, rolls back gains associated with consumers' greater access to information in the information age, and places more efficient and innovative competitors at a competitive disadvantage.

## V. THE ONCE AND FUTURE FTC CAMPAIGN AGAINST ADVERTISING

Antitrust jurisprudence long ago recognized that persuasive advertising is anticompetitive. In a remarkable series of cases starting in the late 1950s, the U.S. Federal Trade Commission challenged persuasive advertising as a violation of the antitrust laws, successfully rolling back acquisitions of Clorox bleach and S.O.S. scrub pads by Procter & Gamble and General Foods, respectively, on the ground that the deals would give those brands an anticompetitive advertising advantage over rivals, and obtaining a U.S. Supreme Court opinion acknowledging the anticompetitive character of persuasive advertising.[13] In the early 1980s, the FTC even convinced a federal appeals court to affirm a single-firm monopoli-

11 See Arnaud De Bruyn & Gary L. Lilien, *A Multi-Stage Model of Word-of-Mouth Influence Through Viral Marketing*, 25 Int'l J. Res. in Marketing 151, 151–52 (2008).

12 See Marijke De Veirman et al., *Marketing through Instagram Influencers: The Impact of Number of Followers and Product Divergence on Brand Attitude*, 36 Int'l J. Advertising 798, 798 (2017).

13 See *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 579 (1967); *General Foods Corporation v. FTC*, 386 F.2d 936, 945, 947 (10th Cir. 1967). The history of this campaign is engagingly recounted in Elizabeth Mensch & Alan Freeman, *Efficiency and Image: Advertising as an Antitrust Issue,* 1990 Duke L.J. 321, 323–53.

zation case that treated persuasive advertising as anticompetitive.[14] But at about that time, the FTC's campaign against advertising ground to a halt under the weight of the argument that all advertising provides consumers with useful product information.

With the obsolescence of the information function of advertising, the FTC must renew its campaign against advertising, and seek in particular to obtain recognition from the courts of advertising as *per se* illegal monopolization in violation of Section 2 of the Sherman Act. Stripped of its information function, advertising strikes at the heart of the free market, distorting consumer preferences and therefore handicapping the ability of consumers to use their purchase decisions to dictate the socially-optimal mix of products that firms should produce. The purely anticompetitive and consumer-harmful character of advertising in the information age makes advertising a good candidate for *per se* treatment under the Supreme Court's prevailing standard for imposing *per se* rules. That standard makes *per se* unlawful conduct for which "the effect [is] to threaten the proper operation of our predominantly free-market economy — that is, [conduct that] facially appears to . . . always or almost always tend to restrict competition and decrease output."[15] The manipulation of consumer preferences always does that. Indeed, persuasive advertising is like naked price fixing, the quintessential *per se* illegal form of anticompetitive conduct, only more so, because price fixing, when deployed to stave off ruinous competition, can actually benefit consumers.[16] By contrast, advertising that distorts consumer purchase decisions never can benefit consumers, so long as we believe that consumers, unmolested, always choose the products that are best for them.[17]

## VI. FUNDING MEDIA AND SEARCH AFTER ADVERTISING

A renewed FTC campaign against advertising would deprive industries that serve a socially useful purpose, such as newspapers, online search, and social media itself, of an important source of revenue. But that does not counsel against antitrust intervention. The media and online search are public goods, services that confer benefits on society, but for which individual consumers may not be willing to pay the full value of the benefits they receive for these services. Public goods can only ever be funded through taxation, however, and the funding of the media and online search through advertising is no exception, because advertising is actually a covert form of taxation. But a form that is both wasteful and undemocratic. Antitrust intervention to put an end to advertising would force a public reckoning regarding whether and how to tax society to fund these services, and that can only be a good thing.

Advertising is covert taxation because not advertisers, but the public, acting as consumers, ultimately pays for advertising-funded services through the higher prices and lower product quality that consumers experience as a result of making advertising-influenced purchases. The $300 billion spent annually on advertising is only the lower bound of the amount of the tax paid by consumers to fund the media and online search industries, because to spend $300 billion on advertising, firms must generate more than $300 billion in advertising-driven revenues from consumers.[18] Advertising is an undemocratic tax because consumers do not vote on whether firms should advertise, and indeed advertisers devote huge sums to finding ways to thrust advertising on consumers involuntarily. Indeed, few consumers even realize that the advertising they consume represents a tax, inflicting a cost on them in terms of price and product quality. By contrast, when they elect legislators, consumers exercise some control over the government-sponsored taxes that they pay. The extraordinary waste associated with taxation through advertising is reflected in the fact that the actual operating cost of the media and online search industries does not exceed $100 billion, with the result that of the minimum of $300 billion taxed annually from consumers via advertising, only a maximum of a third is actually spent on the socially valuable services provided by the media and online search. The rest is wasted either on constructing the infrastructure of advertising — the ads themselves, the targeting, and so on — or taken out as profits by advertisers.[19]

14 See *Borden, Inc. v. FTC*, 674 F.2d 498, 511, 515–16 (1982). This opinion was later vacated at the request of the Reagan Administration. See Daniel M. McClure, *Trademarks and Competition: The Recent History*, 59 Law & Contemp. Probs. 13, 19 (1996).

15 *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 19–20 (1979).

16 See Michael D. Whinston, Lectures on Antitrust Economics 16–17 (2008).

17 See Abba P. Lerner, *The Economics and Politics of Consumer Sovereignty*, 62 Am. Econ. Rev. 258, 258 (1972).

18 See Leslie Levesque et al., *Economic Impact of Advertising in the United States*, IHS Market 3 (2015).

19 See Ramsi A. Woodcock, *supra* note 2, at 2340–41 n.345 (concluding that the operating costs of search and social media costs are no greater than $52 billion annually); *Newspapers Fact Sheet*, Pew Research Center, http://www.journalism.org/fact-sheet/newspapers/ (showing that newspaper industry revenue in 2017 was $27.5 billion).

Recognition by antitrust of advertising as *per se* illegal would cut the advertising-based funding stream for media and online search, and thereby force the question how to fund these services out into the open, giving the public the opportunity to decide whether and how much to spend through government-sponsored taxation, as opposed to taxation through advertising. If the public were to choose to continue to pay for these services, paying for them through direct taxation, rather than advertising, would bring about huge reductions in the effective taxes paid by the public for these services, by eliminating the hundreds of billions of dollars wasted on advertising infrastructure and profits for advertisers. For an Internal Revenue Service that collects trillions of dollars of tax annually, collecting another $100 billion to fund the media and online search would be almost costless by comparison.[20]

The money saved through no longer funding the online advertising infrastructure, from Google Adwords to paid influencers, needed to run the current system, would also have the incomparable benefit of eliminating an infrastructure of manipulation that could easily be repurposed by our own government — and has already been exploited by the Russian government — for political control.[21] There always has been something profoundly troubling about the use of persuasive advertising to fund public goods such as journalism. Something counterproductive about the strategy of seeking to develop an informed, educated, and independent-minded populace on one side of the proverbial newspaper fold, while selling space to businesses to manipulate that same populace on the other side of the fold. Antitrust can force a reckoning in this regard, and pursue its consumer and competition protection missions at the same time, by recognizing a *per se* rule against advertising. Antitrust can do this because commercial manipulation not only threatens democracy, but, in free markets that require consumer sovereignty to function properly, manipulation is bad for markets and competition too.

20 See *What is the breakdown of tax revenues among federal, state, and local governments?*, Tax Policy Center, https://www.taxpolicycenter.org/briefing-book/what-breakdown-tax-revenues-among-federal-state-and-local-governments.

21 See Ramsi A. Woodcock, *Advertising is obsolete – here's why it's time to end it, supra* note 2.

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