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U.S. DEPARTMENT OF JUSTICE
ANTITRUST DIVISION
950 PENNSYLVANIA AVE, NW
WASHINGTON, DC 205

Comments filed with the Department of Justice:

RE: PUBLIC WORKSHOP ON COMPETITION IN TELEVISION AND DIGITAL ADVERTISING

ASHLEY BAKER
DIRECTOR OF PUBLIC POLICY
THE COMMITTEE FOR JUSTICE

We at the Committee for Justice (“CFJ”) write to the Department of Justice (“DOJ”) regarding the recent workshop on competition in television and digital advertising. Disruptive forms of technological change are upending traditional business models, and regulators are struggling to keep pace. As business models evolve in response to the convergence and expansion of various technologies, they can shift from one regulatory category to another. This is particularly true of the digital marketing industry, and we commend DOJ for this workshop and opportunity for public input.¹

Founded in 2002, CFJ is a non-profit legal and policy organization that educates the public and policymakers about the rule of law and promotes constitutionally limited government. CFJ has a long history of leadership on Supreme Court and federal judicial nominations in the Senate and has recently focused on issues at the intersection of constitutional law and technology.² Consistent with that mission, our latest efforts have encompassed areas such as data privacy policy, administrative law, and antitrust law.³

¹ U.S. Dept. of Justice. *Public Workshop on Competition in Television and Digital Advertising*. (2019, May). Retrieved from <http://bit.ly/2ImkeRP>

² See, e.g. Levey, C. and Baker, A. (2018, Sept.). *Letter to the Senate Judiciary Committee on the Nomination of Brett Kavanaugh*. Retrieved from bit.ly/CFJ-Letter; Baker, A. (2019, March). *Justice Gorsuch, Carpenter, and the Fourth Amendment*. The Federalist Society. [Video file]. Retrieved from <http://bit.ly/2lpDNJf>; Baker, A. (2019, March). *New Technology, Same Principles: The Supreme Court and Tech*. American Action Forum. Retrieved from <http://bit.ly/SCOTUStech>

³ See, e.g. Baker, A. (2018, Dec.). *RE: Developing the Administration’s Approach to Consumer Privacy*, Docket Number 180821780-8780-01. Retrieved from bit.ly/CFJ-NTIA; Baker, A. (2018, Nov.). *Privacy Policy and the Economics of Data Collection Rules*. Retrieved from <http://bit.ly/PrivacyEcon>; Baker, A. (2018, December). *RE: Hearings on Competition and Consumer Protection in the 21st Century: Consumer Privacy*, Docket Number FTC-2018-0098. Retrieved from <http://bit.ly/2XW8laO>

INTRODUCTION & EXECUTIVE SUMMARY

“The video ecosystem has never been more complicated and exciting. We have seen an unprecedented number of content creation sources, distribution platforms, and consumption channels, and as a result, more video viewing time in total. While traditional TV still dominates ad revenue, digital video — especially mobile video—is the fastest-growing video type by consumption. All of these developments and touchpoints have provided more opportunities for 21st century brands and marketers to directly connect and engage with consumers.”¹

We’ve gone from the early days of newspaper and print ads to the debut of radio commercials in the 1920s, to Kodak moments and Lucky Strike ads, to the Energizer bunny and Apple’s famous 1984 commercial. Then, in the last two decades, an abundance of ads were accommodated by the expanded capacity of digital cable systems.⁴ Today’s entertainment—and the advertisements that come with it—is frequently distributed via online platforms.

As Judge Robert Bork said:

The chief function of advertising and promotion, of course, is the provision of information. Even the least informative advertising tells consumers of the existence of particular products, what functions they perform, what kinds of outlets sell them, and (usually) the general range of prices. Many forms of advertising provide much more detail. Often advertising is rather general, its object being to get consumers interested.⁵

The same holds true for digital advertising, which yields a significant impact on consumers and the U.S. economy. According to a 2019 study, digital advertising will outperform other forms of advertising this year, exceeding over \$100 billion in value.⁶

⁴ Waldfoegel, J. (2017). *How Digitization Has Created a Golden Age of Music, Movies, Books, and Television*. *Journal of Economic Perspective*, 31(3), 2007-2008. Retrieved from <https://pubs.aeaweb.org/doi/pdfplus/10.1257/jep.31.3.195>

⁵ Bork, R. H. (1993). *The Antitrust Paradox: A policy at war with itself*. (4th ed., p. 317). New York, NY: Free Press.

⁶ Fleming, Sean (2018). *Digital now accounts for half of all US advertising*. World Economic Forum. Retrieved from <https://www.weforum.org/agenda/2018/10/digital-now-accounts-for-half-of-all-us-advertising/>

In his opening remarks, Assistant Attorney General (“AAG”) Makan Delrahim pointed out the need to define or distinguish digital advertising and television advertising:

Digital advertising offers an opportunity to target customers in a way that was unimaginable in traditional media advertising. Understanding the extent to which that distinction is significant from an advertisers’ perspective is important to our analysis of these markets. Although they may have embraced digital advertising we must understand if advertisers view advertising on digital media as a substitute to television or as a useful complement.⁷

However, with the decline and augmentation of broadcast television and the rise of online platforms, digital ads have become asynchronous, presenting new regulatory challenges. Specifically, despite the evolving business model, the tools for antitrust analysis and determining the relevant market remain the same.

We argue that digital advertising is both a substitute for and a complement to television advertising. In other words, the rampant ascent of digital marketing was made possible by TV advertising and its ability to influence consumer behavior. In that way, it is a useful complement. The convergence of the two forms of advertising allowed marketers to measure efficacy and observe trends, which diverted attention to digital ads. ***Television and online ads no longer exist in separate silos; the two are inexplicably intertwined and functional distinctions have collapsed.***

In sum, digital advertising is not a traditional, linear market. It is a two-sided market in which advertisers try to influence the online behavior of consumers through an intermediary.

⁷ The Department of Justice. (2019, May 23). *Public Workshop on Competition in Television and Digital Advertising* (Opening Remarks). [Video file]. Retrieved from <https://www.youtube.com/watch?v=7AZdtAM46WM>.

THE FALSE DICHOTOMY OF TELEVISION & ONLINE ADS

“The combination of sight, sound, and motion that underlies video storytelling has unique advantages in creating enduring two-way relationships with consumers that 21st century brands desire to reach and engage. Convergence of traditional TV and digital video consumption is growing rapidly, impacting advertising planning, selling, and buying. This confluence of consumer behavior and technology will continue to propel the industry to adopt a more holistic understanding of the consumer that recognizes the differences by consumption, platform, content type, and audience segment.”⁸

Television and Digital Advertising Markets Have Converged

Traditionally, market definition is framed around a static product with a distinct type of customer. With advances in technology, this build-and-freeze model breaks down as advertising platforms evolve. The once-distinct markets for television and digital advertising have become fluid.

However, as Ronald Coase pointed out:

[I]f an economist finds something - a business practice of one sort or other - that he does not understand, he looks for a monopoly explanation. And as in this field we are rather ignorant, the number of ununderstandable practices tends to be rather large, and the reliance on monopoly explanations frequent.⁹

Indeed, when it comes to the innovative business model that has engulfed digital and television advertising, regulators are struggling to apply the correct regulatory framework.

During the workshop, Christina Beaumier¹⁰ relayed that her experience with TV platforms makes clear that televisions and digital advertising markets have converged: “There’s no doubt that national traditional TV is converging with digital video. And this starts with the consumer and how she is consuming content across all different devices.”

⁸ IAB Digital Video Center of Excellence. *Video Landscape Report* (Rep.). (2018). Retrieved https://www.iab.com/wp-content/uploads/2018/05/IAB-Video-Landscape-Report-May-2018_-4th-Edition_Final.pdf

⁹ Coase, R.H.(1972). *Industrial Organization: A Proposal for Research*. Policy Issues and Research Opportunities in Industrial Organization. (p. 67). (Victor R. Fuchs ed.)

¹⁰ Christina Beaumier is the vice president of product for the TV platform Xandr.

Beaumier noted that this is at least in part due to how we use devices: “So, what used to be traditional TV being consumed on one device in the household, now it’s being consumed on a number of devices—a connected TV, the set-top box, the mobile device, etc.”¹¹

Dave Lougee¹² pointed out how he has adapted to the migration of ads between platforms: “

[W]e’ve created a company called ‘Premion’ that provides local advertisers the ability to place [the] same video ad inside high-quality long-form video programming...on their own digital platforms, as well as their distribution on a number of popular OTT services, such as Sling or the Sony PlayStation.¹³

“It is one highly interchangeable video market now,” Lougee continued. “So, in other words, if broadcasters raise their prices, advertisers can, will, and do take their dollars elsewhere.”¹⁴

¹¹ The Department of Justice. (2019, May 23). *Public Workshop on Competition in Television and Digital Advertising* (Panel 4, starting at 45:17). [Video file]. Retrieved from <https://www.youtube.com/watch?v=7AZdtAM46WM>.

¹² Dave Lougee is President and CEO of TEGNA.

¹³ The Department of Justice. (2019, May 23). *Public Workshop on Competition in Television and Digital Advertising* (Panel 3, starting at 30:44). [Video file]. Retrieved from <https://www.youtube.com/watch?v=7AZdtAM46WM>

¹⁴ *Id.*

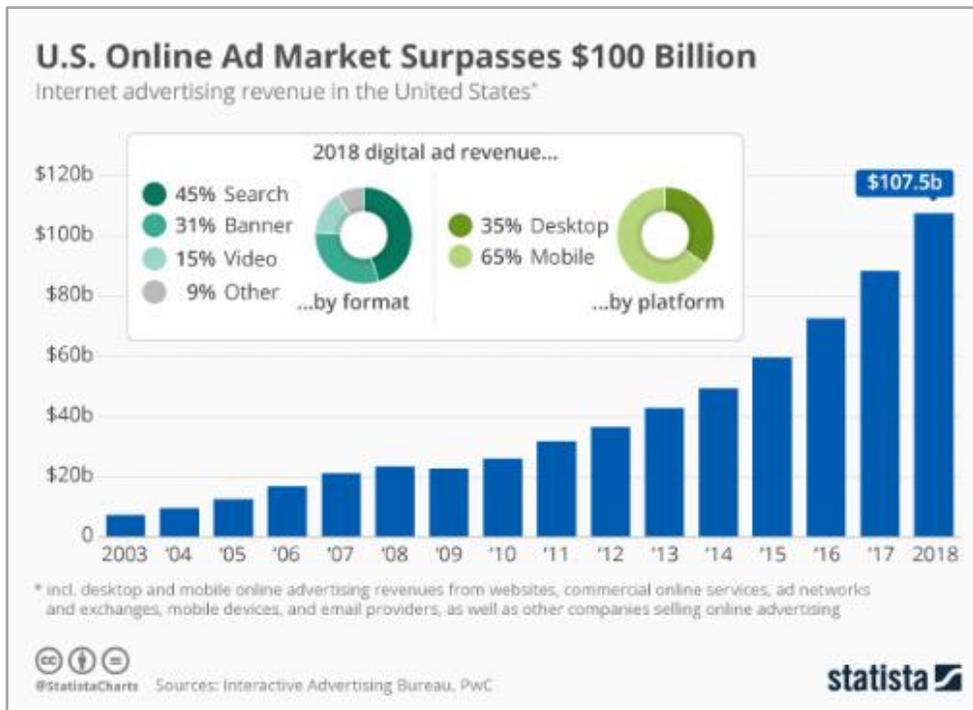


Figure 1¹⁵

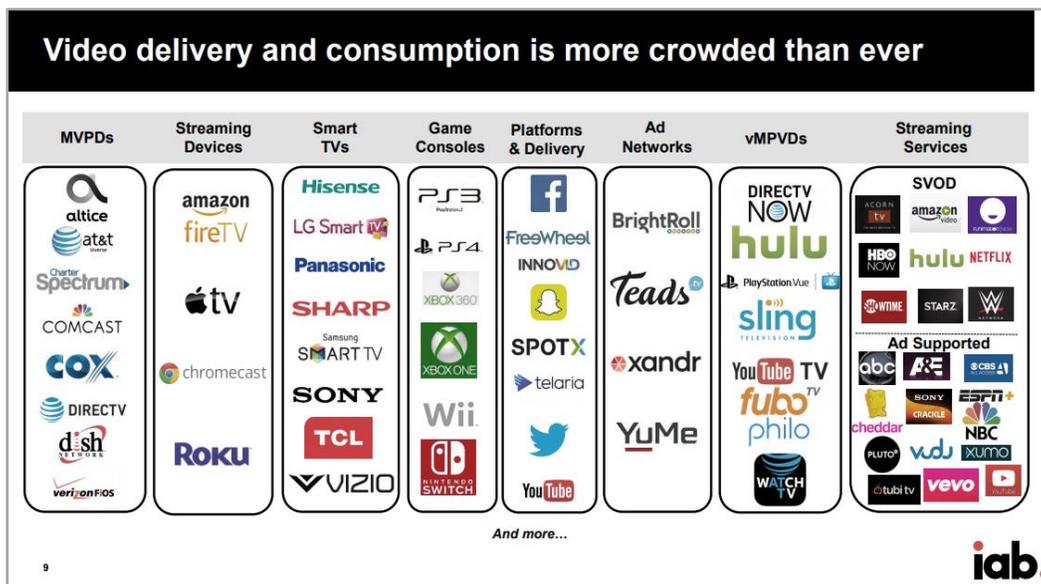


Figure 2¹⁶

¹⁵ Richter, F. Infographic: *Worldwide Digital and TV Ad Spending*. Statista. Retrieved from <https://www.statista.com/chart/12136/worldwide-digital-and-tv-ad-spending/>

¹⁶ IAB Lab. *Video Landscape Report*. (2018). Retrieved https://www.iab.com/wp-content/uploads/2018/05/IAB-Video-Landscape-Report-May-2018_-4th-Edition_Final.pdf

As for social media marketing, Facebook views its platform as a complete substitute for more traditional types of advertising. During the third panel, Ty Ahmad-Taylor noted that:

In competition for advertising dollars at each stage of the funnel, we view that we [Facebook] are a likely substitute or a swap for both television, for print, for cable advertising, and for other types of media or billboards even that might compete for your attention. And brands can figure out if they're actually converting by looking at their efficacy across these different channels.¹⁷

Additionally, companies—which typically put digital and television advertising in the same budget—have dramatically increased their spending on digital advertising over the past decade. As Marc Pritchard pointed out during the first panel, companies are shifting their budgets to advertising on new platforms:

About 10 years ago, when the digital advertising industry was really starting to get going, we helped fuel that. We helped modify many of these platforms to digital. We spent maybe 5 or 6% in digital and then ramped up to well over, more than a third.¹⁸

A comparison of worldwide digital and TV ad spending from 1999 to 2022 reveals that this trend will magnify:

¹⁷ The Department of Justice. (2019, May 23). *Public Workshop on Competition in Television and Digital Advertising* (Panel 3, starting at 11:51). [Video file]. Retrieved from <https://www.youtube.com/watch?v=7AZdtAM46WM>

¹⁸ The Department of Justice. (2019, May 23). *Public Workshop on Competition in Television and Digital Advertising* (Panel 1, starting at 1:15). [Video file]. Retrieved from <https://www.youtube.com/watch?v=7AZdtAM46WM>

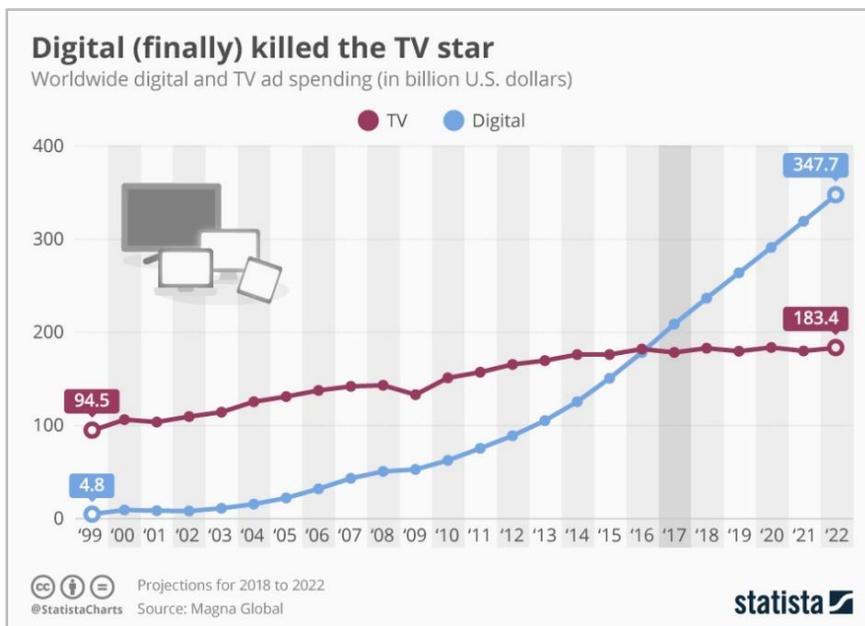


Figure 3¹⁹

Television Ads Influence Online Behavior

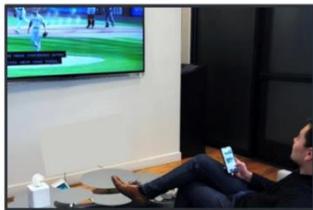
Digital advertising trends are heavily influenced by what is known as “second screening” in which viewers multi-task while using a second device such as a phone or tablet while watching television. According to Nielsen, 88 percent of television viewers say they use a second digital device while watching TV and 71 percent research content related to what they’re watching mid-show.²⁰ This, in turn, can lead to increased conversions and even influence purchase decisions:

¹⁹ Richter, F. (2018). Infographic: Digital (Finally) Killed the TV Star. Statista. Retrieved from <https://www.statista.com/chart/12136/worldwide-digital-and-tv-ad-spending/>

²⁰ Craft, E. J., & Slefo, G. P. (2019, June). *Mary Meeker's 2019 Internet Trends Report: 11 highlights (and lots of industry insight)*. Retrieved from <https://adage.com/article/digital/mary-meekers-2019-internet-trends-report-11-highlights-and-lots-industry-insight/2177626>

TBD = Impact on Ad Targeting... Digital TV-Based Ads (Aided by In-Hand Mobiles)

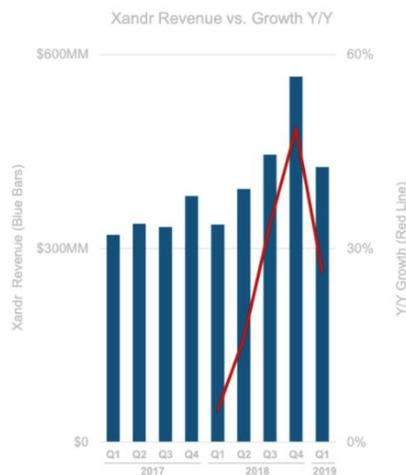
Multi-Platform Data Improves Relevancy...



Nielsen Audience Report (USA)

- 88% = Use a Second Digital Device While Watching TV
- 71% = Look Up Content Related To Content They Are Watching
- 41% = Message Friends / Family About Content They Are Watching

...Creating Opportunities for Better Ad Experiences



BOND
Internet Trends

Source: AT&T / Xandr Releases, Nielsen Q2-18 Total Audience Report (12/18). Note: Survey based on Nielsen National USA Panel data. Note: 2018 USA Mid-term elections drove above-average television advertising spend on Xandr platform.

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Figure 4²¹

A forthcoming study indicates that second-screening influences online behavior and “show[s] that ordinary TV ads lead to a variety of immediate online responses and that advertisers can use these signals to enrich their media planning and campaign evaluations.”²² Second-screening, which occurs most frequently during commercial breaks, is regularly exhibited by 178 million Americans while watching TV.²³

Although over 90% of ads are shorter than one minute, the ads can cause an immediate, or within minutes, surge in online activities such as searches for the product or brand, downloads, or website visits.²⁴ Because second screens have become easily accessible, viewers are empowered to “take immediate actions after seeing an ad, such as searching for product reviews, attributes, or prices; expressing opinions on social media; or placing an order on the advertiser’s website.”²⁵

²¹ <https://adage.com/article/digital/mary-meekers-2019-internet-trends-report-11-highlights-and-lots-industry-insight/2177626>

²² Du, Rex Yuxing and Xu, Linli and Wilbur, Kenneth C. (2019, May). *Immediate Responses of Online Brand Search and Price Search to TV Ads*. Journal of Marketing, Forthcoming. (p. 81). Retrieved from: <https://ssrn.com/abstract=3037734>

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

Ad vendors have seized this opportunity to introduce services that will analyze the relationship between ads and spikes in online behavior and attribute them “to the individual TV ads that caused them, helping advertisers select ad copy and media placements to maximize immediate online response. [M]ore than a dozen vendors...offer such services.”²⁶ Thanks to the second-screening phenomenon, new technology can be used to assess the effectiveness of ad placement.

During the second panel, Kevin Arrix, Senior Vice President at DISH Media, validated the findings that television ads influence online behavior:

For us, digital advertising, it gives us the flexibility to leverage either existing third-party data or brand first party data along with our subscriber data to deliver targeted advertising, to deliver addressable advertising. In the end, it is all digital-delivered, data-driven video that we provide.²⁷

Question from Audience: “I’m curious what kind of conversion you’re seeing between online digital advertising and offline advertising.”

Arrix: “We’re seeing a lot.”²⁸

²⁶ *Id.*

²⁷ The Department of Justice. (2019, May 23). *Public Workshop on Competition in Television and Digital Advertising* (Panel 2, starting at 43:05). [Video file]. Retrieved from <https://www.youtube.com/watch?v=7AZdtAM46WM>

²⁸ The Department of Justice. (2019, May 23). *Public Workshop on Competition in Television and Digital Advertising* (Panel 2, starting at 1:21:19). [Video file]. Retrieved from <https://www.youtube.com/watch?v=7AZdtAM46WM>.

COMPETITIVE DYNAMICS IN BROADCAST & ONLINE ADVERTISING

Antitrust law must chart a narrow course between fostering and restraining competition. Because the same economic activity can have desirable or undesirable consequences depending on the circumstances, by its nature antitrust analysis is constrained to outlaw not specific conduct, but rather conduct that has specific economic consequences.²⁹

Creative Destruction

Mark Perry of American Enterprise Institute (AEI) has noted that the 2017 Fortune 500 list of companies includes only sixty companies (fewer than 12 percent) that appeared on the 1955 list.³⁰ Indeed, we can see the effects of Schumpeterian creative destruction over the past six decades.³¹

Similarly, during the workshop, AAG Delrahim points out that: “Of the top 10 companies that contributed to digital advertising’s revenue growth 10 years ago, only three remain on the top 10 list today.”³²

²⁹ Easterbrook, Frank H. (1985). *The Limits of Antitrust*, University of Chicago Law Occasional Paper, No. 21.

³⁰ Perry, Mark. (October, 2017). *Fortune 500 firms 1955 v. 2017: Only 60 remain, thanks to the creative destruction that fuels economic prosperity*. The American Enterprise Institute. Retrieved from <http://www.aei.org/publication/fortune-500-firms-1955-v-2017-only-12-remain-thanks-to-the-creative-destruction-that-fuels-economic-prosperity/> (“Another economic lesson to be learned from the creative destruction that results in the constant churning of Fortune 500 (and S&P 500) companies over time is that the process of market disruption is being driven by the endless pursuit of sales and profits that can only come from serving customers with low prices, high-quality products and services, and great customer service. If we think of a company’s annual sales revenues as the number of “dollar votes” it gets every year from providing goods and services to consumers, we can then appreciate the fact that the Fortune 500 companies represent the 500 companies that have generated the greatest dollar votes of confidence from us as consumers – like Walmart (No. 1 this year at \$486 billion in “dollar votes” for 2017, and No. 1 in 10 of the last 13 years), Apple (No. 3 at \$216 billion), ExxonMobil (No. 4 at \$205 billion), CVS (No. 7 at \$178 billion), GM (No. 8 at \$166 billion) and Amazon (No. 12 at \$136 billion).”)

³¹ Schumpeter, J. A. (1942), *Capitalism, Socialism, and Democracy*. 3d ed. (p. 83). Harper and Brothers. (“The opening up of new markets, foreign or domestic, and the organizational development from the craft shop to such concerns as U.S. Steel illustrate the same process of industrial mutation—if I may use that biological term—that incessantly revolutionizes the economic structure from within, incessantly destroying the old one, incessantly creating a new one. This process of Creative Destruction is the essential fact about capitalism.”)

³² The Department of Justice. (2019, May 23). *Public Workshop on Competition in Television and Digital Advertising* (Opening Remarks, starting at 6:40). [Video file]. Retrieved from <https://www.youtube.com/watch?v=7AZdtAM46WM>.

It is predicted that half of today's S&P 500 firms will be replaced over the next 10 years.³³

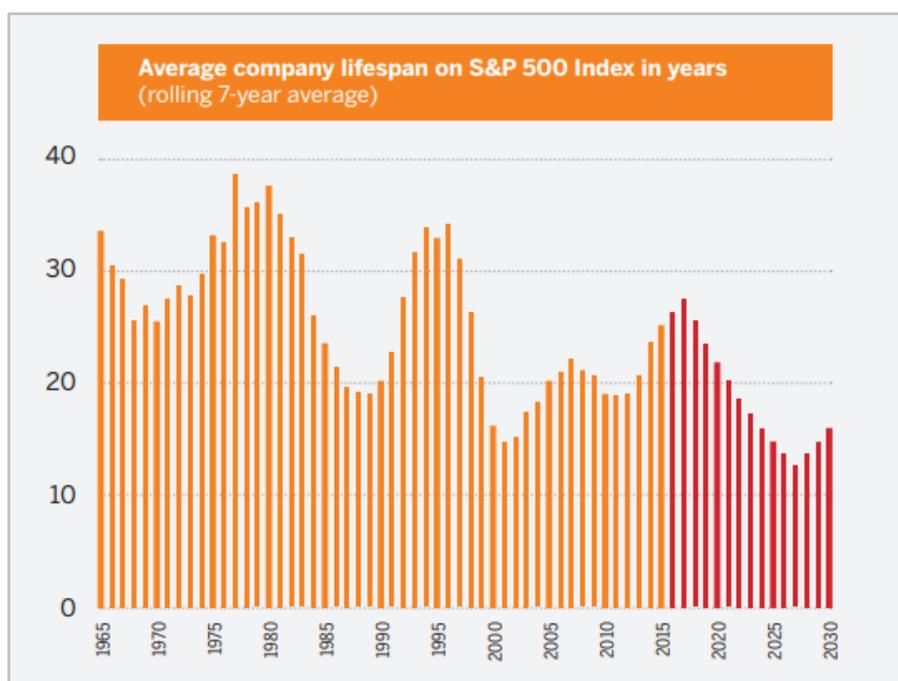


Figure 5³⁴

We can see the constant turnover in the digital economy today. Panelist Wendy Moe of the University of Maryland describes witnessing creative destruction in action:

I remember yesterday there was a news article that revealed that Amazon for the first time had surpassed Google in the number of product searches, and so from that perspective, thinking about the power of Google to direct product searches and consumers to their appropriate product, that is weakening and yielding to Amazon.³⁵

³³ Anthony, S.D., Viguier, S.P., and Waldeck, A. (2016). *Corporate Longevity: Turbulence Ahead for Large Organizations*. InnoSight, Retrieved from <https://www.innosight.com/wp-content/uploads/2016/08/Corporate-Longevity-2016-Final.pdf>

³⁴ *Id.* at 2.

³⁵ The Department of Justice. (2019, May 23). *Public Workshop on Competition in Television and Digital Advertising* (Panel 2). [Video file]. Retrieved from <https://www.youtube.com/watch?v=7AZdtAM46WM>

It's not only Google that is threatened by Amazon.³⁶ To compete with Amazon, Walmart is offering both insertion order-based media buys and programmatic display through Walmart Exchange, a media network the company introduced in 2014 to connect online consumer behavior to in-store sales data that its biggest rival Amazon lacks.³⁷ In addition to its own offerings, the company has been serving third-party display ads in the format of banners, search ads, product listing ads, and native ads on their website.³⁸

With around 140 million people shopping at its 5,000 stores in the U.S. every week, programmatic infrastructure combined with in-store data was an “underappreciated growth opportunity” given Amazon’s lack of brick-and-mortar stores.³⁹



Figure 6⁴⁰

³⁶ Chen, Y. (2017, August 28). *With Amazon looming, Walmart quietly grows as an advertising force*. Digiday. Retrieved from <https://digiday.com/marketing/amazon-looming-walmart-quietly-grows-advertising-platform/>

³⁷ Liffreing, I. (2017, August). *The Amazon effect echoes across the industry*. Digiday. Retrieved from <https://digiday.com/marketing/amazon-effect-echoes-across-industry>

³⁸ Glenday, J. (2017, August). *Walmart nurtures online ad business by stealth*. The Drum. Retrieved from <http://www.thedrum.com/news/2017/08/14/walmart-nurtures-online-ad-business-stealth>

³⁹ Garcia, T. (2017, August). *Wal-Mart earnings: Some analysts say traffic has fallen, others say it has grown*. MarketWatch. Retrieved from <https://www.marketwatch.com/story/wal-mart-earnings-some-analysts-say-traffic-has-fallen-others-say-it-has-grown-2017-08-14>

⁴⁰ Unknown. (2019, June) *Retail's Last Hurrah Against Amazon*. Seeking Alpha. Retrieved from <https://seekingalpha.com/article/4083448-retails-last-hurrah-amazon>.

The market competition resulting from the advent of digital marketing has also created spillover effect that can be felt across other industries. In *How Digitization Has Created a Golden Age of Music, Movies, Books, and Television*, Joel Waldfogel recounts the impact of the digital economy on the film industry:

In 2012, 550 films were distributed through US theaters: about 200 of these were MPAA major-studio movies, while the other 350 were small-scale releases of mostly independent movies. In many cases, these films were released briefly in just a few theaters to get some reviews, then, later, distributed through other channels. As of 2013, the number of 2010 releases available streaming on Netflix was 1,058, and the number on the Amazon Instant service was 1,230, or roughly twice the number of 2010 movies that had been available in theaters. ***The bottom line is that the barriers to entry into creation have fallen and the distribution bottleneck has been relaxed***, making it possible for a large number of new movies to make their way to consumers.⁴¹

Advertising Networks

In his remarks, AAG Delrahim pointed to the role of ad networks:

Today, because of the data that ad networks and publishers are able to collect about a website's audience behavioral targeting now accounts for a large percentage of digital advertising. Moreover, because ad networks represent multiple publishers at once they are often able to offer publishers to much greater quantities of data it would not be able to access individually. At the same time, this data allows ad networks to adopt a new model that circumvents content providers and targets individuals directly.

Ad networks have quickly proliferated in recent years, allowing smaller companies to compete with tech giants. Last year, with the \$1.6 billion acquisition of AppNexus, AT&T began to compete with Google, Facebook, and Verizon in the race for digital ad dollars. AppNexus is a supply-side platform (SSP) that combines first-party data with predictive

⁴¹ Waldfogel, J. (2017). *How Digitization Has Created a Golden Age of Music, Movies, Books, and Television*. *Journal of Economic Perspective*, 31(3), 2007-2008. Retrieved from <https://pubs.aeaweb.org/doi/pdfplus/10.1257/jep.31.3.195>. (emphasis added).

analytics and advertising technology to deliver content.⁴² The acquisition put AT&T “on a collision course” with Google and Facebook.⁴³

In addition to the acquisition of ad-tech vendors, another way to compete in the digital ad market is through ad pools or networks. To recover digital ad dollars from Google and Facebook, “News IQ”, a platform owned and operated by News Corp., pooled data from publications such as The Wall Street Journal, New York Post, and Barron’s to reach 140 million consumers in the U.S. and millions more globally. NBCUniversal and Vox Media, Verizon and Oath, and Disney formed their own ad partnerships.⁴⁴

Less than one year later, New York Media, PopSugar, and Rolling Stone joined the Vox Media-NBCUniversal joint-venture, which became known as “Concert.” Additionally, Viacom Inc., Time Warner Inc.’s Turner and 21st Century Fox formed the TV network consortium “OpenAP,” which is operated by Accenture.⁴⁵

Previously, twenty-seven digital publishers—including Condé Nast, ESPN, NBCUniversal, The Washington Post, and more—formed an automated online ad network led by the trade association Digital Content Next (DCN). DCN’s marketplace, “TrustX”, was formed as a nonprofit public benefit corporation with the goal of promoting transparency in advertising.⁴⁶

⁴² Sullivan, L. (2018, June 25). *AT&T Acquisition Of AppNexus Good For Ad Tech, Insiders Say*. Media Post. Retrieved from <https://www.mediapost.com/publications/article/321302/att-acquisition-of-appnexus-good-for-ad-tech-ins.html>

⁴³ Slefo, G. (2018, June). *Another 'Walled Garden?' Here's what AT&T acquisition of AppNexus means*. Adage. Retrieved from <https://adage.com/article/digital/t-acquisition-appnexus-means/314023>

⁴⁴ Fischer, S. (2017, December). *News Corp to fight Google/Facebook with Global Ad Network*. Axios. Retrieved from <https://www.axios.com/news-corp-to-fight-googlefacebook-with-global-ad-network-1513388394-8de2efc8-758b-4aaf-b470-4f9aba2b1b6d.html>

⁴⁵ Mullin, B. (2018, May). *Publishers From Rolling Stone to PopSugar Pool Ad Sales Efforts to Combat Tech Giants*. The Wall Street Journal. Retrieved from <https://www.wsj.com/articles/publishers-from-rolling-stone-to-popsugar-pool-ad-sales-efforts-to-combat-tech-giants-1527771600>

⁴⁶ Lichterman, J. (2016, September). *Digital Content Next is Launching an Automated Ad Marketplace to Try to Solve Online Advertising's Problems*. Nieman Lab. Retrieved from <https://www.niemanlab.org/2016/09/digital-content-next-is-launching-an-automated-ad-marketplace-to-try-to-solve-online-advertisings-problems/>

CONSUMER WELFARE SHOULD GUIDE ANALYSIS

A consumer-oriented law must employ basic economic theory to judge which market structures and practices are harmful and which beneficial. Modern antitrust has performed this task very poorly. Its version of economics is a mélange of valid insights and obviously incorrect—sometimes fantastic—assumptions and effects of business behavior.⁴⁸

Regulating at the Speed of the Internet

During the height of the Great Depression, AAG Thurmond Arnold expanded the Antitrust Division to 500 lawyers—twenty-seven times the previous size of eighteen. Then, at the start of the Second World War, Franklin D. Roosevelt realized that these large companies were needed to supply America’s “arsenal of democracy.”

That is only one of many examples of the enormous power of competition. Progressives in the 1960s argued that it was necessary to use the power of heavy-handed government regulations in order to control big companies such as General Motors. GM, of course, “was eventually controlled—to the point that the government had to rescue it from bankruptcy—but not tamed by the government; it was tamed by Toyota, a company that built a better car at a lower price.”⁴⁹

Recently, companies that have been identified as antitrust targets include Google, Facebook, Apple, and Amazon. Meanwhile, the European Union has imposed billions in fines for privacy and antitrust violations, and both Republicans and Democrats have called for the breakup of big tech companies, asserting that they are too powerful and have too much data.

That Europe does not have a Google is no coincidence. Some countries have become so inured to regulation that it’s easy to forget that markets and consumers can perform just as well—if not better—without strict regulation.

⁴⁸ Bork, R. H. (1993). *The Antitrust Paradox: A policy at war with itself* (4th ed., p. 7). New York, NY: Free Press.

⁴⁹ Wallison, P. J. (2018). *Judicial Fortitude: The Last Chance to Rein in the Administrative State* (p. 79). Encounter Books.

However, as Liebowitz points out: “A responsible explanation of the historical record provides evidence that entrepreneurship and consumer sovereignty work as well in high-tech markets as they do in more traditional ones.”⁵⁰ The large tech companies in the United States achieved dominance through accessibility and popularity, not force or coercion. “We return to our simple truth: In the market, good products win. And we can add a corollary: When good products win, the public wins.”⁵¹

Still, some lawmakers in the United States, despite the evidence, still reject consumer-oriented economic theory and are content in ceding consumer sovereignty while advocating for the blunt instrument of antitrust law. The Microsoft trials provide an excellent example. In 1997, an amicus brief filed by a lawyer working for Microsoft’s competitors stated: “It is difficult to imagine that in an open society such as this one with multiple information services, a single company could seize sufficient control of information transmission so as to constitute a threat to the underpinnings of a free society. But such a scenario is a realistic (and perhaps probable) outcome.”⁵²

These fantastic claims were repeated by Ralph Nader at a conference Nader organized prior to the start of the Microsoft trial. The following year was filled with headlines about “Internet addiction and depression among online users.”⁵³ In 2019, these claims may sound familiar, and they are just as extraordinary today as they were more than thirty years ago.⁵⁴

To the contrary, some things are more useful when lots of people have them.⁵⁵ The earliest email adapters, the first to join Facebook, and the owner of the first cell phone probably found these products a lot more useful when others jumped on the consumer bandwagon. Advertisements enable these customers to learn of new products and services, and practically every new business in the economy. Additionally, ad revenue gives customers access to news media, television, search engines, and social media when they would otherwise be priced out.

⁵⁰ Liebowitz, S. J., & Margolis, S. E. (2001). *Winners, Losers & Microsoft: Competition and antitrust in high technology*. (1st ed., p. 4). Oakland, CA: The Independent Institute.

⁵¹ *Id.* at 8

⁵² *Id.* at 248

⁵³ Grossman, W. (2001, April). *From Anarchy to Power*. Retrieved from <https://nyupress.org/9780814731413/from-anarchy-to-power/>

⁵⁴ See, e.g., Senators Josh Hawley (R-MO) and Elizabeth Warren (D-MA).

⁵⁵ Liebowitz, S. J., & Margolis, S. E. (2001). *Winners, Losers & Microsoft: Competition and antitrust in high technology*. (1st ed., p. 5). Oakland, CA: The Independent Institute.

ADVERTISING PREDICTIONS

Privacy Regulations Will Cripple Advertising Markets

Privacy regulations such as the General Data Protection Regulation (GDPR)—or any federal baseline privacy bill that is passed in the United States—pose the greatest threat to the digital advertising industry.⁵⁶

Specifically, data protection policies such as “opt-in rules” could deter venture investments and strangle smaller companies and ad networks.⁵⁷ These effects are not merely hypothetical. For example, following the implementation of the opt-in model mandated in the EU’s Privacy and Electronic Communications Directive (2002/58/EC), online ads became 65 percent less effective.⁵⁸ This is also one of the reasons for the absence of tech startups in Europe.⁵⁹ The inability to generate online revenue forms a roadblock for the entire industry.

Strict data protection rules also diminish consumer welfare. Writing at the American Enterprise Institute several months after GDPR’s implementation, Daniel Lyons notes the effects such a rule is likely to have:

The chilling effect on digital products available to European consumers could be significant. Even if companies are not actively marketing to European residents,

⁵⁶ The following two sections appear—in part—in an earlier filing with the FTC. (Ashley Baker, *Comments Submitted to the Federal Trade Commission Regarding Hearings on Competition and Consumer Protection in the 21st Century*. 21 Dec. 2018.) https://www.ftc.gov/system/files/documents/public_comments/2018/12/ftc-2018-0098-d-0033-163368.pdf

⁵⁷ And yet, a 2016 study found that, despite most participants’ unease with an email provider using automated content analysis to provide more targeted advertisements, 65 percent of them were unwilling to pay providers any amount for a privacy-protecting alternative.⁵⁷ Such studies remind us that most consumers do not value data privacy enough to pay anything for it. Public opinion polls showing support for stronger data protections are misleading because they rarely confront consumers with the monetary and other costs of their choices. (Lior Jacob Strahilevitz and Matthew B. Kugler. “Is Privacy Policy Language Irrelevant to Consumers?” *The Journal of Legal Studies* 45, no. S2. Sept. 9, 2016. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2838449.)

⁵⁸ Alan McQuinn. “The Economics of ‘Opt-Out’ Versus ‘Opt-In’ Privacy Rules.” Information Technology and Innovation Foundation. 6 Oct. 2017, <https://itif.org/publications/2017/10/06/economics-opt-out-versus-opt-in-privacy-rules>.

⁵⁹ Mark Scott. “For Tech Start-Ups in Europe, an Oceanic Divide in Funding.” *The New York Times*. 19 January 2018. <https://www.nytimes.com/2015/02/14/technology/for-tech-start-ups-in-europe-an-oceanic-divide-in-funding.html>.

they may have European visitors interacting with their webpage, taking advantage of marketing offers, or subscribing to newsletters. If these interactions result in retention of personally identifiable information, the company is subject to the GDPR. The ease with which a company may find itself bound, coupled with the cost of compliance and potentially draconian penalties for violation, creates strong incentives for companies to withdraw -- aggressively -- from European markets.⁶⁰

A 2013 report commissioned by the U.S. Chamber of Commerce notes similar impacts that would be felt by consumers as a result of potential trade disruptions to cross-border data flows stemming from the GDPR. The report argues that the negative impact on EU gross domestic product (GDP) could reach 0.8% to -1.3%.⁶¹ It continues:

EU services exports to the United States drop by -6.7% due to loss of competitiveness. As goods exports are highly dependent on efficient provision of services (up to 30% of manufacturing input values come from services), EU manufacturing exports to the United States could decrease by up to -11%, depending on the industry. In such case, the export benefits produced by the EU-U.S. FTA are eradicated by a good margin.⁶²

The end result would be a direct negative welfare effect on four-person households of about \$1,353 per year.⁶³

Large companies can typically survive these decreases in revenue and increased compliance costs, while smaller companies may no longer be able to operate. Public debate is disproportionately focused on large companies, but the vast majority of Internet companies fall in the latter category and include the very companies that might otherwise grow to compete with and even supplant the other tech giants of today.

Accordingly, sweeping *ex ante* regulatory approaches like the GDPR and the California Consumer Privacy Act are also likely to create an artificial imbalance in the competitive ecosystem in which many firms operate. This imbalance is likely to result in anticompetitive lock-in effects for incumbent firms. Unlike their resource-lean startup

⁶⁰ Daniel Lyons, "GDPR: Privacy as Europe's tariff by other means?," American Enterprise Institute, 3 July 2018, <https://www.aei.org/publication/gdpr-privacy-as-europes-tariff-by-other-means/>.

⁶¹ Matthia Bauer, et. al., "The Economic Importance of Getting Data Protection Right: Protecting Privacy, Transmitting Data, Moving Commerce," European Centre for International Political Economy, report commissioned by the U.S. Chamber of Commerce, Mar. 2013, p. 3, https://www.uschamber.com/sites/default/files/documents/files/020508_EconomicImportance_Final_Revised_lr.pdf.

⁶² *Id.*

⁶³ *Id.*

counterparts, large companies are far better situated to devote labor costs and time to address the increased compliance costs necessitated by broad data protection mandates like the GDPR.

In other words, as privacy-based compliance costs in a given digital market increase, the level of new entrants to, and competition among firms within, that market is likely to decline:

Smaller ad networks typically lack the direct consumer relationships needed to secure consent from users on their own behalf, but may also find that media publishers and other website hosts are reluctant to ask for user consent for the broad range and volume of data that these advertisers can presently access without hindrance. Without access to the data on which they currently rely, smaller advertising networks may be simply cut out of the online market altogether unless they can find a way to gain some advantage over the platforms in compliance, user-friendliness, or rates.⁶⁴

Arguably, data privacy regulations are more likely to create a duopoly than anticompetitive practices, or the mere size of the companies we have today. The ad tech industry is still out of compliance with GDPR. Importing Europe's data protection laws would pose a formidable threat to the entire industry.

⁶⁴ Susan E. McGregor and Hugo Zylberberg, "Understanding the General Data Protection Regulation: A Primer for Global Publishers," Tow Center for Digital Journalism at Columbia University (New York, NY: Mar. 2018), pp. 37-38, <https://doi.org/10.7916/D8K08GVB>.

CONCLUSION

The recent concerns about the Internet—from antitrust to privacy to online speech—have their roots in decisions made and directions taken decades ago concerning the Internet's technical structure and the business model that supports most of the enterprises on the world wide web.

When the Internet was conceived and designed 50 years ago, the goal was to make the flow of data easy and virtually indiscriminate in both directions – that is, sending and receiving. The problems we face today arise from the successful achievement of that goal. Contrast that with television and radio, which has a one-way flow, or traditional telephony, in which only a limited amount of information flows back to the service provider.

In the 1990s, when the world wide web emerged and made the Internet a household word, people wondered how the exploding number of websites were going to convert their popularity into profitability and sustainability. The answer turned out to be, for the most part, selling advertising. It was inevitable that web sites would sell their competitive advantage – that is, access to user data – to advertisers, which provided the second necessary component for today's questions of market definition. With an open Internet architecture and a business model driven by user data, it was just a matter of time and growth until evolving market dynamic raised questions of enforcement and antitrust policy.

We'd like to reiterate that digital advertising is not a traditional, linear market. Because advertisers try to influence the online behavior of consumers through an intermediary, television and digital marketing are inexplicably intertwined, and functional distinctions have collapsed. We commend the DOJ for this workshop, which is an excellent starting point in evaluating this complex problem.

Sincerely,

Ashley Baker
Director of Public Policy
The Committee for Justice