

**BEFORE THE FEDERAL TRADE COMMISSION**

**Competition and Consumer Protection  
in the 21st Century Hearings**

Topic 1: The state of antitrust and consumer  
protection law and enforcement, and their  
development since the Pitofsky hearings

**Project # P181201  
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**COMMENTS OF THE AUTHORS GUILD, INC.**

**Introduction**

The long chronicle of reform movements demonstrates that history is made by abrupt transitions. The 1890s are remembered as the Gilded Age where plutocrats like J. P. Morgan and John D. Rockefeller asserted control over the U.S. economy and politics. By 1906, both Rockefeller and Morgan were being forced by antitrust regulators to break up their vast holdings. Eighteen months ago, we thought we were back in the 1890's, in regard to the question of Internet platform monopoly; but today, we are in fact at the beginning of a profound change in how we view tech monopolies. In the last fourteen months the European Union has fined Google a total of \$7.2 billion in two separate antitrust actions and the Federal Trade Commission has opened an inquiry around Facebook's misuse of consumer data. Part of the reason for this abrupt shift is the mounting evidence of the destructive role that both Facebook and Google played in the American election of 2016—only hinted at eighteen months ago. But the crisis of Internet monopoly goes way beyond the election. We have come to the realization that we have entrusted Amazon,

Google and Facebook with so much of our most intimate data and now question whether they are worthy of that trust. We also understand that the last ten years have seen the wholesale destruction of creative economies—journalists, musicians, authors, and filmmakers—wrought in particular by three tech monopolies: Google, Facebook, and Amazon. That the FTC has opened a new inquiry into the “intersection of privacy, big data and competition” is to be commended.

Our comments on the inquiry are informed by the FTC’s stated vision: “A vibrant economy characterized by vigorous competition and consumer access to accurate information.” Though the Commission has outlined 11 topics of inquiry, we confine our initial remarks to three main areas of broad interest.

1. Do the three largest platforms (Google, Amazon and Facebook) exercise market power either as monopolies or monopsonies?
2. What is the effect of this market power on the creative economies of America?
3. Do the current regulations (or lack thereof) provide “consumer access to accurate information” in the form of news and other media data?

We then propose a few remedies that the FTC might contemplate implementing.

### **Platform Market Power**

The question of whether the three largest Internet platforms exercise market power does not seem controversial. Google controls 80% of the \$45 billion U.S. search advertising market (according to eMarketer). Facebook controls the four top mobile social networking apps (Facebook, Instagram, WhatsApp and Messenger) in

the United States. Amazon controls 76% of the e-book market and 55% of the audiobook market (according to market research firm Codex). While Google and Facebook use their market power to extract monopoly rents from advertisers, often at 20% premiums over the market price, Amazon uses its “monopsony” (a market structure in which only one buyer interacts with many would-be sellers) to force authors, publishers and booksellers to lower their prices, putting many of them out of business. The economist Paul Krugman explains that, “In economics jargon, Amazon is not, at least so far, acting like a monopolist, a dominant seller with the power to raise prices. Instead, it is acting as a monopsonist, a dominant buyer with the power to push prices down.” And this dominant power of Amazon expands around the globe. As Farhad Manjoo pointed out in *The New York Times*, “The larger Amazon gets, then, the more its rules — rather than any particular nation’s — can come to be regarded as the most important regulations governing commerce.”

As the last remaining bookstore chain, Barnes and Noble struggles to stay afloat, Amazon increasingly takes more of the book business. In 2017, physical bookstores only sold 24.3% of the new books sold, the rest coming through the online channel, of which Amazon holds a 73% market share (Codex-Group Book Preview, May 26-June 10, 2018). As a market analyst wrote me, “What's tremendously concerning is the major market decline in physical book stores, and Amazon's great dominance of the online channel, meaning all Amazon has to continue to do is to financially stress physical retail, force more store closings and by default walk away with the rest of the market, thus putting publishers, and by extension authors, in a totally untenable position with no bargaining power left.”

This was not the decentralization that the founders of the Internet imagined, but ironically it was the very design of the Internet, with a set of global standards that allowed for massive scale which led to the “winner takes all” economy of the Internet age. The fact that the FTC was solely focused on “consumer welfare” rather than the effect monopoly and monopsony have on sellers of creative product has led to the destruction of many creative industries, which has a downstream effect on consumers by reducing the availability of quality content. The Commission’s willingness to revisit the consumer welfare issue is significant and overdue.

It must be realized that the trade of seemingly free services in return for complete access to consumer data will only increase in a world of “smart assistants” powered by artificial intelligence (“AI”). The companies that will win the AI race will be the companies that are already in the forefront: Google, Facebook, and Amazon. As AI venture capitalist Kai-Fu Lee recently wrote, “AI is an industry in which strength begets strength: The more data you have, the better your product; the better your product, the more data you can collect; the more data you can collect, the more talent you can attract; the more talent you can attract, the better your product.” Google, Facebook, and Amazon are already pushing out of tech into other sectors of the economy, as Amazon’s acquisition of Whole Foods demonstrates. Google’s life sciences division, Verily, is producing glucose-monitoring contact lenses for diabetics, wrist computers that read diagnostic nanoparticles injected in the blood stream, implantable devices that modify electrical signals passed along nerves, medication robots, human augmentation, and human brain simulation devices. Google’s autonomous car division is already working with Avis to manage

their forthcoming self-driving car fleet. As for Facebook's brand extension plans into video, they recently bid \$800 million for the worldwide rights to broadcast Indian Cricket on their platform, only to be outbid by Rupert Murdoch's Star India. These are just the start of many initiatives to extend the tech giants' technologies into many parts of the American economy. But there are other dangers coming from AI and machine learning. The uses of AI in Creating "Deepfake" videos and audios is a huge danger to the FTC's mission of "consumer access to accurate information." As Senator Mark Warner has written, "Aided in large part by advances in machine learning, tools like Deepfake allow a user to superimpose existing images and videos onto unrelated images or videos." The potential misuse of this technology is truly frightening.

This deserves the attention of the FTC, as in the near future, AI "Smart Assistants" sold by Google, Amazon and Facebook will become as much a part of daily life as our ubiquitous smartphones.

### **Platform Power and the Creative Economy**

Since 2000, U.S. recorded music revenues have fallen from \$19.8 billion to \$7.2 billion per year. Home entertainment video revenue has fallen from \$24.2 billion in 2006 to \$12 billion in 2017. The Association of American Publishers has noted that while book publishing revenues only marginally decreased from 2016 to 2017, industry sales have actually fallen for three consecutive years, dropping by almost a billion dollars between 2014 and 2017. During that same period (2003-2015) Google revenue grew from \$400 million to \$74.5 billion, and Amazon's grew

from \$1.08 billion to \$25.36 billion.

Today, Google is the largest media company in the world, collecting \$95 billion in ad revenue for 2017—a figure 166 percent larger than No. 2 ranking The Walt Disney Company, a TV giant that controls ABC, ESPN and the Disney Channel. And because Google has such a large share of online revenue, global brands are paying a premium to Google (and Facebook), which of course is passed on to consumers in the form of higher prices.

The astonishing fact of the precipitous declines in revenue to the content creators has nothing to do with the idea that people are reading less news, listening to less music, reading fewer books or watching fewer movies. In fact, all surveys point to the opposite—the top searched Google items are all about entertainment categories. It is not a coincidence that the rise of the digital monopolies has led to the fall of content revenues. The two are inextricably linked.

In the third quarter of 2016 companies owned by Facebook or Google took 90% of all new digital ad revenue. As the Wall Street Journal recently reported, “none of the would-be challengers to the Google-Facebook ‘duopoly’ even cracks a 3% share of global digital advertising.” This extraordinary duopoly is behind much of the destruction in the journalism and other content businesses. Going beyond criticizing the digital duopoly, advertising executives are beginning to question the whole measurement systems used by Google and Facebook to get paid. For instance, AdNews recently reported that the “viewability scores” on Facebook video ads are as low as 2% when compared to TV on a like-for-like basis. In other words, Facebook counts as a “view” if a user scrolled past an ad for two seconds. Given that

the sound was probably off and they were just scrolling through their newsfeed, it's a wonder that any agency pays for these ads. Here again, there is a role for the FTC in making the digital ad business more transparent and less fraudulent.

Facebook and Google resist efforts to have third party measurement of their ad systems, as is the standard for TV and newspaper advertising. But this lack of transparency can also be seen in the subject of fake news. Ultimately Google and Facebook know a lot more about the forces behind the fake news epidemic than they have publicly disclosed. Google's Ad Sense software, which provided much of the revenue to the Eastern European teams that were flooding the web with Fake News, knew both the IP address and in many cases the bank account information of the fake news providers. Facebook, which shut down 30,000 fake accounts just before the French election, has never disclosed how many fake accounts were involved in hacking the U.S. election, nor the location of the individuals who established the fake accounts. This week, Facebook announced it had shut down dozens of fake accounts on both Facebook and Instagram, which were being used to sow civil discord in advance of the 2018 mid-term election.

Finally, the issue of Network Neutrality needs to be considered in the context of the monopoly platforms. As Amazon, Facebook and Google push farther into the businesses of creating their own content, their ability to use their supposedly "neutral platform" to the advantage of their own content is an area of concern. Already the two large fines the EU recently imposed on Google were for violations of this standard. The FTC has looked at this issue in the past but needs to revisit it in the context of the platforms push into content creation.

## **Fake News and Consumer Access to Accurate Information**

The ability of bad actors to easily access global platforms like Facebook and YouTube is no longer considered news. But the question of how the FTC helps preserve the Fourth Estate is increasingly an urgent matter. As Barry Lynn recently wrote in *The Guardian*:

Of all the social goods now in flames the one we must protect first is trustworthy journalism. In the nine years since Google bought the mobile ad company AdMob, annual ad revenue at Google and Facebook has soared, to more than \$95 billion and almost \$40 billion respectively. During this period, ad revenue at newspapers fell from about \$50 billion in 2005 to \$20 billion today.

Clearly the decline of the local newspaper business advertising economy can be traced back to Google and Facebook, even while Facebook trots out a massive PR campaign called the Facebook Journalism Project and Google touts its Google Digital News Initiative. Due to the enormous losses in advertising revenue, American journalism is in crisis today—a problem for our democracy as well as the industry. The number of jobs for reporters and journalists declined, as have the salaries, and many local newspapers have been shuttered.<sup>1</sup> Since 2007, fifteen North American

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<sup>1</sup> According to the U.S. Bureau of Labor Statistics, newspaper jobs declined by 60% from 458,000 in 1990 to 183,000 in 2016. <https://www.bls.gov/opub/ted/2016/employment-trends-in-newspaper-publishing-and-other-media-1990-2016.htm>. As of 2017, newspaper reporters and correspondents were the lowest paid among media and communications professionals with a median income of \$39,370. <https://www.bls.gov/ooh/media-and-communication/reporters-correspondents-and-broadcast-news-analysts.htm#tab-5>



metro dailies have closed, including the King County Journal, Cincinnati Post, Baltimore Examiner, and Tampa Tribune, while many others have been acquired by large media conglomerates.<sup>2</sup> The Editor and Publisher International Yearbook reports an even starker historical trend: in 1945 there were 1800 publications per 100 million Americans, a figure that had dwindled to 400 publications per 100 million American by 2015.<sup>3</sup> Last week the New York Daily News announced it was laying off half its newsroom staff, citing the role of Google and Facebook in the sharp decline in revenue.

Given that 93% of Americans access news online (using Google and Facebook as the entry point) this situation is not sustainable if we want to maintain a free press. According to the Pew Research Center, the “overall decline in [newspaper] circulation [has] coincided with a double-digit decline in advertising revenue for the industry as a whole.” The total ad revenue for the industry declined by almost two-thirds: from \$49 billion in 2006 to \$18 billion in 2016.<sup>4</sup> U.S. Newspaper ad revenue has fallen from \$65.8 billion in 2000 to \$17 billion in 2017. Although the New York Times, Wall Street Journal and Washington Post may be able to weather this hurricane, the viability of local papers in hundreds of U.S. markets is in jeopardy.

As carefully edited journalism perishes, the vacuum is being filled with propaganda and misinformation. But the hijacking of social media as a propaganda organ is distinctly different from partisan radio and television. To begin with, our

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<sup>2</sup> Newspaper Death Watch, <http://newspaperdeathwatch.com/>.

<sup>3</sup> <https://www.brookings.edu/wp-content/uploads/2016/07/new-media.pdf>

<sup>4</sup> <http://www.pewresearch.org/fact-tank/2017/06/01/circulation-and-revenue-fall-for-newspaper-industry/>

smartphones are with us every waking hour, whereas TV and radio are not regularly consumed in our workplace. We check our phones 150 times per day and Facebook alone gets 54 minutes of our time per day. The ability of our phones to use notifications to interrupt our other activities, combined with their ability to deliver random rewards like a slot machine, make us perfect receptors and transmitters of propaganda. What Trump's former campaign manager Steve Bannon understood was that a fake news article ("The Pope Endorses Trump") linked to a Facebook page and then bombed with a million bots can move the article to the top of Google search and Facebook trending topics almost instantly. As former Google engineer Tristan Harris has shown: "Bot networks are used to intimidate users, fabricate social consensus, manipulate #trending topics, propagate disinformation, and manipulate public opinion."

Needless to say, the application of machine learning to the creation of fake news presents far greater dangers than the existing problems the FTC is facing. The ability to put words in the mouth of a world leader and distribute the Deepfake to two billion people, presents an existential threat to democracy and world peace. Heretofore the platforms have operated under the safe harbor protection of Section 230 of the Communications Decency Act, which provides them immunity. While Section 230 makes sense when applied to neutral telecommunication carriers, we should have no illusions about the fact that Google, Amazon and Facebook are exercising extreme editorial control of the content you see, either through algorithms or human curation. As Senator Ron Wyden recently stated, "I just want

to be clear, as the author of Section 230, the days when these [platforms] are considered neutral are over."

### **Potential Policy Options**

Our suggestions for policy action fall basically into three categories:

- Getting the platforms to take responsibility for the content they serve
- Antitrust remedies that would increase competition
- Privacy remedies that would protect consumers

### **Platform Responsibility**

**Section 230 Reform**-Section 230 of the Communications Decency Act was meant to protect neutral internet communications providers from liability for content flowing through their channels, which they had no part in producing or distributing. Its application to services like YouTube, Facebook and Twitter—media platforms that play an active role, through human and AI moderators, in vetting, curating, and promoting content—goes beyond Congress' intent. The FTC should work with Congress to ensure that Google, YouTube, Facebook and Amazon are no longer protected by Section 230 of the Communications Decency Act, as they are clearly not "neutral platforms" as specified in the Act. Their businesses thrive on controlling and exploiting user-posted content. They should not be exempted from liability for defamation, false light, and public disclosure of private facts; if they were instead

required to vet content on their platforms like newspapers, radio stations, and TV networks, much of the fake news epidemic could be curtailed.

**Section 512 Reform:** The Internet platforms should be held responsible for ensuring that their services do not facilitate piracy. Knowingly facilitating piracy while handsomely profiting from it is clear secondary liability under the copyright law; and yet some of the major internet platforms have been allowed do just that by hiding behind Section 512 of the Copyright Act in a manner that Congress never intended. In a game of telephone tag, federal courts have managed to mangle and misinterpret the requirements of Section 512 to the extent that the major internet platforms are permitted to freely foster and profit from piracy. Let's reset the DMCA safe harbors so they work – so that internet providers actually are incentivized to cooperate with rights holders and keep piracy at bay. Mass commercial book piracy is growing at an exponential rate right now, extending beyond the educational sector to trade books, and authors who independently publish are particularly venerable. Book piracy cuts robs authors of money due to them for their hard work and adversely affects the ability of authors to keep writing and of publishers to invest in their books. Meanwhile, Google, protected by the safe harbors, does almost nothing to prevent piracy, requiring a thousand or so takedown notices before they will demote a website devoted to piracy—even those that clearly state that they are a devoted to pirated works.

Internet service providers that host pirated content have the means to identify copyright pirates; they also have the legal and technical ability to take the

infringing content down and to terminate the accounts of the pirate users, but some entities will only do so pursuant to notices that comply with the requirements in Section 512(c)(3) of the Copyright Act, as strictly interpreted by the courts, and will only take down the copy at the location (generally the URL) indicated in the notice. So long as an internet platform has the ability to receive Section 512 notices and a bare-bones repeat infringer policy, it is protected from liability under some of the case law, even if it is profiting from the piracy and does absolutely nothing to discourage it. This result is absurd. Unless an author's pirated book is published by one of the few publishers that have the means to actively address piracy, the only recourse an author has is to send fruitless DMCA notices in a never-ending game of Whack-a-Mole. This is hardly a good use of resources. It does nothing but allow internet service providers to avoid liability and save face. A better solution must be found.

We ask the FTC to work with the Copyright Office in their study of Section 512 (see <https://www.copyright.gov/policy/section512/>) and with Congress to amend Section 512 so that its intent is clear and it works to keep piracy off of the major platforms.

**Network Neutrality**-As the platforms which consumers use to find content (Google, Amazon and Facebook) begin to produce more of their own content, an inherent conflict of interest arises. As I use Amazon Prime Video, will Amazon-produced content be advantaged in the search engine over content that Amazon does not

own? The answer appears to be yes. This will increasingly be a problem. In the book business which Amazon dominates, the FTC might require Amazon to get entirely out of the businesses of publishing, self-publishing, printing, and selling used books. At a minimum Amazon should be prohibited from forcing publishers to agree to certain prices (through penalties if they do not) or offering the “buy button” to used book dealers. And self-published authors who use platforms other than Amazon’s KDP should not be subject to unfavorable treatment by the Amazon retail platform. These are classic monopsony tactics that need to be prohibited. We believe an appropriate remedy would aim to accomplish several goals: to eliminate Amazon’s power to discriminate among authors and readers, whether through pricing, marketing, or the fees it charges for its service; to prevent Amazon from selling books below cost to acquire customers for unrelated lines of business; and to restore competition in self-publishing, by requiring the book-retailing arm of Amazon to compete with other self-publishing platforms on a level playing field.

### **Antitrust Exemptions to Permit Collective Bargaining with the Platform**

**Monopolies:** There is no fair bargaining between any single publisher and Amazon; or between any single news media publisher and Facebook or Google. The internet platforms hold all the power. No publisher can walk away from Amazon and stay in business. No music company can walk away from YouTube. The giant Internet platforms should be treated as common carriers and regulated as such. Or the playing field should be leveled by allowing news organizations to bargain collectively with Facebook and Google (the news media tried to introduce legislation

recently); and allow publishers and self-published authors to bargain collectively with Amazon.

### **Privacy Remedies**

**Individuals should own their own data.** Personal data—information about a person and their activities—should be clearly owned by the person to whom the data attaches, not by the entity that collects it. Individuals should be allowed to profit from the use of their data for advertising or other purposes, not the companies that track it. Moreover, the right to own and use one’s data should be nonwaivable and non-assignable. The right of individuals to decide exactly when, how and by whom any of their data is used for any purpose is fundamental to protecting individual rights in the future.

The largest internet platforms monopolies are impossible to compete with because they own all of our data—about what we buy, what we like, what we search for, our taste in books or clothes, where we travel. No other company can catch up. If individuals owned their own data—as a property right, not just a privacy matter, and could license it (but not waive the right through click-through terms of use), and companies were required to pay individuals for commercial (e.g., advertising) uses, it would better level the playing field. Tim Berners-Lee the inventor of the World-Wide Web is working on such an idea. The FTC should interview him for this project.

### **Importance of the FTC’s Intervention to the Survival of American Creative**

**Industries.** The government has the responsibility to maintain an open,

competitive, free, unsupervised, and undistorted market for creative content. We know that among the traditional remedies to limit monopolies has been separation of business components. Whether that, or some less drastic remedy, is called for here is obviously a matter that we entrust to your judgment. Our larger point is that we believe the FTC needs to reassess the overwhelming market power of Amazon, Google and Facebook, bearing in mind the special constitutional sensitivities that have historically been applied to any business that has established effective control of a medium of communication.

Respectfully submitted,

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