

Fraud Or Fact: Should Speech Be Regulated In Social Media?

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Introduction

“...It’s about morality and social conscience, it’s about standing up for what’s right versus moral laziness, it’s about courage versus cowardice.”¹

The first amendment is the basis of many debates, struggles, and discussion within our everyday life. The concept of our basic freedoms even though specific, tend to be taken in a vague manner allowing for various interpretations from varying perspectives, all of which, lead to the constant debate of our basic rights. Freedom of religion, speech, assembly and to petition the government, construct the basic structure of the first amendment.² These rights are guaranteed against the excesses of the government, but what is the extent to which these rights are expressed in current domestic policy?

There are exceptions to every rule, loopholes to every method, and limits to every freedom. The first amendment is no stranger to this. The laws of the United States are designed to protect the safety of the people, albeit limiting the freedoms that were given to us. The rights entrusted to the people are broad but not unlimited. Yet, the advancement of society and its more modern school of thought requires innovative methods in order to uphold the rights the justice system claims to protect. With the rise of social media, the internet, and technology, our consumption of technology has affected our personal lives, from the way we operate our business that support our livelihood, to our main stream form of communication, which brings us to the issue at hand. With social media becoming our primary source of information, should freedom of speech and expression include the protection against purposeful dishonesty and deceit for online publishing?

Fraudulent news stories are a current issue, recently noticed by the growing

¹ Arun D. Ellis, *Daydream Believers Corpulism II*, Amazon Publishers (2014).

² U.S. Const. Amendment I.

number of fake stories exposed by the press. Due to the exploitation and growing problem with fake news, Google was the first to take a stand against the websites with deceptive news stories. Facebook followed, by banning the advertisement from these websites on the Facebook page. However, legal stops have not been yet created for false news outlets. Because of the great population and ease of online publication, it is not just journalist who will be publishing stories online, but anyone with a will and access can publish a piece to be taken as a news story. This ease of access is what brings the problem of created stories being published as real news stories online to our public awareness.

Fabricated stories are not just a problem online, but also on popular news channels. In 2000, in the case of *New World Communications of Tampa, Inc. v. Jane Akre*,³ a Tampa Bay Fox affiliate faced charges for wrongful termination of two employees who had refused to publish a story they knew to be fake. The principal issue at hand occurs when a story might be tainted with false information yet appear and claim to be realistic. These fake news stories are where the main problem lies and whether the protections given under the First Amendment's protected speech regulations should be allowed.

This raises the ultimate question: how far does the protection go? As far as the law is concerned, this protection is limited up to the point that does harm to the public. An example is defamation, or libel. Per the law, this is a part of unprotected speech under the first amendment for it is harmful to the character of the victim. Yet, fabricated news are protected under the first amendment, although they might be harming people's reputations with the stories they say are true. However, as the case above suggests, should it not be considered a contradiction of our laws and fundamentally, a detriment to the primary goal of protecting the people?

The Canon of Journalism

We can begin by looking at what the public would believe and expect to be true. Like any other profession, journalists are guided by ethical standards that

³ *New World Communications of Tampa, Inc. v. Akre*, 866 So. 2d 1231 (Fla. Dist. Ct. App. 2003), as clarified on reh'g (Feb. 25, 2004).

must be followed, otherwise, consequences can be expected. As for journalists, the code of ethics, otherwise known as the canons of journalism, is the guideline for which they should aspire to follow. It is comprised of six codes: responsibility to the public welfare, freedom of the press is to be guarded, independence from all obligations that might affect truth bearing to the people, sincerity by being truthful and accurate, impartiality to be free from any bias and fair play to not publish accusations that will harm moral character without the chance of the accused being heard.⁴

According to the Society of Professional Journalism, the main focus of journalists is to “seek truth and report it.”⁵ The accuracy of their work is essential. It must be verified and great care should be taken in ensuring that information is not misrepresented. Sources need to be presented clearly and biases must be vetted. Throughout a developing story’s progression, journalists should make sure that updates and corrections are made promptly. Furthermore, part of the responsibilities of journalists is to give “voice to the voiceless.” Journalists must be guardians of the press and wary of government interference in order to present the truth to the people. They must never distort information, including reenactments and visual aids. The journalistic community is dependent on clarity, fairness and transparency. To expose others who might be acting unethically in journalism, even within their own organizations is part of their code of ethics. Journalists should take responsibility for their work and the information they provide. They must remember the gravity of their work and ensure that it is of the highest quality.

By analyzing the journalists’ code of ethics, it is obvious that the reporting of truthful stories is where the main objective lies. Despite the truth being expected professionally as well as publicly, the truth is not what usually will help a journalist’s career. Many journalists, although they may tell the truth and report stories accurately, cannot find the ‘big story’ that will help boost their career. One impactful story could be the stepping stone of their career

⁴ *Code of Ethics or Canons of Journalism* (1923), Ethics code collection (2011), <http://ethics.iit.edu/ecodes/nodes/4457> (last visited Feb 6, 2017).

⁵ *SPJ Code of Ethics*, Society of Professional Journalists, Improving and protecting journalism since 1909, Spj.org (2017), <http://www.spj.org/ethicscode.asp>, (last visited Jan 30, 2017).

and journalists always seek the career changing story that will bring them fame.

Nevertheless, with events that happen on an everyday basis, people are no longer interested in the mundane stories of everyday lives. The public continues to search for more and more extraordinary stories. It causes writers to exaggerate the stories and truth into more interesting forms in order to gain attention and a reoccurring audience.

As for the journalists who choose to take such actions, exaggerating stories and distorting the truth, protection is given by the first amendment and the freedom of expression. The freedom of expression ensures that the public is permitted to represent their ideas and opinions without interference from the government. The topic or essence of the literature is to not be intercepted no matter how wrong it may be. Unfortunately for the masses, it does not protect them against false media and print.

Precedence supporting fake news may have been established in the *New World Communications of Tampa Inc. v. Jane Akre*.⁶ The case involved two employees who were fired for their refusal to run a story they knew to be false. However, Fox News still wanted to publicize the story, ultimately leading to the termination of the employees who threatened to go to the FCC. The employees' claim was based on the whistleblower law which allowed them to sue for wrongful termination. Fox fought to prove that the whistleblower laws did not apply, since they did not break any laws, due to the fact that the employees were not reporting anything of importance that could be protected.⁷ The court decided that Fox News' actions were protected under the First Amendment rights stated in the Constitution. The FCC policy against falsification was considered a policy only, not a law, rule or regulation.

⁶ *New World Communications Of Tampa, Inc., d/b/a WTVT-TV, Appellant, v. Jane AKRE*, Appellee, No. 2D01-529 Dist. Ct. Of Appeals of Fla, 2nd District, February 14, 2003, <http://caselaw.findlaw.com/fl-district-court-of-appeal/1310807.html>, (last visited April 10, 2017.).

⁷ Jane Akre and Steve Wilson, *Modern Media's Environmental Coverage: What We Don't Know Can Hurt Us*, 33 Boston College Environmental Affairs Law Review 551 (2006), <http://lawdigitalcommons.bc.edu/ealr/vol33/iss3/4/>, (last visited April 10, 2017).

Despite the outcome of the appeal, the core dilemma that brought this case all the way to the Supreme Court was the question of the First Amendment rights when publishing inaccurate information in their news station.⁸

However, the public was still not satisfied that although what they were doing what was classified as constitutionally legal, it seemed completely immoral and wrong. It was found that exaggerating the truth or even making up parts of a story did not fall into the illegal categories of the freedom of speech within journalistic parameters.

Publisher v. Distributor

Based on common law, a publisher is liable for any defamatory statement that may have been created by another journalist. However, distributors are not liable for materials they distribute however defamatory they may be. With the beginning of the internet boom, courts were faced with a new structure to deal with and the distribution of liability as well. In a 1991 case, *Cubby, Inc. v. CompuServe, Inc.*,⁹ the company provided their subscribers with access to 150 forums run by third party members. One of the forums was Cameron Communications which focused on the journalism industry and promised to control content, "in accordance with editorial and technical standards and conventions of style as established by CompuServe."¹⁰ CompuServe only provided the access to the forum but had no filters established for the documents the forum presented. Therefore, the court identified CompuServe as a distributor rather than publisher and dismissed their liability.

However, in the 1995 case of *Stratton Oakmont, Inc. v. Prodigy Services Co.*,¹¹ an unknown user posted comments on the Prodigy Services Co. bulletin board claiming criminal activity by Stratton Oakmont and its president. Stratton Oakton brought suit against Prodigy Services Co. for defamation. Similarly to CompuServe, Prodigy Services Co. was a forum that

⁸ *Fox News wins in court*, Daily Kos (2007),

<http://www.dailykos.com/story/2007/7/31/364678/>- (last visited Jan 24, 2017).

⁹ 776 F. Supp. 135 (S.D.N.Y. 1991).

¹⁰ *Id.*

¹¹ 1995 WL 323710 (N.Y. Sup. Ct. 1995).

allowed third parties to publish documents on the site. The sole difference between the sites was the set of guidelines and screenings that the site had established in order to avoid offensive and defamatory material. Due to the site's attempts at restricting illegal documents, the court ruled the site to be considered a publisher rather than a distributor. The end result consequently led to the belief that any effort to try to restrict material faced a higher risk of liability than they would have if they had not tried at all.¹²

Following the outcome of both these cases, the courts agreed that a system needed to be in place in order to deal with this new issue that emerged as a result of the new technology. The Communications Decency Act¹³ was established in 1996 to prevent further issues with the conflicting realities and values emerging as a result of a new technology. The Act declared that “no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”¹⁴ The interactive computer service was defined as any information service, system or access software provider that provides access by multiple users. The establishment of the Computer Decency Act of 1996 allowed internet publishers to be treated differently from publishers in print, television and radio when it comes to liability issues. However, this did not immunize the actual creator of the defamatory document from liability when using the online service, which is a conclusion widely ignored by the public.

Democracy and the Real Freedom to Choose

With the new era of social media, information is sought after within online postings rather than the original form of news sources such as newspapers and television. Due to the ease of online postings and paired with the feeble enforcement of violations within the internet, fake news stories have become a growing trend that is affecting the entire world. According to a recent survey

¹² *Immunity for Online Publishers Under the Communications Decency Act*, Digital Media Law Project, Dmlp.org (2017), <http://www.dmlp.org/legal-guide/immunity-online-publishers-under-communications-decency-act> (last visited Feb 6, 2017).

¹³ § 230. Protection for private blocking and screening of offensive material, 47 U.S.C.A. § 230 (West) 1996.

¹⁴ *Id.*

by Buzz Feed, it has been found that fake news stories are becoming more popular than real ones.¹⁵

During the past election, a significant amount of fake news stories were published about the candidates and other influential persons. Fake clickbait headlines hooked more users more often than real stories did. The investigation compared fake news hoax sites and hyper-partisan blogs to legitimate news articles from nineteen major news outlets. News title such as “WikiLeaks confirms Hillary sold weapons to ISIS” or “Hillary is disqualified from holding any Federal office” and “Pope Francis shocks the world, endorses Donald Trump for president,” were examples of fake news stories that were purposely created to fool the people into swaying opinions about the candidates.¹⁶

In a CBS news story, their research revealed that of the top twenty fake news stories, all but three were Pro-Trump or Anti-Clinton and those stories were selected more than 8.7 million times. On the other hand, of the top twenty real news stories, pros and cons of each candidate were found but were selected by readers less than 7.4 million times. There was a difference of at least 1.3 million readers that was recorded between the popularity of fake news stories and real news stories.¹⁷

The greatest trouble about the numerous fake stories found was they were all capable of swaying the public’s opinion and perceptions about the candidates thus significantly changing the course of the campaign and presidential race. Stories that taint the reputation of the candidates or even lead the people to believe that a person might be engaged in illegal activities or even disqualified from the race, are headliners that can truly affect the perception of reality for

¹⁵ Craig Silverman and Jeremy Singer-Vine, *Most Americans Who See Fake News Believe It, New Survey Says*, BuzzFeedNews, Dec. 16, 2016, https://www.buzzfeed.com/craigsilverman/fake-news-survey?utm_term=.gx3q7MM33#.jg3nABBPP, (last visited April 10, 2017).

¹⁶ Id.

¹⁷ *Probe reveals stunning stats about fake election headlines on Facebook*, CBSnews.com (Nov. 17 2017), <http://www.cbsnews.com/news/facebook-fake-election-news-more-popular-than-real-news-buzzfeed-investigation/> (last visited Jan 30, 2017).

the public therefore taking away any real chance of choosing a candidate since the people are misinformed. Being compelled and tricked into choosing a candidate versus being correctly informed and choosing a candidate after predetermined consideration are two entirely different systems. By being misinformed, it is not just unethical and unjust, but since media outlets are trusted to inform us of the truth, by intentionally lying to us, they are trying to control us and deny our right to choose and vote soberly. Although this is not the only example in which fake news can affect the public, it is the most recent example of the influence that this new trend can have.

Facebook and Google were both under fire for the widely-shared news stories that spread false information about the candidates. Google established a new policy in which they would withhold lucrative digital ads from appearing on any sites that “misinterpret, misstate or conceal information.” One example was the top search results for the phrases “final election results” or “who won the popular vote,” which directed all to a fake news blog named “70news” that falsely claimed Trump won the popular vote by over 700,000 votes. Google’s new policy of withholding these ads gives news and information sites greater incentives to avoid false headlines or risk losing revenue by not having their pages banned from being advertised.¹⁸

In a CBS survey, sixty-six percent of Facebook users get their news from Facebook stories and forty-four percent of Americans read or watch news solely on Facebook. Yet during an interview, Mark Zuckerberg, CEO of Facebook, was intent on denying the idea of the fake news being able to affect the public opinion. Still, a few weeks later, it was confirmed that Facebook followed Google’s example in keeping advertising dollars away from fake news sites. The only loophole found for these sites is the audience network policy, which does not take part in the ban, therefore shared content on a person’s own news feed is not covered and permitted to be advertised.

¹⁸ *Facebook, Google announce new policies to fight fake news*, CBSnews.com (2017), <http://www.cbsnews.com/news/facebook-google-try-to-fight-fake-news/> (last visited Feb 7, 2017).

Human Rights v. Ethics

The main problem the public and the legal system faces is whether fake news that appears to be real should be protected under the First Amendment. Ethically, the public believes the answer to be no, yet legally under the commercial speech protections, the answer tends to be yes. Fake news has been present for longer than most of us realize, but it was only recently that the problem has risen to this magnitude.

As of yet, no international court has considered the legitimacy of news provisions under international law. A statement by the United Nation concerned with the human rights make it clear that false news provisions are inconsistent with the guarantee of freedom of expression especially if the allegations of false news are pursued under criminal law. Establishing a law only to prohibit the dissemination of false news creates the threat of public unrest. In 2000, UN Special Rapporteur held a press conference denouncing laws that result in imprisonment solely based on false news provisions. For example, a case might arise in which a journalist reports a developing story. The originally stated facts are later proved to be untrue, hence creating a false information allegation. In a case like this, prison terms for publishing or broadcasting false information is overbroad and in some cases, both reprehensible and out of proportion.

Moreover, according to Article 19, a charity registered in England and Wales, writing the goal into law may present unacceptable dangers.¹⁹ Examples from this organization include the effect on rapidly developing stories, telling the difference between facts and opinions, recognizing what the truth is on a particular matter and the potential for abuse. The fundamental point that the author was attempting to make was that in situations where the journalist cannot assure the public that the story is completely valid, it is not just for a person to be persecuted for those actions. The journalist may have the best intentions in providing a story that is up to date and current and in that process, fact-checking may be skipped or even unavailable. The dangers

¹⁹ *False news*, Article 19 (a 2017 Registered charity number 327421 (registered in England and Wales), <https://www.article19.org/pages/en/false-news.html>, (last visited Feb 2, 2017).

presented above should be considered when deciding whether or not to make the publication of fake news criminally actionable.

The dangers presented result in the journalists being victims. Many times, the mistakes are made by good people trying to do their best job and in the process they get caught up in the legal nonsense and end up culpable for no good reason. Imprisoning journalists for mistaken reporting presents as a true human rights violation and an extreme argument for not prosecuting mistaken reporting. The argument that is not truly being considered is the side of a journalist who takes advantage of the freedoms given, the side that involves malice, which can truly make a person culpable for their action. Similarly to a criminal case, in order to avoid a human rights violation, a requirement of intent or motive must be present in order to be guilty of a crime when false information is involved.

As the organization, Article 19, suggests, false news does not meet the requirements needed under the limitations placed on the freedom of expressions. The first part of the limitations under consideration by the U.N. Human Rights Commission requires that it must be provided by law in sufficient clear terms to make it foreseeable as to whether or not statements are permissible.²⁰ The necessity for these statements to be specific makes it impossible for a law to be written that will predict false news that should be negated. This is a great challenge that must be overcome before writing the goal into law.

Of concern also, is the law that protects internet publishing sites by the Communication Decency Act of 1996 because it is outdated and requires change. We cannot allow for the use of the internet to continue harming others due to fear of liability. As a government created for the people, we must seek to protect the public in every manner possible. Changes to be made include revising laws that, although they may have functioned properly in the past, are currently failing to support the welfare of the public.

²⁰ *Limitations*, Article 19, (2017), <https://www.article19.org/pages/en/limitations.html> (last visited Feb 2, 2017).

Conclusion

Although ethically journalists should strive to be truthful at every turn, with the reality of our constantly changing world, innovative laws need to be created to keep up with the contemporary issues. A re-occurring problem within the online publishing community is the growth of fraudulent stories written and published online. Deceptive stories made a significant impact during the recent political election, thereby demonstrating the true power the press holds in swaying public opinion. Millions of people get their information through social media sources, which can be tainted by unprofessionalism.

It was previously tested and proven through court cases, that the protection of free speech was guaranteed even for false stories created by the press. The case involving Fox News was a clear example of the abuse permitted by the law. Ethically, this is a standard that must be revised for it affects the public and the expectations and the trust we place in the media.

Understandably, there are many opposing the writing of these goals into laws. Extremists' views and results are depicted demonstrating the worst possible outcome as the only possible consequence to this law being enacted.

In order to avoid this grave miscarriage of justice, a motive behind the action should be investigated and incorporated into the contemporary legal design against fabricated news accounts. Taking this action will allow for mistakes to be avoided in the future and innocent people to not be affected and unjustly criminalized for a misunderstanding or error. Laws need to be updated in order to stay current, thus a change in limitations for freedom of expression and the protections within the Communication Decency Act are overdue.

With the rise of technology and communication via social media, we have grown to seek and depend on sites such as Facebook to obtain our daily news information. Protected by the first amendment, publishers allow the creation of fraudulent news stories that are published all over sites to gain attention or mislead readers. A goal to end this ethical violation, faces various challenges when considered being acted upon and written into law. However, if we take special consideration and write the law carefully, we should be able to find a way in which we are capable of stopping this unethical allowance while making sure innocent people do not suffer a harsh injustice.

Since the establishment of the U.S. Constitution, our country has been successful in providing a legal system that successfully strives to act to protect the people from any injustices that may have been created. Although change has been slow to occur, with the rapid advancement of technology and lifestyle changes that come with it, we are currently being pushed to update our lives to match the newest technologies. There are no excuses or loopholes for resisting change. In order to advance, adaptation is necessary. It is also true that in order to protect our way of life, the law must also adapt