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The State of the 4th Estate – Media Law
(Fake News, Alternative Facts, and the Law)
Friday, June 28, 2017

"We may now live in a world of 'fake news' and 'alternate facts,' but if we cannot trust, honor, and respect our Judges and Justices, who can we trust?"

–In re Callaghan, 796 S.E.2d 604, 641 (W. Va. Feb. 9, 2017)

Moderator: Mark R. Gaylord, Esq. (Ballard Spahr LP)

Panelists: Professor Eugene Volokh (UCLA Law School)

Jeffrey J. Hunt, Esq. (Parr Brown Gee & Loveless)

Paul S. Edwards (Governor Herbert's Deputy Chief of Staff.

What is fake news?

- Fake news is published with the intent to mislead in order to gain financially or politically, often with sensationalist, exaggerated, or patently false headlines that grab attention.

- Seven types of fake news:

  - Satire or parody
  - False connection
  - Misleading content
  - False content

  - Imposter content
  - Manipulated content
  - Fabricated content

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Why do we care about fake news?

- In today's world, fake news affects all of us.

- Pew Research study – December 2016

  - 64% reported fake news causes a "great deal of confusion."

  - 24% reported "some confusion."

  - 11% reported "not much" or "no confusion."

  - 71% reported they "often" or "sometimes" saw completely made up political news stories.

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The History of Fake News

- The idea of "fake news" and "alternative facts" is not new.

    - Medieval times

    - Sedition Act – 1798

    - World War I – *Schaefer v. United States*, 251 U.S. 466 (1920).

    - FCC broadcast regulations

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Where do consumers get their news?

- **Sources of news**

  - Mainstream media

  - Internet

  - Facebook/Social media

    - Access to mass audience

      - 62% of U.S. adults get some news via social media

      - No editorial standards

      - No fact-checking

      - No consequences?

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The 2016 Election and Fake News

- ## **2016 Presidential Election**

  - The concept of fake news came to prevalence

  - Did fake news and alternative facts have an impact?

  - Stanford University study reported 159M views of 65 "fake news" sites.

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Fake News in the Judiciary

- **Potential Causes of Action to Combat Fake News**

  - Defamation/Libel/Slander

  - False Light

  - Fraud

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Fake News in the Judiciary

- ***FTC v. LeadClick Media, LLC*, 838 F.3d 158 (2d Cir. 2016)**

  - FTC fined LeadClick Media, an advertising company for violations of 15 U.S.C. § 45 (FTC Act).

  - LeadClick knew of several fake news sites it used to promote their client's product.

  - By allowing the use of fake news sites, LeadClick engaged in a deceptive practice and was held liable under the FTC Act.

- ***In re Grand Jury, Gronowicz*, 764 F.2d 983 (3rd Cir. 1985)**

  - Author falsely represented he interviewed Pope for his book entitled "God's Broker."

  - Publisher sued for civil fraud.

  - Intentional false statements receive no 1st Amendment protection.

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Fake News in the Judiciary

- ***Leidig v. Buzzfeed, Inc.*, 2017 U.S. Dist. LEXIS 76660 (S.D.N.Y. May 9, 2017).**

  - Buzzfeed, Inc. posted an article claiming that plaintiff was in the business of publishing "fake news."

  - Plaintiff sued for defamation, claiming he never published any fake news.

  - Court denied the Plaintiff's MSJ, stating that it cannot find the statements in the Buzzfeed article defamatory as a matter of law without a complete evaluation of the facts at issue.

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Are there solutions to fake news?

- ## Philippines – Senate Bill 1492 – June 22, 2017

  - Seeks to punish those who create, publish, or spread false news

  - False news is defined as news "*which either intend to cause panic, division, chaos, violence, and hate, or those which exhibit a propaganda to blacken or discredit one's reputation.*"

  - Punishments:

    - **<u>Private Citizens</u>**: 1–5 years imprisonment and P100,000–P5,000,000 fine (approx. $2,000–$100,000 USD)

    - **<u>Public Officials</u>**: Double penalties and barred from office

    - **<u>Mass Media Outlets</u>**: 10–20 years imprisonment and P10,000,000–P20,000,000 fine (approx. $200,000–$400,000 USD)

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Are there solutions to fake news?

- **Germany – NetzDG *or* "Network Enforcement Act" – June 30, 2017**

    - Aims to hold social media networks responsible for hosting fake news and hate speech

    - Social media networks (< 2 million users) must remove hateful content or fake news within a 24 hour time period or face fines

    - Specifically cites "the experience in the US election campaign" as a reason for a crackdown on "punishable false reports ('fake news')."

    - Punishments:

        - **<u>Social Media Outlets</u>**:

            - Fines up to €50,000,000 (approx. $53,000,000 USD)

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Are there solutions to fake news?

- Czech Republic

  - Created a government task force called the "Centre Against Terrorism and Hybrid Threats"

  - Dedicated to countering "disinformation campaigns related to internet security."

- Singapore

  - News laws to combat fake news will be introduced next year

Self-Regulation by Social Media Networks

- Facebook

    - Published advertisements on how to spot fake news

    - Removed tens of thousands of fake accounts in Britain

    - Hiring 3,000 more moderators to police fake content

- Twitter

    - Exploring options to let user flag tweets that contain fake news

- Google

    - Introduced a report feature to let users report misleading results

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Does the United States need a solution?

- Are the current laws enough to protect us?

  - Defamation/Libel/Slander laws

- Do we need new legislation?

- Self-policing by the media?

- Other potential solutions?

- Potential drawbacks:

  - First Amendment concerns

  - Enforcement concerns

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