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COMMENT

Fake News: No One Is Liable, and That Is a Problem

EMMA M. SAVINO†

INTRODUCTION

The Oxford Dictionary Word of the Year for 2016 was “post-truth,”¹ which was fitting for a year riddled with fake news stories.² Though the number of fake news stories on social media was surprisingly small, their overall reach, as demonstrated by the number of shares,³ was responsible for their publicity.⁴ In the ten months leading up to the 2016 presidential election, the top twenty fake news stories on

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1. *Word of the Year 2016 is . . .*, U. OXFORD, <https://en.oxforddictionaries.com/word-of-the-year/word-of-the-year-2016> (last visited Jan. 31, 2016) (defining “post-truth” as “relating to or denoting circumstances in which objective facts are less influential in shaping public opinion than appeals to emotion and personal belief”).

2. In an effort to reduce the confusion between fake news and non-fake news, all cited fake news stories will be denoted as such.

3. A “share” is defined as “[a]n instance of posting or reposting something on a social media website or application.” *Share*, U. OXFORD, <https://en.oxforddictionaries.com/definition/share> (last visited Oct. 9, 2017).

4. Aja Romano, *The Scariest Part of Facebook’s Fake News Problem: Fake News Is More Viral than Real News*, VOX: TRENDING (Nov. 16, 2016, 12:30 PM), <https://www.vox.com/2016/11/16/13626318/viral-fake-news-on-facebook>.

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 million⁵—fake news was shared more than real news. This sharing was not limited to average Facebook users. Television news hosts reported fake news stories,⁶ and then-President-elect Trump and his son shared other fake news stories on social media.⁷

Since its initial entrance into the vernacular, “fake news” has lacked a consistent definition. David Mikkelson, the founder of Snopes.com, a myth-busting website, stated that the term “fake news” now includes “bad reporting, slanted journalism, and outright propaganda.”⁸ He personally defines “fake news” as “purposely fabricated stories for clicks and revenue.”⁹ *The New York Times* defined “fake news” as “a made-up story with an intention to deceive, often geared

5. *Id.* (citing Craig Silverman, *This Analysis Shows How Viral Fake Election News Stories Outperformed Real News on Facebook*, BUZZFEED NEWS (Nov. 16, 2016, 4:15 PM), https://www.buzzfeed.com/craigsilverman/viral-fake-election-news-outperformed-real-news-on-facebook?utm_term=.auAz78AOPw#.enA70z48ZV).

6. Becky Bratu et al., *Tall Tale or Satire? Authors of So-Called 'Fake News' Feel Misjudged*, NBC NEWS (Dec. 15, 2016, 10:32 AM), <https://www.nbcnews.com/news/us-news/tall-tale-or-satire-authors-so-called-fake-news-feel-n689421>.

7. Caitlin Dewey, *Facebook Fake-News Writer: 'I Think Donald Trump is in the White House Because of Me'*, WASH. POST: THE INTERSECT (Nov. 17, 2016), https://www.washingtonpost.com/news/the-intersect/wp/2016/11/17/facebook-fake-news-writer-i-think-donald-trump-is-in-the-white-house-because-of-me/?utm_term=.745ff184c050; Brian Flood, *10 Times Donald Trump Shared Fake News*, WRAP (Jan. 26, 2016, 12:47 PM), <http://www.thewrap.com/alternative-facts-10-times-donald-trump-was-president-of-fake-news/>; Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 10, 2016, 6:19 PM), <https://twitter.com/realDonaldTrump/status/796900183955095552>.

8. Jeremy W. Peters, *Wielding Claims of 'Fake News,' Conservatives Take Aim at Mainstream Media*, N.Y. TIMES (Dec. 25, 2016), <https://www.nytimes.com/2016/12/25/us/politics/fake-news-claims-conservatives-mainstream-media-.html?mcubz=0>.

9. *Id.*

toward getting clicks.”¹⁰ Other definitions focus on the potential financial gain of fake news by describing it as “articles fabricated to gain traffic and advertising revenue, not standard-issue reporting errors or slant.”¹¹ For the purposes of this Comment, the definition of “fake news” will not include propaganda, conspiracy theories, or satire, although satire will be discussed.¹² Rather, “fake news” will be defined as intentionally fabricated¹³ stories that are entirely or mostly false statements of fact, created to deceive and be shared.¹⁴

The spread of fake news causes a host of problems, including situations where misinformed people act precipitously on false information.¹⁵ Experts opine that the dissemination of fake news is “creating confusion, punching holes in what is true, causing a kind of fun-house effect that leaves the reader doubting everything, including real news.”¹⁶ The confusion is likely widespread because sixty-two percent of U.S. adults receive their news on social media

10. Sabrina Tavernise, *As Fake News Spreads Lies, More Readers Shrug at the Truth*, N.Y. TIMES (Dec. 6, 2016), <https://www.nytimes.com/2016/12/06/us/fake-news-partisan-republican-democrat.html>.

11. Brian Feldman, *Here Are the Most Viral Fake News Stories of 2016*, N.Y. MAG: SELECT/ALL (Dec. 30, 2016, 2:30 PM), <http://nymag.com/selectall/2016/12/here-are-the-most-viral-fake-news-stories-of-2016.html>.

12. *See infra* Section III.D.

13. This Comment defines “fabricate” as “to make up for the purpose of deception.” *Fabricate*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/fabricate> (last visited Mar. 17, 2017).

14. This Comment defines “false” as “intentionally untrue.” *False*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/false> (last visited Mar. 17, 2017).

15. *See, e.g.*, Cecilia Kang & Adam Goldman, *In Washington Pizzeria Attack, Fake News Brought Real Guns*, N.Y. TIMES (Dec. 5, 2016), https://www.nytimes.com/2016/12/05/business/media/comet-ping-pong-pizza-shooting-fake-news-consequences.html?_r=0 (discussing how #PizzaGate resulted in a fake news reader firing a gun inside a pizzeria in an attempt to rescue children that were allegedly being held as sex slaves in a child-abuse ring led by Hillary Clinton.).

16. Tavernise, *supra* note 10.

websites,¹⁷ and often do not fact check what they are reading.¹⁸ Instead, they proceed to share articles after only reading the headline.¹⁹ The sheer volume of shared content combined with limited internet literacy²⁰ could potentially lead to millions of U.S. adults interpreting fake news articles as truth. Unfortunately, the law does not currently afford a remedy to these issues.

While fake news was frequently discussed in the media after the 2016 presidential election, there is currently insufficient scholarship that discusses the lack of legal protection afforded those who wish to combat it. While fake news may not be a novel concept,²¹ the confluence of profitability through advertisements, influx of internet illiterate users on social media, and turbidity of the 2016 election has made it relevant once more. Thus, this Comment is one of the first to address the deficiencies in our current legal system and suggest potential recourse for its victims.

Part I of this Comment details the key aspects of fake news articles, including content, authors, and dissemination. Part II explains why this is an issue for readers and why they fail to differentiate between real and fake news. Part III details the common law framework that applies for printed falsehoods. Part IV then explains why websites are immune to any legal remedies for hosting fake news stories posted on their platforms. Part V provides potential solutions for this quandary.

I. FAKE NEWS OVERVIEW

To understand why fake news merits discussion, one

17. Jeffrey Gottfried & Elisa Shearer, *News Use Across Social Media Platforms 2016*, PEW RES. CENT. (May 26, 2016), <http://www.journalism.org/2016/05/26/news-use-across-social-media-platforms-2016>.

18. See Bratu et al., *supra* note 6.

19. See *id.*

20. See *infra* Section II.C.

21. See *infra* Section II.A.

must first understand what is considered fake news at this juncture. To begin, this Comment provides two examples of fake news stories. It then points out the inaccuracies in one story and details the unfortunate repercussions of the other. While these stories are not representative of all fake news stories, they are illustrative. Next, this Comment explores two authors' financial incentives for writing fake news and how much revenue each author receives. The path of a fake news story from initial publication to viral status will then be described, including an explanation of how Facebook, specifically, impacts the fake news phenomenon.

A. *Examples of the Deceptiveness of Fake News Articles*

The most viral fake news story of 2016 was headlined: "Obama Signs Executive Order Banning the Pledge of Allegiance in Schools Nationwide."²² It had 2,177,000 Facebook shares, comments, and reactions.²³ The story was originally posted on abcnews.com.co, which is designed to look like the *ABC News* website, a reputable news organization.²⁴ Though slightly altered, the logo is nearly indistinguishable from the original *ABC News* logo. The story begins, "Early this morning, President Obama made what could very well prove to be the most controversial move of his presidency with the signing of Executive Order 13738, which revokes the federal government's official recognition of the Pledge of Allegiance."²⁵ The story continues, "Under

22. Craig Silverman, *Here Are 50 of the Biggest Fake News Hits on Facebook from 2016*, BUZZFEED NEWS (Dec. 30, 2016, 8:12 AM), https://www.buzzfeed.com/craigsilverman/top-fake-news-of-2016?utm_term=.dgXGNqIz7L#.fwrWwr0jq2.

23. *Id.*

24. Caroline Wallace, *No, Obama Did Not Ban the Pledge of Allegiance in Public Schools*, HUFFINGTON POST (Sept. 2, 2016, 2:19 PM), http://www.huffingtonpost.com/entry/obama-pledge-of-allegiance_us_57c9bc7ae4b0e60d31defd6d.

25. Jimmy Rustling, *Obama Signs Executive Order Banning the Pledge of Allegiance in Schools Nationwide*, ABCNEWS.COM.CO (Dec. 11, 2016), <http://abcnews.com.co/obama-executive-order-bans-pledge-of-allegiance-in->

the new order, it is now illegal for any federally funded agency to display the pledge or for any federal employee to recite, or encourage others to recite, the pledge while on duty.”²⁶ For all intents and purposes, so far it appears that the article is an accurate news story.

Though the first half of the article seems legitimate, the second half is more noticeably fabricated. At that point, there is a quote from Sarah Bradley, who, according to the article, is a “spokeswoman for Sock It Forward, a group that provides the homeless and those less fortunate with brand new socks.”²⁷ Next, the article includes a quote from “Fappy The Anti-Masturbation Dolphin, a mascot for a Christian organization that travels around the country educating children about the dangers and consequences of masturbation.”²⁸ After the 719 comments the article received, an earlier version of this story displayed the following passage:

Thanks to ABC News President & CEO, Dr. Paul “Un-Buzz Killington” Horner for making ABC News the greatest website in the multiverse. We need writers! Contact us! Looking to advertise? Contact us! All trademarks, service marks, trade names, trade dress, product names, images and logos appearing on the site are the property of their respective owners. Do you have a complaint? We love to hear them! You can call our complaint department directly at (785) 273-0325. Do you have a problem with self-rape? Are you looking to get off the Devil’s playground? Fappy the Anti-Masturbation Dolphin can help! Praise Fappy! We reserve the right to change, modify or delete comments on this website, so post accordingly!²⁹

Paul Horner is not the president of *ABC News*. James Goldston is the president of *ABC News*.³⁰ Paul Horner is a

schools/ (fake news article).

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *James Goldston*, ABC NEWS, <http://abcnews.go.com/News/james-goldston/story?id=46731298> (last visited Sept. 26, 2017).

prolific fake news author and an Internet troll.³¹ The phone number listed is associated with the Westboro Baptist Church in Topeka, Kansas.³² Executive Order 13738 does in fact exist, but it concerns Fair Pay and Safe Workplaces—not the pledge of allegiance.³³ Clearly, this is neither an accurate news story nor published by *ABC News*. While this becomes apparent toward the end of the article, how many individuals read that far into the article before liking it or sharing it? Some readers may have shared the article based solely on the headline without reading any of it.³⁴

Other fake news stories had more serious consequences. One such example began as a far-flung conspiracy, but is a clear example of the potentially disastrous results of fake news. This situation began when John Podesta's email account was hacked, and WikiLeaks published his emails.³⁵

31. See Joshua Gillin, *Story About Ryan Announcing Trump's Resignation Comes from Infamous Fake News Writer*, POLITIFACT: PUNDITFACT (July 5, 2017, 12:00 PM), <http://www.politifact.com/punditfact/statements/2017/jul/05/stgeorgegazettecom/story-about-ryan-announcing-trumps-resignation-com/>; Kim LaCapria, *Snopes' Field Guide to Fake News Sites and Hoax Purveyors*, SNOPE (July 14, 2017), <http://www.snopes.com/2016/01/14/fake-news-sites/>.

32. *Westboro Baptist Church*, WHITEPAGES, <http://www.whitepages.com/business/westboro-baptist-church-topeka-ks> (last visited Mar. 17, 2017).

33. See Exec. Order No. 13738, 81 Fed. Reg. 58807 (Aug. 26, 2016).

34. Bratu et al., *supra* note 6; Jayson DeMers, *59 Percent of You Will Share This Article Without Even Reading It*, FORBES (Aug. 8, 2016, 2:27 PM), <https://www.forbes.com/sites/jaysondemers/2016/08/08/59-percent-of-you-will-share-this-article-without-even-reading-it/#4d17f9022a64> (“A recent study confirmed this phenomenon isn't in our heads; in fact, 59 percent of all links shared on social networks aren't actually clicked on at all, implying the majority of article shares aren't based on actual reading. People are sharing articles without ever getting past the headlines.”).

35. Cecilia Kang, *Fake News Onslaught Targets Pizzeria as Nest of Child-Trafficking*, N.Y. TIMES (Nov. 21, 2016), https://www.nytimes.com/2016/11/21/technology/fact-check-this-pizzeria-is-not-a-child-trafficking-site.html?_r=0.

Users on both Reddit³⁶ and 4chan³⁷ began searching the emails for any evidence of wrongdoing as Mr. Podesta was, at that time, the chairman of Hillary Clinton's presidential campaign.³⁸ These users were predominantly on alt-right fringe message boards and those in support of Donald Trump's presidential candidacy.³⁹ Mr. Podesta's emails contained discussions of dinner plans with his brother, Tony, that included the word "pizza."⁴⁰ This conversation of "cheese pizza" was then connected to pedophilia by a 4chan user because "c.p." commonly denotes child pornography.⁴¹ Next, these users focused their attention on Comet Ping Pong, a Washington, D.C. pizzeria, because the leaked emails contained a correspondence between Mr. Podesta and James Alefantis, the owner of Comet Ping Pong, who also has Democratic Party connections.⁴² From there, the story started to gain more traction as fake news articles spread on Twitter and Facebook with the hashtag #PizzaGate.⁴³ Following this, the stories began to include accusations of

36. "Reddit is a social news website and forum where content is socially curated and promoted by site members through voting. The site name is a play on the words 'I read it.'" Margaret Rouse, *Reddit*, TECHTARGET, <http://searchcio.techtarget.com/definition/Reddit> (last visited Oct. 10, 2017).

37. "4chan is a series of wholly anonymous, anything-goes forums. . . . [U]nlike Reddit, users never need to make an account or pick a username—even a pseudonymous one . . . [and] 4chan threads expire after a certain amount of time—less time for R-rated boards, more time for G or PG ones." Caitlin Dewey, *Absolutely Everything You Need to Know to Understand 4chan, the Internet's Own Bogeyman*, WASH. POST: THE INTERSECT (Sept. 25, 2014), https://www.washingtonpost.com/news/the-intersect/wp/2014/09/25/absolutely-everything-you-need-to-know-to-understand-4chan-the-internets-own-bogeyman/?utm_term=.f3dccb9d0ebb.

38. Gregor Aisch et al., *Dissecting the #PizzaGate Conspiracy Theories*, N.Y. TIMES (Dec. 10, 2016), <https://www.nytimes.com/interactive/2016/12/10/business/media/pizzagate.html>.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

Satanism, kill rooms, underground tunnels, and cannibalism in other nearby businesses.⁴⁴ None of these allegations were true.⁴⁵

To combat the problems associated with fake news, Mr. Alefantis contacted the Federal Bureau of Investigation and the local police, but this was to no avail.⁴⁶ He also asked Reddit, YouTube, Twitter, and Facebook to remove all the fake news articles about Comet Ping Pong, but the misinformation continued to spread.⁴⁷ After reports of abusive comments, Yelp blocked the comment section on Comet Ping Pong's Yelp review page.⁴⁸ However, other comments remained in large part on the YouTube videos about #PizzaGate.⁴⁹ After Mr. Alefantis and his employees complained to Reddit that Comet Ping Pong was being targeted, Reddit merely posted a warning that users were prohibited from revealing personal information about other individuals on the #PizzaGate discussion thread, but it did not prohibit the posts.⁵⁰

After reading these stories online, Edgar M. Welch was intent on investigating the conspiracy.⁵¹ Mr. Welch decided that he had to rescue the children that were supposedly being held as sex slaves in a child-abuse ring led by Hillary Clinton.⁵² He drove six hours from his home to Comet Ping Pong to see the situation for himself.⁵³ Mr. Welch arrived at Comet Ping Pong with a handgun, as well as an AR-15 rifle

44. *Id.* (highlighting a few of the numerous theories regarding Comet Ping Pong).

45. Kang, *supra* note 35.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. Kang & Goldman, *supra* note 15.

52. *Id.*

53. *Id.*

which he fired inside the pizzeria.⁵⁴ Luckily, no one was injured,⁵⁵ and, when he was arrested, he surrendered peacefully because he did not find evidence that children were being held in the pizzeria.⁵⁶ Mr. Welch has since been sentenced to four years in prison for assault with a dangerous weapon and transporting a firearm over state lines.⁵⁷ Though there is still a plethora of articles defaming Comet Ping Pong on the Internet, there is little legal recourse afforded to Mr. Alefantis, as will be explained further in Part III.⁵⁸

B. *Authors of Fake News*

While Mr. Alefantis was able to contact those websites that hosted defaming material about Comet Ping Pong to have it removed, he was unable to locate the authors of these articles because many fake news authors post anonymously. Despite this issue, the NPR radio show *All Things Considered* managed to identify a fake news website owner.⁵⁹ *All Things Considered* set out initially to find the owner of the site DenverGuardian.com, which has since been taken down.⁶⁰ During its search, it found that the site was linked

54. *Id.*

55. Aisch et al., *supra* note 38.

56. Kang & Goldman, *supra* note 15.

57. Aria Bendix, 'Pizzagate' Shooter to Serve Four Years in Jail, ATLANTIC (June 22, 2017), <https://www.theatlantic.com/news/archive/2017/06/dcs-pizzagate-shooter-sentenced-to-4-years-in-jail/531381/>.

58. *Fake News Surge Pins D.C. Pizzeria as Home to Child-Trafficking*, NPR (Nov. 27, 2016, 8:38 AM), <http://www.npr.org/2016/11/27/503489400/fake-news-surge-pins-d-c-pizzeria-as-home-to-child-trafficking>. See *infra* Part III.

59. Laura Sydell, *We Tracked Down a Fake-News Creator in the Suburbs. Here's What We Learned*, NPR: ALL TECH CONSIDERED (Nov. 23, 2016, 3:31 PM), http://www.npr.org/sections/alltechconsidered/2016/11/23/503146770/npr-finds-the-head-of-a-covert-fake-news-operation-in-the-suburbs?utm_source=npr_newsletter&utm_medium=email&utm_content=20161127&utm_campaign=bestofnpr&utm_term=nprnews.

60. See *id.*; Rachel Sandler, *'It's Hurt My Wallet'—How One Fake News Publisher Is Faring After Facebook Crackdown*, USA TODAY (Aug. 2, 2017, 4:19 PM), <https://www.usatoday.com/story/tech/2017/08/02/its-hurt-my-wallet-how>

to NationalReport.net, USAToday.com.co, and WashingtonPost.com.co through a single rented server inside Amazon Web Services.⁶¹ Journalists for NPR's *All Things Considered* soon determined the owner of these sites was Jestin Coler, CEO and publisher of Disinfomedia.⁶² At its peak, Disinfomedia owned approximately twenty-five fake news domains, and, according to Coler, he had one of the largest fake news businesses.⁶³ At any one time, Coler had twenty to twenty-five writers contributing to his fake news sites, but even he did not know all of their identities.⁶⁴

Coler claimed that he began writing fake news stories to “infiltrate the echo chambers of the alt-right, publish blatantly false or fictional stories and then be able to publicly denounce those stories and point out the fact that they were fiction.”⁶⁵ Whether he actually succeeded in this endeavor is debatable. *The Denver Guardian* published some of the most viral fake news stories of 2016, including the story headlined “FBI Agent Suspected in Hillary Email Leaks Found Dead in Apparent Murder-Suicide.”⁶⁶ Coler himself was surprised by how quickly his stories spread and how easily readers believed his completely fictional stories.⁶⁷ Coler generates income from his fake news articles from advertisements on his website, earning between \$10,000 and \$30,000 per month.⁶⁸ Yet, Coler claims that he does not post fake news for the profit, but, instead, to demonstrate how fake news spreads.⁶⁹

one-fake-news-publisher-faring-after-facebook-crackdown/486720001/.

61. Sydell, *supra* note 59.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. Silverman, *supra* note 22.

67. Sydell, *supra* note 59.

68. *Id.*

69. *Id.*

Paul Horner, another infamous fake news writer, has earned money from fake news stories for years.⁷⁰ In an October 2014 interview, he stated that he can earn up to \$10,000 per day from a story that goes viral.⁷¹ Horner owned at least ten fake news sites in November 2016, and he told *The Washington Post* that he earns at least \$10,000 per month from Google AdSense alone.⁷² One of Horner's articles was shared on Twitter by both President Trump's son and then-campaign manager, Corey Lewandowski.⁷³ Similar to Coler, Horner intended for his fake news stories to make President Trump supporters "look like idiots" for believing what he wrote.⁷⁴ During the most recent election, Horner found that Trump supporters in particular believed his stories because they failed to adequately fact-check them.⁷⁵

C. Dissemination and Trajectory of Fake News Stories

While the goal of some fake news authors is to demonstrate the spread of fake news,⁷⁶ the goal of others is to make a story go viral to collect revenue from advertisements.⁷⁷ *The New York Times* recently conducted a case study exploring how fake news goes viral.⁷⁸ While the following story⁷⁹ does not fall into this Comment's definition

70. Caitlin Dewey, *This Is Not an Interview with Banksy*, WASH. POST: THE INTERSECT (Oct. 22, 2014), https://www.washingtonpost.com/news/the-intersect/wp/2014/10/21/this-is-not-an-interview-with-banksy/?utm_term=.6273d42dce2c; Gillin, *supra* note 31.

71. Dewey, *supra* note 70.

72. Dewey, *supra* note 7.

73. *Id.*

74. *Id.*

75. *See id.*

76. Sydell, *supra* note 59.

77. *See Dewey, supra* note 7.

78. Sapna Maheshwari, *How Fake News Goes Viral: A Case Study*, N.Y. TIMES (Nov. 20, 2016), https://www.nytimes.com/2016/11/20/business/media/how-fake-news-spreads.html?_r=0.

79. *See infra* pp. 13–15.

of fake news, the path from publication to viral status remains the same. Fake news stories have been disseminated more than once by political personalities. For example, television news hosts repeatedly reported fake news stories, which were quoted by then-Presidential-candidate Trump.⁸⁰ Additionally, then-President-elect Trump and his son retweeted other fake news stories.⁸¹

Political personalities have considerable influence over the population. Therefore, when they endorse a piece of information, the reader may be more inclined to take it as true or at least accurately sourced.⁸² President Trump, in particular, has more clout with his supporters because he

80. Bratu et al., *supra* note 6; Juju Chang et al., *When Fake News Stories Make Real News Headlines*, ABC NEWS (Nov 29, 2016, 2:43 PM), <http://abcnews.go.com/Technology/fake-news-stories-make-real-news-headlines/story?id=43845383>.

81. Robert Fisk, *Trump's Claim that a General Dipped Bullets in Pigs' Blood Is Fake News—But the US Massacre of Moro Muslims Isn't*, INDEP.: VOICES (Aug. 18, 2017, 6:00 AM), <http://www.independent.co.uk/voices/donald-trump-barcelona-attack-twitter-tweet-pigs-blood-general-fake-news-duterte-philippines-a7899826.html>; Sapna Maheshwari, *10 Times Trump Spread Fake News*, N.Y. TIMES (Jan. 18, 2017), <https://www.nytimes.com/interactive/2017/business/media/trump-fake-news.html>; Mike Murphy, *Fake News? Trump Tweeted About Iran Missile Launch that Never Happened*, MARKET WATCH (Sept. 25, 2017, 7:36 PM), <http://www.marketwatch.com/story/fake-news-trump-tweeted-about-iran-missile-launch-that-never-happened-2017-09-25>.

82. See Seung-A Annie Jin & Joe Phua, *Following Celebrities' Tweets About Brands: The Impact of Twitter-Based Electronic Word-of-Mouth on Consumers' Source Credibility Perception, Buying Intention, and Social Identification with Celebrities*, 43 J. ADVERT. 181, 192 (2014) (finding in an experiment that “a celebrity endorser with a high number of followers was significantly associated with higher ratings on source credibility compared to a celebrity endorser with a low number of followers. Consumers perceived the celebrity with a high number of followers as being more physically attractive, trustworthy, and competent.”). See also Shmuel I. Becher & Yuval Feldman, *Manipulating, Fast and Slow: The Law of Non-Verbal Market Manipulations*, 38 CARDOZO L. REV. 459, 482 (2016) (“Social psychology, more particularly research on social influence, explains why celebrities are a powerful advertising tool, and the fact that firms use celebrities as a marketing tactic is common knowledge. However, celebrities also influence consumers’ perception in nuanced and subliminal ways which are beyond their awareness.”) (internal citation omitted); Roberta Rosenthal Kwall, *Fame*, 73 IND. L.J. 1, 25 (1997) (“The visibility of celebrities and the public’s need to know about products lead consumers to listen closely to celebrity endorsements”).

transcended the role of celebrity to politician. Trump the celebrity was seen as a source of higher credibility and this continued as he became a political candidate and posted fake news articles, which his supporters then believed.

The study followed a now-deleted tweet by Eric Tucker, which stated, “Anti-Trump protestors [sic] in Austin today are not as organic as they seem. Here are the busses they came in. #fakeprotests #trump2016 #austin,” and included a picture of Coach buses.⁸³ Although Mr. Tucker said his misinformed tweet was not intentionally fake news,⁸⁴ the aftermath is worth discussing as an example of the fake news phenomenon. Mr. Tucker posted the tweet on November 9, 2016, shortly after 8 p.m. Eastern Standard Time to his forty Twitter followers.⁸⁵ Mr. Tucker claimed that he performed a search to see if any conferences were being held downtown after seeing the suspicious buses, but he was unable to find anything.⁸⁶ He later stated, “I did think in the back of my mind there could be other explanations, but it just didn’t seem plausible.”⁸⁷ Less than four hours later, Mr. Tucker’s tweet was posted to a pro-Donald Trump Subreddit with the heading “BREAKING: They found the buses! Dozens lined up just blocks away from the Austin protests.”⁸⁸ The post quickly generated over 300 comments and 7488 upvotes.⁸⁹

The story proceeded to gain momentum over the next day culminating in then-President-elect Trump mentioning the

83. Maheshwari, *supra* note 78.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*; *BREAKING: They found the buses! Dozens lined up just blocks away from the Austin protests*, REDDIT, https://www.reddit.com/r/The_Donald/comments/5c6ag1/breaking_they_found_the_buses_dozens_lined_up/ (last visited Aug. 1, 2017).

protests in a tweet.⁹⁰ The next morning, on November 10, 2016, a user on Free Republic, a conservative discussion forum, posted a link to the Reddit post.⁹¹ Later that same day, several Facebook pages linked to the Free Republic discussion, which were then shared more than 5000 times and liked by more than 300,000 Facebook users.⁹² That same day, Sean Hughes, the Coach USA North America Director of Corporate Affairs, was contacted by a reporter at a Fox News station in Austin.⁹³ Mr. Hughes informed the reporter that Coach USA buses were not involved in the Austin protests.⁹⁴ Mr. Hughes did not receive any calls or emails from the unknown internet users who were writing about it.⁹⁵

Despite the false information which ultimately may have been prevented by a mere confirmation with the source, Mr. Tucker's post had been retweeted and liked over 5000 times.⁹⁶ Later that night, *The Gateway Pundit*, a conservative blog, featured a story with the photos Mr. Tucker had posted with the headline "Figures. Anti-Trump Protesters Were Bussed in to Austin #FakeProtests."⁹⁷ This article was shared on Facebook over 44,000 times.⁹⁸ Then, that same night, then-President-elect Trump tweeted: "Just had a very open and successful presidential election. Now professional protesters, incited by the media, are protesting. Very unfair!"⁹⁹ In just forty-eight hours, a disingenuous

90. Maheshwari, *supra* note 78.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *See id.* ("You're the second journalist to actually call me to see what was going on, no bloggers or anything, and we're easily accessible on our website.").

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

Twitter post spread from a mere forty followers to 14.5 million followers after President-elect Trump tweeted about it.¹⁰⁰ On November 12, 2016, Mr. Tucker deleted his original tweet, and he posted a picture of his original tweet with the word “false” over it.¹⁰¹ After a week, the corrected tweet had only twenty-seven likes and twenty-nine retweets.¹⁰²

D. Facebook as a Host of Fake News

Arguably, the most important vehicle for fake news stories is Facebook.¹⁰³ On Facebook, fake news articles look almost identical to those from reputable news organizations. Each article displays a headline, a picture, the originating website, the person or company who posted it, and the number of likes, shares, and comments. Fake news sites’ ability to mirror the appearance of an authentic news site, on both Facebook and their respective websites, is essential to their success—the replicated appearance allows for the reader to believe that what she is reading is news from a reputable source.¹⁰⁴

100. Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 11, 2016, 6:19 PM), <https://twitter.com/realDonaldTrump/status/796900183955095552>.

101. Maheshwari, *supra* note 78.

102. *Id.*

103. See Jonathon Morgan, *Facebook and Google Need to Own Their Role in Spreading Misinformation—and Fix It*, CNN (Oct. 9, 2017, 8:39 AM), <http://www.cnn.com/2017/10/09/opinions/social-media-platforms-spreading-disinformation-opinion-morgan/index.html>; Abby Ohlheiser, *This Is How Facebook’s Fake-News Writers Make Money*, WASH. POST: THE INTERSECT (Nov. 18, 2016), https://www.washingtonpost.com/news/the-intersect/wp/2016/11/18/this-is-how-the-internets-fake-news-writers-make-money/?utm_term=.5ae2b14182fe; Rob Price, *Facebook Will Now Teach You How to Spot Fake News*, BUSINESS INSIDER (Apr. 12, 2017, 4:36 PM) <http://www.businessinsider.com/facebook-how-to-spot-fake-news-2017-4> (“The social network has come under heavy criticism over its central role in the spread of fake news”).

104. See Joshua Gillin, *PolitiFact’s Guide to Fake News Websites and What They Peddle*, POLITIFACT: PUNDITFACT (Apr. 20, 2017, 9:54 AM), <http://www.politifact.com/punditfact/article/2017/apr/20/politifacts-guide-fake-news-websites-and-what-they/>; Melanie Radzicki McManus, *10 Ways to Spot a Fake News Story*, HOW STUFF WORKS, <http://history.howstuffworks.com/history-vs-myth/10-ways-to-spot-fake-news-story.htm> (last visited Oct. 11, 2017); Craig

Facebook's importance as a vehicle for fake news is evidenced by the sheer number of users who receive news on the site. In 2012, a Pew Research study indicated that forty-nine percent of U.S. adults reported seeing news on social media.¹⁰⁵ Later, in 2016, a similar Pew Research study showed that sixty-two percent of U.S. adults receive their news on social media websites.¹⁰⁶ While these studies were "based on a slightly different question," where one asked if the participant had seen news on social media and the other asked if she received news on social media, the increase remains significant.¹⁰⁷ The percentage of users who get their news on the following social networking sites vary: seventy percent of Reddit users get their news on Reddit; sixty-six percent of Facebook users get their news on Facebook; fifty-nine percent of Twitter users get their news on Twitter; twenty-three percent of Instagram users get their news on Instagram; twenty-one percent of YouTube users get their news on YouTube; and seventeen percent of Snapchat users get their news on Snapchat.¹⁰⁸

Once the total reach of these sites is factored in, the numbers are more dramatic. Facebook reaches sixty-seven percent of U.S. adults and sixty-six percent of those adults get their news on Facebook.¹⁰⁹ Once the user percentage is combined with the total number of U.S. adults, this equates to forty-four percent of the U.S. adult population receiving its news on Facebook.¹¹⁰ That is thirty-four percentage points more than the largest proportion of U.S. adults receiving

Silverman, *This Analysis Shows How Viral Fake Election News Stories Outperformed Real News On Facebook*, BUZZFEED NEWS (Nov. 16, 2016, 4:15 PM), https://www.buzzfeed.com/craigsilverman/viral-fake-election-news-outperformed-real-news-on-facebook?utm_term=.aoZN8wQ8E#.ysJg8lP8a.

105. Gottfried & Shearer, *supra* note 17.

106. *See id.*

107. *See id.*

108. *Id.*

109. *Id.*

110. *Id.*

their news on any other social media site.¹¹¹ While Facebook users receive their news on other platforms as well, a larger percentage receives its news from Facebook than any other platform alone, including local TV, cable TV, network nightly TV, news websites and apps, radio, and print newspapers.¹¹²

Not only are fake news stories promoted by Facebook users, there is at least one instance of a fake news story being promoted by Facebook itself.¹¹³ In August 2016, Facebook terminated the employment of twenty-six employees who managed the “Trending Topics” feature,¹¹⁴ and replaced them with an algorithm.¹¹⁵ This permits Facebook to be able to claim that it is merely a technology company, and not a media company, which is a mediator of content, as evidenced by the lack of employees with editorial control.¹¹⁶ There are still some employees involved in the process of determining what stories appear in the Trending section, but it is fewer than originally employed,¹¹⁷ and no longer rises to the level

111. *See id.* (displaying how YouTube is the next leading site).

112. *See id.*

113. *See* Robinson Meyer, *Facebook Purges Journalists, Immediately Promotes a Fake Story for 8 Hours*, ATLANTIC (Aug. 29, 2016), <https://www.theatlantic.com/technology/archive/2016/08/facebook-steps-in-it/497915/>; Sam Thielman, *Facebook Fires Trending Team, and Algorithm Without Humans Goes Crazy*, GUARDIAN (Aug. 29, 2016 12:48 PM), <https://www.theguardian.com/technology/2016/aug/29/facebook-fires-trending-topics-team-algorithm>.

114. The Trending Topics feature shows each user a list of news stories that Facebook deems to be “trending.” *See Trending*, FACEBOOK, <https://www.facebook.com/facebookmedia/get-started/trending> (last visited Aug 1, 2017) (“Trending works by surfacing topics that are seeing high overall volume of mentions on Facebook and sharp increases in mentions over a short period of time. Trends are personalized for each individual on Facebook based on a number of factors, including: Pages you’ve liked, feedback you’ve provided on previous trending topics and other factors.”).

115. Meyer, *supra* note 113.

116. Robinson Meyer, *Did Facebook Defame Megyn Kelly?*, ATLANTIC (Aug. 30, 2016), <https://www.theatlantic.com/technology/archive/2016/08/did-facebook-defame-megyn-kelly/498080/>.

117. Meyer, *supra* note 113.

of editorial control that was previously employed.¹¹⁸ Fewer employees monitoring the “Trending Topics” feature resulted in Facebook promoting at least one fake news story purporting that Megyn Kelly had been fired from Fox News because she endorsed Hillary Clinton.¹¹⁹ The trending algorithm promotes those articles that are discussed the most and then places them in the trending section, regardless of their validity.¹²⁰ Similar to the viral path of Mr. Tucker’s tweet,¹²¹ when a story starts to trend on Facebook, even if it is only being talked about by a few thousand people, it will then nevertheless appear in front of millions of people on the side of their news feed,¹²² whether they like it or not and regardless of the veracity of the story.

II. PEOPLE ARE UNABLE TO DIFFERENTIATE REAL FROM FAKE NEWS

Fake news is not a new phenomenon, but the format has changed over time. Despite the average person’s acknowledgment of sensationalized headlines in print, she is still unable to discern what is real or fake when presented online. This Part briefly mentions the phenomenon of misinformation and sensationalized headlines in history. Next, it explains how most internet users lack general

118. See Caitlin Dewey, *Facebook Has Repeatedly Trended Fake News Since Firing Its Human Editors*, WASH. POST: THE INTERSECT (Oct. 12, 2016), https://www.washingtonpost.com/news/the-intersect/wp/2016/10/12/facebook-has-repeatedly-trended-fake-news-since-firing-its-human-editors/?utm_term=.145d2303d2ef (“Last May, however, Facebook faced a torrent of high-profile accusations about political bias on the Trending editorial team—so much so that, in the aftermath, the company decided to tweak the role humans play in approving Trending topics.”).

119. *Id.* (“I’m not at all surprised how many fake stories have trended,’ one former member of the team that used to oversee Trending told the Post. ‘It was beyond predictable by anyone who spent time with the actual functionality of the product, not just the code.”); Meyer, *supra* note 113.

120. See Meyer, *supra* note 116.

121. See *supra* Section I.C.

122. Meyer, *supra* note 116.

internet literacy. Finally, it explores why this lack of internet literacy coupled with fake news articles results in readers believing everything they read or nothing, including authentic news.

A. *Fake News Is not New*

One of the earliest historical false news¹²³ stories is commonly referred to as “The Great Moon Hoax.”¹²⁴ It was a series of six articles published in 1835 by *The New York Sun*, a newspaper which was made profitable by these stories.¹²⁵ The stories, written by Richard Adams Locke, alleged that there was an alien civilization on the moon.¹²⁶ In addition to his description of humans with bat-like wings living on the moon, Locke included references to real astronomy in his stories.¹²⁷ Edgar Allen Poe thought that the author was a genius and that less than ten percent of readers believed that the story was a hoax.¹²⁸

Other historical examples of historical false news include “yellow journalism,” which, similar to fake news as defined by this Comment, emphasized sensationalism over facts.¹²⁹

123. The following stories are labeled “historical false news” as they do not fully fit into this Comment’s definition of “fake news.” As previously noted, this Comment defines “fake news” as intentionally fabricated stories that are entirely or mostly false statements of fact, created to deceive and be shared.

124. See Jacob Soll, *The Long and Brutal History of Fake News*, POLITICO (Dec. 18, 2016), <http://www.politico.com/magazine/story/2016/12/fake-news-history-long-violent-214535> (“By the early 19th century, modern newspapers came on the scene, touting scoops and exposés, but also fake stories to increase circulation.”).

125. *Id.*; J. Donald Fernie, *Marginalia: The Great Moon Hoax*, 81 AM. SCIENTIST 120, 120 (1993); *The Great Moon Hoax*, HISTORY, <http://www.history.com/this-day-in-history/the-great-moon-hoax> (last visited Oct. 11, 2017).

126. See Fernie, *supra* note 125, at 120.

127. *Id.*

128. *Id.* at 122.

129. See Jessica E. Jackson, Note, *Sensationalism in the Newsroom: Its Yellow Beginnings, the Nineteenth Century Legal Transformation, and the Current Seizure of the American Press*, 19 NOTRE DAME J. L. ETHICS & PUB. POL’Y 789, 790 (2005) (describing yellow journalism as “[c]haracterized by prominent headlines

It was marked by fake interviews, dramatic headlines, bogus stories, excessive use of pictures that lacked significance, overt sympathy for the underdog, and “campaigns against abuses suffered by the common people.”¹³⁰ Yellow journalism often refers specifically to the narrative style used by two competing newspaper publishers, Joseph Pulitzer and William Randolph Hearst, with regard to their profit-driven coverage of developments in Cuba prior to the Spanish-American War.¹³¹ The coverage included bold headlines of stories depicting the harshness of the Spanish rule and the nobility of the revolutionaries, all of which were false.¹³² In response, there was both a call for an honest press and advocates in defense of newspapers’ right to free speech.¹³³

Other historical false news publications have had more staying power. *The National Enquirer* has been in publication since 1926.¹³⁴ *The National Enquirer* began publishing sensationalized stories about politics, theatre news, sports, and human-interest stories.¹³⁵ More recently, it publishes predominantly celebrity gossip.¹³⁶

The general population now understands that *The*

that screamed excitement, a lavish use of pictures, frauds of various kinds [. . .] serv[ing] an entertainment, rather than educational, function”) (internal quotations omitted).

130. Trevor D. Dryer, “*All the News That’s Fit to Print*”: *The New York Times*, “*Yellow*” Journalism, and the Criminal Trial 1898-1902, 8 NEV. L.J. 541, 547 (2008).

131. Jackson, *supra* note 129, at 791; *U.S. Diplomacy and Yellow Journalism, 1895-1898*, U.S. DEPT STATE: OFF. HISTORIAN, <https://history.state.gov/milestones/1866-1898/yellow-journalism> (last visited July 31, 2017).

132. U.S. DEPT STATE: OFF. HISTORIAN, *supra* note 131.

133. Jackson, *supra* note 129, at 792. For further discussion of the origins of yellow journalism, see *id.* at 790-94.

134. *90 Years of The National ENQUIRER! Find Out How One Magazine Changed Modern Journalism*, NAT’L ENQUIRER (Oct. 3, 2016, 3:08 PM), <http://www.nationalenquirer.com/celebrity/national-enquirer-90th-anniversary-panel/>.

135. *National Enquirer*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/National-Enquirer> (last visited July 31, 2017).

136. *Id.*

National Enquirer is not a credible source of news and should not be taken as complete truth as the articles are written to be attention-grabbing and sensationalized.¹³⁷ Despite this knowledge with regard to *The National Enquirer* and other misleading print sources, readers have been unable to apply this ability to decipher real from fake to online news.¹³⁸ Perhaps the news medium itself determines whether or not people can ascertain what is real and fake. Regardless of the reason, it's evident that with the proliferation of online news articles, the average person now has a difficult time discerning what is accurate news.¹³⁹ Furthermore, individuals and entities are able to profit quickly off this misunderstanding in larger quantities than their predecessors experienced;¹⁴⁰ fake news today is a new enemy.

B. *People Lack Internet Literacy*

The fake news articles presented in Part I display how such articles can easily mislead readers who may only read the headline or a small portion of the article.¹⁴¹ A recent Pew Research Center Poll found that sixty-four percent of U.S. adults believe that fake news stories cause a great deal of confusion, twenty-four percent believe it causes at least some confusion, and eleven percent believe it causes little or no confusion around basic facts about current events.¹⁴² These

137. See *Media Credibility*, PEW RES. CTR. (Aug. 17, 2008), <http://www.people-press.org/2008/08/17/media-credibility/>.

138. See *id.*; Camila Domonoske, *Students Have 'Dismaying' Inability to Tell Fake News from Real, Study Finds*, NPR: THE TWO-WAY (Nov. 23, 2016, 12:44 PM), <http://www.npr.org/sections/thetwo-way/2016/11/23/503129818/study-finds-students-have-dismaying-inability-to-tell-fake-news-from-real>. See also *infra* Section II.B.

139. See *infra* Section II.B.

140. See Fernie, *supra* note 125, at 120. See also *supra* Section I.C.

141. See *supra* Section I.A.

142. Michael Barthel, Amy Mitchell & Jesse Holcomb, *Many Americans Believe Fake News Is Sowing Confusion*, PEW RES. CTR. (Dec. 15, 2016), <http://www.journalism.org/2016/12/15/many-americans-believe-fake-news-is->

beliefs were shared widely across education levels, partisan affiliation, income levels, and most other demographic characteristics.¹⁴³ Despite this belief, thirty-nine percent of U.S. adults are very confident in their own ability to identify a fake news story, forty-five percent are somewhat confident, nine percent are not very confident, and six percent are not confident at all.¹⁴⁴ While readers believe they can identify fake news, they still believe it causes a great deal of confusion. The aforementioned polls were directed at U.S. adults and, consequently, failed to account for the general presumption that the younger generation is more proficient at identifying fake news, as they have always lived in a time when news was delivered over the internet.¹⁴⁵

To explore this presumption, the Stanford History Education Group recently conducted a study that examined the internet literacy of younger people with respect to social media and shared content.¹⁴⁶ The study collected and analyzed 7804 student responses, ranging from middle school students through university students from twelve different states.¹⁴⁷ The students were from under-resourced, inner-city schools as well as from well-resourced, suburban schools.¹⁴⁸ The study also included students from different universities of differing prestige that ranged from large state universities to Stanford.¹⁴⁹ The findings of the study

sowing-confusion/.

143. *Id.*

144. *Id.* It must be noted that these are self-reported polls, and it is possible that some of the 1,002 U.S. adults that were surveyed may have exaggerated their perceived abilities.

145. See, e.g., Patricia Reaney, *Teens More Resilient, Tech Savvy than Older Millennial: Study*, REUTERS (June 19, 2013, 4:11 PM), <http://www.reuters.com/article/us-millennials-poll-idUSBRE95I1J420130619>.

146. See generally STAN. HIST. EDUC. GROUP, EVALUATING INFORMATION: THE CORNERSTONE OF CIVIC ONLINE REASONING (2016), <https://sheg.stanford.edu/upload/V3LessonPlans/Executive%20Summary%2011.21.16.pdf>.

147. *Id.* at 3, 4.

148. *Id.* at 3.

149. *Id.*

indicated that students, regardless of varying socioeconomic and education backgrounds, were incompetent at determining the validity of information on the internet.¹⁵⁰

The researchers found that students focus on the content, rather than the source of social media, and are unaware of how to determine if the information is verified.¹⁵¹ For example, over three-quarters of middle school students were able to identify traditional news stories and advertisements.¹⁵² However, more than eighty percent mistakenly believed that sponsored content was a real news story,¹⁵³ despite being labeled as “sponsored content.”¹⁵⁴ Almost forty percent of high school students believed that a photo of deformed daisies on Imgur¹⁵⁵ “provided strong evidence [for the dangers of nuclear radiation] because it presented pictorial evidence about conditions near the power plant.”¹⁵⁶ Another twenty-five percent believed it did not provide strong evidence, but only because the picture did not show animals or plants that were affected by nuclear

150. *Id.* at 4.

151. Brooke Donald, *Stanford Researchers Find Students Have Trouble Judging the Credibility of Information Online*, STAN. GRADUATE SCH. EDUC. (Nov. 22, 2016), <https://ed.stanford.edu/news/stanford-researchers-find-students-have-trouble-judging-credibility-information-online>.

152. STAN. HIST. EDUC. GROUP, *supra* note 146, at 10.

153. *Id.* at 10.

154. “Sponsored Content” is to be defined as “written stories, videos or podcasts that look and feel like journalistic content,” that are in fact advertisements. John Hermann, *How Sponsored Content Is Becoming King in a Facebook World*, N.Y. TIMES (July 24, 2016), https://www.nytimes.com/2016/07/25/business/sponsored-content-takes-larger-role-in-media-companies.html?_r=0.

155. “Imgur is an image hosting and sharing site. . . . It hosts images for free in various formats, including animated Gif files, supported by advertising, with paid-for professional accounts available. Those images are kept online for free, only deleted if the image is not accessed at least once during any six-month period. Users of the site can post comments, use tools to create new images and then share those images with both Imgur users and the wider internet.” Samuel Gibbs, *What Exactly Is Imgur, and Why Is Yahoo Trying to Buy It?*, GUARDIAN (Dec. 11, 2013 6:54 AM), <https://www.theguardian.com/technology/2013/dec/11/imgur-yahoo-image-sharing-reddit>.

156. STAN. HIST. EDUC. GROUP, *supra* note 146, at 17.

radiation.¹⁵⁷ The students ignored important details such as the source of the photo, and, instead, relied on the picture to evaluate the trustworthiness of the post.¹⁵⁸

Another assessment asked high school students to evaluate two Facebook posts that announced Donald Trump's candidacy for president.¹⁵⁹ One announcement was from an account that looked like *Fox News*, while the other was from the verified *Fox News* account.¹⁶⁰ Over thirty percent of students claimed the fake news article was more trustworthy due to some graphic elements, and only twenty-five percent recognized and explained the meaning of the blue check mark, indicating a verified source.¹⁶¹ This finding, in particular, is important for purposes of this Comment—a common issue with fake news articles is that their appearance mirrors accurate news sources, which effectively imbues the article with ample credibility.¹⁶²

These findings were not only evident at the middle school and high school level, but persisted at the university level. University students were presented with a tweet from a liberal advocacy group which stated, “New polling shows the @NRA is out of touch with gun owners and their own members,” and a graphic saying, “Two out of three gun owners say they would be more likely to vote for a candidate who supported background checks.”¹⁶³ The tweet also contained a link to a press release by the poll's sponsor.¹⁶⁴ The study then asked the students why the tweet may or may not be a useful source of information.¹⁶⁵ The results showed

157. *Id.*

158. *Id.*

159. Donald, *supra* note 151.

160. *Id.*

161. *Id.*

162. *See supra* Section I.C.

163. STAN. HIST. EDUC. GROUP, *supra* note 146, at 23.

164. *Id.*

165. *Id.*

that students had difficulty evaluating the tweets, and less than one-third explained that the political agenda of the liberal advocacy group could influence the content.¹⁶⁶ Notably, more than half of the university students did not click on the link in the tweet.¹⁶⁷ Some of the students did not click on any of the links, while others attempted to do outside internet searches.¹⁶⁸ Though further research is needed, this study suggests the younger generation is not as internet literate as previously believed,¹⁶⁹ thus this incompetence is not limited to adult internet users.

C. Results of Fake News

This illiteracy is only exacerbated by readers' retention of false information.¹⁷⁰ Some argue that readers should be responsible for determining whether news is fake before sharing it, but, according to psychologist Dannagal Young, readers cannot help spreading fake news.¹⁷¹ Young argues that "[o]ur brains have a finite capacity for processing information and for remembering, so our minds make value judgments about what to keep. Humor tips the scales in favor

166. *Id.*

167. *Id.* at 24.

168. *Id.*

169. *Id.* at 7.

170. See Hunt Allcott & Matthew Gentzkow, *Social Media and Fake News in the 2016 Election*, 31 J. ECON. PERSP. 211, 232 (2017), <https://web.stanford.edu/~gentzkow/research/fakenews.pdf> ("We estimate that the average US adult read and remembered on the order of one or perhaps several fake news articles during the election period, with higher exposure to pro-Trump articles than pro-Clinton articles."); Craig Silverman & Jeremy Singer-Vine, *Most Americans Who See Fake News Believe It, New Survey Says*, BUZZFEED NEWS (Dec. 6, 2016, 7:31 PM), https://www.buzzfeed.com/craigsilverman/fake-news-survey?utm_term=.dbQj6RQPp#.yfyBjErMb ("Fake news headlines fool American adults about 75% of the time, according to a large-scale new survey conducted by Ipsos Public Affairs for BuzzFeed News.").

171. Nsikan Akpan, *The Very Real Consequences of Fake News Stories and Why Your Brain Can't Ignore Them*, PBS NEWSHOUR (Dec. 5, 2016, 6:06 PM), <http://www.pbs.org/newshour/updates/real-consequences-fake-news-stories-brain-cant-ignore/>.

of being remembered and recalled, even when counterarguments are strong.”¹⁷² When exposed to fake news or satire, the brain can access the humor constructs and brings the information into the working memory, a part of the short term memory.¹⁷³ This results in the reader being unable to “un-think” the story.¹⁷⁴ Whether the reader believed the fake news story to be true or not, she will continue to remember it as “this powerful mode of persuasion extends to sensational fake news as well.”¹⁷⁵

According to Michael Lynch, a professor of Philosophy at the University of Connecticut, the credulity of people is not the larger problem with regard to fake news.¹⁷⁶ Rather, “[t]he wider problem is fake news has the effect of getting people not to believe real things.”¹⁷⁷ Lynch describes this as readers believing that all information is so biased or conflicting that they ignore facts.¹⁷⁸

Most of us experience an echo chamber of information on social media.¹⁷⁹ A recent study done by social scientists Walter Quattrociocchi, Antonio Scala, and Cass Sunstein found that users tend to interact with only “like minded” friends which create echo chambers on Facebook.¹⁸⁰ In

172. *Id.*

173. *See id.*

174. *See id.*

175. *See id.*

176. Tavernise, *supra* note 10.

177. *Id.*

178. *Id.* (“He described the thinking like this: ‘There’s no way for me to know what is objectively true, so we’ll stick to our guns and our own evidence. We’ll ignore the facts because nobody knows what’s really true anyway.’”). *See also* Michael P. Lynch, *Fake News and the Internet Shell Game*, N.Y. TIMES (Nov. 28, 2016), <https://www.nytimes.com/2016/11/28/opinion/fake-news-and-the-internet-shell-game.html>.

179. *See* Walter Quattrociocchi et al., *Echo Chambers on Facebook*, 2016 JOHN M. OLIN CTR. L. ECON. & BUS. (manuscript at 14), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2795110.

180. *Id.*

addition, users that are more active within their own echo chamber are more likely to interact with other users who share similar beliefs.¹⁸¹ The study also found that confirmation bias¹⁸² was a contributing factor to whether or not a user decided to spread content, and this created “informational cascades within identifiable communities.”¹⁸³ Further, users rejected information that undermined their preferred narrative and instead sought information that strengthened it.¹⁸⁴ Notably, the study found “intentionally false claims are accepted and shared, while debunking information is mainly ignored [and as a result], exposure to debunking information may even increase the commitments.”¹⁸⁵ So long as the intentionally false information conformed with the narrative of the user, even when framed as satire, it was welcomed and treated as suitable content for certain echo chambers.¹⁸⁶

The result is readers believing the most recent article that they read, whether authentic or fake, and others who believe nothing, including real news, because they lack the requisite Internet literacy and exist in an echo chamber on social media. Unfortunately, the current legal landscape does not afford a remedy to this situation, as will be discussed in Part IV.¹⁸⁷

181. *Id.*

182. CAROL TAVRIS & ELLIOT ARONSON, MISTAKES WERE MADE (BUT NOT BY ME): WHY WE JUSTIFY FOOLISH BELIEFS, BAD DECISIONS, AND HURTFUL ACTS 22 (Houghton Mifflin Harcourt 2015) (“So powerful is the need for consonance that when people are forced to look at disconfirming evidence, they will find a way to criticize, distort, or dismiss it so that they can maintain or even strengthen their existing belief. This mental contortion is called ‘confirmation bias’”).

183. Quattrocio et al., *supra* note 179, at 14.

184. *Id.* at 14.

185. *Id.* at 2.

186. *Id.* at 12.

187. *See infra* Part IV.

III. COMMON LAW FRAMEWORK

Fake news feels inherently immoral to many,¹⁸⁸ yet it can be difficult to determine what law fake news violates. Many fake news stories fall under the category of defamation,¹⁸⁹ because they are false and defamatory statements about another, often a public official, made with actual malice, as the statements are intentionally false.¹⁹⁰ However, the common law framework of defamation does not apply when content is posted on the internet.¹⁹¹ To best understand how third-party liability on the internet is the exception, one must first understand the common law approach. This portion next explains the common law

188. See, e.g., Madeline Buxton, *A Fake News Writer Says His Articles Helped Trump Win*, REFINERY29: TECH (Nov. 17, 2016, 2:05 PM), <http://www.refinery29.com/2016/11/130288/paul-horner-facebook-fake-news> (“His site isn’t humorous; it’s just misleading. And that’s not okay.”).

189. *What Legal Recourse Do Victims Of Fake News Stories Have?*, NPR (Dec. 7, 2016, 7:04 PM), <http://www.npr.org/2016/12/07/504723649/what-legal-recourse-do-victims-of-fake-news-stories-have> (“Derigan Silver, a professor of media, First Amendment and Internet law at the University of Denver, tells NPR’s Audie Cornish that victims of fake news stories have legal recourse under defamation law.”).

190. See Bill Haltom, *But Seriously Folks: Presence of Malice*, 53 TENN. B.J. 40, 41 (2017) (“much of the ‘news’ you find reported on Facebook and other social media outlets is not only unreliable, it is downright false. In fact, much of it is intentionally false. There are now internet ‘journalists’ who intentionally post false stories. The fake news phenomena was particularly prevalent during the recent presidential election. This isn’t absence of malice. It’s presence of malice.”).

191. Anthony Ciolli, *Chilling Effects: The Communications Decency Act and the Online Marketplace of Ideas*, 63 U. MIAMI L. REV. 137, 137–38 (“Congress, declaring that ‘it is the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services,’ included a provision in the Communications Decency Act of 1996 (CDA) to alter centuries of common-law precedent to grant the owners of such private online forums unprecedented immunity from liability for defamation and related torts committed by third-party users.”); Patricia Spiccia, Note, *The Best Things in Life Are Not Free: Why Immunity Under Section 230 of the Communications Decency Act Should Be Earned and Not Freely Given*, 48 VAL. U. L. REV. 369, 379 (2013) (“While almost all providers of third-party content are subject to liability depending on the above categories [including common carriers, publisher, and distributor], Congress, through the CDA [Communications Decency Act], has made the Internet an exception.”).

framework of defamation, including a discussion of the law's application depending upon the format of the defamatory material. It concludes with a brief discussion of satire, despite its intentional exclusion from the definition of fake news in this Comment, as some fake news authors attempt to argue that their work is satirical.

A. *The Tort of Defamation*

While the constitutional right to free speech is greatly valued in the United States, the Supreme Court has made clear that this right is not absolute,¹⁹² and has stated that “there is no constitutional value in false statements of fact.”¹⁹³ Defamatory content falls within this category of unprotected speech.¹⁹⁴ The *Restatement (Second) of Torts* defines “defamation” as communication that tends “to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.”¹⁹⁵ The *Restatement* then bifurcates defamation into libel and slander.¹⁹⁶ Libel is “the publication of defamatory matter by written or printed words . . . that has the potentially harmful qualities characteristic of written or printed words.”¹⁹⁷ Slander, on the other hand, is “the publication of defamatory matter by spoken words, transitory gestures or by any other form of communication other than” written or printed words.¹⁹⁸

192. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942) (“[I]t is well understood that the right of free speech is not absolute at all times and under all circumstances”).

193. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974).

194. *Chaplinsky*, 315 U.S. at 571–72 (identifying categories of speech that are not constitutionally protected including “the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words”).

195. RESTATEMENT (SECOND) OF TORTS § 559 (AM LAW INST. 1979).

196. *Id.* § 568.

197. *Id.* § 568(1).

198. *Id.* § 568(2). See also Ciolli, *supra* note 191, at 141–43 (discussing the distinction between slander and libel).

Each state slightly differs in its definition of defamation at the common law. The *Restatement* provides general guidance on what elements must be met to find an actor liable for defamation, which includes:

(a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.¹⁹⁹

In addition, many jurisdictions deem a statement defamation *per se* if it imputes unto another: (1) sexual misconduct; (2) a loathsome disease; (3) criminal conduct or offense; or (4) misconduct, inability or lack of integrity in a one's profession, office, trade, or occupation.²⁰⁰

Prior to *New York Times Company v. Sullivan*, a plaintiff could bring a defamation suit premised on a negligence or strict liability standard, depending on the state.²⁰¹ However, the Supreme Court made clear in *Sullivan* that a higher standard is required when the defamatory statements concern a public official.²⁰² The Court explained that this higher standard required that the plaintiff prove that the statement was made with "actual malice," which the Court defined as "knowledge that it was false or with reckless disregard of whether it was false or not."²⁰³ Thus, in order to prevail, the plaintiff must show the defendant published: (1) a false statement of fact about a public official (2) having defamatory content with (3) actual malice.²⁰⁴ The Court chose not to define who qualifies as a public official in

199. RESTATEMENT (SECOND) OF TORTS § 558.

200. Leslie Yalof Garfield, *The Death of Slander*, 35 COLUM. J.L. & ARTS 17, 23–24 (2011) (discussing slander *per se*).

201. See *Gertz v Robert Welch Inc.*, 418 U.S. 323, 342 (1974) ("This standard administers an extremely powerful antidote to the inducement to media self-censorship of the common-law rule of strict liability for libel and slander").

202. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 283 (1964).

203. *Id.* at 279–80.

204. *Id.* at 271–73, 279–80.

Sullivan,²⁰⁵ but revisited it in *Gertz v. Robert Welch, Inc.*, where it defined a “public figure” as one who “achieve[s] such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts” or “an individual [who] voluntarily injects himself or is drawn into a particular public controversy.”²⁰⁶

Further, the *Restatement* makes clear that publishers and distributors are treated differently for purposes of defamation.²⁰⁷ A primary publisher is presumed to have a greater degree of control over the material than a distributor and is therefore held to a more stringent standard than a distributor.²⁰⁸ When a person or organization transmits the defamatory content through radio, television, or newspaper, the person or organization is deemed the primary publisher.²⁰⁹ A distributor, on the other hand, is only held liable for content it distributes if it knew or had reason to know that the content was defamatory.²¹⁰ As will be further discussed in Part IV, the difference between publisher and distributor is immaterial toward determining the scope of liability when the content is on the internet.²¹¹

205. *Id.* at n. 23 (“We have no occasion here to determine how far down into the lower ranks of government employees the ‘public official’ designation would extend for purposes of this rule, or otherwise to specify categories of persons who would or would not be included.”). See also John Bruce Lewis & Bruce L. Ottley, *New York Times v. Sullivan at 50: Despite Criticism, the Actual Malice Standard Still Provides “Breathing Space” for Communications in the Public Interest*, 64 DEPAUL L. REV. 1, 18–21 (2014) (providing an in-depth discussion of the *New York Times v. Sullivan* decision).

206. 418 U.S. at 351–52.

207. See RESTATEMENT (SECOND) OF TORTS § 581.

208. See *id.* § 581(2) cmt. g. See also Vanessa S. Browne-Barbour, *Losing Their License to Libel: Revisiting § 230 Immunity*, 30 BERKELEY TECH. L.J. 1505, 1511–12 (discussing primary publisher liability).

209. RESTATEMENT (SECOND) OF TORTS § 581(2) cmt. g.

210. See *id.* § 581(1).

211. *Zeran v. AOL, Inc.*, 129 F.3d 327, 332 (4th Cir. 1997); *Barrett v. Rosenthal*, 40 Cal. 4th 33, 39 (2006) (finding that Communications Decency Act Section 230 immunity for defamatory material appearing online “has been applied regardless of the traditional distinction between ‘publishers’ and ‘distributors.’”). See *infra*

B. Republication Rule

In addition to publisher and distributor liability, one who republishes defamatory content may also be subject to liability. Under the *Restatement*, “one who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it,” with the exclusion of those who “only deliver or transmit defamation published by a third person.”²¹² Generally, courts hold republishers liable even if the republisher attributes the statement to the original speaker or publisher.²¹³

At common law, a republisher who publishes defamatory content in print form is subject to the same liability as that of the original publisher.²¹⁴ Yet, a republisher who publishes defamatory content online has immunity under the Communications Decency Act (CDA) Section 230.²¹⁵ As such, where Facebook could be found liable for republishing fake news in print, it is afforded complete immunity under the CDA.²¹⁶

*C. Neutral Reportage Doctrine*²¹⁷

While one who republishes defamatory material may be held liable, the neutral reportage doctrine exempts those

Part IV.

212. RESTATEMENT (SECOND) OF TORTS § 578.

213. *Id.*

214. *Id.*

215. Spiccia, *supra* note 191, at 376–77 (“The extent of liability imposed on an entity that republishes defamatory third-party content varies depending on the medium used to transmit the information because, while most mediums are subject to the common law framework, the CDA exempted the Internet medium from the common law analysis.”).

216. *See infra* Sections IV.B., IV.C.

217. The neutral reportage doctrine is not recognized in all states, and it is far more complex than this brief description suggests. For an in-depth discussion of the neutral reportage doctrine, see generally Dan Laidman, *When the Slander is the Story: The Neutral Reportage Privilege in Theory and Practice*, 17 UCLA ENT. L. REV. 74 (2010).

who report on the defamation.²¹⁸ The neutral reportage doctrine was created by the Second Circuit in *Edwards v. National Audubon Society*.²¹⁹ The doctrine provides protection for those who accurately and disinterestedly report the charges made by a prominent organization, even if the charges ultimately are found to be defamatory.²²⁰ Notwithstanding this degree of protection for those who accurately and disinterestedly report the charges, the original author of the defamation may still be found liable.²²¹ Notably, the court stated that it did “not believe that the press may be required under the First Amendment to suppress newsworthy statements merely because it has serious doubts regarding their truth.”²²² While the Second Circuit did not formulate an explicit test, it described some relevant factors that courts should consider, including: (1) the neutrality of the report; (2) the accuracy of the report; (3) the responsibility of the source; (4) the attribution of the source; (5) the nature of the original report; (6) whether the target of the report is a public figure; (7) whether the source of the report is a public figure; (8) whether the report is newsworthy or concerns a public controversy.²²³

This doctrine specifically protects the republication of defamatory statements made by “responsible, prominent organization[s].”²²⁴ This exemption from liability would

218. See *Edwards v. Nat'l Audubon Soc'y*, 556 F.2d 113, 120 (2d Cir.); RESTATEMENT (SECOND) OF TORTS § 578.

219. *Edwards*, 556 F.2d at 120.

220. *Id.* at 120.

221. *Id.* See also Justin H. Wertman, Note, *The Newsworthiness Requirement of the Privilege of Neutral Reportage Is a Matter of Public Concern*, 65 FORDHAM L. REV. 789, 801–02 (1996) (discussing the creation and scope of the neutral reportage privilege).

222. *Edwards*, 556 F.2d at 120.

223. See *id.*; Keith C. Buell, Note, “Start Spreading the News”: Why Republishing Material from “Disreputable” News Reports Must Be Constitutionally Protected, 75 N.Y.U. L. REV. 966, 982 (2000).

224. *Edwards*, 556 F.2d at 120 (“when a responsible, prominent organization . . . makes serious charges against a public figure, the First

likely not be a source of immunity for those republishing fake news, like Facebook, as fake news stories are not made by “responsible, prominent organization.”²²⁵ Rather, fake news is most often the product of unknown Internet users or internet trolls,²²⁶ who are far from responsible in their reporting.

D. *Satire*²²⁷

Many fake news authors consider their articles satire.²²⁸ Some sites clearly denote that the writer’s intention to be satirical,²²⁹ while others leave issues of authorial intent vague.²³⁰ Initially, it appears that a court would find satire to be defamation under the *Sullivan* standard. For example,

Amendment protects the accurate and disinterested reporting of those charges, regardless of the reporter’s private views regarding their validity”).

225. *Id.*

226. An Internet troll lacks a clear definition, but Adrienne LaFrance, author of a book on trolling, described it in an *NPR* interview as “someone who is just delighting in chaos, sort of utterly hateful, provocative, really wants a reaction. But culturally, we’ve sort of burdened trolling and trolls with so many other meanings that it has become pretty murky. And almost—it gets difficult to talk about because people can’t agree with what a troll even is. Is it just someone who’s mean? Is it someone who disagrees with you? Do you have to, you know, be facing a death threat for it to be real trolling? So there’s this sort of spectrum and not a lot of clarity about what a troll really is.” Michel Martin, *Barbershop: Internet Trolling*, *NPR: ALL THINGS CONSIDERED* (July 8, 2017, 6:04 PM), <http://www.npr.org/2017/07/08/536197350/barbershop-internet-trolling>.

227. While satire is not included in this Comment’s definition of fake news, many of the authors of fake news consider their work to be satirical, and thus it must be addressed.

228. See Bratu et. al., *supra* note 6; Andrew Higgins et al., *Inside a Fake News Sausage Factory: ‘This Is All About Income’*, *N.Y. TIMES* (Nov. 25, 2016), <https://www.nytimes.com/2016/11/25/world/europe/fake-news-donald-trump-hillary-clinton-georgia.html>.

229. E.g., *The Burrard Street Journal Disclaimer*, BARRARD ST. J., <http://www.burrardstreetjournal.com/disclaimer-satire-news/> (last visited Oct. 23, 2017) (noting in the disclaimer that it is “satire news, parody and humor website and is for entertainment purposes only.”); *LAST LINE OF DEFENSE*, <http://thelastlineofdefense.org/privacy-policy/> (last visited Aug. 27, 2017) (noting at the bottom of every page that the site is “satire rated”).

230. See *supra* Section I.A.

satire is often a work of exaggeration, so it can be labeled as false. Satire is usually critical of the subject, and therefore it can be labeled as defamatory, and the satirist writes with “actual malice,” as she knows either knows the statement is false or consciously disregards the truth.

Under the *Sullivan* standard satire would often be found to be defamation, however in *Hustler Magazine, Inc. v. Falwell*, the Supreme Court carved out an exception to *Sullivan* to release satirists from potential liability.²³¹ In *Hustler Magazine, Inc.*, the Court recognized that political satire and parody play an important role in public debate and that society must tolerate the kind of satire at issue to ensure general First Amendment protections.²³² The Court noted that, while false statements are inevitable in a society with free debate, a strict liability rule against publishers for these statements would have a chilling effect on speech.²³³ The Court stated that First Amendment protects “speech [that] could not reasonably have been interpreted as stating actual facts about the public figure involved.”²³⁴

The Court held that public figures must show that publication of a false statement of fact was made with “actual malice” to recover for the intentional infliction of emotional distress.²³⁵ While the Court’s holding appears to be an application of *Sullivan*, the Court stated that it was not a “blind application” of the *Sullivan* standard.²³⁶ Rather, the

231. Roy Gutterman, *New York Times Co. v. Sullivan: No Joking Matter—50 Years of Protecting Humor, Satire and Jokers*, 12 FIRST AMEND. L. REV. 497, 499, 506–509 (2014) (“*Hustler Magazine v. Falwell*, another libel case, relied heavily on *Sullivan*, and, at the same time, carved out a large area of protection for a generation of comedians, performers, humorists, and assorted wise guys”); Jeff Todd, *Satire in Defamation Law: Toward a Critical Understanding*, 35 REV. LITIG. 45, 50–57 (2016).

232. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 54–56 (1988).

233. *Id.* at 50.

234. *Id.*

235. *Id.* at 56.

236. *Id.*

holding “reflects [the Court’s] considered judgment that such a standard is necessary to give adequate ‘breathing space’ to the freedoms protected by the First Amendment.”²³⁷ By qualifying any work as satire, writers may essentially immunize themselves from claims of defamation.

Unlike fake news websites, the intent of most satirical sites is not to trick readers, but to make a comment on current events that has some basis in truth.²³⁸ While readers often misconstrue satire for real news, the writers of *The Onion* argue that it is the fault of the reader for misinterpreting their jokes, and trickery is far from their intent.²³⁹ Further, most satirical websites and articles, as previously mentioned, have a disclaimer that labels them as such.²⁴⁰ The disclaimer not only immunizes the website but also alerts the reader that the information is not intended to be an accurate news account. On the other hand, as the intent of most fake news sites is to fool the reader, they are often not labeled as satire.²⁴¹

If fake news were in print and not labeled as satire,

237. *Id.*

238. Lauren Gilbert, *Mocking George: Political Satire as “True Threat” in the Age of Global Terrorism*, 58 U. MIAMI L. REV. 843,857–58 (2004) (“Political satire is a literary or artistic device calculated to expose political or religious leaders and their follies to ridicule, often through the cruel exploitation of physical or mental traits or politically embarrassing events.”).

239. *Id.* at 858 (“It has been said that a satirist’s goals can be achieved ‘only to the extent that the audience responds to the attack.’”); *Satire vs. Fake News*, C-SPAN (Sept. 25, 2016), <https://www.c-span.org/video/?c4637569/satire-vs-fake-news>.

240. *See, e.g., Frequently Asked Questions*, ONION, <http://www.theonion.com/about/> (last visited Sept. 17, 2017) (“What if I want to sue *The Onion*? Please do not do that. The First Amendment protects satire as a form of free speech and expression. *The Onion* uses invented names in all of its stories, except in cases where public figures are being satirized. Any other use of real names is accidental and coincidental.”).

241. *See, e.g., About the Reporter*, DRUDGE REPORT, <http://drudgereport.com.co/about-the-reporter> (last visited Mar. 17, 2017) (fake news website); NEWS EXAMINER, <http://newsexaminer.net/> (last visited Dec 31, 2016) (fake news website).

liability would likely be found for those who publish, distribute, and republish it, as it is often defamatory. However, when fake news is published on the internet, all of the aforementioned forms of liability cease to exist.²⁴²

IV. CDA SECTION 230

Unlike the common law, where liability depends on the form of publication, websites receive broad immunity from liability for third-party content posted on its platform under Section 230 of the CDA.²⁴³ This next Section begins with a brief legislative history of CDA Section 230, including an explanation of the New York Supreme Court case that was the catalyst for the Act. A detailed examination of the statute will be provided in addition to its judicial application in several decisions.

A. *Legislative History of Section 230 of the CDA*

In 1996, Congress enacted CDA Section 230 as part of the Telecommunications Act of 1996.²⁴⁴ Before the Act was proposed, a *Time Magazine* cover story brought attention to the vast array of sexually offensive material on the internet.²⁴⁵ After reading this story, Senator James Exon introduced several draft bills that were intended to protect children from this sexually explicit content.²⁴⁶ Senator Exon's bills proposed such content be regulated by the FCC, but this proposal was not well received.²⁴⁷ The final language

242. Spiccia, *supra* note 191, at 376–77.

243. *See infra* Section IV.C.

244. 47 U.S.C. § 230 (2012).

245. Spiccia, *supra* note 191, at 380.

246. *Id.* The senator believed that “[t]he information superhighway should not become a red light district. This legislation will keep that from happening and extend the standards of decency which have protected telephone users to new telecommunications devices.” 141 CONG. REC. S1953 (daily ed. Feb. 1, 1995) (statement of Sen. Exon).

247. Spiccia, *supra* note 191, at 380–81.

of Section 230 did not resemble any of Senator Exon's proposed bills.²⁴⁸ What ultimately became Section 230 were provisions from a competing piece of legislation, the Online Family Empowerment Amendment, also known as the Cox-Wyden Amendment, which was sponsored by Representatives Christopher Cox and Ron Wyden.²⁴⁹ This legislation was intended to respond to the then-recent New York Supreme Court decision of *Stratton Oakmont v. Prodigy Services Co.* and to encourage private companies to monitor internet indecency.²⁵⁰

The court in *Stratton Oakmont* treated defamatory comments posted online as if the comments had been in print and applied the common law framework.²⁵¹ In *Stratton Oakmont*, the plaintiff sued Prodigy, a "computer network," as defined by the court, for defamatory comments made by an unknown person on Prodigy's bulletin boards.²⁵² The court held that Prodigy was liable for the defamatory comments because it was acting as a publisher.²⁵³ The court reasoned that Prodigy was subject to publisher liability because Prodigy deleted offensive comments on its bulletin

248. David S. Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity Under Section 230 of the Communications Decency Act*, 43 LOY. L.A. L. REV. 373, 410 (2010) ("Neither Senator Exon's first bill nor his second bill contained any language resembling section 230.").

249. 141 CONG. REC. 22,044 (1995). See also David Lukmire, Note, *Can the Courts Tame the Communications Decency Act?: The Reverberations of Zerán v. America Online*, 66 N.Y.U. ANN. SURV. AM. L. 371, 378–81 (2010) (providing further detail on the Cox-Wyden Amendment).

250. *Zeran v. AOL, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997) ("§ 230 responded to a New York state court decision, *Stratton Oakmont v. Prodigy Servs. Co.*"); H.R. REP. NO. 104-458, at 193–94 (1996) (Conf. Rep.); 141 CONG. REC. H8469-70 (daily ed. Aug. 4, 1995) (Statement of Rep. Cox) ("Our amendment will . . . protect [online service providers] from taking on liability such as occurred in the Prodigy case in New York.").

251. *Stratton Oakmont v. Prodigy Servs. Co.*, 1995 N.Y. Misc. LEXIS 229, at *10–11 (N.Y. Sup. Ct. May 24, 1995).

252. *Id.* at *2.

253. *Id.* at *10–11.

board, which constituted editorial control.²⁵⁴ Some thought this ruling would stifle free expression on the internet, as the hosting website could be liable for failure to review posts.²⁵⁵

In responding to the *Stratton Oakmont* decision, the Cox-Wyden Amendment made clear that the policy goals of the amendment were to aid in the development and expansion of the internet by preventing overregulation by the states or the federal government.²⁵⁶ To achieve this goal, Section 230 was designed to encourage the free exchange of ideas and information over the internet, while still fostering voluntary monitoring by internet service providers (ISPs).²⁵⁷ Representative Cox stated that the Cox-Wyden Amendment would “protect computer Good Samaritans, online service providers, anyone who provides a front end to the Internet . . . who takes steps to screen indecency and offensive material for their customers.”²⁵⁸

Both the Senate and the House passed the CDA as Title V of the Telecommunications Act of 1996, and President Bill Clinton signed the act into law on February 8, 1996.²⁵⁹ Before

254. *Id.* at *10 (“By actively utilizing technology and manpower to delete notes from its computer bulletin boards on the basis of offensiveness and ‘bad taste’, for example, PRODIGY is clearly making decisions as to content, and such decisions constitute editorial control.”) (citations omitted).

255. Peter H. Lewis, *Prodigy Seeks to Reargue Its Defense in Libel Lawsuit*, N.Y. TIMES (July 25, 1995), <http://www.nytimes.com/1995/07/25/business/prodigy-seeks-to-reargue-its-defense-in-libel-lawsuit.html>.

256. 47 U.S.C. § 230(b)(1)-(2) (2012) (referencing the policy goals of the federal government in enacting these provisions “to promote the continued development of the Internet and other interactive computer services and other interactive media [and] to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.”)

257. *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1099–1100 (9th Cir. 2009) (“The statute is designed at once ‘to promote the free exchange of information and ideas over the Internet and to encourage voluntary monitoring for offensive or obscene material.’”) (quoting *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1122 (9th Cir. 2003)).

258. 141 CONG. REC. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox).

259. Communications Decency Act of 1996, Pub. L. No. 104-104, 110 Stat. 133

the CDA went into effect, the majority of it was struck down as unconstitutional,²⁶⁰ yet Section 230 survived review.

B. *Section 230 of the CDA*

Section 230 of the CDA states in relevant part, “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.”²⁶¹ Courts have broadly interpreted this provision to immunize websites and ISPs from claims based on third-party speech.²⁶²

To determine immunity, courts generally employ a three-part test where the defendant must show: (1) it is a “provider or user of an ‘interactive computer service;” (2) it acted as a “publisher or speaker;” and (3) the content at issue was “information provided by another information content provider.”²⁶³ In addition, liability cannot be imposed under a

(1996). *See also* Joel R. Reidenberg et al., Section 230 of the Communications Decency Act: A Survey of the Legal Literature and Reform Proposals 4 (Fordham L. Legal Stud., Research Paper No. 2046230, 2012), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2046230 (explaining the legislative history of the CDA). For further discussion of the legislative history of Section 230, see Amy J. Tindell, “*Indecent Deception: The Role of Communications Decency Act § 230 In Balancing Consumer and Marketer Interests Online*,” B.C. INTELL. PROP. & TECH. F., 2009, at 1, 3–4.

260. *Reno v. ACLU*, 521 U.S. 844, 849 (1997) (striking down sections of the CDA, which attempted to protect minors from patently offensive and indecent material on the Internet, as unconstitutionally vague). For further discussion of this particular holding, see generally Debra M. Keiser, Note, *Regulating the Internet: A Critique of Reno v. ACLU*, 62 ALB. L. REV. 769 (1998).

261. 47 U.S.C. § 230(c)(1).

262. Eric Taubel, Note, *The ICS Three-Step: A Procedural Alternative for Section 230 of the Communications Decency Act and Derivative Liability in the Online Setting*, 12 MINN. J.L. SCI. & TECH. 365, 366–67 (2011) (“Courts have interpreted [section 230’s] immunity in a broad and sweeping manner, making it nearly impossible for any plaintiff to successfully hold an ICS liable for the tortious behavior of a third party.”) (footnote omitted).

263. *Batzel v. Smith*, 333 F.3d 1018, 1037 (9th Cir. 2003) (Gould, J., concurring in part, dissenting in part).

state or local law that is inconsistent with Section 230.²⁶⁴

Under the first prong, an “Interactive Computer Service” (ICS) is defined as “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server.”²⁶⁵ Early commentators suggested that this definition would only apply to those businesses that provide consumers with internet access, such as cable and phone companies, commonly known as ISPs, but this has not been the definition that courts have adopted.²⁶⁶ Rather, courts have held that an ICS may include any interactive website, including social media websites, such as Facebook, and a company’s own website.²⁶⁷

Under the second prong, the court determines whether the defendant’s conduct falls under the definition of “publisher or speaker.” A “publisher” has been defined as a person or entity that reviews and edits material and ultimately determines whether to publish it.²⁶⁸ A “speaker” has been defined as the individual who “actually submits the material that will be published.”²⁶⁹

264. 47 U.S.C. § 230(e)(3).

265. *Id.* § 230(f)(2).

266. See Reidenberg, *supra* note 259, at 1 (defining an “interactive computer service” and noting that it has “been broadly interpreted to include any website or online service”).

267. *Klayman v. Zuckerberg*, 910 F. Supp. 2d 314, 318 (D.D.C. 2012) (finding that Facebook qualified as an ICS because it provided and enabled access to a computer server for multiple users); *Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785, 801–02 (N.D. Cal. 2011) (finding that Facebook, a social media website, can act as an ICS); *Carafano v. Metrosplash.com, Inc.*, 207 F. Supp. 2d 1055, 1065–66 (C.D. Cal. 2002) (finding a dating website to be an ICS).

268. *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1102 (9th Cir. 2009).

269. *Communication Decency Act Section 230 Immunity: Defining an Internet Service Provider as a Publisher or Speaker*, TRAVERSE LEGAL (June 9, 2009, 1:54 PM), <https://web.archive.org/web/20090926050521/http://section230communicationsdecencyact1996.com/communication-decency-act-section-230-immunity-defining-an-internet-service-provider-as-a-publisher-or-speaker/2009/06>.

Under the third prong, an “Information Content Provider” (ICP) is defined as “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.”²⁷⁰ If the information is not provided by “any other” ICP, the ICS may not be afforded immunity under the CDA.²⁷¹ In addition, in *Barnes v. Yahoo!*, the court included a fourth prong which asks whether the defendant specifically promised to remove content and failed to do so.²⁷²

Therefore, when Facebook publishes fake news on a Facebook user’s newsfeed, it is afforded immunity. Courts have found Facebook, specifically, to be an ICS.²⁷³ Facebook publishes the fake news stories on a Facebook user’s news feed without authoring the defamatory content. Finally, these articles are written by an ICP other than Facebook, thus satisfying all three prongs. As such, Facebook, and other websites that host fake news stories, would likely be afforded immunity.

In furthering the policy objectives of the Act, the Act states that an ICS cannot be held liable for actions made in good faith by the ICS to remove or restrict access to material that it deems to be harassing, obscene, excessively violent, or otherwise objectionable, even if the material is constitutionally protected.²⁷⁴ This immunity applies to all civil claims, except claims based on alleged violations of the Electronic Communications Act of 1986 and intellectual property law.²⁷⁵ This section is rarely at issue, because typically the plaintiff sues the ICS for its failure to remove

270. 47 U.S.C. § 230(f)(3).

271. *See id.*

272. *Barnes*, 570 F.3d at 1107–09.

273. *E.g.*, *Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785, 801–02 (N.D. Cal 2011) (finding Facebook acted as an ICS).

274. 47 U.S.C. § 230(c)(2)(A).

275. *Id.* § 230 (e)(2), (4).

content, not its overzealous removal of content that it deems objectionable.²⁷⁶

C. *Judicial Application of Section 230*

Most federal courts have interpreted Section 230 to broadly immunize a website or other ICS from liability with respect to third-party content.²⁷⁷ Thus, it is likely that most circuits would afford immunity to websites, such as Facebook, for hosting defamatory fake news posts. However, each circuit applies the law slightly differently, and a survey of several decisions is illustrative.²⁷⁸

The Fourth Circuit first addressed the scope of immunity provided by CDA Section 230 in *Zeran v. America Online, Inc.*²⁷⁹ In *Zeran*, an anonymous third-party posted a message on an America Online (AOL) message board advertising

276. Nicholas Conlon, *Freedom to Filter Versus User Control: Limiting the Scope of § 230(c)(2) Immunity*, 14 U. ILL. J.L. TECH. & POL'Y 105, 116 (2014) ("Most of the § 230 case law has focused on subsection (c)(1), which protects a provider from liability for disseminating material created by a third party."). See, e.g., *e360Insight, LLC v. Comcast Corp.*, 546 F. Supp. 2d 605, 609–10 (N.D. Ill. 2008) (providing § 230 immunity to Comcast for its "good Samaritan" blocking and filtering of solicitous e-mails). For further discussion of the application of section 230 (c)(2), see Conlon, *supra* note 276, at 116-22.

277. *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1124 (9th Cir. 2003) ("[S]o long as a third party willingly provides the essential published content, the interactive service provider receives full immunity regardless of the specific editing or selection process."); *Batzel v. Smith*, 333 F.3d 1018, 1032 (9th Cir. 2003) ("The scope of the immunity cannot turn on whether the publisher approaches the selection process as one of inclusion or removal, as the difference is one of method or degree, not substance."); *DiMeo v. Max*, 433 F. Supp. 2d 523, 531 (E.D. Pa. 2006), *aff'd*, No. 06-3171, 2007 WL 2717865 (3d Cir. 2007) ("In sum, Max's Web site uses (and likely provides) an 'interactive computer service.' DiMeo seeks to treat Max as a publisher or speaker of information. And the six posts constitute 'information provided by another information content provider.' Thus, the statute blocks DiMeo's defamation claim.") (internal citations omitted).

278. This section takes a holistic approach at how the federal circuits apply Section 230. For a further discussion of the differing applications by circuit, see Ryan French, Comment, *Picking up the Pieces: Finding Unity after the Communications Decency Act Section 230 Jurisprudential Clash*, 72 LOUISIANA L. REV. 443, 451–73 (2012).

279. *Zeran v. AOL, Inc.*, 129 F.3d 327 (4th Cir. 1997).

shirts with offensive slogans related to the 1995 Oklahoma City Bombing.²⁸⁰ Those who wanted to purchase one of these shirts were instructed to call “Ken” at Mr. Zeran’s home number, and, as a result, Zeran received a high volume of calls, which were mostly derogatory.²⁸¹ Zeran contacted AOL and requested that the post be removed.²⁸² An employee assured Zeran that the post would be removed, but it was not.²⁸³ Zeran filed suit alleging AOL was liable for the third-party defamatory statements because it acted as a distributor.²⁸⁴

The court did not agree. It rejected the possibility of holding an ICS liable under distributor liability reasoning that Section 230 clearly immunizes an ICS from liability for information that originated with third-parties.²⁸⁵ The court stated that the difference between distributor and publisher liability was meaningless for purposes of Section 230.²⁸⁶ In short, *Zeran* found that Section “230 provides immunity to online distributors in defamation suits where, had the same content been distributed in hard print, the publisher’s liability would have been determined under the applicable state defamation laws.”²⁸⁷ *Zeran*’s interpretation of Section 230 remains the majority view.²⁸⁸

Where an ICS retains editorial rights to remove content, it may still be afforded immunity under Section 230. In

280. *Id.* at 329.

281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.* at 331.

285. *Id.* at 332–33.

286. *Id.*

287. Joanna Schorr, Note, *Malicious Content on the Internet: Narrowing Immunity Under the Communications Decency Act*, 87 SAINT JOHN’S L. REV. 733, 746 (2013).

288. *Id.* For a further explanation of *Zeran*, see Annemarie Pantazis, Note, *Zeran v. America Online, Inc.: Insulating Internet Service Providers from Defamation Liability*, 34 WAKE FOREST L. REV. 531, 532–37 (1999).

Blumenthal v. Drudge, two White House employees, Sidney Blumenthal and Jacqueline Jordan Blumenthal, brought a defamation suit against both AOL and Matt Drudge after Drudge wrote and published on his webpage, *The Drudge Report*, allegedly defamatory statements about them, specifically that Mr. Blumenthal abused his wife.²⁸⁹ AOL was joined in the suit as it had a licensing agreement with Drudge where it compensated him for making his website available to AOL's customers.²⁹⁰ The agreement allowed Drudge to manage his website's content, but AOL reserved the right to remove any content that did not comply with its own standards.²⁹¹ Relying on *Zeran*, the court held that, despite AOL's certain editorial rights, AOL was immunized by Section 230.²⁹²

The Ninth Circuit further expanded the scope of what constitutes a "publisher" in *Batzel v. Smith*.²⁹³ In *Batzel*, a third-party sent an e-mail to the Museum Security Network alleging that Ellen Batzel was in possession of artwork stolen from various Jewish families during World War II.²⁹⁴ The Museum Security Network then published the email to a Network listserv.²⁹⁵ The court found that a website retains its status as an ICS and does not forfeit Section 230 immunity unless it performs an act "more substantial than merely editing."²⁹⁶ Further, the court noted that Section 230 provides immunity to users in addition to ICSs.²⁹⁷ Notably, the court held that an ICS or user is afforded immunity when a third-party, that created or developed the content at issue,

289. *Blumenthal v. Drudge*, 992 F. Supp. 44, 46-47 (D.D.C. 1998)

290. *Id.* at 47.

291. *Id.*

292. *Id.* at 51-53.

293. *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003).

294. *Id.* at 1021.

295. *Id.* at 1022.

296. *Id.* at 1031.

297. *Id.* at 1030.

provides the content to the ICS or user, “under circumstances in which a reasonable person in the position of the service provider or user would conclude that the information was provided for publication on the Internet.”²⁹⁸

The Ninth Circuit broadened the scope even further in *Carafano v. Metrosplash.com, Inc.*²⁹⁹ In *Carafano*, a third-party created an online dating profile on Matchmaker.com for Christianne Carafano, a popular actress, without her permission.³⁰⁰ The profile contained her picture, name, address, and telephone number.³⁰¹ Carafano discovered the identity theft when she began to receive threatening and sexual voicemails and emails, and she subsequently sued Matchmaker.com.³⁰² The court ultimately held that “so long as a third party willingly provides the essential published content,” an ICS is immune pursuant to Section 230, despite any selection or editing process involved.³⁰³ The court noted that Section 230 would immunize the defendant unless it “created or developed the particular information at issue.”³⁰⁴ Accordingly, to retain immunity under Section 230 in the Ninth Circuit, a website simply must not create or develop defamatory fake news.

At the outset of a California Supreme Court decision, *Barrett v. Rosenthal*, the court stated bluntly that Section

298. *Id.* at 1034. For a further discussion on *Batzel*, see Jae Hong Lee, Note, *Batzel v. Smith & Barrett v. Rosenthal: Defamation Liability for Third-Party Content on the Internet*, 19 BERKELEY TECH. L.J. 469, 478–81 (2004); Joanna Schorr, Note, *Malicious Content on the Internet: Narrowing Immunity Under the Communications Decency Act*, 87 ST. JOHN’S L. REV. 733, 746–47 (2013).

299. See *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119 (9th Cir. 2003).

300. *Id.* at 1121.

301. *Id.*

302. *Id.* at 1121–22.

303. *Id.* at 1124.

304. *Id.* at 1125. For a further discussion of *Carafano*, see Jeffrey Lipschutz, Note, *Internet Dating . . . Not Much Protection Provided by the Communications Decency Act of 1996 Based on Carafano v. Metrosplash.com*, 339 F.3d 1119 (9th Cir. 2003), 23 TEMP. ENVTL. L. & TECH. J. 225, 228–30, 235–39 (2004).

230 provides immunity where the common law did not.³⁰⁵ The court stated that:

The immunity has been applied regardless of the traditional distinction between “publishers” and “distributors.” Under the common law, “distributors” like newspaper vendors and booksellers are liable only if they had notice of a defamatory statement in their merchandise. The publisher of the newspaper or book where the statement originally appeared, however, may be held liable even without notice.³⁰⁶

The plaintiffs in *Barrett* alleged that Ilena Rosenthal and others committed libel by distributing defamatory statements through email and internet postings.³⁰⁷ The plaintiffs alleged that Rosenthal republished some of the messages even after Barrett warned her that they were defamatory.³⁰⁸ Expanding the scope of immunity further than other jurisdictions, the court held “that section 230(c)(1) immunizes individual ‘users’ of interactive computer services, and that no practical or principled distinction can be drawn between active and passive use.”³⁰⁹ By affording the defendant immunity under Section 230, the court expanded the scope of immunity from a website that hosts the republished defamatory statements to also include those individuals or entities who republish defamatory statements online.³¹⁰ Thus, Facebook users who post or republish fake news stories would likely be afforded immunity, at least in California.

One district court, nevertheless, found that, in some instances, Facebook would qualify not just as an ICS but also an ICP. In *Fraley v. Facebook*, the court dealt with

305. *Barrett v. Rosenthal*, 40 Cal. 4th 33, 39 (2006).

306. *Id.* at 39.

307. *Id.* at 40.

308. *Id.*

309. *Id.*

310. *Id.* at 53. For a further discussion on *Barrett*, see generally Ternisha Miles, Note, *Barrett v. Rosenthal: Oh, What a Tangled Web We Weave—No Liability for Web Defamation*, 29 N.C. CENT. L.J. 267 (2007).

“Sponsored Stories,” which consisted of another member’s profile picture, name, and a statement that the person “likes” an advertiser along with the advertiser’s logo.³¹¹ These stories were generated when a Facebook user employs the like, post, or check-in feature, and the content, as determined by Facebook, relates to an advertiser.³¹² In a class action suit, the plaintiffs alleged that Facebook’s Sponsored Stories violated the following: California’s Unfair Competition Law, Business and Professions Code § 17200, *et seq.* (UCL); California’s Right of Publicity Statute, Civil Code § 3344; and the common law doctrine of unjust enrichment.³¹³ Interestingly, the court found that Facebook acted as both an ICP and an ICS, and denied CDA immunity.³¹⁴ The court focused on the fact that “Facebook contributes, at least in part, to the creation or development of the Sponsored Story,” instead of simply “publishing tortious content.”³¹⁵ The court noted that, despite Facebook members being ICPs, Facebook is not precluded from also being an ICP by aiding, even slightly, in the information posted as Sponsored Stories.³¹⁶

Conversely, in *Caraccioli v. Facebook, Inc.*, where Facebook reviewed obscene content and chose not to remove it, the same district court treated Facebook solely as an ICS and afforded it immunity.³¹⁷ In *Caraccioli*, the plaintiff alleged that an unidentified third-party created a fictitious Facebook account that contained pictures and videos of the plaintiff sexually pleasuring himself.³¹⁸ The plaintiff requested that

311. *Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785, 790 (N.D. Cal. 2011).

312. *Id.* at 791.

313. *Id.* at 790.

314. *Id.* at 801–02.

315. *Id.* at 801.

316. *Id.* at 802. For a further discussion of *Fraley*, including CDA immunity, see Rotem Medzini, *Prometheus Bound: An Historical Content Analysis of Information Regulation in Facebook*, 16 J. HIGH TECH. L. 196, 253–62 (2016).

317. *Caraccioli v. Facebook, Inc.*, 167 F. Supp. 3d 1056, 1065 (N.D. Cal. 2016).

318. *Id.* at 1060.

Facebook remove the account, but it refused to do so until the plaintiff threatened legal action.³¹⁹ The plaintiff alleged that Facebook was liable because the creator of the content was unknown and that Facebook should be held responsible because it reviewed the account and decided not to remove it.³²⁰ Ultimately, the court held that Facebook was not liable because, in this instance, Facebook did not provide or materially contribute to the content.³²¹ The court did not agree with the plaintiff's argument that Facebook acted as republisher after refusing to remove the content; instead, the court found that Section 230 precluded liability.³²²

As this survey of decisions suggests, it is exceedingly difficult to hold a website liable for content that is posted by a third-party, even when the content is defamatory on its face, such as posts concerning #PizzaGate.³²³ One may argue that when Facebook displays a fake news story in its "Trending Stories" section it is acting as an ICP and would not be afforded immunity as in *Fraley*.³²⁴ However, this is not entirely clear. Currently, the only entity that may be sued for a fake news story is the author, and, as previously explained, this is a difficult task as most authors are unknown and difficult to track down. Further, while some owners of fake news sites may make sizeable income from these stories, these instances are few and far between.³²⁵

319. *Id.* at 1060–61.

320. *Id.* at 1065–66.

321. *Id.* at 1065.

322. *Id.* at 1066.

323. *See* Kang, *supra* note 35.

324. *Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785, 802 (N.D. Cal. 2011) (finding that Facebook was not afforded CDA Section 230 immunity because it aided in the information posted as "Sponsored Stories").

325. *Compare* Sydell, *supra* note 59 ("He wouldn't give exact figures, but he says stories about other fake-news proprietors making between \$10,000 and \$30,000 a month apply to him.") *with* Higgins et al., *supra* note 228 and Craig Silverman & Lawrence Alexander, *How Teens In The Balkans Are Duping Trump Supporters With Fake News*, BUZZFEED: NEWS (Nov. 3, 2016, 7:02 PM), <https://www.buzzfeed.com/craigsilverman/how-macedonia-became-a-global-hub->

Rather, most authors are likely not worth pursuing for financial reasons, with the exception of a few of the bigger players, most of whom are still difficult to track down.³²⁶ This unfortunately affords the defamed with little legal recourse.

V. PROPOSED SOLUTIONS³²⁷

This Comment proposes several potential interdependent solutions to prevent the spread of fake news. First, this Part argues that readers have a responsibility to become internet literate, and websites must continue their attempts to combat fake news. As previously suggested, the entity that would be worth pursuing financially would be the hosting website, such as Facebook, but CDA Section 230 immunizes an ICS from third-party content that it republishes.³²⁸ Thus, this Part proposes the addition of secondary liability to the CDA.

A. *Reader Responsibility*

Currently, the responsibility to determine what is and is not fake news is ultimately left to the reader. As previously explained, many readers, including younger, supposedly more internet-savvy readers, are ill-equipped to differentiate between the two.³²⁹ Readers could, however, become internet literate by reading more closely and seeking verification of

for-pro-trump-misinfo?utm_term=.ttJY3lyGj#.oayO9w1Km (“I stopped because I didn’t really enjoy doing it and we didn’t actually make any money from it since there are so many people posting already,” the university student said. “The people who started early are the ones reaping the rewards.”).

326. See sources cited *supra* note 325.

327. While there are First Amendment concerns with most of these solutions, the focus of the analysis is not on the First Amendment, as it is outside the scope of this Comment. This is an issue that should be addressed in the future so as to strike a balance between combatting this phenomenon and adequately respecting the First Amendment.

328. Courts would likely find Facebook to be an ICS with regard to fake news as Facebook’s level of involvement is analogous to its involvement in *Caraccioli v. Facebook, Inc.*, 167 F. Supp. 3d 1056, 1065 (N.D. Cal. 2016).

329. See *supra* Section II.B.

the published material, instead of absentmindedly trusting the source simply because it has a picture.³³⁰ While this ability to discern must be self-taught for those who are older, it may also be incorporated into school curriculums to address it earlier.

Since the recent proliferation of fake news, many schools have written guides on how to determine if a news story is fake.³³¹ These guides instruct the reader to first verify the news stories using such websites as FactCheck.org, Snopes, and PolitiFact.³³² Additionally, the guides suggest that the reader should look at the domain name, as domains that end in “.com.co” are likely to be deceiving in some capacity.³³³ Even when the site looks professional and the logos look strikingly similar to those of verified sources, if it ends in “.com.co,” it is probably not a legitimate news source.³³⁴ For example, while abcnews.com is a legitimate news source, abcnews.com.co is not and the website ends “.com.co” because the author wants readers to think it is abcnews.com.³³⁵ The reader should check if other news sources are reporting the same story and consult the “About” section of the source.³³⁶ Looking at the quotations is also an indication of the veracity of the story, as most news stories about controversial or serious issues contain quotations from various

330. See, e.g., STAN. HIST. EDUC. GROUP, *supra* note 146, at 17 (finding students believed a photo of deformed daisies on Imgur “provided strong evidence because it presented pictorial evidence about conditions near the power plant”).

331. E.g., *How Do I Spot Fake News?*, U. TORONTO LIBR., <https://onereach.library.utoronto.ca/faq/how-do-i-spot-fake-news> (last visited Mar. 20, 2017).

332. *Id.*

333. *Id.*

334. Wynne Davis, *Fake or Real? How to Self-Check the News and Get the Facts*, NPR: ALL TECH CONSIDERED (Dec. 5, 2016, 12:55 PM), <http://www.npr.org/sections/alltechconsidered/2016/12/05/503581220/fake-or-real-how-to-self-check-the-news-and-get-the-facts>.

335. See *id.*

336. U. TORONTO LIBR., *supra* note 331.

professionals.³³⁷ Next, the reader should look at the source of the quoted language and try to determine if the quotations are from a reputable source.³³⁸ Finally, the reader should conduct a reverse image search by right clicking on the image and choosing to search Google for it.³³⁹ This will show the reader other websites that include that image, which may give the reader additional sources to determine the veracity of the story.³⁴⁰

While internet literacy should be reinforced, it alone will not eliminate the spread of fake news. Many people will still click on these fake news site links thereby providing the writers revenue through advertising based on clicks.³⁴¹ Further, if a reader is fact checking the article, she is forced to click on it and read through it to determine its veracity. Increased internet literacy may limit sharing of fake news, but it will not limit the views, and, therefore, it will not impact the profits associated with fake news. Without a renewed legal approach toward addressing this issue, nothing will deter authors from writing and publishing fake news stories. Nonetheless, used in conjunction with other methods detailed next, increased internet literacy could still help to alleviate the issues that illegitimate news sources present.

B. *Website Responsibility*

Rather than leaving this issue solely to the reader, websites can regulate fake news by flagging or removing fake news stories. Facebook has already begun to label articles as

337. Davis, *supra* note 334.

338. *Id.*

339. *Id.*

340. *Id.*; *Search for Images with Reverse Image Search*, GOOGLE SEARCH HELP, <https://support.google.com/websearch/answer/1325808?hl=en> (last visited July 30, 2017).

341. See Higgins et al., *supra* note 228 (“The income comes mostly from Google, which pays a few cents each time a reader sees or clicks on advertisements embedded in one of Mr. Latsabidze’s websites.”).

“disputed.”³⁴² Currently, the labeling is not immediate; there is a process by which an article is labeled as “disputed.”³⁴³ First, either a Facebook user reports the story as fake or Facebook’s software notices something bizarre about the story.³⁴⁴ Facebook has introduced “new analytical techniques including machine learning” to try to weed out fake news stories even before they are flagged by a user.³⁴⁵ This software is more likely to target articles that have a larger total reach through repeat posting.³⁴⁶ However, this may leave smaller fake news source that do not have a large reach untouched.

Next, Facebook sends the story to some of the organizations that agreed to provide free fact checking, including Snopes and PolitiFact.³⁴⁷ If and only if two of the fact checkers believe the article is fake, then the “disputed” label is attached to the article.³⁴⁸ Once Facebook provides the list of stories that have been flagged, each fact-checking organization can vet any story that it chooses.³⁴⁹ This means that it could take several days for an article to be labeled as “disputed,” even when the article was published originally on a known fake news website.³⁵⁰ In addition to the “disputed” label, Facebook briefly displayed a box at the top of each user’s newsfeed titled “Tips for Spotting False News.”³⁵¹ By

342. Peter Kafka, *Facebook Has Started to Flag Fake News Stories*, RECODE (Mar. 4, 2017, 6:22 PM), <http://www.recode.net/2017/3/4/14816254/facebook-fake-news-disputed-trump-snopes-politifact-seattle-tribune>.

343. *Id.*

344. *Id.*

345. Seth Fiegerman, *Facebook’s Global Fight Against Fake News*, CNN:TECH (May 9, 2017, 10:35 AM), <http://money.cnn.com/2017/05/09/technology/facebook-fake-news/index.html>.

346. *Id.*

347. Kafka, *supra* note 342.

348. *Id.*

349. Fiegerman, *supra* note 345.

350. Kafka, *supra* note 342.

351. Rob Price, *Facebook is Trying to Teach its Users How to Spot Fake News*,

clicking on the link, the user was directed to Facebook's Help Center where ten different tips for spotting fake news are displayed.³⁵² While this feature is no longer atop each user's newsfeed, the list of tips remains in Facebook's Help Center.³⁵³

Facebook recently announced that, to further combat the spread of fake news, it will offer a paid news subscription tool for news publications.³⁵⁴ The service will be part of Facebook's Instant Articles platform and will function as a paywall where the user will be asked to pay for a subscription after she has visited ten stories from one publisher.³⁵⁵ This has been suggested to prevent the spread of fake news if Facebook users view those publishers who are part of the paywall as credible because the user will then have options to subscribe to trusted news sources.³⁵⁶ It should be noted that this could have the exact opposite effect where trusted news sources are hidden behind a paywall and readers who are unable to pay for the trusted sources are forced to look elsewhere, including potential fake news sites.³⁵⁷

Facebook is not alone in its attempt to regulate fake news. Google is also striving to eliminate fake news, and its

BUSINESS INSIDER: TECH INSIDER (Apr. 7, 2017, 6:56 AM), <http://www.businessinsider.com/facebook-tips-spotting-fake-news-2017-4>.

352. *Id.*

353. *Tips to Spot False News*, FACEBOOK, <https://www.facebook.com/help/188118808357379> (last visited June 22, 2017).

354. Kevin Tran, *Facebook Confirms Paid News Subscription Tool*, BUSINESS INSIDER (July 21, 2017, 9:27 AM), <http://www.businessinsider.com/facebook-confirms-paid-news-subscription-tool-2017-7>.

355. Seth Archer, *Facebook Is Edging Higher After Announcing a Paid News Feature (FB)*, BUSINESS INSIDER: MARKET INSIDER (July 19, 2017, 10:18 AM), <http://markets.businessinsider.com/news/stocks/facebook-stock-price-is-edging-higher-after-announcing-a-paid-news-feature-2017-7-1002187155>.

356. Tran, *supra* note 354.

357. See Anurag Harsh, *Is Facebook's Subscription-Based News Service Bad for The Publishing Industry?*, HUFFINGTON POST (July 20, 2017, 12:06 AM), https://www.huffingtonpost.com/entry/is-facebooks-subscription-based-news-service-bad-for_us_59702c24e4b0f68541cd6290.

engineers increased their efforts after Google was criticized for promoting a fake news story inside its News Box.³⁵⁸ Since mistakenly promoting a fake news article, Google has removed 200 publishers from one of its AdSense networks, thereby cutting these publishers off from a primary revenue stream.³⁵⁹ These publishers included many fake news sites with domain names that ended in “.com.co.”³⁶⁰

Allowing these sites to edit content that they deem “disputed” comports with common law theories of republisher liability, in that by holding republishers liable as if they are the primary publisher, sites then want to edit content they republish in order to avoid liability. As previously explained, CDA Section 230 does not treat republishers in this manner. Moreover, CDA Section 230 protects the actions of sites that remove content that they deem to be “otherwise objectionable, whether or not such material is constitutionally protected.”³⁶¹

Recently, Congress questioned executives from Facebook, Google, and Twitter about the misinformation spread by Russia on their platforms during the 2016 presidential election.³⁶² The Senate Intelligence Committee previously warned the social media companies of fake news and bots, which were used by Russia to “conduc[t] an information operation intended to divide our society along issues like race, immigration and second amendment

358. Lizzie Plaugic, *Google's Answer to 'Who Won the Popular Vote' Is a Conspiracy Blog*, VERGE (Nov. 14, 2016, 11:24 AM), <http://www.theverge.com/2016/11/14/13622566/google-search-fake-news-election-results-algorithm>; Tess Townsend, *Google Has Banned 200 Publishers Since It Passed a New Policy Against Fake News*, RECODE (Jan. 25, 2017, 9:01 AM), <http://www.recode.net/2017/1/25/14375750/google-adsense-advertisers-publishers-fake-news>.

359. Townsend, *supra* note 358.

360. *Id.*

361. 47 U.S.C. § 230(c)(2)(A) (2012).

362. Max Chafkin, *Facebook Is Still in Denial About Fake News*, BLOOMBERG: BUSINESSWEEK (Oct. 31, 2017, 1:42 PM), <https://www.bloomberg.com/news/articles/2017-10-31/facebook-is-still-in-denial-about-fake-news>.

rights.”³⁶³ Senator Warner was concerned about the scope of misinformation on the three platforms and criticized the companies’ leaders for dismissing the Senate Intelligence Committee’s initial concerns.³⁶⁴ While there is a bipartisan effort exploring regulatory solutions,³⁶⁵ it is unclear whether any of these solutions will come to fruition.

What is clear is that relying on individual websites to regulate fake news, without the threat of litigation, will not alleviate the wide-ranging issues fake news creates. Websites will only improve if changing could increase their profits, and this will likely be insufficient to prohibit legitimate defamation concerns. If there is no impending liability, then there is little incentive to reform one’s approach.

C. Secondary Liability

CDA Section 230 should be amended in part to mitigate the total immunity that that it provides. If Section 230 were overturned in its entirety, courts would ultimately rely on common law theories of liability, a consideration pondered already by many.³⁶⁶ However, eliminating CDA immunity in

363. Ben Jacobs, US Senators Warn of ‘Fake News’ Threat from Russia and Urge Tech Giants to Act, *GUARDIAN* (Nov. 1, 2017, 7:25 PM), <https://www.theguardian.com/technology/2017/nov/01/us-senators-russia-fake-news-threat-russia> (quoting Sen. Richard Burr).

364. *Id.*

365. Issie Lapowsky, Eight Revealing Moments from the Second Day of Russia Hearings, *WIRED* (Nov. 1, 2017, 3:40 PM), <https://www.wired.com/story/six-revealing-moments-from-the-second-day-of-russia-hearings/>.

366. See Matthew G. Jeweler, *The Communications Decency Act of 1996: Why Sec. 230 Is Outdated and Published Liability for Defamation Should Be Reinstated Against Internet Service Providers*, 8 *PITT. J. TECH. L. & POL’Y* 1, 20 (2008) (“Congress should repeal the CDA and courts should apply the common law framework to Internet defamation cases attempting to hold an ISP or website operator liable under a publisher or distributor liability theory.”); Heather Saint, Note, *Section 230 of the Communications Decency Act: The True Culprit of Internet Defamation*, 36 *LOY. L.A. ENT. L. REV.* 39, 66 (2015); Matt C. Sanchez, Note, *The Web Difference: A Legal and Normative Rationale Against Liability for Online Reproduction of Third-Party Defamatory Content*, 22 *HARV. J.L. & TECH.*

its entirety could cause a chilling effect on both Internet users and website owners, which, in turn, could undermine the benefits of posting content on the Internet in a quick, efficient manner. Elimination of the CDA would likely result in internet users and website owners over censoring content,³⁶⁷ which could lead websites to prohibit sharing of any news whether credible or not for fear of liability.

The proposed solution falls on the spectrum between total immunity and the liability imposed on print sources. The theory borrows from both copyright law and previous court decisions and attempts to create liability where CDA Section 230 prevented it. Since defamatory content and copyright are both exceptions to the First Amendment,³⁶⁸ it seems logical that they could be treated similarly with respect to liability of websites.³⁶⁹ Notably, this proposed solution would not affect the liability currently imposed on

301, 302 (2008) (“CDA 230 has elicited concern from courts and commentators who argue that immunizing online reproduction while punishing identical offline reproduction makes little sense.”) (citations omitted).

367. See Ciolli, *supra* note 191, at 148 (“Most believed that the *Stratton* decision [which imposed common-law liability] would more likely result in a chilling effect on Internet speech. Intermediaries, rather than never censoring their content, would overcensor their content in order to both avoid lawsuits and please parents and others who desire a ‘clean’ Internet experience. Thus, many feared Internet intermediaries would remove a third party’s content whenever an individual claimed the content was offensive or defamatory, ‘regardless of whether the speech actually met the threshold for defamation or not.’”) (citation omitted).

368. See *R.A.V. v. St. Paul*, 505 U.S. 377, 383 (1985) (noting that the First Amendment right of free speech does not include defamation); *Spence v. Washington*, 418 U.S. 405, 417 (1974) (Rehnquist, J., dissenting) (referring to copyright law as an example of a speech restriction).

369. This method has been suggested by others as well. Olivera Medenica & Kaiser Wahab, *Does Liability Enhance Credibility?: Lessons from the DMCA Applied to Online Defamation*, 25 *CARDOZO ARTS & ENT. L.J.* 237, 263 (2007) (“Although the DMCA has received its fair share of criticism, it may provide some guiding points in terms of tailoring an approach to defamatory materials posted online.”); Spiccia, *supra* note 191, at 397 (“The most common modification to section 230 that academics have suggested is the adoption of a notice-and-takedown procedure that is almost identical to Title II of the Digital Millennium Copyright Act (‘DMCA’), which is entitled the Online Copyright Infringement Liability Limitation Act (‘OCILLA’).”).

the original speaker of the defamatory content, which is not insulated by CDA Section 230. Nevertheless, the original speaker is often hard to determine resulting in the injured party having no legal recourse.

The original intent of CDA Section 230 was to protect ISPs from liability for comments on a webpage,³⁷⁰ but courts have interpreted this provision more expansively.³⁷¹ Courts have failed to analyze ISPs consistently and, instead, have included both ISPs and websites in their definition of an ICS.³⁷² The courts' polysemous use of the term ICS is likely due to a lack of technological understanding.³⁷³ Thus, part of the proposed solution is a clarification of the definition of an ICS through the addition of a third category.

Currently, an ICS is defined as “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet.”³⁷⁴ This definition is similar to that of an ISP, as defined by the Digital Millennium Copyright Act (DMCA)

370. The Act was created in response to the then-recent case of *Stratton Oakmont v. Prodigy Services Co.* 1995 N.Y. Misc. LEXIS 229 (N.Y. Sup. Ct. May 24, 1995) in which Prodigy Services, an ISP, was the defendant. *See supra* Section IV.A.

371. *See supra* Section IV.B.

372. *See* *Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785, 801 (N.D. Cal. 2011) (“There is no question that § 230 provides broad immunity to websites that publish content provided primarily by third parties.”) (internal quotations omitted); Sewali K. Patel, Note, *Immunizing Internet Service Providers from Third-Party Internet Defamation Claims: How Far Should Courts Go?*, 55 VAND. L. REV. 647, 676 (2002) (“ISPs are categorized inconsistently, and precedent regarding third-party Internet defamation cases does not offer much guidance.”)

373. *See* Raymond Shih Ray Ku, *Irreconcilable Differences?: Congressional Treatment of Internet Service Providers as Speakers*, 3 VAND. J. ENT. L. & PRAC. 70, 71 (2001) (“Internet service providers (ISPs), the primary entities responsible for providing individuals with access to cyberspace, do not fit neatly into the existing conceptual boxes for speech intermediaries under First Amendment law.”); Medenica & Wahab, *supra* note 369, at 247 (“As the Internet took on increasing importance in the nation’s daily life, courts began to grapple with its implications.”).

374. 47 U.S.C. § 230(f)(2) (2012).

as “an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user’s choosing, without modification to the content of the material as sent or received.”³⁷⁵ While an ISP transmits the content, a website is often the content transmitted as a “website” is defined as “a group of World Wide Web pages usually containing hyperlinks to each other and made available online by an individual, company, educational institution, government, or organization.”³⁷⁶ A website does not allow an individual to access the internet; it merely provides content. Thus, a website should not fall under the category of an ICS.

Therefore, this Comment proposes adding a category called an Internet Content Host (ICH). This category would apply to websites that host third-party content.³⁷⁷ Specifically, this category would include websites that provide for the exchange or sharing of any kind of content with other users or make such content accessible to other users through hosting services. With the creation of this category, ISPs remain immunized as ICSs, but ICHs may be held liable under certain circumstances for third-party defamatory content.

An ICH may be held contributorily liable if it creates or materially contributes to the defamatory content.³⁷⁸ This liability is similar to that of an ICP, but the liability does not

375. 17 U.S.C. § 512 (k)(1)(A) (2012).

376. *Website*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/website> (last visited Aug. 2, 2017). Notably, there are no federal statutes defining the term “website.”

377. As explained in Section IV.B, those that provide content are not immune under the CDA as ICPs. *See* 47 U.S.C. § 230(f)(3) (describing an “ICP” as “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.”).

378. This concept of “materially contribute” is adopted from *Caraccioli v. Facebook, Inc*, where the court found that Facebook was not liable because it did not materially contribute to the alleged act. 167 F. Supp. 3d 1056, 1065 (N.D. Cal. 2016).

require the same level of action on the part of an ICH, as the ICH must only “materially contribute” to the content rather than create or develop it.³⁷⁹ To materially contribute to the content, the ICH must both have the ability to stop³⁸⁰ and engage in conduct that furthers the spread³⁸¹ of the defamatory content. As many ICHs have a policy statement that permits the removal of defamatory content,³⁸² the ability to stop the spread would rarely be contested.³⁸³ This level of contribution has been suggested by some courts, but it is not followed uniformly.³⁸⁴ While it could be argued that

379. See 47 U.S.C. § 230(f)(3).

380. This is suggested by the Ninth Circuit in *Perfect 10, Inc. v. Amazon*. See Mark Bartholomew, *Copyright, Trademark and Secondary Liability After Grokster*, 32 COLUM. J.L. & ARTS 445, 457–58 (2009) (“Instead, [this test] asks whether the defendant is capable of stopping infringement, regardless of its degree of involvement with the direct infringer. Thus, even though Google did not have a particularly direct or strong relationship with a group of websites infringing the plaintiff’s copyright, the Ninth Circuit held that Google likely materially contributed to infringement because its search engine helped consumers find those infringing websites.”).

381. See Mark Bartholomew & John Tehranian, *The Secret Life of Legal Doctrine: The Divergent Evolution of Secondary Liability in Trademark and Copyright Law*, 21 BERKELEY TECH. L.J. 1363, 1391 (2006) (“To make a material contribution, the defendant must either (1) contribute machinery or goods that provide the means to infringe, or (2) engage in personal conduct that furthers the infringement.”).

382. E.g., *Disabled Accounts*, FACEBOOK: HELP CENTER, <https://www.facebook.com/help/185747581553788/> (last visited Aug. 22, 2017) (“We disable Facebook accounts that don’t follow the Facebook Terms. Some examples include: Posting content that doesn’t follow the Facebook Terms”); *Statement of Rights and Responsibilities*, FACEBOOK, <https://www.facebook.com/terms> (last visited Aug. 22, 2017) (“We can remove any content or information you post on Facebook if we believe that it violates this Statement or our policies.”).

383. It should be noted that this scheme could have the unfortunate consequence of ICHs giving up all editorial control, so as to avoid liability. However, the larger social media websites, such as Facebook, would likely not relinquish this control for fear of backlash from the media, and these sites are where the spread of fake news is most pronounced.

384. *Compare* *Batzel v. Smith*, 333 F.3d 1018, 1031 (9th Cir. 2003) (finding an ICS must do “something more substantial than merely editing” to be liable), *with* *O’Kroy v. Fastcase, Inc.*, 831 F.3d 352, 355 (6th Cir. 2016) (“Nor did Google’s alterations ‘materially contribute to the alleged unlawfulness of the content.’”),

this form of liability could be achieved through the common law, the lack of uniformity suggests that added statutory language is required.

Some have argued that the website should have knowledge of the defamatory content to establish contributory liability, as is required by copyright law to establish copyright infringement.³⁸⁵ Unlike copyright law, this Comment proposes that knowledge not be required for an ICH be found contributorily liable.³⁸⁶ Without a knowledge requirement, ICHs must act diligently in their editing process of content that is promoted, as they would not be afforded the defense of lack of knowledge should they promote defamatory content. If knowledge were required, ICHs would be incentivized to not monitor any third-party content for fear of creating liability. Consequently, under this proposed contributory liability scheme, when Facebook highlights a fake news story on its “Trending Stories” section, a court could find liability as Facebook materially contributed to the content by highlighting it for millions to see.

with Phan v. Pham, 182 Cal. App. 4th 323, 327–28 (2010) (finding that an emailer did not “materially contribute” to the email he forwarded and was afforded immunity under the CDA).

385. *E.g.*, Patel, *supra* note 372, at 689–90 (“Distributor liability is similar to contributory infringement in the sense that ISPs and other distributors can be held liable for third-party content that is objectionable if knowledge of the objectionable nature existed or should have existed. Analogizing copyright law to defamation law as applied in the Internet context, therefore, indicates that ISPs should be subject to distributor liability.”) (internal citations omitted).

386. *See* Religious Tech. Ctr. v. Netcom Online Commc’n Serv., 907 F. Supp. 1361, 1373 (N.D. Cal. 1995) (“Liability for participation in the infringement will be established where the defendant, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another.”) (internal quotations omitted); Bartholomew & Tehranian, *supra* note 381, at 1368 (“Contributory liability then attaches where there also exists (1) the defendant’s knowledge of the infringement; and (2) the defendant’s material contribution to the infringement.”); Joshua A.T. Fairfield, *The God Paradox*, 89 B.U. L. REV. 1017, 1030 (2009) (“In order to avoid tarring all makers of communications technologies with the brush of secondary infringement, courts have focused on the concept of knowledge.”).

The court may also hold an ICH vicariously liable for defamatory content when the ICH has the right and ability to control or supervise the user's acts and receives a financial benefit from the posted defamatory content, unless it is removed in a timely manner.³⁸⁷ This form of liability also does not require that the ICH have knowledge of the defamatory content. Similar to that of copyright infringement, the financial benefit could be satisfied where either the ICH directly profits from the posting or indirectly profits because the defamatory material drew more users to the ICH.³⁸⁸ This would create liability for Facebook, or another ICH, if it receives any kind of advertisement revenue from defamatory content.

For example, Facebook arguably has the right to control whether or not it posts fake news stories³⁸⁹ as it may remove

387. This language was adopted from an opinion explaining vicarious liability with respect to copyright infringement. *Religious Tech. Ctr.*, 907 F. Supp. at 1375 (“A defendant is liable for vicarious liability for the actions of a primary infringer where the defendant (1) has the right and ability to control the infringer’s acts and (2) receives a direct financial benefit from the infringement. Unlike contributory infringement, knowledge is not an element of vicarious liability.”) (internal citation omitted). See *Fairfield*, *supra* note 386, at 1029 (“A court may hold an ISP vicariously liable for infringing content if the ISP has the right and ability to exercise control over the actual user (the true infringing party) and derives profit from the posting. Thus, in the context of copyright law, vicarious liability extends . . . to cases in which a defendant has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities.”) (internal citation and quotations omitted).

388. See *Bartholomew*, *supra* note 380, at 452 (“Meanwhile, courts construing vicarious copyright infringement claims continue to hold that the second prong—receipt of a direct financial benefit from the infringement—can be satisfied merely where the direct infringer’s conduct may hypothetically draw more customers to the secondary defendant.”).

389. See *Religious Tech. Ctr.*, 907 F. Supp. at 1376 (finding a genuine issue of material fact as to right and ability to control where the ISP had “in fact exercised its ability to police its users’ conduct, plaintiffs cite evidence that [the ISP] has acted to suspend subscribers’ accounts on over one thousand occasions. . . . Further evidence shows that [the ISP] can delete specific postings.”). It should be noted that under the DMCA safe harbor provision 17 U.S.C § 512(c)(1)(B), some circuits have held that the “right and ability to control” requires “something more than the ability to remove or block access to material.” *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 38 (2d. Cir. 2012) (quoting *Capitol*

content that it finds objectionable and may suspend users for posting content that does not abide by its terms.³⁹⁰ In addition, Facebook receives advertising revenue indirectly from fake news because fake news results in users looking at their newsfeed longer, which means they will likely click on other advertisements, which are sold based on cost per click.³⁹¹ Therefore, under this proposed liability Facebook could be held vicariously liable for the dissemination of fake news.

Since both of these forms of liability are premised on the lack of knowledge, the damages for an infraction should not be exorbitant. If the damages were extremely large, ICHs would likely stop allowing users to post content for fear of the potential damages resulting from defamatory content posted by their users.³⁹² The damages should, however, be more than a nominal amount, as the defamed should be made whole, a fundamental premise of our common law tort principles.³⁹³ In addition, the damages could divest any income the ICH received as a result of the defamatory

Records, Inc. v. MP3tunes, LLC, 821 F. Supp. 2d 627, 645 (S.D.N.Y. 2011)); Mavrix Photographs, LLC v. LiveJournal, Inc., 853 F.3d 1020, 1033 (9th Cir. 2017).

390. See FACEBOOK: HELP CENTER, *supra* note 382; FACEBOOK, *supra* note 382.

391. See Peter Cohan, *Does Facebook Generate Over Half of Its Revenue from Fake News?*, FORBES: INVESTING (Nov. 25, 2016, 10:36 AM), <https://www.forbes.com/sites/petercohan/2016/11/25/does-facebook-generate-over-half-its-revenue-from-fake-news/print> (“How much revenue would Facebook sacrifice if it purged fake news from its site? Sadly, I can’t provide a reliable figure—but a BuzzFeed News analysis of top fake news traffic before the election suggests that the proportion of time that users spent on fake—as opposed to real news—on Facebook was considerable. . . . It might be possible to estimate how much Facebook ad revenue comes from fake news by multiplying the proportion of time the user spends reading the fake news by Facebook’s total ad revenue.”).

392. See Ciolli, *supra* note 191, at 188.

393. See Stephen J. Shapiro, *Overcoming Under-Compensation and Under-Deterrence in Intentional Tort Cases: Are Statutory Multiple Damages the Best Remedy?*, 62 MERCER L. REV. 449, 450 (2011) (“The main purpose of tort law is to make the plaintiff whole, to the extent possible, in order to put the plaintiff in the same financial situation the plaintiff would have been in absent the defendant’s actions.”).

content. The goals of the damages are to compensate the defamed but also to deter the ICH from permitting the defamatory content to remain published.³⁹⁴ If the ICH is not receiving income from the content, directly or indirectly, it has no incentive to allow it to remain posted. Further, the deterrence aspect would likely cause at least some ICHs to be more diligent in their practices of preventing the publication and republication of defamatory content on their sites.

Similar to that of the DMCA, there could be safe-harbor provisions that provide immunity if the ICH removes the defamatory content.³⁹⁵ Unlike safe-harbor provisions proposed by others,³⁹⁶ the proposed safe-harbor provision would not include a notice element.³⁹⁷ Thus, the ICH would

394. See Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System-and Why Not?*, 140 U. PA. L. REV. 1147, 1150 (1992) (“The substantive rules of tort law exist to serve certain social purposes. The most prominent among these are compensating innocent victims for injury and deterring behavior that presents risks that exceed their social value.”).

395. 17 U.S.C. § 512(c)(1) (2012). Title II of the DMCA, or OCILLA, states that a service provider is immune from liability if: it does not have apparent or actual knowledge of the infringement; it does not financially benefit from the infringement; and, once notified, it rapidly removes or restricts access to the material. *Id.* In addition, it is the responsibility of the service provider to “do what it can reasonably be asked to do to prevent the use of its service by ‘repeat infringers.’” *In re Aimster Copyright Litig.*, 334 F.3d 643, 655 (7th Cir. 2003) (quoting § 512(i)(1)(A)). For a further discussion of the DMCA, see Medenica & Wahab, *supra* note 369, at 256–58.

396. Medenica & Wahab, *supra* note 369, at 265 (“The DMCA and its legacy can provide a blueprint for approaching an amendment to section 230. Some of the most significant facets of the DMCA are its notice and takedown provisions.”); Ryan Gerdes, Note, *Scaling Back § 230 Immunity: Why the Communications Decency Act Should Take a Page from the Digital Millennium Copyright Act’s Service Provider Immunity Playbook*, 60 DRAKE L. REV. 653, 672–75 (2012); Lukmire, *supra* note 249, at 406–07.

397. Medenica & Wahab, *supra* note 369, at 362 (“[O]nce an ISP receives written notice of an allegedly defamatory statement pursuant to a statutory notice requirement, the ISP would have to take down the defamatory materials for a finite period of time, such as ten to fourteen days.”); Lukmire, *supra* note 249, at 406–07 (“An analogous statute concerning liability for hosting defamatory third-party content would preserve liability upon notice, and would have the advantage of vetting meritless claims.”).

receive immunity if it does not financially benefit from the infringement, and it removes the material expeditiously. To qualify as expeditious under the proposed provision, the content must be removed in less than five business days.³⁹⁸ This shortened time frame is crucial as once a story begins trending, it spreads quickly, and the faster it is removed, the less damage it will inflict upon the defamed.

Facebook's current process is a starting point for finding safe-harbor immunity.³⁹⁹ Pursuant to this proposed provision, the ICH would be required to remove the post once it has been determined to be defamatory. Facebook, in particular, has already made strides in determining if posted content is fake news through the use of independent third-parties,⁴⁰⁰ and this process could be further applied to defamation. To find the content defamatory, the independent third-party would apply the same defamatory standard as a court would.⁴⁰¹ There could be a potential issue where, by the time the content has been brought to Facebook's attention by the third-party, Facebook has already received revenue from the content. In this scenario, Facebook would be required to pay the defamed the revenue received from the defamatory content. While this solution would not always find ICHs that host defamatory content liable, it would at least give the injured party the possibility of recourse, which is lacking entirely under the current legal scheme.

398. An even shorter time frame would be impractical and likely result in controversy. See Soraya Sarhaddi Nelson, *With Huge Fines, German Law Pushes Social Networks to Delete Abusive Posts*, NPR: PARALLELS (Oct. 31, 2017, 7:44 AM) <https://www.npr.org/sections/parallels/2017/10/31/561024666/with-huge-fines-german-law-pushes-social-networks-to-delete-abusive-posts> (nothing that one issue with Germany's new law is that it requires social media companies to delete posts that violate German law within only twenty-four hours or be fined).

399. See *supra* Section V.B.

400. See *supra* Section V.B.

401. For example, if the statement is about a public official, the standard applied to find defamation would be the *Sullivan* standard: (1) a false statement of fact about a public official (2) having defamatory content with (3) actual malice. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 271–73, 279–80 (1964).

CONCLUSION

While many advocate for the unlimited right of free speech on the internet, this unlimited right should not apply to defamatory content, as “there is no constitutional value in false statements of fact.”⁴⁰² Courts have routinely recognized that those who write, publish, republish, and distribute defamatory content in print may be held liable. The medium alone should not be the litmus test in determining liability. While both print and online media should not necessarily be afforded the same treatment across the spectrum, one form should not be provided blanket immunity.

Both intellectual property and defamatory content are exempted from the First Amendment, but only intellectual property is exempted from the immunity CDA Section 230 may provide.⁴⁰³ As previously argued, this should not be the case. Rather, the way in which an entity or person may be found liable for defamatory content should be similar to that of copyright infringement. While holding only some ICHs liable, the legal solution presented in Part V is not a perfect one. However, in conjunction with increased internet literacy and more proactive efforts by content hosting websites to remove such material, the end result would be an improvement.

While the buzz word of 2016 seemed to be “fake news,” it is not clear that this is an issue that will continue or whether it will soon be forgotten. Since beginning this Comment, many of the fake news websites that received notoriety have since been taken down, but that does not mean more will not crop up in their place. Further, President Trump has erroneously used the term “fake news” to describe

402. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974).

403. *See* 47 U.S.C. § 230(e)(2) (“Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.”); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 555–60 (1985); *R.A.V. v. St. Paul*, 505 U.S. 377, 383 (1985).

traditional, reputable news sources repeatedly.⁴⁰⁴ Arguably, the term “fake news” is more prevalent now, as used by President Trump, than it ever was with regard to the previously mentioned fake news websites. Regardless of the life span of fake news, what is certain is that defamatory content on the internet will not disappear anytime soon, and this proposed solution could provide those defamed parties potential recourse.

404. See Cody Lyon, *How Dangerous Is President Trump's 'Fake News' Rhetoric?*, HUFFINGTON POST (July 24, 2017 3:54 PM), https://www.huffingtonpost.com/entry/how-dangerous-is-president-trumps-fake-news-rhetoric_us_5973a737e4b0545a5c310094; Alex Wagner, *Trump vs. the Very Fake News Media*, ATLANTIC (Feb. 17, 2017), <https://www.theatlantic.com/politics/archive/2017/02/trump-vs-the-very-fake-news-media/516561/>.