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FAKE NEWS: THE COMMODITIZATION OF INTERNET SPEECH

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INTRODUCTION

What do a recent college graduate living in North Carolina, [1] a computer science student in Tbilisi, Georgia, [2] and a teenager in the ***124** Republic of Macedonia [3] all have in common? They all make money by creating and disseminating fake news on the Internet.

For recent North Carolina graduate, Cameron Harris, fake news was an easy solution to a cash shortage problem. [4] In early September of 2016, Harris found it increasingly difficult to make ends meet. As a true child of the Internet Age, Harris turned to the web; and after a quick internet search, he realized he could make advertising money [5] by generating fake news. [6] Within an hour, he purchased www.ChristianTimesNewspaper.com for five dollars and started writing news stories. [7] The fake news business model is simple: the more people that visit the site to read the stories, the more advertising money the author generates. [8]

Luckily for Harris, his foray into the fake news racket could not have come at a better time. The 2016 American Presidential election was the perfect topic; it was all anyone wanted to read about. [9] Harris generated moderate traffic and a small amount of advertising money with stories entitled, "Hillary Clinton Blames Racism for Cincinnati Gorilla's Death" and "NYPD Looking to Press Charges against Bill Clinton for Underage Sex Ring." [10] However, his biggest payday was the result of a sudden bolt

of inspiration while listening to then ***125** presidential candidate, Donald Trump, told a crowd in Ohio, "I'm afraid the election is going to be rigged, I have to be honest." [11]

Harris sat down at his computer and in an hour had a story complete with photo-shopped images of Randall Prince, an Everyman [12] from Columbus, standing with boxes full of fraudulent ballots. [13] The headline read, "BREAKING: 'Tens of Thousands' of fraudulent Clinton votes found in Ohio warehouse." [14] The article is replete with quotations from sources describing "'potentially tens of thousands of votes' for Hillary Clinton" and a replica of a fraudulent ballot provided by an Ohio affiliate. [15] Harris posted the story to his website, www.ChristianTimesNewspaper.com, promoted it through a few dummy Facebook profiles, and waited. [16] The response was incredible, and literally overnight. [17] The very next day, the board of elections in Franklin County, Ohio announced it was investigating the possible election tampering. [18] Six million people shared the story and Harris made about $5,000 in ad revenue--more than enough to pay the rent. [19]

***126** Beqa Latsabidze, a twenty-two-year-old unemployed college senior from Tbilisi, Georgia, was in a situation not much different than Harris's when he set up a fake news website specifically to generate advertising revenue. [20] Latsabidze too wrote about the election on his website www.MyFreshNews.com; [21] however, he began with pro-Hillary articles, but gained little traction. [22] It was not until he started posting "laudatory stories about Donald J. Trump that mixed real--and completely fake--news in a stew of anti-Clinton fervor" that he started generating enough traffic to make money. [23] According to data compiled by BuzzFeed, Latsabidze penned the "third most-trafficked fake story on Facebook from May [2016] to July [2016]." [24] The article reported that "the Mexican government announced they will close their borders to Americans in the event that Donald Trump is elected President of the United States." [25] Latsabidze also wrote an article in August 2016 claiming an ISIS suicide bomber killed 106 people attending a California music festival. [26]

In an interview, Latsabidze claimed his intent is merely to create satirical news stories. "Nobody really believes that Mexico is going to close its border .... This is crazy." [27] For him, it is "all about income, nothing more," and his Mexico border article brought in approximately $6,000 in advertising revenue from Google. When asked if a crackdown on fake news may deter fake news purveyors, Latsabidze replied, "[S]omething else will come along to replace it," and "[if America wanted] to, they [could] control everything, but this will stop ***127** freedom of speech." [28] Despite landing a day job at a software company, Latsabidze is reluctant to give up the fake news racket; he even considered learning French to write fake news on France's Presidential Election in April 2017. [29]

The money generated by fake news is even more appetizing to Dimitri, [30] an eighteen-year-old living in Veles, Macedonia. [31] His story is identical to Harris and Latsabidze's; but for Dimitri, the money he makes is 1250% more than the average annual wage in Macedonia. [32] A startling number of Macedonians are panning for gold in the virtual fake news gold rush, and Internet savvy entrepreneurs all over the republic are making up news and cashing in. [33] In fact, an investigation by BuzzFeed and the Guardian revealed more than 100 fake news domains originated from Veles. [34] When asked about the fake news boom, Veles's mayor, Slavcho Chadiev, said, "No one can be sure, but it's nice to think we could have changed the course of American history." [35]

The onslaught of fake news during the 2016 presidential election was staggering and spawned conversations about the "age of post-truth politics," [36] producing terms like, "alternative facts." [37] Never before has the fragility of the relationship between a healthy marketplace of ***128** ideas and a working democracy been more apparent. Despite compelling evidence of the effect

on the 2016 United States presidential election and the public's growing distrust in the mainstream media, there has been no legal action brought against any purveyor of fake news. [38]

This Note provides a possible solution to stop the blitzkrieg of fake news in the United States. Part I of this Note creates a taxonomy consisting of four distinct species of fake news. The fourth and final type of fake news discussed in Part I is the primary focus of this article. Part II lays out the two most significant impediments to regulation, specifically First Amendment jurisprudence and Section 230 of the Communications Decency Act (CDA). Part III sets forth a solution in three parts. First, Part III offers a way to define and identify "commoditized speech." Second, Part III sets forth a proposed level of judicial scrutiny for "commoditized speech" sourced from the European Court of Human Rights (ECtHR). Finally, Part III addresses the CDA and Internet Service Providers (ISP) liability.

I. WHAT IS FAKE NEWS?

Fake news is exactly that, a fabricated story or article propagated in the same fashion and via the same mediums as real news. [39] Fake news is not a new phenomenon, but has roots reaching back to sixth century A.D. [40] Procopius, a Byzantine historian, "churned out dubious information, known as *Anecdota* [to] smear the reputation of the Emperor Justinian." [41]

The invention of the printing press in 1439 exponentially increased the circulation of news in a time when verification was nearly ***129** impossible. [42] In 1475, the entire Jewish population in Trent, Italy, was arrested and tortured because of a fake news story that purported the Jewish community had murdered a child and drank its blood to celebrate Passover. [43] The story was broadcasted by a preacher, and was factually baseless. [44] Fifteen of the Jewish prisoners were burned at the stake after being found "guilty." [45] It wasn't until Galileo's trial in 1610 that "a desire for scientifically verifiable news ... helped create influential scholarly news sources." [46]

The United States is no stranger to fake news: in 1874 the New York Herald published an article claiming, "animals had broken out of the Central Park Zoo, rampaged through Manhattan, and killed dozens." [47] Despite the small disclaimer at the end of the article stating the "entire story given above is pure fabrication," many New York residents attempted to flee the city en masse. [48]

Perhaps more memorable is Orson Welles' War of the Worlds radio broadcast, complete with fake news bulletins interrupting the regularly scheduled programming to report an alien invasion. [49] The response was "flabbergasting ... [h]ouses were emptying, churches were filling up; from Nashville to Minneapolis there was wailing in the street and the rending of garments." [50] Though the reaction was more than was expected, the intent of the War of the Worlds radio broadcast was to entertain. The intent to entertain is behind much of the modern day ***130** satirical fake news, like The Onion. [51] The success of satirical news is often predicated on the ability to be just ridiculous enough to be true, which is often accomplished by incorporating actual facts. [52] However, the most recent incarnation of fake news grown in the wild west of the Internet is a slippery chimera, [53] more pervasive than the fake news and satire previously experienced. The repercussions of a marketplace of ideas inundated with counterfeit news packaged to look true are serious and have the potential to destroy entire political systems. An examination of the current landscape reveals two types of fake news: accidental and intentional.

A. Accidental - Viral Fake News

According to a 2016 study by the Pew Research Center, 79% of Americans with internet access use Facebook,[54] 24% use Twitter,[55] and 62% of adults obtain news from social media platforms.[56] Furthermore, the user-friendly interface of most social media platforms allow for ***131** information to be "reposted"[57] or "retweeted"[58] from individual accounts with a few clicks of a mouse or flicks of a finger.

On November 9, 2016, Eric Tucker, a middle-aged man from Texas, used his Twitter account to post a photo of a caravan of charter busses with the caption, "Anti-Trump protestors in Austin today are not as organic as they seem. Here are the busses [the protestors] came in. #fakeprotests #trump2016 #austin."[59] Eric Tucker had only forty followers on his Twitter account at the time he posted the photo.[60] However, by 9:00 p.m. the next day, the post had been shared more than 16,000 times on Twitter, more than 350,000 times on Facebook, and had even been referenced in a tweet by President-elect, Donald Trump.[61]

Eric Tucker's initial post and subsequent viral status is an example of accidental fake news. He had no intention for his story, which he did not fact check, to be seen by a number of people exponentially greater than his forty followers.[62] Communication on the Internet lacks physicality, facilitating a "disinhibition effect,"[63] which causes "temporal synchrony."[64] In other words, communication on the ***132** Internet creates a wide space between actions and consequences. This chasm allows for Internet users to feel mentally divorced from the possible effects of their actions, especially those that seem statistically unlikely. Additionally, the anonymity afforded by the Internet allows individuals to skirt responsibility by posting anonymously or under a pseudonym. Compounded with the insouciance of the modern Internet user, is the allure of instant fame should a post go viral.[65]

On election night, shortly after Donald Trump was declared the winner, people took to social media to respond, vent, and share their reactions.[66] A Twitter account belonging to European freelance sports reporter, "Simon Rowntree" posted, "I am at a Trump rally in Manhattan, and thousands are chanting [sic] 'We hate Muslims, we hate blacks, we want our great country back.' [sic] Disgusting."[67] The tweet was shared more than 100,000 times, including by a researcher from Amnesty International and a CNN journalist.[68] An investigation revealed Simon Rowntree's twitter was a fake account set up specifically to spread false information.[69] There were no reports of any ***133** retaliation in response to the tweet; however, benignity is not always the case.

One month after the election, "on December 4, 2016, Edgar Maddison Welch entered the Comet Ping Pong restaurant [in Washington DC] and fired an AR-15 rifle into a door."[70] This occurred exactly one month after a Reddit user posted a thread entitled "Comet Ping Pong Pizzagate Summary" to a message board used by Donald Trump supporters, conservatives, and the alt-right.[71] The thread "developed a wholly fictitious conspiracy theory that maintains Comet Ping Pong [was] the site of an international Satanic child sex abuse cabal hosted by powerful Democrats, including Hillary Clinton."[72] Prior to Welch showing up to conduct an armed investigation of the DC pizzeria, Alex Jones, a noted far right commentator added credibility to the story by promoting it through his website and radio show.[73] No one was seriously injured by the incident. However, in the wake of both negative and positive press, the owner of the pizzeria had to close the restaurant in the days following Welch's arrival and hire armed security.[74] Most surprisingly, is the Tweet written by then nominee for President-elect Trump's national security advisor, Michael Flynn. Despite the overwhelming evidence that Pizzagate was in fact false, ***134** General Flynn tweeted, "U decide - NYPD Blows Whistle on New Hillary Emails: Money Laundering, Sex Crimes w Children, etc ... Must READ! https://t.co/O0bVJT3QDr."[75]

B. Accidental - Irresponsible Media

The news as an institution has humble beginnings. [76] The trustworthiness of information was of great importance, and in Medieval Europe the credibility of news was directly related to the person delivering it. [77] Prior to the rise of printed news, ascertaining the truth of a story was easier, as the listener could immediately question the source of information. However, as the news market grew, the "problem of establishing the veracity of news reports remained acute." [78] The stories found in sixteenth-century newspapers were often misreported because the need to be first was often in conflict with the need to be true. [79] News organizations struck a balance between speed and truth by relying on a second source to corroborate the story. [80]

However, as traditional news mediums struggle to keep up with the shifting landscape of technological advances and social media, the conflict between truth and speed worsens. [81] A casualty of this conflict ***135** is a slackening of the journalistic fact-checking decorum. [82] Additionally, technology and the proliferation of social media platforms has allowed for average citizens, with no sense of moral obligation to fact-check, to play an integral role in the editorial process by contemporaneously updating social media profiles in real time. [83]

In December 2016, Knoxville News Sentinel published an article about a hospitalized, terminally ill boy dying in the arms of a visiting Santa Clause. [84] Shortly after publication, the Washington Post, BBC, CNN, NBC, Daily Mail, Today, People, Cosmopolitan, Mashable, and BuzzFeed all republished the heart-warming holiday story. [85] Within a week of publishing the story, it was revealed no such thing had taken place in any of the local hospitals. [86] In this situation, "news outlet[s] covering this story simply assumed that the one before had performed the necessary fact checking, and as the number of major outlets covering the story grew, so too did its perceived trustworthiness." [87]

More recently, in June 2017, CNN ran a story claiming the United States Senate was investigating the ties between Anthony Scaramucci, a confidant of President Trump, and a Russian investment fund. [88] The story was quickly retracted and the three journalists who penned the story resigned. [89] President Trump took to Twitter commenting, "Wow, CNN had to retract big story on 'Russia,' with 3 employees forced to ***136** resign. What about all the other phony stories they do? FAKE NEWS!" [90]

While the immediate consequences of each of the preceding examples of journalistic failures range from completely innocuous to potentially dangerous, both contribute to a growing distrust for the media and further contributing to the post-truth worldview. [91]

C. Intentional - Fake News as an Agent of Chaos or Influence

At 8:30 a.m. on September 11, 2014, the Director of the Office of Homeland Security and Emergency Preparedness for St. Mary Parish, Louisiana, Duval Arthur's phone rang. [92] On the other end, was a person reporting an explosion at a local chemical processing plant, Columbia Chemical. [93] Shortly after ending the conversation, Arthur received text messages and more phone calls claiming the same thing. [94] On Twitter, hundreds of accounts reported the explosion, [95] and "[t]he #ColumbianChemicals hashtag was full of eyewitness accounts of the horror." [96] From New York to Louisiana, journalists "found their Twitter accounts inundated with messages about the disaster." [97] ***137** Corroborating evidence was also posted on the Internet, in the form of a screenshot of CNN's home page, which contained a photo of the explosion and a YouTube video claiming ISIS was responsible. [98] Two hours after Duval Arthur initially heard about the attack, Columbian Chemicals issued a press release, claiming reports of an explosion were false. [99] It was *all* fake: the screenshots, the YouTube video, the Twitter accounts, the

phone calls, the text messages, and the Wikipedia page. [100] The cell phones that made the initial calls and texts about the explosion were traced, but such efforts led nowhere. [101]

A single viral tweet from an ill-informed citizen did not generate the Columbian Chemicals explosion hoax; it was a "highly coordinated disinformation campaign, involving dozens of fake accounts that posted hundreds of tweets for hours, targeting a list of figures precisely chosen to generate maximum attention." [102] The Columbian Chemicals disinformation campaign, and many other similar campaigns, [103] have been traced back to a corporation in St. Petersburg, Russia, known as the Internet Research Agency, or less formally as Russia's "troll farm." [104]

***138** The Internet Research Agency employs hundreds of people to create fake online identities and post pro-Kremlin propaganda, to create the illusion of a massive army of Kremlin supporters. [105] Marat Burkhard, a Russian blogger, compared the Internet Research Agency to the Ministry of Truth from George Orwell's dystopian novel, 1984, [106] with regulations against laughing or fraternizing and fines for being even a minute late. [107]

In early 2017, the U.S. intelligence community [108] released findings from an investigation of Russia's involvement in the 2016 presidential election. [109] The report stated, "Russian efforts to influence the 2016 US presidential election represent the most recent expression of Moscow's long-standing desire to undermine the U.S.-led liberal ***139** democratic order, but these activities demonstrated a significant escalation in directness, level of activity, and scope of effort compared to previous operations." [110] There is evidence that Russia leaked Democratic National Committee emails, which severely affected Hillary Clinton's campaign. [111] Russia created internet-based disinformation campaigns to "seed[] doubt and paranoia, and destroy[] the possibility of using the Internet as a democratic space." [112]

During the 2016 U.S. presidential election in Michigan, the Computational Propaganda Project at the University of Oxford analyzed Twitter to determine "the distribution of junk news, including fake news, computational propaganda and ideologically extreme, hyper-partisan, and conspiratorial content ...." [113] The findings show fake news and professional news content were shared at a one-to-one ratio in Michigan. [114] This statistic is particularly disconcerting considering Michigan was an important swing state in the 2016 presidential election. According to the project, *fake news websites and politically controlled bots rely on social media to increase engagement* and "aim to influence conversations, demobilize opposition and generate false support." [115]

140** ***D. Intentional - Fake News for Profit

When the Internet was still called the "ARPANET" (Advanced Research Projects Agency Network), Gary Thuerk, "the grandfather of spam," sent the first email advertisement to 400 people. [116] It is hard to believe that Internet advertising, now "a key player in the twenty-first-century global economy," had such humble beginnings. [117] In 2013, Internet advertising revenues surpassed both broadcast and cable television, with $42.8 billion dollars in annual revenue. [118] While the revenue report for 2016 has not been released yet, internet advertising is projected to generate 20% more than the $59.6 billion in 2015--making internet advertising the gold rush of the twenty-first century. [119] Individual-users make money by pairing with an internet advertising network and posting advertisements on their websites, generating money every time someone visits the website. [120] The formula is simple: the more people who visit the site, the more money the website owner makes. The three anecdotes

in this Note's introduction are an example of fake news for profit and it is clear that the business of fake news is booming--money is good.

Jestin Coler, of Los Angeles, California, is the CEO of Disinfomedia, a company that owns fake news websites, such as NationalReport.net, USAToday.com.co, WashingtonPost.com.co. [121] ***141** Coler began creating fake news in 2013 as a way to expose the "extremism of the white nationalist alt-right" by "infiltrat[ing] the echo chambers of the alt-right, publish[ing] blatantly [sic] fictional stories and then be able to publicly denounce those stories and point out the fact that they were fiction." [122] However, Coler quickly realized how fast fake news can spread and how much money can be made. [123] More importantly, Coler realized how easily people believed fake news generally, and his brand particularly. [124] For example, after Coler posted a fake story on NationalReport.net about Colorado residents using food stamps to buy marijuana, a state representative "propos[ed] actual legislation to prevent people from using their food stamps to buy marijuana." [125] Coler makes between $10,000 and $30,000 per month creating fake news, a number that undoubtedly increased exponentially during the 2016 presidential election. [126]

In Phoenix, Arizona, Paul Horner, [127] has been creating fake news for a while. [128] In 2013, he convinced about five million people he was the elusive street artist, Banksy." [129] During the 2013 government shutdown, he wrote a fake news article titled, "Obama uses own money to open Muslim museum amid government shutdown." Horner's article claimed "President Obama paid out of pocket to keep a 'federally funded' Muslim culture museum in Mississippi open" during the ***142** shutdown. [130] Despite the fact that there are no Muslim culture museums anywhere in Mississippi, Fox News reported the story. [131]

The 2016 United States presidential election provided an audience of Trump supporters or Clinton haters, who were hungry for Horner's brand of fake news. [132] In March 2016, Horner penned an article about paid protesters rallying for then presidential candidate Donald Trump. [133] The article included a faux Craigslist ad and details about ***143** the "six-hour training class where [paid protesters] were taught chants like 'Dump Trump' and 'Trump is Racist.'" The article was tweeted by former Trump campaign chairman, Corey Lewandowski. [134] Sarah Palin acknowledged the story during a rally speech stating that Trump was "not even president yet and [he is] already creating jobs." [135]

The preceding examples yield a taxonomy that reveals stark differences between the first three types of fake news and the last. The last type of fake news is motivated by money, and offers little value as a commodity in the marketplace of ideas. This type of fake news has the following characteristics: it is often knowingly false or intentionally distorted; its content is curated to elicit an emotional (rather than logical) reaction; its readers share it an inordinate amount of times on social media and other internet platforms; and it originates from a website where advertisements generate income for the author. The creators of intentional fake news for profit are directly incentivized to write incendiary stories that garner the most attention and earn the most money.

II. IMPEDIMENTS TO FAKE NEWS REGULATION

The success of a democracy hinges on an informed citizenry, and the unfettered flow of information upon which citizens may make choices regarding their government. [136] Protection for the "marketplace ***144** of ideas" is enshrined in the First Amendment of the Bill of Rights, [137] which prohibits the government from establishing any law that curtails an individual's freedom of speech or freedom of the press. [138] Though Americans "still champion the First Amendment as a fundamental right" most engender a sense of ambivalence and "agree that unrestricted free speech has the potential to prevent irreparable harm" and at the same time the potential to "cause our nation irreparable harm." [139] Understandably, the need to negotiate the space

between appropriate effective regulations that comports with the intentions embedded in the First Amendment and overreaching stifling regulation is paramount. [140]

A. United States Supreme Court

The First Amendment, as interpreted by the Supreme Court, "does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom." [141] Rather, the Supreme Court has carved out exceptions for First Amendment coverage, [142] ***145** preventing obscenity, [143] fighting words, [144] defamation, [145] child pornography, [146] and incitement to imminent lawless action [147] from receiving the full protection of the First Amendment. Further, the Supreme Court has limited protection for commercial speech. [148]

With the exception of the aforementioned categories of speech, the Supreme Court has shied away from making any content-based determinations about speech out of fear that the government will become the absolute arbiter of what should be protected under the First Amendment; effectively chilling speech. [149] Ostensibly it is this fear ***146** that motivated the Court to afford First Amendment protection to false speech, [150] violent video games, [151] hate speech, [152] images of small animals being crushed by women wearing high heels, [153] blatant political propaganda disguised as documentaries, [154] and protests at the funeral of an American soldier killed during combat. [155]

The Supreme Court case presenting the largest roadblock to the regulation of fake news is *United States v. Alvarez*, [156] a 2012 case striking down the federal Stolen Valor Act of 2005, "which criminalized falsely representing oneself as having been awarded military medals or decorations." [157] The Court, in its opinion, claimed counterspeech in the form of online ridicule and bad press is sufficient to correct the harms caused by the false speech. [158] The significance of this decision is the defendant, Xavier Alvarez, violated a law by *knowingly lying about something he definitively knew to be false*, and the Court granted him First Amendment protection all the same.

B. United States' State Courts

In February 2017, California assembly member Ed Chau introduced AB 1104, The California Political Cyberfraud Abatement Act. [159] The proposed bill would make it a crime "for a person, with intent to mislead, deceive, or defraud, to commit an act of political cyberfraud." [160] Cyberfraud was defined as "caus[ing] a person reasonably to believe that a political Web site has been posted by a person other than the person who posted the Web site, and would cause ***147** a reasonable person, after reading the Web site, to believe the site actually represents the view of the proponent or opponent of a ballot measure." [161] The first hearing on this bill was cancelled at the request of assembly member Ed Chau. [162] However, even if California had passed AB 1104 (which is unlikely) [163] the Supreme Court would undoubtedly find the law unconstitutional.

Currently, there are nineteen states with statutes prohibiting false political speech. [164] The definition of political speech varies from state ***148** to state: some states prohibit statements by or about candidates relating to the honesty, integrity or moral character or a candidate, [165] while others are more focused on false speech regarding ballot initiatives. [166] Unfortunately, for assembly member Ed Chau and AB 1104, First Amendment challenges to these laws have been overwhelmingly successful.

For example, the Washington Supreme Court held that a law "punishing the sponsor of any political advertisement that contained false speech regarding material fact if the false speech was published with 'actual malice,'" violated the First Amendment. [167] The court "stated that the law erroneously 'presupposes [that] the State possesses an independent right to determine truth and falsity in political debate,'" and the "content-based regulation ... did not survive strict scrutiny because the government had no compelling state interest in prohibiting such speech." [168]

Similarly, a Minnesota regulation prohibiting false speech in the form of political advertisements or campaign materials disseminated with actual malice was found to be a violation of the First Amendment. [169] The Eighth Circuit concluded that the false campaign ***149** speech fails to implicate the interest at the foundation of libel law--that is the prevention of injury to a private person. [170] The Eighth Circuit framed the injury as being sustained by the subject of the false speech and not those whose opinions were formed by the speech.

Most recently, an Ohio court struck down a statute that proscribed false campaign speech, making it a crime to "[p]ost, publish, circulate, distribute, or otherwise disseminate a false statement concerning a candidate, either knowing the same to be false or with reckless disregard of whether it was false or not, if the statement is designed to promote the election, nomination, or defeat of the candidate." [171] A pro-life advocacy group challenged the law after the Ohio Election Commission prevented the group from erecting a billboard reading, "Shame on Steve Driehaus! Driehaus voted FOR taxpayer-funded abortion." [172] The message referred to Democratic Representative Steve Driehaus's vote in favor of the Affordable Care Act. [173]

C. Communications Decency Act, Section 230

Congress passed the Communications Decency Act (CDA) in 1996. [174] Prior to the CDA, Internet Service Providers (ISP) were vulnerable to defamation claims. [175] Specifically, if an ISP engaged in any kind of content regulation, they could be categorized as "publishers" under common law defamation doctrine thereby imputing ***150** liability. [176] Worried this would discourage "the development and utilization of blocking and filtering technologies, to restrict children's access to inappropriate online material," Congress passed the Communications Decency Act, as a part of the Telecommunications Act of 1996. [177] Congress also intended to avoid chilling internet free speech by imposing "liability upon companies that do not create potentially harmful messages but are simply intermediaries for their delivery." [178]

Section 230 of the CDA exempts ISPs from liability by providing they "shall [not] be treated as the publisher or speaker of any information provided by another information content provider." [179] In addition, under Section 230, an entity will only be considered an ISP if it can satisfy three requirements: "(1) an entity is a provider or user of an interactive computer service, (2) the claim is based on information provided by another information content provider and (3) the claim would treat [the defendant] as the publisher or speaker of that information." [180]

In the jurisprudence following the CDA's inception, the following internet entities have been categorized as interactive computer service providers, garnering protection: website hosting services, [181] social networking websites, [182] internet search engines, [183] internet message ***151** board operators, [184] and online classified advertisers. [185] [186] The fear of chilling speech on the Internet has created a virtual wild west, where anything goes and accountability is rare. The protection afforded by the First Amendment and Section 230 makes bringing a common law defamation claim against an ISP essentially impossible. Further, Internet users have become increasingly savvy in obfuscating the origin of activity, making locating the source of the

speech a futile exercise. There has been little indication of any willingness to abdicate from the theory that regulation of Internet speech is inherently unconstitutional. [187]

III. "COMMODITIZED SPEECH" SOLUTION IN THREE PARTS

The types of speech covered in Part I of this Note are markedly different than the speech considered in the drafting of the First Amendment. Democracies require citizens to be armed with all relevant information, engage in thoughtful and challenging dialogue, expose fallacies and untruths, and inevitably arrive at a cohesive (or even recognizable) truth. [188] Speech protections are predicated upon the organic formation of a marketplace of ideas that functions similar to a capitalistic market. [189] Wherein, the consumer's discerning eye would force out false statements and liars, and good trustworthy speech is preferred to bad speech. [190] However, what happens when that marketplace is flooded, not with bad speech, but false speech pretending to be true? [191]

***152** Commoditized speech (that is, speech which itself is a commodity) has value not for its ability to express an idea, but for its likelihood of being consumed. [192] Much like a minnow stops being just a fish when put on the end of a hook, the value of commoditized speech comes from its ability to lure readers. [193] The intent of commoditized speech is not to inform, opine, or express--it is to be thrust into the stream of clicks and create income for the author. [194] The author is directly incentivized to create and publish content that is shocking and creates an urgent need to "share." [195] Today, the law not only allows for this to happen, but also blindly protects the author's right to do so. [196] Under the current First Amendment jurisprudence, fake news is indiscriminately protected. [197] Under section 230 of the CDA, Facebook, Google, and anything else categorized as an ISP, are exempted from liability for the tortious behavior of its users. [198] The recent barrage of fake news has forced some internet advertising companies to deny service to fake news publishers and suspended and delete social media accounts connected with fake news publishers. [199] However, these actions have all been spearheaded by the entities themselves in an attempt to rehab bad publicity in the wake of the 2016 presidential election. [200]

It has become glaringly obvious that the one-size-fits-all appeal of the First Amendment does not fit the amoeboid shape of the Internet. [201] The First Amendment was penned during a time when all communication took place either in person or by handwritten letter, and now cursive is not even taught in schools. The solution in the following ***153** sections for commoditized speech considers the drastic change in how and where Americans communicate.

A. Defining "Commoditized Speech"

Defining commoditized speech in a way that is both narrow and broad is perhaps the most difficult part of the solution. The lines must be drawn to maintain the freedoms of legitimate businesses trading in information, satirical commentaries, and artistic endeavors. First, the initial requirements are the speech must be on the Internet and be intentionally or knowingly false. However, the actual determination of whether or not the speech is considered commoditized would be based on an evaluation in light of the following factors: (1) whether the speech must be used as a way to generate income (2) the level of falsity, (3) the strength of the correlation between how many people view the speech and its intrinsic value, (4) the existence of past publications of similar material, (5) the extent to which the speech holds itself out to be true, (6) the publisher's intent, and (7) the publication's effect. Each requirement would be assessed on a spectrum and certain cases will require more or less than one requirement. Additionally, as an affirmative defense, the publisher may escape liability by providing proof of an explicit disclaimer of truth featured prominently on the publication.

Following the 2016 U.S. presidential election many ISPs, including Twitter, Google, and Facebook, pledged to crackdown on fake news by creating "trust indicators." [202] Many of these companies are creating algorithms to "flag concerning articles." [203] The fact that there is a mathematical and scientifically grounded method by which fake news can be ferreted out and categorized as "commoditized speech" is promising for potential regulation.

B. European Judicial Review Paradigm

Much like the First Amendment, Article 10 of the European Convention on Human Rights (ECHR), adopted in 1953, guarantees ***154** freedom of expression and information. [204] Article 10 of the ECHR includes the freedom for expression, the freedom to hold opinions, and receive and impart information. [205] The second clause of Article 10 limits this freedom by allowing Member States to derogate from this right if "prescribed by law and necessary for a democratic society." [206] The European Court of Human Rights (ECtHR) was established to enforce the ECHR, and has solidified itself as an astute arbiter of the freedom of expression since the early 1970s. [207] When confronted with claims of Article 10 violations, the ECtHR must balance the rights afforded in the Article with the limitations of Article 17. The effect of Article 17 is "to withhold the benefit of the Convention's guarantees from those who wish to use them to further an objective contrary to the values protected by the Convention." [208] Article 17 has allowed the ECtHR to deny protection to clearly racist speech, hate speech, and speech denying the Holocaust. [209]

Unlike the First Amendment, the balancing of Article 10 and Article 17 of the ECHR creates a paradigm that aims to protect speech up to a certain point by reconciling the rights of an individual and the rights of the hoi polloi. This paradigm allows states to derogate from freedom of expression if the restriction is "in accordance with the law" and meets the "democratic necessity test." [210] "The purpose of the 'democratic necessity test' is to ensure that any specific interference with rights is judged against the "true," rather than the alleged, needs of a democratic society." [211]

***155** Further, the ECtHR has been "making increased use of the concept of 'positive obligations.'" [212] Essentially, "rather than merely requiring Council of Europe states to refrain from interfering with individuals' rights, the Court is frequently insisting that those states take direct action to protect those rights" and "do things for [] individuals that give them a certain quality of life." [213]

It is highly unlikely that the Supreme Court will impute the First Amendment with a positive governmental obligation. However, there is a possibility of adopting a new level of scrutiny inspired by the ECtHR for Internet speech. [214] Specifically, the Supreme Court should adopt the "democratic necessity test" mentioned as the level of scrutiny applied to laws regulating commoditized speech. The "democratic necessity test" would require the Supreme Court to assess and examine the true need of American society in conjunction with the individual rights of the person challenging a statute. This analysis would include an evaluation of the need to preserve the marketplace of ideas and the faulty concept that the best solution to false speech is more speech on the Internet.

C. Internet Service Provider Liability

The last component to effectuating meaningful regulation of commoditized speech is requiring ISPs to regulate fake news. The likelihood of successful eradication of fake news created for profit is contingent upon taking away the platforms used by purveyors of commoditized speech. [215] While there have been efforts by both Google ***156** and Facebook to limit the number of fake news stories and bot accounts used to push out the stories, there must be liability imputed to these internet platforms to meaningfully cure the fake news epidemic. [216]

Part II-C of this Note focuses on how section 230 of the CDA protects ISPs and essentially prevents any regulation that will impute liability. However, in September 2016, the Second Circuit Court of Appeals found an Internet marketing company that promoted weight loss products through fake news websites to be precluded from immunity under the CDA.[217] In *FTC v. LeadClick Media*, the defendant, LeadClick Media "operated an affiliate-marketing network to provide advertising in Internet commerce" by "connecting [its merchant clients] to third-party publishers--affiliates--who advertised the merchant's products."[218] The affiliates would create fake news sites, which looked like genuine news sites: they had logos styled to look like news sites and included pictures of supposed reporters next to their articles. The articles generally represented that a reporter had performed independent tests that demonstrated the efficacy of the weight loss products. The websites also frequently included a "consumer comment" section, where purported "consumers" praised the products. But there were no consumers commenting--this content was invented.[219]

Essentially, LeadClick's affiliates serve the same function as the employees at the Russian "troll farm" described in Part I-C of this Note.[220] LeadClick argued that it was protected from liability for violating a FTC regulation because it was immune under Section 230 ***157** of the CDA. The court held LeadClick did not meet the three requirements[221] to be considered an ISP under the CDA.[222] In the context of this Note, the most significant aspect of the *LeadClick* decision is the court considered the intent, content, and effect of the speech.[223] It was relevant to the court's decision that the intent was to confuse, the content was patently false, and the effect was to misinform internet users.[224]

While the *LeadClick* case is not the perfect watershed case in the pursuit of ISP liability, it does provide precedent upon which to build.

CONCLUSION

Fake news will not be cured through the passive "wait it out" approach. The echo chambers created by the Internet are now filled with extremist, paranoid, and hateful information aimed to reaffirm and promote ignorance.[225] Further, if the regulation of commoditized speech decreases the amount of fake news in the market place, it would be easier to discern fake news employed by foreign actors as a way to manipulate political systems and the people they govern. James Madison once said in defense of the First Amendment liberty, "A popular government, without popular information, or the mean of acquiring it, is but a prologue to a farce or a tragedy; or perhaps both. Knowledge will forever govern ignorance; and a people who mean to be their own governors must arm themselves with the power which knowledge gives." The truth of this statement still persists: a constituency without knowledge or access to knowledge is insufficient to support the demands of a democracy. Rightfully, the First ***158** Amendment and the right to freedom of expression are protections against governments taking the power of information from the people. However, it follows that the right to true information should be protected as well. Access to all of the world's information is useless if it is impossible for individual citizens to differentiate facts from alternative facts.

Footnotes

a1 J.D., cum laude, California Western School of Law, January 2018; Bachelor of English with an Emphasis in Poetry, Minor in Political Science, University of California at Irvine, May 2009. I would like to thank Professor Jessica Fink for her guidance, sharp editing, and for being an amazing role model. Thanks also to Brooke Raunig, Elijah Gaglio, Madison Vojak, and Andrew Scrape for your support and, most importantly, your patience and grace.

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144 *See* *Chaplinsky*, 315 U.S. at 568. Supreme Court held the First Amendment offers no haven for, "face-to-face words plainly likely to cause a breach of the peace by the addressee, words whose speaking constitute a breach of the peace by the speaker--including 'classical fighting words,' words in current use less 'classical' but equally likely to cause violence, and other disorderly words, including profanity, obscenity and threats." *Id.* at 573.

145 *See* Beauharnais v. Illinois, 343 U.S. 250, 266 (1952); Gertz v. Robert Welch, Inc., 418 U.S. 323, 347-48 (1974) (narrowing the scope of the exception for defamation); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 283 (1964) (incorporating an "actual malice" standard for defamation laws).

146 *See* New York v. Ferber, 458 U.S. 747 (1982). The Supreme Court held child pornography is "material the production and distribution of which is not entitled to First Amendment protection." *Id.* at 765.

147 *See* Brandenburg v. Ohio, 395 U.S. 444, 449 (1969). The Supreme Court held, a statute prohibiting advocacy of "violence 'as a means of accomplishing industrial or political reform' ... falls within the condemnation of the First and Fourteenth Amendments." *Id.*

148 *See* Sorrell v. IMS Health Inc., 564 U.S. 552, 572 (2011). The Supreme Court held in order to sustain targeted content-based speech prohibition, "the State must show at least that the statute directly advances a substantial governmental interest and that the measure is drawn to achieve that interest." *Id.* at 572.

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159 The California Political Cyberfraud Abatement Act, Assemb, B. 1104 (Cal. 2017), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB1104.

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