Francesco Biondo / Gevisa La Rocca /
Viviana Trapani (eds.)

Information Disorder

Learning to Recognize Fake News

PETER LANG

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The Fake News project was developed as a social project to suggest an idea of a plural, open, and dialectical society. One product of social action is public opinion, which directly and indirectly influences policy decisions, including those concerning the control and prospects of social innovation, thus exerting pressure on any kind of democratic regime. Disinformation hinders the free process of public opinion building by using various means to negatively influence public opinion with the effect of widening the chasm between decision-making power and active citizenry, who in turn needs to be properly informed to usefully contribute to achieving publicly shared goals in a transparent manner.

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The marketplace of ideas and its externalities: Who pays the cost of online fake news?

Abstract: Since the nineteenth century, thanks to J.S. Mill, an argument against limiting the freedom of expression has been gaining ground, namely that the truth of an argument is the result of free competition between different ideas in a "marketplace of ideas" and that this competition can yield an approximate form of the truth or a robust argument. In this paper I will argue that Mill's model of the marketplace of ideas is an "idealised" model because it assumes that there is a subject who seeks to know in a detached manner, without being influenced by his or her expectations, needs, ideologies, or biases. However, the metaphor of the marketplace of ideas is still relevant because it also harbours a limitation to the marketplace itself, namely the production of "negative externalities": the spread of fake news (conspiracy theories and the deliberate spread of alarm), the polarisation of the debate, and the concentration of the advertising market in the hands of a few companies. Just as in the case of pollution, these costs need to be taken into account. How can this be done? The available conventional mechanisms seem to be insufficient because they need to pursue two conflicting goals, i.e., reducing the number of disinformation sites on the one hand and protecting users' freedom of expression on the other. Platforms may not allow competing apps to be downloaded or may impose automated and intrusive regulatory schemes. However, this means that censorship would return in the form of a "private" censor. I will compare two models for possibly solving the conundrum: the one proposed by Paul Romer of regressive taxation of platforms and the mixed model proposed by the European Commission.

Keywords: Fake news, externalities, freedom of expression, marketplace of ideas

Introduction

Arguing about the legal regulation of so-called fake news implies, for a jurist or a philosopher of law, to examine the reasons that justify freedom of expression. Words are not just an expression, they are also communication "actions", and those actions can have consequences. If they had no consequences, we might then ask what need is there for something to be expressed. These consequences are then subject to evaluation, and the evaluation depends on the "value" that is given to the freedom to express anything: an opinion, a scientific thesis, or an evaluative or aesthetic judgement. There are several justifications for freedom of

expression, understood as the claim that expression cannot be sanctioned. It is assumed that there are at least four rationales: (1) the value of the autonomy of those who express themselves (Mackenzie, Meyerson, 2021), (2) the attainment of truth (Marshall, 2021), (3) distrust of public censorship institutions (Mill, Holmes, discussed below), and (4) the participation of individuals in governing the democratic state (Bhagwat, Weinstein, 2021). Of course, advocates of free speech very often develop the four rationales together, but there is a clear advantage in distinguishing them. These rationales can then be grouped into two major classes: non-consequentialist justifications, and consequentialist justifications. The former justify freedom of expression because it is an "individual right", the latter because society as a whole ultimately benefits from it.

In this paper I will focus on a particular justification of freedom of expression (consequentialist): the argument that public debate ultimately functions as a free market (marketplace of ideas). One enters a market with a commodity (an idea), and if the commodity (or idea) is sold, then that commodity is valued (accepted as being true, valid, correct). Let us also assume that, like a marketplace, the acceptance of an idea implies that consensus about another idea (or multiple ideas) will decline. In this model, what is relevant is not the content of the goods or an idea, but the fact that these are sold. Even the presence of goods (ideas) that turn out not to meet consumer tastes (because they prove to be fake) is not a problem. Just as the market disposes of goods, i.e., leaves them unsold, because they do not meet consumer tastes, debate will weed out false ideas. No one will accept them. So, there is no need to build an institutional apparatus (censorship) that first checks which idea is correct and sanctions those who express it. Indeed, such an apparatus might even eliminate ideas that might turn out to be correct, acceptable. Or it could prevent other theses that are only correct at a certain point in time from later turning out to be incorrect in the light of new scientific evidence. Therefore, an ex-ante control would prevent any form of development. Similar to the marketplace, where the entry of a new product drives competitors to improve the goods they offer, the spread of a new idea drives opponents of that idea to improve their arguments[1]. Incidentally, the four rationales stated above would also be protected.

1 According to Mokyr (2017), Britain owes its commercial success to the fact that the notion of a "marketplace of ideas" has been firmly entrenched in the country as early as the eighteenth century.

The birth of the "marketplace of ideas" argument

This argument has developed throughout history over a long period of time and has three main proponents: John Milton (poet), John Stuart Mill (philosopher), and Oliver Wendell Holmes (Supreme Court justice).

The three developed their arguments at different times and for different purposes. In the brief space of this article, I will dwell only on the aspects that each author has contributed to developing the "marketplace of ideas" argument.

The first author argued that the institution of censorship is an insult to the power that truth has to impose itself on falsehood without needing any help from the public institution of censorship. There is no need for any authority to permit or prohibit an idea; if an idea is true, it will prevail over false ideas. Milton does not offer historical, methodological, or empirical arguments; it is enough for him to express his confidence in God's will to let a true idea prevail in a contest with a false idea (Blasi, 2021, pp. 21–24).

Mill follows the hypothesis that a true idea (not only in the theological realm) triumphs over a false idea through competition and explains how this is possible without the need for transcendent authorities. Any possible link to theological issues vanishes in the competition, and the advantages of accepting that false ideas may also compete become clear[2].

"But the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error" (19).

The only way to get to the truth is for people to discuss and learn from their mistakes:

"In the case of any person whose judgment is really deserving of confidence, how has it become so? Because he has kept his mind open to criticism of his opinions and conduct. Because it has been his practice to listen to all that could be said against him; to profit by as much of it as was just, and expound to himself, and upon occasion to others, the fallacy of what was fallacious" (22).

One might, however, think that what we and our group believe is true, but Mill cautions that prohibiting a false statement is not permitted either:

2 In https://eet.pixel-online.org/files/etranslation/original/Mill,%20On%20Liberty.pdf.

"To call any proposition certain, while there is any one who would deny its certainty if permitted, but who is not permitted, is to assume that we ourselves, and those who agree with us, are the judges of certainty, and judges without hearing the other side" (23).

This way we would not be seeking the truth, but only reassurance in our beliefs. Interestingly, in the following passage Mill hints at the idea, which I will return to, of the reassuring effect of group thinking:

"Absolute princes, or others who are accustomed to unlimited deference, usually feel this complete confidence in their own opinions on nearly all subjects. People more happily situated, who sometimes hear their opinions disputed, and are not wholly unused to be set right when they are wrong, place the same unbounded reliance only on such of their opinions as are shared by all who surround them, or to whom they habitually defer; for in proportion to a man's want of confidence in his own solitary judgement, does he usually repose, with implicit trust, on the infallibility of "the world" in general. And the world, to each individual, means the part of it with which he comes in contact; his party, his sect, his church, his class of society" (19–20).

However, it is only with Oliver Wendell Holmes and his important dissenting opinion in the Abrams case that the concept of the market of ideas, or marketplace of ideas, was born[3]. The Abrams case concerned the constitutionality of the conviction of a group of pacifists for circulating leaflets against enlistment during World War I under the Espionage Act. The defendants sought reversal of their sentences because these violated the First Amendment. In his dissenting opinion, Justice Holmes, who only seven months earlier had accepted the constitutionality of limiting free speech if there was a "clear and present danger"[4], made clear that the First Amendment is based on a conception of truth as a "clash" of opinions in a "marketplace of ideas".

"Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power, and want a certain result with all your heart, you naturally express your wishes in law, and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you

3 Abrams v. United States, 250 U.S. 616 (1919), retrieved 6.6.2022 from https://supreme.justia.com/cases/federal/us/250/616/

4 Restrictions on freedom of expression are legitimate only if the expression is "of such a nature as to create a clear and present danger that [it] will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."

do not care wholeheartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe he very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That, at any rate, is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year, if not every day, we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system, I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country" (S.320).

Unlike Mill, Holmes did not believe that the conflict between opinions allows the correct one to prevail; he did not believe that there is a "truth" that is achieved through argumentation or that debate makes public opinion more "virtuous." As a supporter of pragmatism and Darwin's theory of evolution,

"Holmes came to value the freedom of speech largely for its capacity over time to generate new ways of thinking, discredit obsolete ideas, and alter priorities of inquiry. Those long-term consequences are what he had in mind when he pronounced the competition of the market to be the best test of truth" (Blasi, 2021, 40)[5].

The failures of the marketplace of ideas

The idea that public debate should be open to any expression regardless of its content has been constantly at the centre of controversy. And it is no coincidence that all liberal legal systems have norms that limit the exercise of freedom of expression, as in the case of hate speech, or in cases of defamation. In many countries, such as Italy, there are criteria for the exercise of freedom of the press and there are rules that make defamation through the press an aggravating

5 Let us also mention Coase (1974) who asserted the analogy between freedom of trade and freedom of expression on the basis of a realistic consideration: in both cases there are actors aiming to obtain a benefit. That is why socialist-oriented free speech advocates should accept free trade and competitive markets. If they do not do so, it is out of self-interest, because they believe their work as intellectuals is more valuable than that of economic entrepreneurs. For reasons of space, I will not elaborate on this topic.

circumstance. If there is a marketplace for ideas, it is definitely a regulated one. Not everyone can access it, and transactions can result in liability in the event of damage, as in the case of other markets. Here, too, however, critical issues arise regarding the marketplace metaphor. Does free entry into the public debate and competition among ideas really produce efficiency? There can even be "failures" in the marketplace of ideas. These failures also include the existence of negative externalities, costs, for example in terms of goods, which are not "internalised" in the transaction, but fall on the community (e.g., pollution). Who pays for the negative externalities brought about by transactions in the marketplace of ideas? I am referring here in particular to the question about who pays for a particular negative externality, the spread of incorrect news, or deliberately fake news?

In what sense can the marketplace of ideas lead to "failure"?

In general, market failure is defined as the suboptimal outcome determined by market relationships without any intervention by the state. Of course, depending on the economic theory one takes, there can be different taxonomies of market failures. Let me cite four of them (on market failures, I refer to Stiglitz, 2000).

The first case concerns the insufficient production by the marketplace of the public good "reliable information". If we all enjoy reliable information (e.g., about health care products, the economy, the weather), we get more benefits than we individually are willing to pay for. Furthermore, each individual obtaining the information does not reduce but rather increases the value of each unit of information. In this situation, however, each economic entity knows that it can benefit from it without paying for it. Producing, or even consuming, "real" information has costs. To produce it, one has to pay specialised staff and to benefit from it, as a consumer, one needs to buy the product. It is therefore more advantageous for the news producer to produce information that "copies" true information, or to reduce the cost of controlling the "quality" of the information. It is more rational to be a free-rider than to help produce the public good. This situation leads to a paradox: if the state does not intervene, then the public good "reliable information" is not produced, because each actor does not have enough incentives to avoid being a free rider. If, on the other hand, the state intervenes through funding to support the production of reliable information or worse through fines, or even criminal sanctions, of "unreliable information", these are clearly forms of control (indirect or direct) of information and ultimately of censorship (Hemel, 2021, p. 125).

The second case of failure of the marketplace of ideas is that of "incomplete markets". Often in transactions, there are obviously cases of asymmetrical

information, i.e., the possibility that in a transaction one party is in possession of some relevant information that they do not want to share with the other. This is the case of the "lemon". As George Akerlof's example of buying a used car shows, the seller has the incentive to sell at the highest price an object of which he is the only one to know the real characteristics. Under these conditions only bad quality cars will be sold, because the seller will have no incentive to sell good quality cars (ibid. p. 129). The same will happen in the information world. The "rational" publisher will be able to sell inaccurate information, passing it off as reliable information.

The third case is the creation of monopolies, with groups that manage to eliminate others or maintain a dominant position in the market. In the case of the news corporations, this can also occur by creating companies that manage to incorporate other companies instrumental in the sale of the "information" product, thus reducing costs, obtaining licenses for video or radio broadcasting, or establishing a monopoly in the advertising market. This way some parties become gatekeepers of access to the marketplace of ideas.

The fourth case is that of the "negative externalities" of a marketplace of ideas with no control over the reliability of information. Take the case of websites that spread news manipulating the risks of vaccination. For as long as vaccines have existed there has always been a fierce debate over the necessity and lawfulness of such measures. However, it is clear that the situation changes with the emergence of a public health care system that offers everyone, regardless of their health care choices, the opportunity to be treated. In the event that a large group refuses to get vaccinated, relying on blogs or other forms of information, which advise against receiving this health treatment, even those who have not made that choice, and require hospital care will pay the consequences. Just as polluters do not pay the cost in terms of environmental degradation, those who spread fake news do not pay the cost of the health care services needed to protect public health.

Why the remedies do not work in the digital world

These cases of failures of the marketplace of ideas are already supported by extensive literature, and present a set of defined institutional solutions to which the traditional mass media have adapted (newspapers, magazines, television, and radio): (1) rules sanctioning the responsibility of the author for false, plagiarised or defamatory statements, (2) professional associations whose membership ensures the quality of the service offered, (3) ethical codes of conduct of the category of journalists, (4) antitrust laws on the management of broadcasting

frequencies or ownership of newspapers. However, these solutions do not apply to the "digital environment", to the way information is produced and disseminated on the Internet.

On the Internet, we are witnessing a new way of circulating information: socials, digital platforms, and web engines. In the digital environment, as we will see, the rules for avoiding the failures of the marketplace of ideas do not seem to work because disintermediation has occurred between the producers of the information and its users.

While in "traditional" media there is a "filter" (or several filters) between the production of content and its dissemination, and reception, in the digital sphere there is no need for such filters. The *raison d'être* of social media, digital platforms and web engines is precisely to offer users free, unlimited, and unrestricted access to the communication arena. In this case, the ideal of the marketplace of ideas really seems to be realised. Everyone can communicate, everyone can write, and everyone can access processed information anywhere, as long as one connects to it. Therefore, the "infrastructure of speech" changes and becomes "democratised" (Balkin, 2014, 2303–2304). This can, however, produce all four failures of the marketplace of ideas, and only partially apply the solutions that are imposed on traditional media instead.

First, the protection of freedom of expression in digital platforms is, at least in the U.S., stronger than in other countries. Section 230 of the Communication Decency Act states:

"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" (47 U.S.C. § 230).

According to advocates of the freedom of expression, this rule has allowed today's digital technology to develop, with the emergence of giants such as YouTube, Facebook, and Twitter.

The website of the NGO Electronic Frontier Foundations reads:

"This legal and policy framework has allowed for YouTube and Vimeo users to upload their own videos, Amazon and Yelp to offer countless user reviews, craigslist to host classified ads, and Facebook and Twitter to offer social networking to hundreds of millions of Internet users. Given the sheer size of user-generated websites (for example, Facebook alone has more than 1 billion users, and YouTube users upload 100 hours of video every minute), it would be infeasible for online intermediaries to prevent objectionable content from cropping up on their site. Rather than face potential liability for their users' actions, most would likely not host any user content at all or would need to protect themselves by being actively engaged in censoring what we say, what we see, and what we do

online. In short, CDA 230 is perhaps the most influential law to protect the kind of innovation that has allowed the Internet to thrive since 1996" (Fishback, 2020).

However, in this way, it becomes difficult to implement any regulation that would hold platforms accountable, all of which are based in the U.S. and host content that disseminates not only false judgements, but also judgements that incite violence, or violate copyright. The limits of freedom of expression remain (such as the prohibition of defamation), but they do not apply for the platforms that host the content, and that profit, as we will see, from the number of visits and shares of such content. The incentive to remove certain content is only "indirect," in terms of commercial prestige.

One might reply that in some legal systems, such as in Italy, in accordance with the provisions of the European directive, postal police can, even on the indication of a private individual, inform the platform of the presence of defamatory content, or content that violates a copyright law. Based on this notice, the platform has a legal obligation to remove the content. In addition, companies impose conditions of use on the users of their services that prohibit the use of expressions that may constitute a violation of the law (defamation, for example) or the uploading of copyrighted material. Finally, several platforms have formed units to monitor hosted content.

The result of these measures do not appear to be very encouraging. First, regarding the ability, or willingness, to prevent the spread of fake news, as a report by the NGO Center for Countering Digital Hate shows, platforms continue to host the accounts of 12 individuals who alone produce 65 % of the anti-vaccine posts on the three major platforms despite repeatedly violating the platforms' own terms of use[6]. In the end, it is not clear how real the incentive is for these companies to enforce their own terms of use. In doing so, they reduce the service to be offered to their clients, giving them an incentive to switch to other providers that do not require these terms of use, and that keep the ideal of expression without limits alive, e.g. the Parler platform (Young, 2022, pp. 13–14).

Moreover, effective intervention by these private parties produces a paradoxical outcome: censorship handled by a public body through administrative measures, which can be appealed in court, is replaced by another form of censorship, i.e., private censorship. And that censorship is hardly subject to judicial review, since platforms can argue that they are merely policing compliance with freely accepted terms of use.

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6 Retrieved 6.3.2022 from https://www.counterhate.com/_files/ugd/f4d9b9_13cbbbef105e459285ff21e94ec34157.pdf.

I mentioned that it is possible for members of a social network to abandon it because it is too "restrictive" in its terms of use. But one has to wonder if apps might then be available. It should be noted that apps are downloaded through two platforms; one is Google Play for Android phones and the other iOS for Apple systems. In the event that those platforms decide not to allow those companies to place apps, then a de-facto monopoly would be in place (Hubbard, 2017).

Antitrust taxation or supranational regulation of gatekeepers?

This situation led Nobel Prize-winning economist Paul Romer (2021) to advocate for the U.S. government to impose a 72 % tax on the profits of companies like Facebook or Google that exceed an advertising revenue threshold. In this way, argues the author, we can avoid the danger of a concentration of economic power in the hands of a few corporations and reduce, at least in part, the spread of fake news. Then again, Romer argues, after the recent Ohio v. American Express ruling (585 U.S., 2018), there is not very much hope that hi-tech giants will be subject to any existing antitrust enforcement.

So, the question, however, is whether heavy taxation with indirect antitrust purposes solves the problem of fake news. According to Petit, the answer is no:

"competition in news distribution might not reduce fake news in the long term. Under competition, firms make lower profits. This, in turn, might trigger a race to the bottom. With lower profits under competition, firms have to cut down costs. They might be incentivized to focus on variable costs reductions. Laying off fact checkers might be a rational strategy under competition" (2020, 249).

It therefore seems that we are faced with a conundrum on the externalities of the marketplace of ideas.

Either we let the platforms govern the spread of fake news, and therefore replace a public censor with a private one. Or we let fake news continue to spread perhaps on various platforms that compete by selling services that ensure maximum dissemination with minimal (or no) control.

However, the recent proposals for European regulations on digital markets and services approved by the European Parliament at the proposal of the Commission seem to avoid this dilemma, at least in their intentions: the Digital Markets Act[7] and the Digital Services Act[8] (Begkamp, 2021; Tommasi, 2021).

7 COM(2020)842.
8 COM(2020)825.

Article 3 of the Digital Markets Act identifies the characteristics of those companies that constitute the "gatekeepers" for entry into the digital world:

> A provider of core platform services shall be designated as gatekeeper if: (a) it has a significant impact on the internal market; (b) it operates a core platform service which serves as an important gateway for business users to reach end users; and (c) it enjoys an entrenched and durable position in its operations or it is foreseeable that it will enjoy such a position in the near future.

To be a gatekeeper, two determined criteria have been established:

(a) the requirement in paragraph 1 point (a) where the undertaking to which it belongs achieves an annual EEA turnover equal to or above EUR 6.5 billion in the last three financial years, or where the average market capitalisation or the equivalent fair market value of the undertaking to which it belongs amounted to at least EUR 65 billion in the last financial year, and it provides a core platform service in at least three Member States;
(b) the requirement in paragraph 1 point (b) where it provides a core platform service that has more than 45 million monthly active end users established or located in the Union and more than 10,000 yearly active business users established in the Union in the last financial year;

These gatekeepers have particular obligations toward customers including (art. 6):

(a) refrain from using, in competition with business users, any data not publicly available, which is generated through activities by those business users, including by the end users of these business users, of its core platform services or provided by those business users of its core platform services;
(b) allow the installation and effective use of third party software applications or software application stores using, or interoperating with, operating systems of that gatekeeper and allow these software applications or software application stores to be accessed by means other than the core platform services of that gatekeeper;
(c) refrain from technically restricting the ability of end users to switch between and subscribe to different software applications and services to be accessed using the operating system of the gatekeeper, including as regards the choice of Internet access provider for end users;

According to the directive, platforms cannot restrict access to competing platforms with less or more stringent usage rules. The risk of a private monopoly

of online communication is reduced compared to what has been observed previously (for reasons of space, I will not address the issue of sanctions here).

With regard to the phenomenon of the spread of illegal content on digital platforms, the regulation of the Digital Services Act identifies in article 25(1) 45 million monthly users as the threshold above which a platform becomes subject to specific regulation (the so-called big tech companies such as Facebook, Google, etc.). These companies are subject to the obligation to mitigate the following risks (art. 26):

(a) "the dissemination of illegal content through their services;
(b) any negative effects for the exercise of the fundamental rights to respect for private and family life, freedom of expression and information, the prohibition of discrimination and the rights of the child, as enshrined in Articles 7, 11, 21 and 24 of the Charter respectively;
(c) intentional manipulation of their service, including by means of inauthentic use or automated exploitation of the service, with an actual or foreseeable negative effect on the protection of public health, minors, civic discourse, or actual or foreseeable effects related to electoral processes and public security."

Of course, it is difficult to predict the outcome of these measures. Much depends on the effectiveness of controls and possible sanctions, both by national authorities and especially by EU authorities. In any case, a step forward has been taken at least in Europe to "internalise" the costs of dissemination through platforms of false or defamatory information without making private companies the "guardians" of rights in the digital sphere or worse "private censors". However, the risk of "capture of the regulator" (a substantial deference of the regulator's action to the interests of the large corporations) is always lurking, and in that case, there would be no choice but to rely on antitrust legislation (or taxation) … provided that lawmakers do not get "caught".

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