Herald and *Chicago Examiner*

FINAL · VOL. LVIII—NO. 146 · MONDAY—OCTOBER 31—1938 · 2 CENTS

RADIO FAKE SCARES NATION

Hysteria among radio listeners throughout the nation and actual panicky evacuations from sections of New York and New Jersey resulted from a too-realistic radio broadcast last night describing a fictitious visitation of strange men from Mars.

RAISING QUESTIONS ABOUT FAKE NEWS

Fake news is high on the agenda of concerns about media, but what is it and could it be regulated? **LORNA WOODS** frames the debate

Concerns have been expressed about the quality of information available in the public sphere, often under the label 'fake news', and the impact of unreliable information on public discourse, and indeed the operation of democracy. The best approach to tackling the perceived prevalence of misinformation is, however, not clear. This article considers three preliminary questions given the background of freedom of expression: what is fake news; if regulation is appropriate, who would be regulated; and what form of regulation should be adopted.

WHAT IS FAKE NEWS?

There is no agreed definition of fake news, though the normal dictionary meaning of these words is a starting point. According to the Oxford English Dictionary, fake means spurious, counterfeit or a sham. That is, content is aiming to be taken as something other than it is. While 'false' can also be used to indicate deceptive practices, it can also be used to mean untrue. Making this distinction is important because, while most media codes of

War of the worlds: Orson Welles' famous radio broadcast may not have caused great panic but fake it certainly was

practice say that journalism should be accurate, failures should not automatically constitute fake news. Indeed, looking at human rights case law, what seems important is the journalist's orientation towards truth – that is, verifying stories.

In *Bladet Tromsø and Stenaas*,[1] the European Court of Human Rights noted that the safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the proviso that they are acting in good faith to provide accurate and reliable information in accordance with the ethics of journalism. In terms of style, the human rights body has also emphasised that:[2]

"... while the court does not have to approve the polemical and even aggressive tone used by journalists, Article 10 protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed ..."

The broad protection to political speech reaches its limits, however, when the content is purely abusive, or steps over the line to hate speech.[3] It may be that here we would find regional differences. A US-based approach is less concerned about the impact of hate speech on its victims

⬅ than, for example, that in Europe and of course gives rise to difficulties for companies that operate via the internet. The issue of hate speech raises difficult questions for those reporting on individuals and institutions which hold those views, if even the repeating of those views itself is an impermissible re-publication/redistribution of criminal content.[4]

'Truth' is not a complete answer as regards the boundary between fake news and journalism. Not all published statements are susceptible to proof, especially those based on political opinion. It would be easy to undermine political dissent by characterising it as untrue because it is not-proven. The European Court of Human Rights made this point:[5]

"...a careful distinction needs to be made between facts and value judgements. The existence of facts can be demonstrated, whereas the truth of value judgements is not susceptible of proof..."

A similar approach to the distinction between fact and opinion can be seen in other regional human rights tribunals: for example, the approach of the Inter-American Court in Usón Ramírez.[6] The protection of opinion seems particularly strong when it is based on (verified) facts; the position of opinions which contradict facts, however, is not so protected. This issue is of importance for fake news if we consider it to include hyper-partisan websites, which may consist of little in the way of verifiable information but lots of (extreme) opinion, or one-sided information. Can we say that reporting which omits relevant facts that contradict the main thesis in a story is inaccurate?[7]

Falsity may also not be the best tool for describing clickbait websites, where the complaint is that the attention-grabbing headline does not reflect the article. Of course, some headlines may be false, but that is not the mischief complained of. This issue seems to be about misleading would-be readers as to the content of the article, often for financial gain.

News usually concerns important or interesting events, but what sorts of events might we consider worthy of protection in the public interest? Political speech comes to mind, but other topics could also be considered important. There is, for example, a clear interest in accurate information in the reporting of science (climate change, public health matters). In addition to questions about the provability of science claims, there are also boundary issues. For example, should a food blogger who makes claims about a particular diet be seen as a purveyor of fake news? It is submitted that this would make the category unduly broad and rather unwieldy. Yet, how does one draw the line: is the intention of the originator the key point?

Second, some definitions emphasise that an element of fake news is to make money. It could be argued on this basis that insofar as such speech falls within freedom of expression guarantees, it should be viewed as 'commercial speech', which typically attracts a lower level of protection and for which regulation in the public interest is more easily justified.[8] Advertising regulation can typically prohibit misleading advertising, or claims that are not backed up by evidence. Once again, we can see boundary issues in terms of defining problematic content. In particular, the categorisation of speech by reference to the motives of the speaker (making money) could render mainstream media output 'commercial speech'. This suggests that an approach focusing on motive is at odds with the jurisprudence of most if not all human rights bodies.

Finally, is it practicable to treat fake news or the problem of misinformation as just one thing? There are several behaviours, ranging from state propaganda aimed at destabilising another country's regime to careless re-tweeting of the latest scandal by a private individual. It is also possible to identify particular contexts, such as political advertising or rules relating to elections, which merit special treatment. It would seem sensible to differentiate between these behaviours, to assess the threats they each pose, and to tackle them accordingly. In so far as regulatory action[9] is taken against fake news or other categories of misinformation, attention should be paid to definitions. Terms that are vague or very broad are open to abuse, and may therefore be viewed as contrary to freedom of expression guarantees.[10]

> ## 'Truth' is not a complete answer for the boundary between fake news and journalism.

WHO IS REGULATED?
Historically, regulatory obligations (whether top-down or through self-regulatory systems) have been placed on those who have the final choice as to whether content is published/broadcast or not. Regulation tended to be linked to editorial responsibility. One effect of social media is that a greater range of people may become involved in the creation and dissemination of information, such as re-posting, linking to and 'liking' content. This makes it harder to identify who has responsibility for content and where obligations – for example, relating to accuracy – should lie.

It has been suggested that "consideration should be given to protecting individuals against liability for merely redistributing or promoting, through intermediaries, content of which they are not the author and which they have not modified".[11] However, meaning may be modified inadvertently, for example by a user redistributing content without the original context, which was that the source was a satirical site. The answer may lie in technical measures (so the context is not lost) rather than the regulation of private individuals; such measures are likely to be disruptive to freedom of expression.

Of course, the platforms on which the content is found could be subject to regulation. It is recognised – albeit not universally – that this may stifle technical innovation, as well as infringing freedom of expression. It is still generally accepted that intermediaries should not be responsible for third party content, though the applicable limitations on

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