

Fake News Flooding the Internet - Behavioral Remedies in the Public Interest

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I. Introduction

Who causes the problem?

- The politicians that create fake news?
- The public media that disseminate them?
- The people that believe in them?

My focus: Social media!

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II. Legal remedies to a political problem?

1. The concept of „fake news“

a) *News, not offensive communication*

- not: defamation, hate speech etc.

b) *News = statements of facts, not opinions*

- „fake news“ = contradiction in terms; distinction from opinion =?

c) *All or only qualified „fake“ news?*

(i) Subjective elements? (ii) broad (filtering) concept; (iii) shifting facts!

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II. Legal remedies to a political problem?

2. Fake news since ever

a) *The press*

(i) The origin of the fake news phenomenon

- From legends to fact (l'âge de la lumière/raison); printed books
- The press: G. de Nerval (1808 – 1855): Histoire véridique du canard
H. de Balzac: Monographie de la Presse Parisienne 1842, p. 64 et seq.
(sur le canard), p- 209:
„Pour le journaliste, tout ce qui est probable est vrai.“!
p. 44 et seq.:The press is not printing what it thinks of public affairs,
but what the reader expects it to print, and the reader expects what
he/she thinks.

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II. Legal remedies to a political problem?

2. Fake news since ever

a) *The press*

(ii) The press as a bench mark?

- All the press or only the premium press?

An abstract and „elitist“ benchmark?

b) *The social media of the Internet*: A particular potential for harm?

(i) Enhanced dissemination: high speed, easy access, large reach

(ii) Personalized („user-friendly“) service: preselection pursuant to user preferences, filtering effect

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b) *The social media of the Internet*: A particular potential for harm?

(iii) Affiliation potential

- Networks, information bubble, self-referential, re-assertive instead of open communication

(iv) Attractiveness criteria

- prominent users (quasi-privacy); criteria of content: source, circumstances (crisis, election time etc.)
- priority for information/opinion building: Germany 46% younger people (below 30), 30% middle age, 9% older people (above 50!)

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II. Legal remedies to a political problem?

2. Fake news forever? Do we need an anti-fake news law?

a) *Remedies to illegal content in social media*

- (i) Principles: Individual civil/criminal liability for e.g. defamation, hate speech, misleading advertising, fraud etc. But social media-specific?
- (ii) Intermediary liability for IP infringement, e.g. copyright: conflict of property, freedom of speech, free enterprise = balancing of interests
- (iii) German Network Law Enforcement Bill: Anti-criminal-content law
 - Social media with +2 Mio users: complaint management system, reporting obligations, deletion of „obviously“ illegal content within 24 hours, all other within 7 days, high fines (5 Mio €/50 Mio €), estimated 500.000 complaints, 25.000 on appeal, 500 serious.
 - Controversies: obvious =?; admin.+cost burden. International effects?

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II. Legal remedies to a political problem?

2. Fake news forever?

b) *Remedies to factually false news in social media*

(i) Common denominator of (ii) + (iii): Illegality of content; social media liability as a complement to tortfeasor liability!

- False facts are no wrong! Unless qualified= how? E.g. specific harm!
Consensus on criteria?

Avoid purism; journalists, users must be able to „summarize“

(ii) Protecting the democratic communication process:

- Abusive fake news distorting, disrupting political communication?

- Imperfect communication: information avoidance, voter protection?

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b) *Remedies to factually false news in social media*

(iii) Which remedies? Must be proportionate, but = ?

Ex ante ? Ex post? Red flagging? Deletion? Rectification = state
the truth?

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III. Conclusion

H. De Balzac, loc.cit. p. 211:

„ Si la presse n‘existait pas, il faudrait ne pas l‘inventer“!

And social media?

They live on advertising by their users, both upstream and downstream. How then can we expect the truth to come from them?

I never use them!

Thank you very much for your patience and attention!