



PLATFORM OR PUBLISHER?

The US election has brought the debate about whether social media firms such as Facebook are really media players, not technology platforms, into sharp relief, as **PHILIP M. NAPOLI** and **ROBYN CAPLAN** discuss

The outcome of the presidential election in the US has focused media and public attention on the increasingly influential role that social media platforms may be playing in how voters obtain news and information. Of particular concern has been the potential role that the circulation of fabricated news stories may have played in the election outcome. Facebook, in particular, has come under fire for being a venue for the widespread circulation of 'fake news'.

If the volume of media coverage is any indication, this issue of the circulation of false news stories on platforms such as Facebook appears to have galvanised public attention to the broader issue of the position and operation of social media platforms in the production, dissemination, and consumption of news and information in a way that previous controversies involving the intersection of social media and news did not, such as Facebook's ethically dubious emotional contagion research;¹ the construction of Twitter's trending topics list; and accusations that Facebook was suppressing the spread of conservative news.²

Facebook has been forced to publicly defend itself against critiques that it is failing in its responsibilities to serve its user base. At the same time, the company has initiated internal reviews of its policies and procedures and (along with Google) already has made some alterations, adding fake news sites to its list of content providers that are banned from participating in its ad network.³ While this action does not directly affect the flow of fake news, it does affect the extent to which these sites can generate ad revenue.

What remains to be seen, however, is whether these concerns about how the dramatically changing dynamics of our media ecosystem may be affecting the democratic process will lead to any substantive consideration of whether policy responses of any type are appropriate. Do these accumulations of controversies represent a classic example of a 'policy window'?⁴ Given the election outcome, and the direction in which social media are asserted to have influenced this outcome, policy initiatives of any kind in the US seem unlikely any time soon. However, other countries appear more

likely to respond proactively. Germany's Angela Merkel, for instance, has called for Facebook, Google and others to make their algorithms more transparent; and, in the flurry of concern about the US election, has vowed to regulate fake news.

It seems clear that it is time for researchers and policymakers to begin asking whether the ascendance of social media platforms to their position of potential power and influence in the news and information ecosystem represents an institutional shift in the delivery of news and information that may be on par with the rise of broadcasting in the 1930s. In the 1930s, concerns about the reach and gatekeeping power of broadcasting, and its potential as a mechanism for delivering propaganda, misinformation, and commercially-driven messages, helped give rise to a regulatory apparatus in the US designed to prevent concentration of control, assure that local news and information needs were met, and require that public service values were incorporated into the operation of broadcast licensees.⁵ One could very easily make the case that there are many parallels between the ascendancy of broadcasting in the 1930s and the ascendancy of social media today.

One challenge in this regard, however, is a fundamentally different set of institutional perceptions that are being cultivated around social media platforms. Specifically, social media companies explicitly and steadfastly assert that they should not be considered media companies. Rather, they insist that they should be thought of only as technology companies. Facebook has been particularly insistent on this point. As recently as last summer, Facebook president Mark Zuckerberg maintained that "we're a tech company, not a media company", and that Facebook's focus is on providing users with "the tools to curate", a position that he and his executives have been maintaining for years.

Facebook is hardly alone in this. This rhetorical stance is widespread across the digital media sector. This position can be seen as part of a broader, ongoing effort by these companies to "discursively ... frame their services and technologies", according to Tarleton Gillespie, who also noted that these firms use terms like 'platform' strategically, "to position themselves both to pursue current and future profits, to strike a regulatory sweet spot between legislative protections that benefit them and obligations that do not, and to lay out a cultural imaginary within which their service makes sense".⁶ The self-definition as technology companies rather than media companies is another key dimension of this discursive framing.

On the surface, this position may seem like a mere semantic distinction. However, this distinction has far-reaching ramifications, particularly in terms of impacting whether policymakers approach the emerging power and influence of social media platforms in a manner similar to how they responded to the potential power and influence of broadcasting when that technology first ascended to prominence; or, for that matter, whether they consider any aspect of social media's operation within the contemporary news and information

ecosystem as falling within the scope of their regulatory responsibilities.

The goal of this article is to consider the policy implications associated with this question of corporate identity. Specifically, we consider the legal and regulatory advantages that accrue to social media companies if they are perceived as technology companies. We also explore the contemporary media policy concerns that would likely apply to social media companies if they were considered media companies rather than technology companies. As should be clear, this analysis begins from the assumption that the technology company label fails to adequately capture the nature and function of social media platforms as fundamental media institutions.

LANGUAGE AND CLASSIFICATION IN COMMUNICATIONS POLICY

US communications policymaking has been characterised by numerous disputes over how to appropriately classify new communications technologies and services. Such disputes are important because they affect the regulatory models applied to a technology or service, as well as the legal frameworks under which they operate. They help to illustrate how the specific words and metaphors used to describe technology, as well as the finer points of distinctions between one word and another, matter quite a bit.

The popularisation of the internet and its widespread use led to many issues related to classification. The courts and policymakers could not decide whether the internet, which was taking on many of the functions of media and communication, was something wholly new (exceptional) or whether it fitted within existing media policy regimes. In the 1990s, this became a

major conundrum for the Supreme Court. In its assessment of the constitutionality of the Communications Decency Act in the late 1990s, in which Congress attempted

to impose content restrictions on the internet similar to those that have long been applied to broadcasting, the court struggled with whether to treat the internet as akin to the telephone, a print newspaper, or television/radio.

Given the long tradition in the US of applying completely different regulatory regimes to different communication technologies based on their technological characteristics, the argument of which – if any – analogy to embrace for the internet had far-reaching legal and policy implications. In the US, the application of this approach has meant that different media industry sectors have varying levels of First Amendment protection.

A more recent example can be found in the FCC's network neutrality regulations. The regulations hinge on the classification of internet service providers (ISPs) as telecoms service providers (akin to phone companies) rather than information service providers (akin to web hosting services). ➔



The self-definition as technology companies rather than media is key.



← After initially classifying ISPs as information service providers back in 2002, the FCC reclassified them as telecoms service providers in 2015. This was done because the FCC’s regulatory authority over telecoms service providers is much greater than its authority over information service providers (again, different technologies and services frequently operate under different regulatory models); so much so that the net neutrality regime imposed by the FCC would be impermissible if ISPs were classified as information service providers. Consequently, as one would expect, a significant dimension of the debate surrounding the network neutrality regulations revolved around the meaning of the telecoms service and information service terminologies and their applicability to the provision of internet access.⁷

This discussion highlights the importance that language plays in policymaking. In the public policy literature in general, and in the communications policy literature in particular, there is an increasing reliance on discourse analysis to understand the dynamics of the policymaking process.⁸ This body of literature consistently demonstrates that ‘words matter’;⁹ that the specific terms employed in the discourse and documents that shape and reflect policy decisions have profound consequences, and thus are employed strategically; in some cases, helping to define the contours of a policy issue; in other cases, helping to marginalise certain stakeholder groups from participating in the policymaking process.¹⁰

Of particular importance within the communications policy context is the extent to which the discourse has exhibited a strong technological focus, treating new technologies as autonomous agents, and/or narrowly defining the policy terrain purely in terms of complex technical issues and concerns, to the exclusion of broader social concerns. These dynamics have emerged not only within the US, but within international contexts such as internet governance as well.¹¹ This ‘technocratisation’ of communications policy discourse serves as an important backdrop for the ‘tech-company-not-media-company’ argument being considered here. The embracing of the media or technology company terminology could ultimately help determine the nature of the policy issues that arise and resonate – or whether any policy issues or concerns gain traction at all. Perhaps this has happened already.

LANGUAGE, CLASSIFICATION AND SOCIAL MEDIA

We can look to some recent legal proceedings to see how the rhetorical dynamics around the classification of social media platforms are playing out. As we discussed above, the way in which a company is classified can have significant legal and policy implications. Within the digital media sector, this is well illustrated by some of the challenges that have confronted Twitter. As industry observers have noted, “It has ... suited Twitter to pose as a tech company when it comes to potential regulatory and legal burdens.”¹² For instance, in a response to a court order for information about a user who was



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arrested during an Occupy Wall Street protest, Twitter adopted the legal position that it has no ownership of individual tweets, a position that would seem to operate in conflict with the various forms of editorial discretion that Twitter has

engaged in in relation to the content on its platform.¹³

We’ve seen the courts engaged in the same type of analogy-seeking in relation to Twitter as we saw in the Supreme Court’s Communications Decency Act decision discussed above. In a case involving a government subpoena for information (including tweets) about an individual Twitter user, the court suggested that Twitter was analogous to “scream[ing] out the window”.¹⁴ In another subpoena made to Twitter for the IP information for some of its users (who were associated with the organisation Wikileaks), the court used a different classification, comparing Twitter, and the IP addresses used to connect to the site, to using a telephone. A fundamental implication of these classifications is the question of if, or to what extent, Twitter holds ownership and editorial authority over the content that circulates on its platform.

Similar issues have arisen in regards to Facebook. Recently, it has come under intense pressure in Europe to better police extremism and hate speech on its platform. Of course, such policing represents the type of direct imposition of editorial authority that puts Facebook more squarely in the position of a publisher, and thus potentially subject to the libel laws under which publishers operate. Yet Facebook routinely engages in the enforcing of particular content standards. The most recent high profile example involved the company’s removal of a post by a Norwegian author of the iconic Vietnam War photo of a naked child fleeing a napalm attack. In the wake of criticisms about censorship, the company ultimately reversed its position, on the basis of “the history and global importance of this image in documenting a particular moment in

SOCIAL RESPONSIBILITY

It is also important to note that electronic media companies such as broadcasters and cable companies have historically had a unique set of social responsibilities. These typically have been imposed internally through professional norms and codes of ethics, as well as through government regulations, which in the US have taken the form of various public interest obligations¹⁵ that have included providing audiences with minimum levels of public, educational, and government programming; minimum levels of locally-produced programming; and providing political candidates with the ability to advertise at reduced rates. For a time, such obligations became particularly aggressive, as in the case of the Fairness Doctrine, which, through the 1970s and part of the 1980s, required broadcasters (given their significant bottleneck position) to provide equivalent amounts of coverage to differing perspectives on controversial issues of public importance. Broadcasting is currently subject to much stronger regulation on balance in countries such as the UK of course.

time". Thus, both the decision to remove the photo and the decision to reinstate it reflect the articulation of specific editorial policies and the exertion of editorial authority – activities that would seem to fit the profile of a media company rather than a technology company.

In addition to social responsibility (see panel, p28), even economically-motivated structural regulations and government oversight have historically been more aggressively imposed in the media sector than other industry sectors, given concerns about the relationship between competition in media markets and the effective functioning of the 'marketplace of ideas'. A variety of ownership regulations persist in the electronic media sector, despite the increasing competition facilitated by the internet and its lowering of the barriers to entry into various media markets.¹⁶ Mergers in the electronic media sector undergo a separate public interest review above and beyond the standard scrutiny that all mergers undergo to assess their impact on competition.¹⁷ This public interest standard of review is intended to look beyond economic concerns and to consider the broader political and cultural concerns raised by such mergers.

The key point here is that there is a long history of regulatory interventions in the electronic media sector on behalf of broader public interest concerns related to policy principles such as diversity, competition, and localism. The regulated industries have generally regarded adherence to these regulations as burdensome and costly; and so one can see why digital media platforms would work to establish an organisational identity that places them well outside of this regulatory framework, even if most of the traditional justifications for media regulation (use of a scarce public resource such as spectrum) don't necessarily apply to them.

Imagine, for instance, if Facebook had to operate under a fairness doctrine for social media. In many ways, one could look at the controversies that arose surrounding the alleged suppression of conservative news and the proliferation of fake news stories as just the kind of sparks that could ignite that kind of discussion. Or, one could certainly imagine a digital media platform such as Facebook, with its dominant market position, growing increasingly concerned about the possibility of a more media-oriented competition analysis being applied to its position in both the economic marketplace and the marketplace of ideas.¹⁸

The somewhat surprising fact that such a conversation has yet to take hold at all in US policy discourse could perhaps be attributed to the success thus far of the technology-company-not-media-company rhetoric. The point here is that being classified as media companies could potentially subject social media platforms to types of government intervention that, as technology companies, they are much better insulated against.

Facebook and other social media platforms are understandably resistant to being characterised as media companies, given the unprecedented magnitude of content for which they would bear editorial responsibility and the broader public interest norms and principles that would then apply to them from the standpoints of both professional responsibility and government oversight. The argument that these platforms are first and foremost technology companies is a key component of this resistance. The end results, however, of accepting this position, are disconnects between how a platform behaves and how it is treated under existing legal and policy regimes; and between the intended scope of existing laws and policies and the reality of their reach and applicability.

As this discussion has hopefully made clear, the question of whether platforms such as Facebook and Twitter are media companies or technology companies is not just a matter of semantics but rather part of a larger discursive contest. The outcome of this contest has significant policy legal and policy implications, and is one in which the economic, legal and political motivations for social media platforms to be (mis)perceived as technology companies rather than media companies are quite compelling.

SOCIAL MEDIA INTERSECTIONS WITH CONTEMPORARY COMMUNICATIONS POLICY

The evolving position and function of social media platforms in the contemporary media ecosystem intersect with recent and long-standing communications policy priorities. From this standpoint, treating these platforms as technology rather than media companies has the potential to undermine the effective pursuit of these policy objectives. The goal here, therefore, is to illustrate how the evolving role and function of social media platforms exhibits some strong points of continuity and intersection with established media policy concerns, and to consider whether some of the types of intervention associated with these concerns may have applicability to the social media context.

SOCIAL MEDIA PLATFORMS AND JOURNALISM.

The FCC, which for many years congratulated itself for not wading into internet regulation, has now, though its intervention in issues such as network neutrality, begun to consider the internet within the broader normative framework that it has developed for other communications services under its regulatory authority. In addition, the survival of journalism has become, in and of itself, a basic communications policy issue, with Congress, the Federal Trade Commission, and the FCC all conducting proceedings to explore if and how policymakers should take action to protect and preserve the institution of journalism.¹⁹

This confluence of circumstances suggests that policymakers need to concern themselves with understanding exactly how these social media platforms function in the contemporary journalism ecosystem; how they are interacting with those organisations that actually produce journalism; and if, or to what extent, they are undermining its viability. Organisations/platforms that don't see themselves as media companies – let alone as news media companies – could displace or undermine the viability of legitimate producers of journalism, which operate under news values that have at least some connection to the role that news and information serve in the effective functioning of a democracy. This exacerbates an existing policy problem and therefore requires attention. Further, the increasing centrality of social media platforms to news distribution and consumption is affecting how news organisations behave.

The key point is that, to the extent that the operation of a social media platform like Facebook is becoming inextricably intertwined with the economics and strategy of news organisations, policymakers concerned with the future of journalism need to take into consideration how these platforms are affecting the economics and journalistic output of these organisations. From this standpoint, it may be time for policymakers to start thinking about the interaction between social media platforms and news organisations in the same way that they thought about the interaction between broadcast television and cable, and the potential (though, in this case, ultimately unfounded) threat that cable television and its

FACEBOOK'S MOVES

Facebook's centralised position within the news ecosystem has led to repeated changes within the industry as news organisations have adapted to Facebook's algorithm, and as it has changed its algorithms to adapt to the behaviours of these organisations.

In an effort to combat the 'click-bait' strategies of news organisations, Facebook altered its news feed algorithms in late 2013 to identify 'high-quality' news content. High-quality was defined as whether users were continuing to interact with an article after-the-fact, which meant that some publishers saw older articles begin to re-emerge on the network, with traffic driven to this older content.²⁰

In August 2014, Facebook released another change to its news feed to address click-baiting headlines. In this modification, Facebook used variables like how long people spend reading an article away from Facebook as a way to calculate how users determine content that is valuable to them.

Some outlets were dramatically affected by this change, and thus re-evaluated their own news values to make them more in line with Facebook's criteria.

Over the course of 2015 and 2016, several other changes Facebook made to its news feed have affected news organisations. As status updates and personal sharing among users began to decline over 2015, Facebook began to invest more resources in products geared towards news media distribution. This included a new emphasis on 'native videos' embedded in the news feed, which was communicated to news publishers directly.

It also included, in May of 2015, the launch of Instant Articles, a platform developed exclusively for the hosting of content from recognised news media publishers that would reduce load time for users clicking on news stories. This new platform was also the first step in a new (albeit limited) revenue-sharing model between Facebook and news publishers.

to immediately lead to the increased prominence of fake news stories in Facebook's trending topics list.

It would seem that the more Facebook is perceived as a news source, the more the social media platform works to appear otherwise. However, in Facebook's case, no sooner did the company announce these changes than the platform found itself front and centre as the most important news source in the country, when Diamond Reynolds used the platform to livestream the aftermath of the shooting of Philando Castile by a Minnesota police officer. And, of course, not long after that, Facebook was widely discussed as perhaps the most significant, influential, and potentially corruptible, news source in the 2016 US presidential election.²⁴

These developments help to highlight the significance of recent data indicating that the functionality of platforms such as Facebook and Twitter is migrating away from their initial functionality as a means of individual and small group communication. That is, less of the content on these platforms is composed of the personal news and status updates that were the initial driver of these platforms' diffusion. Today, more of what is being disseminated and consumed on these platforms is essentially institutionally produced content (i.e., professionally produced news, information and entertainment). One could argue that these platforms are evolving into broadcasters, in the most traditional sense. Perhaps it is time they start being considered – and treated – more like broadcasters from a policy standpoint.

In any case, the key point here is that as policymakers increasingly focus attention on how to preserve the institution of journalism, this objective is becoming increasingly intertwined with the role and function of these platforms in the production, distribution and consumption of news; and complicated by the demonstrated ambivalence (at best) that these platforms have shown toward their evolution into central news organisations in the contemporary media ecosystem.

VERTICAL INTEGRATION. The argument that social media platforms are technology and not media companies is premised in large part on the contention that these platforms produce no original content on their own, but rather facilitate the distribution of content produced by others. The irony in this position is that the history of media is one of companies that start out on the periphery of the media sector remaking themselves to be media companies in the fullest sense of the word. If we look historically at 'platforms' that, like social media platforms such as Facebook and Twitter, began primarily as distributors of content and not producers, we see a recurring pattern of integration into content creation. The cable industry is a prime example. An industry that began as an 'antenna service' for broadcast television gradually evolved into offering alternatives to broadcast television. The history of most cable networks is one of migrating from distributing content produced by others to creating original content.

← bottleneck position posed to the viability of broadcast television and the free national and local news that broadcast television provided.

These concerns ultimately led to the must-carry rules, which required cable systems to carry all local broadcast stations. With such regulations, the FCC extended its regulatory authority to the cable television industry in part by classifying cable as ancillary to broadcasting.²¹ Might, similarly, digital media content curators like social media platforms be similarly ancillary to the ISPs that now fall under the FCC's regulatory purview due to the reclassification that took place in connection with the network neutrality regulations?

Reflecting this perspective, some analysts have asserted that social media platforms function as utilities,²² just as ISPs, under the telecoms service designation, are considered utilities in line with traditional phone services, but this argument has yet to gain much traction in the policy sphere. However, the more social media platforms essentially function as the gateway (or portal, to resurrect that term) to the broader web, the more it may be time to revisit this perspective.

What is perhaps most disturbing about this situation is that, despite serving as bona fide news outlets, these social media platforms seem genuinely averse to serving this function. This would seem to be a primary takeaway, for instance, from the controversy about the accusations of the suppression of conservative news stories on Facebook's trending topics list. In what seems to have been a direct response to this controversy, Facebook modified its news feed algorithm to increase the prioritisation of posts from friends and family over those by media outlets (though with apparently limited effect).²³ The company also eliminated the editorial positions associated with the curation of its trending list, relying instead purely on algorithms; a change that, as a harbinger of things to come, seemed

And so it goes with companies like Amazon, Netflix, YouTube and Hulu, all of which began purely as content curators/intermediaries, only to integrate into content creation as well. Developments such as Facebook's Instant Articles (in which Facebook hosts, rather than links to, the content produced by various news organisations), and Twitter's live streaming of professional sporting events, political conventions, and Bloomberg television programming, represent the kind of initial steps toward the full-fledged vertical integration into content creation for these companies that history tells us is inevitable. Additional steps have recently followed, with Facebook announcing its intention to license original video programming, produced specifically for distribution on its platform.²⁵

These developments also suggest the potential resurrection of the 'walled garden' strategy employed by AOL during the first tech bubble, which was a significant cause for concern among policymakers at the time. While concerns about AOL-Time Warner leveraging its vertically integrated position in a way that was harmful to the economic market or the marketplace of ideas proved unfounded, it's questionable whether Facebook or Twitter's position in the media ecosystem is comparable to AOL-Time Warner's position, given that their reach is global, rather than limited to those who subscribe to a certain broadband service.

And so, as dominant social media platforms like Facebook and Twitter inevitably head down the vertical integration path, perhaps it is a good time to remember that policymakers have, at various points in the past, found the public interest to be well served by limiting the extent to which companies with a prominent bottleneck role in content distribution can simultaneously produce and own content. The financial interest and syndication rules, which applied for roughly two decades to the 'big three' national television broadcast networks in the US (ABC, NBC, CBS), limited the extent to which these networks could own their primetime programming.

The logic of these regulations rested on the notion that the proportion of audience attention controlled by these networks was so large that the public interest in diversity and competition was served by requiring the networks to allow other content creators to have access to this massive accumulation of audience attention – and to the accompanying revenues.

The cable industry, which essentially replaced the broadcast industry as the primary media bottleneck, found itself operating under must-carry rules (which required cable systems to carry local broadcast stations), as well as limits on the extent to which cable systems could populate their channel line-ups with networks in which they had an ownership stake. And, forgotten in the implosion of AOL-Time Warner is that conditions of the merger included the requirement that the company allow consumers to have access to unaffiliated ISPs, allow these unaffiliated ISPs to control the content of customers' first screen, to assure interoperability of

its instant messaging service (in some ways a precursor to social media) with competing providers, and to open up its network to other interactive television service providers.

The point here is that, historically, media platforms that have obtained significant bottleneck positions as content distributors have sought to leverage that position for content creation as well; and that, historically, policymakers have instituted safeguards to protect competition and diversity under such conditions. As is often the case in communications policy, the question becomes whether it is preferable to be proactive (and potentially discourage innovation) or reactive (and be confronted by the inability to 'put the horse back in the barn'). History tells us that we're likely moving down a similar path in relation to a select few social media platforms, so it is important that these conversations begin sooner rather than later.

CONCLUSION

The fundamental problem is that social media platforms that are playing an increasingly central role in the production, dissemination, and consumption of news and information are – if we accept the technology company identity – essentially independent and distinct from the news and information ecosystem that they mediate. Accepting this argument means that these important platforms for news and information will exist outside of the bounds of regulatory authority that have, since the dawn of the age of electronic media, been able to exert at least some influence over the structure and behaviour of the key participants in the news and information ecosystem. In which case, we have a "discourse [that] serves to shape an institution that it fails to describe".²⁶

When we consider social media platforms through the lens of prominent communications policy concerns, there are a number of points of intersection that would suggest that policymakers need to take social media into consideration. To consider these platforms purely as technology companies ultimately forecloses the application of any public interest principles to what are arguably becoming the most important mechanisms for the flow of news and information that serves the democratic process. Continuing down this path could have dramatic repercussions for how citizens meet their critical information needs and, thus, for how democracy functions.

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