

INTERNET SPEECH PROBLEMS – RESPONSIBILITY AND GOVERNANCE OF SOCIAL MEDIA PLATFORMS

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ABSTRACT

The rise of fake news in our overly technological era has had a snowball effect due to social media. With extremely fast sharing and spreading of data, misinformation is bound to get tangled in the Internet's feeds. With tons of information, ideas and thoughts being poured into social media platforms every second, restrictions and censorship are almost impossible to avoid. However, with free speech on the line, regulation to prevent fake news is an uphill battle. In the debate of social media regulation, it remains unclear who should assume this responsibility. This research explores the complex and delicate issues that exist for fake news regulation through private actors. Through statistics, jurisprudence and more, the authors aim to find a clear look at the implications that go into the dissolution of fake news through social media governance.

KEYWORDS: fake news, free speech, social media, first amendment.

1. INTRODUCTION

Should the Government regulate what we say on social media? There's been a long and exhausting debate about this, and still no action has been taken by the government. Social media is currently regulated in a limited way by private actors and is largely immune from government regulation. For news creators and consumers, uncertainty is a fact and changes are endless, resulting in a confusion effect. On one hand it can be a helpful tool and on the other, it can be destructive and harmful. During the past decade, social media platforms have gained fame globally. Images, videos, podcasts, texts and innovations of all kinds have been generated, which can be broadcasted and shared, this includes fake news. Certainly, social media is a vehicle for social change.

One key benefit of social media is definitely how it has enhanced access to information. Accessing news about any given topic is just a click or tap away. Typing in a word, phrase or specific question into the most used search engine, Google, automatically generates millions of options that provide the knowledge the user requested. Individuals have created a sense of trust on the Internet, to the extent that we rely on it every day for, basically, anything. A poll created by Gallup reveals that today 40% of adults in the United States say they trust the accuracy of the news and information found on the Internet. Back in 1998, that percentage was at 25%. An even more significant increase is the amount of people that use the Internet to get information and news. The poll results show a 12% for 1998, while in 2019 64% of U.S. adults use this method when seeking information (Brenan, 2019).

2. WHAT IS FAKE NEWS?

On the Internet, nothing is what it seems. With a click of a button, you can find anything online. Although this is a great tool, at the same time we risk receiving wrong information or how it's commonly known as 'fake news'. The term is defined by Cambridge Dictionary as "false stories that appear to be news, spread on the internet or using other media, usually created to influence political views or as a joke".

This phrase got even more famous after the 2016 U.S. presidential election. Donald Trump used it as a shield when media outlets ran stories that affected his image and campaign. This has created a false idea about what exactly 'fake news' is (Day and Weatherby, 2019).

The possibility that false news stories on sites such as Twitter and Facebook impacted how Americans viewed national politics subsequently drove at least one major social media site to announce that it is now employing programs to fact-check stories on its platform and will flag those that do not meet certain press standards with warnings about their accuracy (VanLandingham, 2017, p. 12).

Digital platforms have created a whole new reading practice that has changed the processes by which people often interpret news and informational articles. A lot of the information we find online is not reliable, and although we may believe its true, many times it's not. "Truthful information can be difficult to ascertain but can most likely be found on the majority of national and local news profiles. Major news publications have the burden to ensure the information they release is truthful and accurate" (Riddle, 2017). Doing the contrary, they might place themselves in a legal conflict, most likely to be defamation claims (Walters, 2018). This is why there is a need to identify the digital expression required to address the challenges caused by "fake news".

A poll conducted by Monmouth University reported that three out of four Americans believe that the media routinely report fake news, while a Gallup/Knight Foundation study found that 42 percent of Republicans consider any news stories that cast a political group or politician in a negative light to be fake news (Kirtley, n. d., para. 5)

A study from the Pew Research Center, states that Americans rate fake news as a problem bigger than racism, climate change, or terrorism and they blame political leaders for this. But they believe that journalists should be the ones fixing this problem (Mitchell, et. al, 2019). It seems that news sources in the United States have become subjected to a "Trump filter" that categorizes their credibility and journalistic skills into pro-Trump and anti-Trump.

In April 2018, more than 170 television stations owned by conservative-leaning Sinclair Broadcast Group were ordered to use local anchors to produce a scripted "must-run" commentary decrying fake news. Responding to criticism from others in the industry that the segment was itself fake news intended to deceive viewers, Trump tweeted that "The Fake News Networks, those that knowingly have a sick and biased AGENDA, are worried about the competition and quality of Sinclair Broadcast." (Kirtley, b, para. 6)

This constant labeling of the press by a political leader could lead to major repercussions like the total downfall of journalists, news and media channels. Not to mention, the President's behavior

towards the nation's press is viewed throughout the entire world. "Trump's words provide authoritarian leaders in countries such as Kenya, Venezuela, and the Philippines the ammunition to suppress opposition media, even as they spread fake video clips and stories through paid commentators and bots." (Kirtley, c, para. 8).

Government can control and manipulate the flow of information about itself and its actors, so any determination of truth or falsity that fails to recognize the fundamental and coextensive right of the citizen to criticize without fear of sanctions or retribution—what Justice Brennan called "the central meaning of the First Amendment"—is flawed. A free and independent press, not a single leader or a government-run "Truth Tribunal," is the best means to ensure an informed citizenry, and to hold institutions and individuals to account. And that's not fake news. (Kirtley, d, para. 27).

2.1. The Problem with Fake News

The real problem behind fake news is not the amount of fake stories online, in fact the number of fake news stories is a small one. The actual severity of the problem is that these fake news stories reach more people than the real and factual stories. This causes people to abruptly act on misinformation, which translates into shares, likes and comments.

In the ten months leading up to the 2016 presidential election, the top twenty fake news stories on Facebook had over nine million comments, reactions, and shares whereas articles from mainstream media saw a decline in comments, reactions and shares from 12 million to 7.3 million --fake news was shared more than real news. This sharing was not limited to average Facebook users. Television news hosts reported fake news stories, and then-President-elect Trump and his son shared other fake news stories on social media (Savino, 2017, p. 1101).

Parallel trends were seen on Twitter. In a research, the dissemination of true and fake news was verified on Twitter between 2006-2017. About 126,000 "tweets" were shared by 3 million people more than 4.5 million times. The findings included that "fake news" are more novel and inspired emotion of fear, disgust and surprise. "Falsehood diffused significantly farther, faster, deeper, and more broadly than the truth in all categories of information, and the effects were more pronounced for false political news than for false news about terrorism, natural disasters, science, urban legends, or financial information" (Vosoughi, et. al, 2018).

These stories were shared and spread more than stories in the top news channels and pages, thus the phrase 'fake news' is often connected with digital platforms.

Regardless of what 'fake news' actually means, it is typically tied up with anxieties about the democratic ramifications of the shift from consuming news from broadcast television and newspapers to consuming news on social platforms ... Thus, platforms including Facebook and Twitter have been heavily criticized for their role in spreading, facilitating, and even encouraging 'fake news' (Marwick, 2018, p. 476).

Search engines and social media give access to a worldwide audience and they give news creators access to extensive audiences. Therefore, consumers acquire an unlimited range of content on digital platforms and can also become producers, allowing them to express

themselves. However, the harms can also be significant. This new era has crashed the pre-digital business model for news producers.

Between 2011 and 2015, Australian newspaper and magazine publishers lost \$1.5 billion and \$349 million respectively in print advertising revenue, while gaining only \$54 million and \$44 million in digital (as noted by this inquiry's Issues Paper). By 2016, three quarters of the total Australian online advertising spend went to Google and Facebook. And since the US presidential election of 2016, the issue of fake news – and the ongoing dismissal by some public figures of unsympathetic coverage as 'fake news' – continues to challenge the credibility of journalism and news media (2018a, b).

These related platforms through which "fake news" can be disseminated have changed the reading practices of individuals. Nowadays, individuals are less likely to obtain news and information directly from news sources, instead they rely more in social media. "78% of users see news when they are using Facebook for other reasons. While only 34% of users subscribe to a news media source on social media" (Matsa and Mitchell, 2014).

Our legal system has remedies to manage other types of false statement claims against individuals. In libel or defamation claims there's an individual affected by the statement made about him/her by another individual or legal person. "The trouble with fighting back against fake news is it's hard to know who you're fighting against" (Gillin, 2020). Jayne Clemens, Senior Associate at Michel mores and Jacob Dean, Barrister at 5RB Chambers, explain the difference:

Fake news and libelous material are both false. In the case of libelous publications, a complainant can sue for damages if they're able to demonstrate how the published material has caused, or is likely to cause, them serious harm. Fake news may well cause no harm at all, particularly if no one believes it. In short: libel is fake news, but fake news is not necessarily libelous (Clemens and Dean, 2019).

Another type of remedy provided for falsehood claims is intentional infliction of emotional distress (IIED). This "is a common law tort that is regularly alleged against fake news publishers under state law." (Klein and Wueller, 2019). IIED takes place when one person's intentional extreme behavior of one person provokes another individual's severe emotional distress. But, IIED claims require a stricter analysis of the statements. In order for a claim to proceed, these statements must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." (Klein, 2019a, b).

However, fake news poses an even bigger problem. How do we differentiate fake news from opinions? In this technological era, stories are shared thousands of times within seconds. "Libel suits are intended to provide compensation to those whose reputations have been harmed as a result of false statements made with actual malice." (Kirtley, d). But when it comes to fake news, how do we prove an actual damage or harm?

3. WHAT THE U.S. JUSTICE SYSTEM SAYS

Courts have seen a variety of claims regarding defamation, libel and other falsehood-related issues. "In the United States, truth is an absolute defense to libel and slander claims. Likewise,

pursuant to First Amendment free speech protections, each defamation plaintiff must prove that defamatory statements were published with the requisite intent, which varies depending on the plaintiff's level of public prominence." (Klein, 2019a, b, c).

In *New York Times v. Sullivan* (1964), the Supreme Court faced for the first time "the extent to which the constitutional protections for speech and press limit a State's power to award damages in a libel action brought by a public official against critics of his official conduct." Then concluded that "[t]he Constitution accords citizens and press an unconditional freedom to criticize official conduct" (*New York Times co. v. Sullivan*, 1964). The Court also made clear an exception through which a public official can prevail if he/she proves that the statement was made with actual malice. This does not apply to private individuals.

A few years later, in *F.C.C. v. Pacifica Foundation* (1978), the Court held that:

The fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection. For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas.

In *Snyder v. Phelps*, the Supreme Court faced whether First Amendment protect protesters at a funeral from liability for intentionally inflicting emotional distress on the family of the deceased. Justice Samuel Alito argued: "[o]ur profound national commitment to free and open debate is not a license for the vicious verbal assault that occurred in this case." (*Snyder v. Phelps*, 2011)

In a 2012 Supreme Court case, *United States v. Alvarez* (2012), the federal Stolen Valor Act of 2005 was invalidated. This statute criminalized false representation by individuals as having military awards. The Court held that interest in truthful speech was not sufficient to sustain the criminal statute.

Some legal scholars describe the Alvarez ruling as delineating a "constitutional right to lie." While the FTC and Attorneys General have broad discretion to aggressively pursue unfair and deceptive trade practices claims against fake news publishers, defendants in other cases have had increasing success in raising First Amendment defenses to criminal and regulatory claims involving restrictions on false speech (*United States v. Alvarez*, 2012).

However, U.S. courts have not yet decided which standard applies when talking about 'serious intent' online. There is one less strict standard were courts "require the government to prove only that the defendant knowingly made a statement that 'was not the result of mistake, duress, or coercion' and that a 'reasonable person' would regard as threatening." (Larking and Richardson 2014). And another, which is stricter, were "courts analyze whether the speaker knew his speech was likely to be perceived by a reasonable person as threatening and was intended to be threatening." (Williams 2019).

In a recent high-profile case, an actual photo-graph of Anas Modamani (a Syrian refugee living in Germany) taking a selfie with German Chancellor Angela Merkel was transformed into a fake news publication. Mr. Modamani's selfie photo was placed alongside photos of three other men, with the German headline "Homeless Man Set Afloat in Berlin. Merkel Took a Selfie with One of the Perpetrators." After the false image

began circulating on Facebook, Mr. Modamani sought an injunction from a German court that would have required Facebook to block its reproduction and circulation. On March 7, 2017, the court denied the injunction, ruling that Facebook had not manipulated the content itself and, therefore, could not be held legally responsible (Klein, 2019).

4. FAKE NEWS REGULATION: WHAT'S BEING DONE

The Internet has grown and evolved to be such a powerful tool that the need for some type of control or limit is logical. The amount of information accessible through search engines is unimaginable. Just as stated in previous sections, there are endless possibilities when it comes to navigating the web. Or are there?

4.1. Private Response: Social Media Giants' Role

Private companies have gained enormous amount of power and control. So much, that you may even label it as censoring. For example, "[t]he policies of Google, a company that has emerged in recent years as the clear leader among Internet search engines and is responsible for an enormous share of the nation's access to content online, represent a glaring example of corporate abuse of regulatory power." (Dickerson, 2009)

In recent weeks, social media platforms like Facebook, Twitter, and YouTube have banned hate groups and controversial figures such as Louis Farrakhan of the Nation of Islam, Alex Jones of Infowars, and others. This resulted in a chorus of criticism from politicians (across the ideological spectrum), pundits, and the general public. The Trump administration even launched a website to allow users who have been suspended or banned from social media platforms to voice their complaints about political bias. But do social media sites have a legal obligation to allow equal access to all viewpoints? Do they violate the First Amendment if they exclude controversial speakers from their platform? Should the government step in to take corrective action? The answer to all these questions is a resounding no. The First Amendment applies to government actors. It means the government cannot punish you for speech it disapproves of. But social media platforms are private companies. Whether privately run platforms should censor speech is a separate issue ripe for debate. But there should be no debate as to whether the First Amendment bars Facebook, Twitter, or YouTube from restricting speech: No government, no First Amendment claim. (Ortner 2019)

In recent years, we've seen social media company executives like Mark Zuckerberg, be challenged in different aspects, but always regarding the policies of the platform. Quite possibly, creators of what have become a communication staple did not see this coming during the first stages. But, since these platforms have come to replace public squares, additional control and regulation is necessary.

With public controversy over so-called "fake news" and hate speech swirling around them, leading internet companies are now being forced to confront their roles in the digital ecosystem: at birth, these companies were simply technology platforms; over the

years, they have grown into brokers of content and truth on a global scale. (Open Mic 2017)

According to technologist and codirector of the Civic Signals project at the National Conference on Citizenship, Eli Pariser, social media platforms are quite similar to actual physical spaces. He uses a comparison between LinkedIn and Twitter to highlight the importance of structure and rules of these spaces. Pariser states that on LinkedIn, users will only see appropriate and professional content. Whereas on Twitter, it's the total opposite. (Pariser, n.d.). Through this perspective, social media platforms create the norms for users to follow. In this way, they can control what's expected of the users and consequently, what will develop as the platform's culture.

Another platform that has taken action to fight fake news is Snapchat. Since 2017, it "requires publications to fact-check articles for accuracy, not publish misleading or deceptive links, and not impersonate or claim to be a person or organization with the intention to confuse or misleads others." (Mejia, 2017).

4.2. Relevant Statutes

In order to regulate cyberspace, the United States has implemented different laws regarding the Internet. Among them are the following statutes: (1) Communications Decency Act of 1996 (CDA), (2) Child Online Protection Act (COPA), (3) Electronic Communications Privacy Act (ECPA), (4) Computer Fraud And Abuse Act (CFAA), and (5) Cyber Intelligence Sharing And Protection Act (CISPA).

On the other hand, Singapore has created legislation specifically against fake news. This law came into effect in October and "provides for prosecutions of individuals, who can face fines of up to 50,000 SGD (over \$36,000), and, or, up to five years in prison." (Griffiths, 2019) It also provides sanctions of up to 1 million SGD or approximately \$735,000 for companies who are found guilty of publishing fake news. However, concerns have arisen due to the possible effect on free speech.

Other countries who have taken a step towards the regulation of fake news are Russia, France and Germany. Although these governments claim the need to avoid the dissemination of misinformation, human rights advocates fear that the purpose of the legislation is to suppress political oppositions. (Ungku, 2019).

4.3. Freedom of Speech

Freedom of speech is a right guaranteed by the U.S. Constitution. In its First Amendment, it states that "[c]ongress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Courts in the United States have seen a great amount of cases arguing the extent of this constitutional right. "Ruling unanimously in *Reno v. ACLU*, the Court declared the Internet to be a free speech zone, deserving of at least as much First Amendment protection as that afforded to books, newspapers and magazines." (ACLU, n.d.) Through innumerable cases regarding

different types falsehood and/or tort claims, the “Court finds speech unprotected only when it does not contribute to the exchange of ideas as evidenced by external indicia of harm resulting from speech or from actions that are independently harmful, such as threats or lies.”(Wells, 2010)

Although citizens have a constitutional right to speak and express themselves, this right is not unlimited. There’s a fine line when it comes to falsehood claims and freedom of speech. In *United States v. Alvarez*, the Court expressed that “[t]he threat of criminal prosecution for making a false statement can inhibit the speaker from making true statements, thereby “chilling” a kind of speech that lies at the First Amendment's heart.”

Nowadays, whenever a person feels like sharing, questioning or criticizing a particular topic, he or she can tap, type or upload to social media. "Many of the potential uses of social media go hand-in-hand with the freedoms that the Supreme Court has made clear are at the core of the First Amendment's protection." (Hitz, n.d.)

5. CONCLUSION

Articles found via social media can lead the reader to misinterpret the context, structure, style and voice of the news. Due to the popularity of social networks, the discovery of information is being transformed from an individual to a social endeavor where normally users are not objective while using these platforms. (Nikolov, et. al.) This will completely change the way people interact with the articles, and how they will discover information and news. Recent examples of “fake news” show the openness and disposition of the user with whether they can be manipulated by others or not, being directly proportional.

Educating the public about the harms of fake news is not enough to eradicate its effect. Regulating speech on social media is a difficult and delicate task for the United States government. Since Free Speech is guaranteed by the First Amendment, it forces the government to be extra cautious when regulating such areas.

Ultimately, no algorithm alone can stop a moving target like fake news, which succeeds because it seeks to blend in like a chameleon with legitimate news stories. However, people and technology working together in creative ways can help limit the impact of fake news. The CDA silently allows all these methods to develop in a natural manner without a constant threat of litigation. (Walters, 2018).

No algorithm can actually stop “fake news” because it is perfectly suited to the fragmented news scenery, where “clickbait” has been linked to the rapid spread of misinformation online. (Chen, and Rubin, 2018). In an effort to avoid tainting the constitutional rights of citizens, it is necessary for the private sector to take hold of this much needed regulation. Since technology alone will not suffice, human intervention is essential for an effective system to work. Social media platforms need to reevaluate their algorithms based on certain shared characteristics that establish what could potentially be a “fake news” story. The algorithms could have a source fact-checking tool to track its origin and thus, flag questionable pieces. (Baron and Crootof, 2017).

Occasionally, something shared by friends on social media can be taken for granted and obtain validity, although it can be a “fake news” story. In order for citizens to distinguish factual news sources from fake news, an accreditation system should be created for these platforms. A

professional organization should be established for the creation of codes of conduct on the Internet. This organization would grant accreditation to the different news sources. Based on this system, accredited news sources would then be held liable if their content is proven to be fake news. Social media platforms can create a sanction system when the accredited sources are flagged as fake news.

A similar approach has been suggested for implementation in Argentina. The legislation would create a commission for the verification of fake news in order to prevent false information spreading during national election campaigns.” In order to identify false information, the Commission for the Verification of Fake News would verify the content by comparing it with user comments, checking complaints about the data, and reviewing excessive viralization, among other evidence. (Rodríguez-Ferrand, 2019).

When creating this regulation, the First Amendment rights of citizens should be upheld while controlling the excess of falsehood. It will not become a means of silencing people, but a measure of regulating what is fake and what is true. As social media companies take hold of the regulation, users should become more aware of the type of information they’re receiving on a daily basis. This type of control can become a steppingstone in the development of fake news regulation.

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