Fake News and Intent to Distribute: How the FTC Can Stop the Spread

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FAKE NEWS AND INTENT TO DISTRIBUTE: HOW THE FTC CAN STOP THE SPREAD

Pete Love*

Abstract

The proliferation of fake news through targeted social media disininformation campaigns originating in the United States and abroad threatens the hallmark of a well-functioning democracy—"a well-informed electorate." This Note will describe the most damaging type of fake news—knowingly false stories made with the intent to distribute in return for advertising income. First, this Note will provide an overview of fake news and explain why current legal frameworks are insufficient to effectively deter the spread of fake news. Then, this Note will argue that the Federal Trade Commission (FTC) has the authority to address this issue and will recommend the FTC adopt a rule based on a theory of intent to distribute. Finally, this Note will discuss how the proposed rule will better equip the FTC to combat the proliferation of fake news and deter its dissemination from the source—the author.

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INTRODUCTION

The rapid rise of user technology and social media has ushered in an era of unprecedented access to information, revolutionized the process of information distribution, and dramatically changed the landscape of news media.\(^1\) By 2019, 93% of American adults received at least some news from online sources.\(^2\) Additionally, recent survey data has shown that 52% of Americans prefer to obtain their news from digital sources while only 35% preferred television and 5% preferred print publications.\(^3\) The transition to digital media dominance has been so rapid that the truth cannot keep up. The 2016 U.S. presidential election illustrated the prominence of misinformation and falsehoods being presented as fact (“fake news”) and the deleterious effects of such fake news on voters. The impact of this phenomenon was so profound that Oxford University Press selected “post-truths” as its 2016 word of the year.\(^4\) The prominence of fake news has not abated since the 2016 election. To wit, a 2019 poll conducted by the Pew Research Center found that Americans believe fake

\begin{enumerate}
\item Word of the Year 2016, OXFORDLANGUAGES, https://languages.oup.com/word-of-the-year/2016/ [https://perma.cc/B7UX-6BUM] (The term is defined as “denoting circumstances in which objective facts are less influential in shaping public opinion than appeals to emotion and personal belief.”).
\end{enumerate}
news is a bigger problem than terrorism, climate change, and illegal immigration.5

Fake news threatens the existence of a well-functioning democratic discourse built upon shared facts and truths supported by empirical evidence.6 In Buckley v. Valeo, the Supreme Court of the United States noted that “democracy depends on a well-informed electorate. . . .” Judge Wright of the D.C. Circuit further opined that “secrecy . . . dampens well-informed public debate.”7 This Note will argue, however, that it is not secrecy which poses the direst threat to modern public discourse. It is, instead, fake news, designed to reach as vast an audience as possible to generate maximum advertising revenue for the author. Fake news obliterates productive public discussion of meaningful issues and jeopardizes the lifeblood of a democratic society: a well-informed electorate.

Fake news is not a new phenomenon. Numerous examples of the dissemination of falsified information can be seen throughout history,8 including during the founding of the United States,9 which impacted both politics as well as issues and industries beyond the political realm.10 However, while fake news is certainly not a new phenomenon, the advent of the Internet and Internet-based services has drastically exacerbated the detrimental effects of fake news to unprecedented levels. In contrast to its historical modes of dissemination, fake news can now be circulated around the world instantaneously by any individual with one retweet, like, or share making it a much more ominous threat than before.11


9. Chen, supra note 8, at 370 (“From the Founding Era until the twentieth century, fake news stories were prevalent in the United States.”). Following the Revolutionary War, false articles were published claiming George Washington was miserable during the war believing it was a mistake, effectively convincing some members of the public that Washington was a British loyalist. Id.

10. Id. at 374.

11. Id. at 375.
Due to the polarizing and problematic influence of fake news campaigns, many scholars have explored the phenomenon and proposed a variety of solutions. Some propose that the immunity granted by Section 230 of the Communications Decency Act should not extend to online service providers that do not take steps to combat the issue of fake news. Others assert that Section 230 should be amended to include notice and takedown procedures and provide an adequate tort remedy for harmed parties. Other scholars contend that courts offer the best avenue for rectifying the problem, arguing the judicial standard used to determine the constitutionality of proposed legislation targeting fake news should be reduced from strict scrutiny to a more deferential version of intermediate scrutiny. While some have already explored the FTC’s role in controlling fake news through its enforcement powers, this Note will draw lessons from an established body of law to propose a specific, novel approach to stopping the spread of fake news.

This Note will focus on authors who knowingly create political fake news stories with the intent to use the Internet as a forum for widely distributing misinformation for personal financial gain. While fake news can mean many things, this Note defines fake news as unequivocal, verifiable falsehoods that are intentionally passed off as accurate, legitimate news. Those who, via the Internet or social media, post opinions or mistaken falsehoods, republish the fake news of another


13. Danielle K. Citron & Benjamin Wittes, The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity, 86 FORDHAM L. REV. 401, 420 (2017) (CDA’s immunity provision would be unavailable to operators only when they cannot make a cogent argument that they are behaving reasonably to stop illegal activity).


17. Wood, supra note 12 (“a lot of the false news that spreads is not spread for political reasons. It’s spread for economic reasons.”).

author, or who otherwise do not intend to widely distribute false writings online are not the focus of this Note. Additionally, parodies, such as those published by The Onion, are not included in this Note’s definition of fake news, as they are protected under the First Amendment and are thus legally distinguishable from the scope of fake news examined here. Additionally, parodies are reasonably understood as not describing actual facts or events, whereas for-profit fake news is written and disseminated to be reasonably believed.

This Note will argue that the FTC possesses authority under the FTC Act to combat commercialized fake news as an unfair, deceptive practice affecting commerce. The FTC should use its rulemaking authority to develop a regulation imposing civil fines against authors of commercialized fake news. Such a regulation should be modeled after the construction of federal criminal possession with intent to distribute statutes and analogized to the methods of proving intent to distribute found within a well-developed body of existing case law.

Part I will narrow the focus of this Note and explain why knowingly falsified fake news stories—intentionally designed to be widely distributed online for the personal financial gain of the author—constitutes the most damaging form of fake news. Part II will provide a snapshot of the current legal framework available to combat fake news and demonstrate why it ultimately fails to sufficiently discourage the brand of fake news that is the focus of this Note. Finally, Part III will examine a well-established body of law to draw comparisons to the issue at hand and suggest developments that can improve our collective ability to discourage fake news while more effectively empowering the legal system to seek redress for the harms fake news causes.

I. THE FINANCIAL INCENTIVES AND PERILS OF FAKE NEWS

Before analyzing the problems posed by fake news in more depth, one must understand the origin of fake news and why it is so prevalent in modern society. Though there are many reasons why individuals may fabricate stories about political or public figures, writers of widely disseminated fake news stories are most often primarily motivated by personal economic gain. Websites which display, publish, or promote fake news commonly make money through pay-per-click advertising networks such as Google Adsense. An advertiser will agree to a fee that is paid to the network (Google) for every click their advertisement

21. Royster, supra note 14, at 274.
receives. The network will then share a portion of that fee with the publisher of the fake news website. 23 Anyone can make a website, display ads on it through an advertising network, and create fake content to lure internet traffic to their website. 24 The more a fake news story is shared, the more Internet traffic will be driven to the advertiser’s site and, in turn, the more money the fake news author can net from advertising clicks. 25 In short, fake news authors are incentivized to write their stories to be widely believed and shared, such that the fake news is spread to as many people as possible—maximizing the author’s advertising revenue by sowing confusion and discord.

Because fake news authors design their stories to be believable, a vast majority of the public are unable to differentiate real news from fake news. 26 A poll conducted by Buzzfeed revealed that 75% of American adults who read a fake news headline believed it, 27 in addition, a survey conducted by YouGov showed 96% of Britons could not differentiate fake news from factual reports. 28

Consider Jestin Coler, the owner of Disinfomedia. 29 He oversees twenty to twenty-five fake news authors who write for his various websites, earning a profit through advertising. 30 Coler admitted to receiving between $10,000 and $30,000 a month from knowingly publishing fake news, 31 yet he insists fake news did not sway the 2016

23. Id.
25. Id.; See Wood, supra note 12 (“if false news spreads farther, faster, deeper and more broadly than the truth, then it incentivizes producers of false news to produce more false news in order to earn more advertising revenue.”).
30. Id.
31. Id. Paul Horner, a fake news writer, makes $10,000 per month and Macedonian teenagers can make up to $5,000 per month. Ohlheiser, supra note 24. A fake news share from a person within the Trump campaign earns a fake news author as much as $10,000 in extra revenue. Id.
election.\textsuperscript{32} Research, however, suggests otherwise. In fact, in the three months leading up to the 2016 election, fake news received more attention (shares, comments, likes) than real news on Facebook.\textsuperscript{33} Consequently, one study linked this rise in fake news attention to a defection of voters who formerly supported Barack Obama away from Hillary Clinton.\textsuperscript{34} Publication of fake news significantly impacts voter opinion, with a well-informed electorate becoming misguided.

Fake news is able to disseminate rapidly and receive widespread attention and acceptance in large part due to social media. As just one example, a fake news story published by Disinfomedia, claiming that a FBI agent involved in leaking Hillary Clinton’s emails was killed, received 1.6 million views in just ten days.\textsuperscript{35} Some fake news stories are even shared by political figures, which serves to validate the fake news’s source in the public’s eyes, thereby helping fake news garner further acceptance.\textsuperscript{36}

Not only does the proliferation of fake news seriously affect voter opinion, it also affects society in other dangerous ways. For example, one of Coler’s falsified stories that claimed Colorado food stamp recipients were using benefits to buy marijuana resulted in proposed legislation in the Colorado House banning such activity.\textsuperscript{37} More famously, on December 4, 2016, Edgar Maddison Welch fired three shots inside Comet Ping Pong, a Washington, D.C. pizzeria, after he traveled 350 miles from Salisbury, North Carolina, to investigate a fake news story which claimed

\begin{footnotes}
\footnotetext[32]{Sydell, supra note 29.}
\footnotetext[33]{Savino, supra note 14, at 1102. Craig Silverman, This Analysis Shows How Fake News Stories Outperformed Real News Stories on Facebook, BUZZFEED NEWS (Nov. 16, 2016, 4:15 PM), https://www.buzzfeednews.com/article/craigsilverman/viral-fake-election-news-outperformed-real-news-on-facebook [https://perma.cc/4Q2P-46H3] (In the three months leading up to the 2016 election, the top 20 fake news stories received 8.7 million comments, likes, shares; the top 20 news articles from the mainstream media (19 major news outlets combined) received only 7.3 million, a decline from 12 million earlier that year).}
\footnotetext[35]{Sydell, supra note 29.}
\footnotetext[37]{Sydell, supra note 29.}
\end{footnotes}
that Hillary Clinton was involved in a child sex-slave ring run in Comet Ping Pong’s basement.  

38  Despite the intense media coverage and ubiquitous consensus that the story was fake, a poll conducted by YouGov between Dec. 17-20, 2016 found that 46% of Trump supporters believed that leaked Hillary Clinton campaign emails discussed pedophilia and human trafficking.  

39  Even Edgar Maddison Welch, following the incident and his subsequent arrest, refused to dismiss the claims he set out to investigate as false.  

40  The criminal and potentially deadly actions of Welch were inspired by the publication of a fake news story, illustrating the dangerous ramifications fake news poses to our democracy and to anyone enjoying a slice of pizza.

Following the 2016 election, advertisement networks expressed their intent to combat the issue of fake news. Google told Reuters that it would restrict ads on sites that “misrepresent, misstate, or conceal information about . . . the publisher’s content . . . “. Yet, a 2019 study by the Global Disinformation Index, which examined 20,000 websites that published misinformation, found that Google provided AdSense services to 70% of these websites and accounted for 37% of their revenue, $86 million annually, more than any other advertisement company. Networks such as Google and Facebook profit greatly from fake news, thus they are likely to be resistant to adopting policies that effectively combat the issue. The impact of fake news authorship and the “existential threat” it poses to democracy requires a reexamining of current legal frameworks


40  Goldman, supra note 38.


42  Id.

43  David Kirkpatrick, Questions Linger Over How Much Ad Revenue Fake News Generates for Facebook, MARKETING DIVE (Nov. 28, 2016), https://www.marketingdive .com/news/questions-linger-over-how-much-ad-revenue-fake-news-generates-for-facebook/431 149/ [https://perma.cc/K7GH-VUQD] (suggesting that fake news could have accounted for up to half of Facebook’s ad revenue in the months leading up to the 2016 election). Both Google and Facebook could lose revenue if they shut down fake news sites – Facebook benefits whenever something goes viral, regardless if it’s true or not. Ohlheiser, supra note 24. See also Perlman, supra note 26 (noting Facebook financially benefits from hosting fake news platforms).

in order to provide meaningful policies to remove fake news from our democratic society.\textsuperscript{45}

\section*{II. Existing Legal Avenues Do Not Provide Meaningful Solutions}

Despite the risks associated with fake news, current legal frameworks do not provide viable pathways to effectively prevent the widespread dissemination of fake news by authors seeking commercial gain. This section will explore three obstacles that currently prevent the legal system from effectively combating fake news. To begin, Part A will discuss the First Amendment protections given to speech and how they stymie efforts to control fake news through legislation. Next, Part B will show why expanding defamation law is not a viable solution and how the current state of defamation law fails to provide adequate incentives for those harmed to bring suit. Finally, Part C will discuss how Section 230 of the Communications Decency Act protects social media from liability and accountability by not requiring Internet service providers to implement any measures to combat fake news.

\subsection*{A. First Amendment Limitations}

The First Amendment to the U.S. Constitution promotes the free exchange of ideas, no matter how unpopular or offensive.\textsuperscript{46} The robust Free speech protections in the United States, as discussed below, block efforts to control fake news through the legislative process and complicate efforts to seek remedies through defamation law. These protections are especially robust in cases concerning political speech, which enjoys the strongest protection under the First Amendment.\textsuperscript{47} Political speech enjoys heightened protections because it is essential to public discourse.\textsuperscript{48} Accordingly, the First Amendment seeks to prevent a majority government from suppressing the views of the minority.\textsuperscript{49}

Unlike some other countries, the United States has failed to adopt legislative measures to control fake news, largely because the First Amendment bars Congress from passing any law “abridging the freedom

\begin{thebibliography}{10}
\bibitem{Clemons} Eric Clemons, \textit{Why Fake News Campaigns are so Effective}, KNOWLEDGE@WHARTON (Oct. 3, 2018), https://knowledge.wharton.upenn.edu/article/build-fake-news-campaign/ [https://perma.cc/N24M-YDRC].
\bibitem{R.A.V. v. City of St. Paul} R.A.V. v. City of St. Paul, 505 U.S. 377, 422 (1992) (Stevens, J., concurring) ("Our First Amendment decisions have created a rough hierarchy in the constitutional protection of speech. Core political speech occupies the highest, most protected position . . . ").
\bibitem{Riggins} Riggins, \textit{supra} note 16, at 1316.
\bibitem{Id} Id.
\end{thebibliography}
of speech, or of the press.” Under Supreme Court jurisprudence, any law that restricts speech based on its content is subject to judicial strict scrutiny. Strict scrutiny review of a content-based law requires the government to demonstrate that the law is necessary to serve a compelling state interest and is narrowly drawn to achieve that interest. Additionally, the Supreme Court in Brown v. Entertainment Merchants Ass’n established that the government must show a direct causal link between the regulated speech and the problem to be solved.

Consider a bill proposed in 2017 by California assembly member Ed Chau as an example of the difficulties in combatting fake news through legislation. Chau attempted to amend The California Political Cyberfraud Abatement Act to combat the spread of fake news by adding Section 18320.5, which read:

> It is unlawful for a person to knowingly and willingly make, publish or circulate on an Internet Web site, or cause to be made, published, or circulated in any writing posted on an Internet Web site, a false or deceptive statement designed to influence the vote on either of the following:
>
> (a) Any issue submitted to voters at an election.
>
> (b) Any candidate for election to public office.

The proposed amendment was met with immediate backlash, with opponents calling it “obviously unconstitutional” under the Supreme Court’s case law. Concerns about the amendment regarded its potential to allow public officials to rampantly hurl criminal accusations at each other and how the amendment would affect satire and parody, as well as who would have the power to determine what was is and is not “fake news.”

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50. U.S. CONST. amend. I.
51. Roberts, supra note 16, at 113. “Content-based laws are defined as those targeting speech based on its communicative content.” See supra note 50. Any legislative measure adopted by a state or the federal government that attempts to limit fake news would be considered a content-based law.
56. Mass, supra note 54.
news”?

Ultimately, the bill was removed from its scheduled committee hearing at the last minute and was never adopted. Although this proposed, content-based amendment seemingly offers a compelling state interest—protecting against attacks designed to sway an election—it would almost certainly fail a court’s strict scrutiny analysis.

First, California would need to prove a direct causal link between “false and deceptive statements” and actual influence upon the outcomes of elections. Second, the state would need to demonstrate that the influence on elections is not simply “small and indistinguishable from effects produced by other media.” This would be difficult to prove beyond anecdotal and ambiguous evidence because there are many factors that influence voters, and research points in both directions.

Even if the government could demonstrate a direct causal link between fake news and harm to election results, it would then also need to prove the law was narrowly drawn to achieve the interest. In addition to proving this causal link, the “narrowly tailored” prong of strict scrutiny requires that the government use the least restrictive method possible for achieving its asserted compelling interest of regulating fake news. This would require the government to prove the ineffectiveness of three alternative, less-restrictive means of preventing voters from being misled by fake news: counter speech, education, and self-regulation. These approaches are viable alternatives to legislation criminalizing fake news and would likely be found by a court to be effective means for achieving the state’s interest. The foregoing analysis

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59. Brown, 564 U.S. at 786.

60. Id.

61. Compare Krysten Crawford, Stanford Study Examines Fake News and the 2016 Presidential Election, STAN. NEWS (Jan. 18, 2017), https://news.stanford.edu/2017/01/18/stanford-study-examines-fake-news-2016-presidential-election/ [https://perma.cc/XPY6-F55Q] (finding that the impact of fake news may not have had an impact on the outcome of the election), with supra note 34 (finding that, due to the very narrow margin of victory in 2016, may have had an impact on the outcome of the election.).

62. U.S. v. Playboy Ent. Grp., 529 U.S. 803, 813 (2000) (“If a less restrictive alternative would serve the Government’s purpose, the legislature must use that alternative.”). When a less restrictive means is offered to a content-based restriction, the burden shifts to the government to show the ineffectiveness of the proposed less restrictive means. Calvert et al., supra note 61.

63. Infra note 165.
of Section 18320.5 illustrates why legislation designed to restrict fake news faces a steep uphill battle in court.\footnote{Playboy, 529 U.S. at 818 (“It is rare that a regulation restricting speech because of its content will ever be permissible.”).}

False reporting statutes are the closest that a legislative body in the United States has come to taking action against misinformation. Such statutes limit the circulation of false reports of criminal activity or natural catastrophes to the public.\footnote{Louis W. Tompros, Richard A. Crudo, Alexis Pfeiffer & Rahel Boghossian, The Constitutionality of Criminalizing False Speech Made on Social Networking Sites in a Post-Alvarez, Social Media-Obsessed World, 31 HARV. J.L. & TECH. 65, 82 (2017).} False reporting statutes are constitutionally permissible because certain categories of “low-value”\footnote{Those categories include: “incitement, libel, obscenity, defamation, speech integral to criminal conduct, fighting words, child pornography, fraud, true threats, and speech presenting some grave and imminent threat the government has the power to prevent.” Id. at 89.} speech fall outside of First Amendment protection.\footnote{Speech that falls within these categories is typically subject to rational basis review, a highly deferential standard under which a law is almost always upheld. Id.} Although these statutes have been codified in state legislatures for many years, they are seldom used in the context of online speech.\footnote{Id. at 82.} This is because the Supreme Court in \textit{Reno v. ACLU} held that the Internet is a modern-day forum for Justice Holmes’ marketplace of ideas theory of free expression\footnote{False or otherwise misleading speech must be allowed to compete unrestrained with other speech, which false speech can be tested and refuted. Id. at 87.} and determined that there is “no basis for qualifying the level of First Amendment scrutiny . . . to this medium.”\footnote{Id. at 87.}

\section*{B. Tort Law Limitations}

Expanding the types of remedies available under tort law to include those arising out of harms caused by fake news publication is not a feasible option. Defamation is an existing cause of action that allows an individual to recover for reputational harm caused by another’s false speech.\footnote{Reno v. Am. C.L. Union, 521 U.S. 844, 870 (1996).} Defamation laws, however, exist in tension with the First Amendment, especially in the context of fake news.\footnote{Perry, supra note 46, at 259.} Strengthening defamation laws may place increased restrictions on publications, thereby “chilling” free speech, something courts are likely to oppose.\footnote{Id.} An individual’s reputational rights harmed by the spread of fake news are far outweighed by the interests of Free Speech in the modern public forum of the Internet.\footnote{Royster, supra note 14, at 274.}
In the case of *New York Times Co. v. Sullivan*, where an Alabama public official, L.B. Sullivan, sued the New York Times, the Supreme Court considered for the first time the constitutionality of common law defamation. The Court concluded that state defamation laws are limited by the First Amendment’s protection of political speech, holding that, to succeed on a claim of defamation, a public official plaintiff must prove actual malice—that the defamatory statement at issue was known by the defendant to be false or was published by the defendant with reckless disregard for its truth or falsity.\(^{76}\) A public official suffering reputational or political harm from fake news may well be able to prove knowing falsity or reckless disregard. So, why has the nation not seen public figures such as Hillary Clinton, as per the fake news stories mentioned in Part I,\(^{77}\) sue in response to such particularly damaging fake news stories?\(^{78}\)

Defamation fails to provide sufficient incentives and policy options to adequately engage the problem of fake news. The significant time and costs required to bring a defamation lawsuit serve to make defamation litigation a non-option for many parties who may have faced injury due to fake news. First, due to anonymity on the Internet and the difficulty and cost of identifying the source of an online story, it can be onerous to locate defendants against whom to bring a claim.\(^{79}\) Second, litigating a libel suit is both time consuming and expensive for plaintiffs. While perhaps most public officials could handle the costs, the defendant is unlikely to possess the deep pockets necessary to pay damages if a verdict is returned for the public official. Those parties that do have the fiscal resources to justify the costs of litigation—Facebook, Google, and YouTube, for instance—are already protected from liability with the immunity provided by Section 230 of the Communications Decency Act (discussed below). Third, and most important, it would be detrimental to the public official to keep the false allegations within the public’s attention for months or years during the lawsuit.\(^{80}\) Proving actual malice, though possible, is arduous and would involve depositions and perhaps testimony in court from the public official, exposing them to unwanted publicity and perhaps damaging their reputation more than the lawsuit can repair the original injury.\(^{81}\)

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77. Goldman, supra note 38.


79. Royster, supra note 14, at 274.

80. Seidenberg, supra note 78.

81. Id.
C. Section 230

The Communications Decency Act (CDA) was originally adopted to prevent minors from accessing sexually explicit material on the Internet by making it illegal to expose them to obscene or indecent content. Following the signing of the Act into law by President Bill Clinton, it was immediately challenged by the ACLU for violating the First Amendment. In 1997, the Supreme Court struck down the majority of the law as an unconstitutional restriction of free speech in the case of Reno v. ACLU. Only one provision survived—Section 230. Congress included Section 230 in the CDA in response to the paradox created by the lower court decisions in Stratton Oakmont, Inc. v. Prodigy Services, Co. and Cubby, Inc. v. CompuServe, Inc. Under these rulings, Internet-based companies that filtered the content available on their platforms would be held liable under common law publisher liability, while those companies that ignored problematic posts escaped liability altogether. However, the broad interpretation of Section 230 creates freedom from liability for Internet service providers for any defamatory material published on the providers’ websites, regardless of whether or not they exercise editorial control of their website’s content. The provisions in Section 230 grant Internet service providers broader protection from defamation liability than what is granted to television and print broadcasters. Some proposed solutions to the fake news problem call for amending the protections of Section 230 to require more responsibility from online service providers in combatting fake news.

One such proposed solution is to impose a modified version of common law distributor liability, which would hold Internet service providers, including social media websites, responsible for the fake news which they know is posted to their platforms. Another proposition

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83. Ziegler, *supra* note 82.
84. Reno, 521 U.S. at 844.
87. Butler, *supra* note 86, at 432
88. *Id.* at 434. In Zeran v. American, the court reasoned that Congress intended the CDA to shield both publishers and distributors. *Id.* at 433. This, in effect, continues to shield websites that curate or promote certain postings to users. *Id.*
89. *Id.* at 433.
90. *Id.* at 435.
would suggest adding a reasonableness standard to Section 230 by requiring that reasonable steps be taken by Internet service providers to combat certain types of content in return for immunity from liability.\(^{91}\) However, imposing increased responsibility on content forums, considering the immense amount of activity on the most popular websites, simply shifts the burden to those who are not responsible for the original content. Furthermore, social media giants now are taking steps to better police their forums\(^ {92}\) and are likely to comply with the reasonableness standard suggested. But there is speculation that fake news authors will simply adapt to the new community standards to retain their revenue streams.\(^ {93}\)

III. MODELING INTENT TO DISTRIBUTE

Rather than create new laws that would have to survive strict scrutiny or grapple with Internet service providers and their immunity from liability under Section 230, the issues surrounding fake news should instead be handled by an agency that currently possesses the means and authority to do so—the FTC.\(^ {94}\) Regulation by the FTC has drawn recent attention as a possible solution to curb the dissemination of fake news. However, the FTC’s current approach to the fake news issue does not serve the same interest that is necessary to provide a comprehensive solution to the focus of this Note. The FTC directs the majority of its resources towards the exchange of commodities. FTC regulation combats “posting misinformation about a product, and then selling the product . . .,” whereas the “consumers” of a fake story have not purchased such a “product” in the traditional sense.\(^ {95}\) The dissemination of fake news is thus currently outside of the scope of the FTC’s concern. But, because fake news generates revenue for the author, the FTC should consider the dissemination of fake news to be a type of fraudulent commercial activity, which would be under the purview of the FTC’s authority. With this approach, FTC regulation, modeled after a theory of an intent to distribute, can provide a solution for fake news most detrimental to society.

Part A will explain the current approach being taken by the FTC, Part B will explain the authority of the FTC and why fake news falls within the scope of their authority, and Part C will discuss why the FTC should

91. Citron & Wittes, supra note 13, at 419.
93. Ohlheiser, supra note 24.
95. Stone-Erdman, supra note 18, at 429.
adopt a rule modeled after statutory intent to distribute and impose civil fines in order to provide a meaningful solution to fake news.

A. The Current Approach by the FTC

In FTC v. Leadclick Media, LLC, the Second Circuit held that “a defendant may be liable for deceptive practices that cause a consumer harm if, with knowledge of the deceptive nature of the scheme, he either participates directly in the practices or acts or has authority to control them.”96 Leadclick Media, LLC participated in and controlled “fake news websites” that drove Internet traffic to an online retailer.97 This assertion of the FTC’s authority, in bringing this action against Leadclick Media, demonstrates the Commission’s potential to effectively discourage the dissemination of fake news, which similarly involves moving Internet traffic for commercial gain.

B. FTC Regulation

Generally, the FTC may prosecute any inquiry necessary to carry out its duties and is authorized to investigate the business, conduct, and practices of any person engaged in, or whose business affects, commerce.98 The FTC accordingly has two meaningful ways to combat fake news: Section 5(a) enforcement and rulemaking under Section 18.

1. Enforcement

FTC enforcement must be preceded by an investigation.99 The FTC may conduct any investigation necessary to carry out its duties and gather information concerning the business or practice of any person, partnership, or corporation engaged in or whose business affects commerce, except certain financial institutions.100 Under Section 9 of the FTC Act, the FTC may use subpoenas to compel testimony by the witnesses of all documentary evidence relating to any matter under investigation.101 Additionally, under Section 6, the Commission can force business entities to answer specific questions about themselves.102 Following an investigation, the Commission has the authority to initiate

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97. Id.
99. Id.
100. Id.
101. Id.
102. Id.
an enforcement action using either administrative or judicial processes if it has “reason to believe” the law is being violated.\textsuperscript{103}

Section 5(a) states that “unfair or deceptive acts or practices in or affecting commerce... are... declared unlawful.”\textsuperscript{104} Deceptive practices involve a material misrepresentation, omission, or other practice that is likely to mislead a consumer acting reasonably under the relevant circumstances.\textsuperscript{105} Unfair practices are those which cause, or are likely to cause, a substantial injury to consumers that is not reasonably avoidable by consumers themselves and is not outweighed by countervailing benefits to consumers or competition.\textsuperscript{106}

The fake news at issue in this Note falls well within the authority of the FTC, given that such fake news is classifiable as a deceptive practice and might, in fact, be considered an unfair practice as well for the following reasons. First, the advertising revenue generated by these fake news stories should unquestionably be considered commerce. Section 44 of the FTC Act defines commerce as including “commerce among the several states.”\textsuperscript{107} The dissemination of fake news reaches all corners of the United States, and the authors collect revenue based on clicks (engagement with fake news) that transverse state lines.\textsuperscript{108} Next, the nature of the scheme employed by fake news authors is deceptive because the authors materially misrepresent fabricated content as legitimate news stories, target vulnerable consumers,\textsuperscript{109} and generate click revenue through the consumer’s false and misled belief that the content of the author’s website and stories are accurate.\textsuperscript{110} Additionally, the for-profit

\begin{footnotesize}
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\item \textsuperscript{103} Id.
\item \textsuperscript{104} Id.
\item \textsuperscript{105} Id.
\item \textsuperscript{106} Id.
\item \textsuperscript{107} Fed. Trade Comm’n v. Pointbreak Media, LLC, 376 F. Supp. 3d 1257, 1282 (2019).
\item \textsuperscript{109} Certain demographics of Internet users are more vulnerable to believe and share fake news. Older users of social media (above 65 years and older) may be more vulnerable to believing fake news because they have less experience using the Internet and, generally, are more trusting. Paula Span, Getting Wise to Fake News, N.Y. Times (Sept. 11, 2020), https://www.nytimes.com/2020/09/11/health/misinformation-social-media-elderly.html [https://perma.cc/7GUR-FE7C]. In addition, older users are targets because they tend to be more likely to vote in elections. Id. Fake news authors can also use targeted advertising based on user’s ideologies. A University of Colorado Boulder study found that users on the most extreme ends of both sides of the political spectrum were responsible for more than half of the fake news stories circulated in their study. Who Shares the Most Fake News? New Study Sheds Light, CU BOULDER TODAY (June 17, 2020), https://www.colorado.edu/today/2020/06/17/who-shares-most-fake-news-new-study-sheds-light [https://perma.cc/HG23-5XNK].
\item \textsuperscript{110} Roberts, supra note 16, at 112.
\end{itemize}
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dissemination of fake news should additionally be considered unfair under Section 5(a), as legitimate news organizations rely on, and compete for, the same advertising revenue that fake news websites garner through fraud. Legitimate news organizations are thus injured by fake news stories, and there is no countervailing benefit from the confusion and injury that fake news causes.\textsuperscript{111} Thus, because of the nature and ubiquity of fake news, and the lack of any countervailing benefit to its existence, the FTC should undertake a rulemaking procedure in lieu of individually adjudicating claims against purveyors of fake news.

2. Rulemaking

Under Section 18 of the FTC Act, the FTC is authorized to develop rules which “define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce” within the meaning of Section 5(a)(1) of the Act.\textsuperscript{112} Section 57a(b)(3) requires the FTC to believe that any unfair or deceptive practices which the FTC seeks to address through rulemaking occur commonly and are “prevalent.”\textsuperscript{113} Finally, once a rule is promulgated, anyone who violates said rule while possessing actual or fairly implied knowledge that their practice is unfair or deceptive is liable for civil penalties.\textsuperscript{114} However, any person that violates a rule, regardless of intent, is liable for any injury which the violation caused to consumers, a lesser penalty than the civil penalty noted above.\textsuperscript{115}

The FTC has the requisite rulemaking authority to develop a rule regarding the authoring and distribution of for-profit fake news because, as argued in the prior section, such a practice (1) is deceptive due to the inherent falsity of the stories that are disseminated to generate advertising revenue and (2) affects commerce, given that these revenue-driven fake news stories unfairly compete for advertising dollars with truthful content produced by authentic news organizations. The FTC currently regulates deceptive advertising under 15 U.S.C. § 52(a).\textsuperscript{116} The FTC’s authority under this section should be interpreted to also provide it with the ability


\textsuperscript{112}. \textit{A Brief Overview, supra note 98}.

\textsuperscript{113}. 15 U.S.C. § 57a(b)(3). “The Commission may use rulemaking to address unfair or deceptive practices or unfair methods of competition that occur commonly, in lieu of relying solely on actions against individual respondents.” \textit{A Brief Overview, supra note 98}.

\textsuperscript{114}. \textit{A Brief Overview, supra note 98}.

\textsuperscript{115}. \textit{Id}.

\textsuperscript{116}. “[P]erson, partnership or corporation to disseminate, or cause to be disseminated, any false advertisement . . . having an effect upon commerce of food, drugs, devices, services or cosmetics.” 15 U.S.C. § 52(a).
to regulate fake news. Congress has given the FTC expansive authority to regulate false advertising as commercial speech because of its tendency to mislead the public.\textsuperscript{117} Fake news distributed to generate advertising revenue, just as with false advertising, is knowingly false, is disseminated for economic gain, and has a tendency to mislead the public. Furthermore, fake news should fall within the FTC Act’s broad delegation of regulating authority to address “practices that the Commission determines are against public policy for other reasons.”\textsuperscript{118} Rulemaking is an appropriate step by the FTC because fake news is a prevalent problem, recently becoming more impactful than real news on social media.\textsuperscript{119} By issuing a rule, the FTC will establish an industry-wide, bright-line standard regarding what constitutes improper practices, such as the act of profiting from the dissemination of fake news.\textsuperscript{120} An FTC rule will provide clarity about the narrow scope of the rule thereby assuaging concerns about a chilling effect on free speech.\textsuperscript{121}

Additionally, a regulation adopted by the FTC would provide the most effective method of combating fake news because it is likely to survive a constitutional challenge. This is due to the fact that the regulated content (fake news) would constitute commercial speech, and the regulation would therefore be subject to a lower standard of judicial scrutiny than are regulations targeting core political speech. Additionally, because fake news is, by definition, false and misleading speech it would fail the first facet of the \textit{Central Hudson} test and would thus be stripped of any First Amendment protection.\textsuperscript{122} Further, by attaching civil fines to the clearly defined unlawful practice of knowingly writing fake news with the intent


\textsuperscript{120} Riggins, supra note 16, at 1326.


\textsuperscript{122} Roberts, supra note 16, at 121. See also Naprawa, supra note 117, at 507 (“[W]here the commercial speech is false or inherently misleading, the First Amendment does not provide even a residual level of protection and the Central Hudson test does not even apply.”).
to distribute for monetary gain through pay-per-click advertising, the FTC would discourage fake news by stopping the spread before it starts.

3. Permissible Enforcement as Commercial Speech

Commercial speech is poorly defined by the courts. The Supreme Court in *Central Hudson Gas & Electric Co. v. Public Service Commission of New York*, in recognizing the commonsense distinction between commercial speech and other varieties of expression, defined commercial speech simply as “expression related solely to the economic interests of the speaker and its audience.” The Court also defines commercial speech as that which “does no more than propose a commercial transaction.”

Although truthful commercial speech concerning lawful goods and services is protected by the First Amendment, such speech still receives less protection within the hierarchy of speech values than political expression, partly because truthful commercial speech is economically motivated instead of politically driven. Economically motivated commercial speech is more easily verifiable by its disseminator and is less likely than noncommercial speech to be chilled by proper regulation. Furthermore, the government’s legitimate interest in protecting consumers from commercial harms allows for commercial speech to be subject to greater government regulation than noncommercial speech. In *Central Hudson*, the Supreme Court held that the government may ban commercial speech that is more likely to deceive than inform, and that First Amendment protection for commercial speech exists only if the speech is neither false or

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126. The First Amendment applies to commercial speech because it not only serves the economic interests of the speaker, but also because advertising disseminates information and assists consumers. *Central Hudson*, 447 U.S. at 561–62.
127. *Riggins*, *supra* note 16, at 1313; *R.A.V.*, 505 U.S. at 422 (Stevens, J., concurring) (“commercial speech . . . [is] regarded as sort of second-class expression . . .”). Second-class in comparison to core political speech.
130. *Cent. Hudson Gas*, 447 U.S. at 566. In *Central Hudson*, the Supreme Court established a four-part test to determine the constitutionality of a regulation of commercial speech: (1) Does the speech concern illegal activity or constitute false or deceptive advertising that is not protected by the First Amendment? (2) Is the government’s restriction justified by a substantial government interest? (3) Does the restriction advance the government’s interest? (4) Is the regulation no more expansive than necessary to achieve the interest? *Id.*
misleading. By failing to define commercial speech narrowly, however, courts have afforded themselves flexibility in future commercial speech cases to adapt to changing technological advancements. Inherent in the commercial speech doctrine are two threshold determinations: (1) deciding if the speech is, in fact, commercial, and (2) if the speech is commercial, then determining if it is either false or misleading.

Fake news falls well within these threshold determinations inherent in the doctrine of commercial speech.

a. Whether the Speech is Commercial

Because the degree of protection afforded by the First Amendment depends on whether speech is commercial or non-commercial, the aforementioned initial determination requires classifying the expression at issue as either commercial or non-commercial. The Supreme Court in Bolger v. Young Drugs Products Corp. identified three relevant considerations when deciding whether speech is commercial: advertising format (the extent the speech at issue is an advertisement), reference to a particular product, and economic motivation. These factors are not necessarily dispositive, but the existence of all these characteristics within a given publication strongly supports the conclusion that the publication at issue constitutes commercial speech.

i. Advertising Format

“Advertising” does not need to take the form of a person directly offering a good or service to a target audience. Moreover, the fact that a certain expression discusses matters of public concern does not prevent that expression’s categorization as commercial speech. The ultimate purpose of the type of fake news discussed in this Note simply serves as a vessel for misleadingly connecting consumers with advertisements, motivated by the author’s self-serving economic interest. The

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133. Riggins, supra note 16, at 1321.


135. Dex Media W., Inc. v. City of Seattle, 696 F.3d 952, 958 (9th Cir. 2012).


138. Id. at 65.
advertising format of both traditional commercial speech advertisements and fake news successfully markets goods and services to consumers and generates a profit through consumer engagement.\(^\text{139}\) The sole and insignificant distinction between these two formats is their commercial subject. The commercial subject of a traditional advertisement is a good or service, whereas the commercial subject of a fake news article is the advertisement itself, veiled by a fabricated news story which is intended solely to disseminate the advertisement to more consumers. Hence, just like a traditional advertisement, the essential function of fake news is to propose a commercial transaction. This, in turn, should favor a finding that such fake news is commercial speech. The idea that fake news would be able to escape the reach of the commercial speech doctrine because of an insignificant difference in the advertising format of its commercial expression, as compared to more traditional advertisements, is impracticable.

ii. Product Reference

The failure to reference a specific product is a relevant consideration in the commercial speech determination, but it is far from dispositive where expression other than product advertising is concerned.\(^\text{140}\) In Jordan v. Jewel Food Stores, Inc., the Seventh Circuit held that an advertisement by Jewel-Osco that did not contain a single word about a specific product was nonetheless properly characterized as commercial speech because the dominant, implicit commercial function of the message was to promote the Jewel-Osco brand in the mind of consumers.\(^\text{141}\) Similarly, fake news will likely not contain any specific reference to a particular product or service. However, as in Jewel Food Stores, the implicit commercial purpose of the expression of fake news is to serve the overall economic purpose of the author. Just because the expression within fake news publications fails to include a specific reference to a particular good or service does not necessarily mean that it is properly characterized as non-commercial speech.

iii. Economic Motivation

“Economic motivation” implies that a given expression is intended to lead to commercial transactions and that the target audience is composed

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\(^{140}\) Jordan v. Jewel Food Stores, Inc., 743 F.3d 509, 519 (7th Cir. 2014).

\(^{141}\) *Id.* at 518 (In this case, a former basketball player brought suit against Jewel Food Stores when the defendant ran an advertisement congratulating the plaintiff on his induction into the basketball hall of fame.).
of individuals who will engage in such transactions.\textsuperscript{142} Not all types of economic motivation will support a finding of commercial speech. For example, a mere incidental economic benefit, without more, will not support a finding of commercial speech.\textsuperscript{143} The focus of the inquiry is instead on whether the speaker had an adequate economic motivation, such that an economic benefit was their primary purpose for speaking.\textsuperscript{144} The main incentive for fake news is economic profit for the author; if the fabricated fake news story spreads farther and faster than the truth, more advertising revenue will be generated for the producer.\textsuperscript{145} The false statements of fact within fake news only serve the speaker’s economic interest, providing no benefit to the public. This primary economic motivation for the publication of fake news favors a finding that fake news is commercial speech.

Considering the foregoing factors, fake news, which ultimately amounts to false statements of fact imitating real news stories with the purpose of deceptively disseminating the fake news to as many consumers as possible for the sole purpose of maximizing the speaker’s economic gain, should unquestionably be found to constitute commercial speech. “Such speech becomes more like ‘the offspring of economic self-interest’ and ‘is a hardy breed of expression that is not particularly susceptible to being crushed by overbroad regulation.’”\textsuperscript{146} In \textit{Ariix, LLC v. NutriSearch Corp.}, the Ninth Circuit found that when a speaker profited from actively misleading the public about their purported objectivity, they “drowned the public trust for economic gain” and, therefore, their speech was commercial in nature.\textsuperscript{147} Similarly, fake news actively misleads the public in order to promote the economic interest of the speaker and is the type of speech that “society has little interest in protecting . . . under the mantle of the First Amendment.”\textsuperscript{148} Hence, after making the determination that the type of fake news at issue does constitute commercial speech, the inquiry then moves on to the aforementioned second determination: whether such commercial speech is false or misleading.

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\item \textsuperscript{142} \textit{Kasky}, 27 Cal. 4th at 961.
\item \textsuperscript{143} \textit{Ariix}, 985 F.3d at 1117.
\item \textsuperscript{144} \textit{Id}.
\item \textsuperscript{145} \textit{Wood}, supra note 12.
\item \textsuperscript{146} \textit{Ariix}, 985 F.3d at 1119 (quoting \textit{Cent. Hudson Gas}, 447 U.S. at 564 n.6).
\item \textsuperscript{147} \textit{Id}.
\item \textsuperscript{148} \textit{Id}.
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b. Is the Speech False or Misleading?

False and misleading commercial speech is not entitled to any First Amendment protection.149 Fake news publications are intentionally false and misleading, often imitating reputable news organizations to make the fake news story look credible to the consumer, driving up Internet distribution and revenue for the author.150 This clearly fits into the Central Hudson definition of expression which is based solely upon misleading, false, deceptive commercial speech, which is within the reach of State regulation.151 The fact that fake news is often linked to important issues of public debate152 does not rescue the expression from a determination that it constitutes commercial speech within the reach of State regulation.153 Because fake news is intentionally false and misleading commercial speech, any effort by the government to regulate and prevent its dissemination would be permissible.154

In addition, the regulation of fake news would also comport with the policy considerations that have shaped the doctrine of commercial speech. In Virginia State Board of Pharmacy v. Virginia Citizens, the Supreme Court stated that when an expression is made, freedom of speech protects both the speaker and the right of the recipient to receive the expression.155 The Court elaborated that in the context of commercial speech, both individual consumers and society as a whole have a keen interest in the free and clean flow of commercial information so consumers may make intelligent and well-informed decisions.156 The Court, in Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, reflected on the Virginia decision and opined that the extension of First Amendment protection to commercial speech is justified principally by the “value to consumers of the information such speech provides.”157

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149. Jordan v. Jewel Food Stores, Inc., 743 F.3d 509, 518 (7th Cir. 2014). Commercial speech that is not misleading or does not concern unlawful activity may be regulated if the government can satisfy the three prongs of “intermediate” scrutiny review: (1) the government must assert a substantial interest in support of its regulation, (2) the government must demonstrate that the restriction on commercial speech directly and materially advances that interest, and (3) the regulation must be “narrowly drawn.” Accord Fla. Bar v. Went For It, Inc., 515 U.S. 618, 624 (1995).

150. LoBello, supra note 139, at 534.


152. Bolger, 463 U.S. at 68.

153. Id. (holding that the informational pamphlets at issue describing family planning and venereal disease can, and in this case do, constitute commercial speech despite expression concerning current public debate).

154. Zauderer, 471 U.S. at 638 (“States and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading . . . .”).

155. Id. at 756.


The position taken by the Supreme Court in *Virginia State Board of Pharmacy v. Virginia Citizens*, is supported by Alexander Meiklejohn’s theory of democratic self-governance. Meiklejohnian theory holds that speech should be protected to facilitate the “voting of wise decisions.” More particularly, Meiklejohn argued that the “minds of the hearers” take precedent over the speaker’s rights and that speech which mutilates the thinking process of the hearers is rightfully suppressed—it is not essential that everyone shall speak.

Fake news, as defined in this Note, does not facilitate the voting of wise decisions and mars the thinking process of the recipients of the speech in the community. By writing verifiably false stories and imitating genuine news publishers, fake news authors target communities or demographics with the intent to distribute falsehoods in order to reap significant monetary returns on the back of misinformation and confused minds of the victims. This is the type of expression which the theory of democratic self-governance posits would rightfully be suppressed. According to Meiklejohn, there should be no obstacle to suppressing the unfair and irresponsible transmission of information that mutilates the thinking process of the community and leads to the voting of unwise decisions.

In conclusion, under *Central Hudson* a court should find that for-profit fake news falls outside of the scope of protection which the First Amendment affords to commercial speech. Fake news should be considered commercial in nature because it is expression which does no more than propose the commercial transaction of clickbait advertising, motivated solely by the economic benefit of the speaker. After defining the expression as commercial, a court would consider whether the speech is afforded any protection by the First Amendment. For commercial speech to receive such protection, it must be neither false nor misleading and it must pertain to a lawful good or service. Thus, there is no constitutional objection to the suppression of commercial speech that does not accurately inform the public, because the government “may ban forms of communication more likely to deceive the public than inform it.”

Fake news clearly falls into the category of deceptive and false commercial speech because fake news stories and articles are composed of intentionally false statements that generate economic benefit to the

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158. ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 25 (1948).
159. Id. at 25–26.
160. Perlman, supra note 26 (Aptly described by Ben Edelman, associate professor at Harvard Business School, “You want to read it. It sounds so good you can’t help but click on it, hence the term clickbait.”).
162. Id. at 68–69.
speaker by deceiving the public. In addition, fake news contravenes the policy notion underlying the commercial speech doctrine—the audience’s right to receive truthful information in order to make better consumer-based, economic choices.\(^{164}\) Fake news consists of no-value, false statements that do nothing to inform the public or promote the facilitation of information. Therefore, fake news is properly categorized and regulated under the commercial speech doctrine.

It is important to remember that the definition and scope of fake news in this Note narrowly focuses on fake news that is created and disseminated to generate significant commercial activity through clickbait advertising. The argument made here does not infringe upon the notions of a marketplace of ideas\(^{165}\) and counterspeech\(^{166}\) that the First Amendment is built upon. Individuals are free to express their views on matters of public concern on the vast public forum of the Internet without inhibition, but when their expression constitutes no more than commercial activity that is deceptive and misleading and serves no other purpose than to serve the economic interests of the speaker, then the commercial speech doctrine rightfully intervenes and allows such speech to be suppressed due to its harmful impact.

C. Modeling an FTC Rule on a Theory of Intent to Distribute

Modeling a rule on a theory of intent to distribute will: (1) focus the regulation on fake news that is properly under the purview of FTC authority; (2) create a bright-line rule disincentivizing a prevalent practice; and (3) inform the Commission of specific theories of proof that have already been developed in an analogous body of law. An analogy

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164. Zauderer, 471 U.S. at 651 (1985) (“Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides . . .”).

165. Calvert et al., supra note 61, at 131 (John Stuart Mill’s marketplace of ideas is arguably the most prominent theory to shape the United States’ tradition of free speech. The theory promotes an uninhibited, open free exchange of ideas. Mill’s opposed the suppression of opinion. Such a process of uninhibited debate will ultimately promote the discovery of truth). Here, the marketplace of ideas theory would protect non-commercial expression of opinion, any suppressive measures taken in response to the fake news as defined by this Note would not infringe upon such non-commercial opinion expression.

will be drawn to the federal drug enforcement statute, 21 U.S.C. § 841(a)(1), which states:

“Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally-- (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance . . .”

Under existing legal doctrine, to establish a defendant’s possession with an intent to distribute the government must prove the defendant (1) knowingly (2) possessed the drug in question, and (3) intended to distribute. Knowingly possessing a controlled substance can be established by actual possession or constructive possession. A person who, although not in actual possession of a substance, has both knowledge of its presence and control over it either directly or through another person, is in constructive possession of it.

1. Knowledge of Falsified Story

It is important that the suggested regulation over fake news governs only intentionally written falsehoods, thereby distinguishing fake news made with the intent to distribute from sloppy journalism and misinformed opinions. Similarly, to sustain a conviction for possession with intent to distribute, the government must, as the first required element of their claim, demonstrate that the defendant had knowledge of the existence of the contraband at issue. However, suspicious behavior by itself, without proof of the defendant’s knowledge of the contraband at issue, is not enough to support a conviction of possession with intent to distribute.

Similarly, the FTC should be required to show that a distributor of fake news knew that the story at issue was false. This requirement should be easy to meet when considering fake news as a type of “controlled substance” in question. Authors of fake news knowingly write falsehoods to target specific audiences to generate an emotional response and thus increase the likelihood the reader will share the story, generating more website traffic and revenue for the author. One can imagine, however,

172. U.S. v. Gasper, 524 F. App’x 514, 516 (11th Cir. 2013) (the government must prove: (1) knowledge; (2) possession; and (3) intent to distribute).
173. U.S. v. Torres, 604 F.3d 58, 66 (2d Cir. 2010) (holding defendant did not have knowledge of narcotics where defendant had been paid to pick-up packages, which contained narcotics hidden inside cabinets within the packages, and government proffered no evidence showing that the defendant took part in any conversation informing him of the presence of narcotics).
that purveyors of fake news would claim that they were unaware that a story was false and that they did not intentionally write a false story.

However, this is an issue that the courts are equipped to address. Such a state-of-mind requirement already exists in the context of defamation law, where a fact finder must determine whether a message was published with actual malice. Here, the FTC should be required to show that such fake news was made with “knowledge that it was false or with reckless disregard of whether it was false or not.”\(^{174}\) Knowledge can be proven by circumstantial evidence, records, or a cooperating witness.\(^ {175}\) In its enforcement action of the rule, the court can make a determination of whether the FTC met the standard, similar to a finding under an actual malice standard.

2. Knowingly “Authored”

The second element in proving possession with intent to distribute is possession itself. In the context of fake news, possession is analogous to authorship of the fake news story. Just like possession, authorship could be proven through “actual authorship” or “constructive authorship.”\(^ {176}\) A showing of actual authorship would require proof that the fake news story was written by the author against whom the claim was brought. This could be proven by records, such as emails, showing that the defendant was the one who wrote a story, or by a witness who has first-hand knowledge the defendant actually wrote the story. Alternatively, the FTC could show constructive authorship by demonstrating that the person against whom the claim is brought had (1) knowledge that the fake news story was being written and (2) control over the story, either directly or through another person.\(^ {177}\) Constructive authorship is an important theory of possession, especially considering the business-like structure of for-profit fake news and the difficulty technology poses to proving a direct link between the author and an article.\(^ {178}\)

Consider, once again, Jestin Coler. As the owner of Disinfomedia, Coler managed “employees” who wrote fake news stories for the company. Coler may not have written any fake news stories himself and thus would not have been found to have the “immediate, hands-on


\(^{175}\) Torres, 604 F.3d at 66, 70 (holding that without records, a cooperating witness, or other evidence, the government could not prove he had the knowledge necessary to sustain a conviction of intent to distribute).

\(^{176}\) Mangual-Garcia, 505 F.3d at 11.

\(^{177}\) Peebles, 883 F.3d at 1068.

\(^{178}\) Modern trends in remote work technology would allow authors to work independently, removing the possibility of an eyewitness to corroborate. Additionally, the FTC would have to prove an article was associated with an IP address that the person against whom the claim was brought owned.
physical possession of the fake news story required to prove actual authorship. However, under a theory of constructive authorship, Coler would be shown to have both (1) knowledge and (2) control over the fake news stories. Coler could be shown to exercise control over the fake news stories by evidence (emails, texts, recordings) showing that Coler made decisions regarding the content or publications of certain stories, or that Coler paid a person to write fake stories for Disinfomedia.

3. Intent to Distribute

The third element necessary to prove possession with intent to distribute is a finding that the defendant acted with the specific intent to distribute the controlled substance at issue. Because of the subjective nature of a person’s intent to distribute, “circumstantial evidence alone can establish the possession with the intent to distribute offense.” Specific intent may be proven by circumstances surrounding the defendant’s possession that give rise to a reasonable inference of their intent to distribute or at least increase the probability that intent was present. This theory of intent to distribute controlled substances is analogous to a fake news author’s intent to distribute a story to as many readers as possible to increase traffic and advertising clicks on their websites. The following sections will explore in more detail how circumstantial evidence and reasonable inferences can establish a fake news author’s intent to distribute.

i. Quantity

Courts have held that “the intent to distribute can be solely established by the quantity of drugs.” “Intent to distribute may be inferred from possession of . . . a quantity of drugs larger than needed for personal use.” Similarly, it may be possible to infer that an author possessed the intent to distribute fake news if the author published a certain quantity of fake stories within a given time frame.

179. U.S. v. Padilla-Galarza, 886 F.3d 1, 5 (1st Cir. 2018) (quoting U.S. v. Guzman-Montanez, 756 F.3d 1, 8 (1st Cir. 2014) (defining “actual possession”)).
180. Id. (holding that the defendant exercised constructive possession “over an area” by making mortgage payments on the house where a controlled substance was found).
182. U.S. v. Patel, 370 F.3d 108, 113 (1st Cir. 2004) (“Circumstantial evidence asserts something else from which the trier of fact may either (i) reasonably infer the truth of the proposition or (ii) at least reasonably infer an increase in the probability that the proposition is in fact true.”).
184. Peebles, 883 F.3d at 1068 (8th Cir. 2018); U.S. v. Savinovich, 845 F.2d 834, 838 (9th Cir. 1988).
185. U.S. v. Yancey, 228 F. Appx. 267, 269 (4th Cir. 2007).
Conversely, under current caselaw, a lesser quantity of controlled substances, consistent with personal use, does not raise an inference of intent to distribute, at least in the absence of additional evidence showing intent.\textsuperscript{186} The Fifth Circuit held that a man possessing 2.89 grams of cocaine could not be found to possess with an intent to distribute as a matter of law.\textsuperscript{187} Similarly, a person who rarely distributed any fake stories could not be found to have intended to distribute fake news. This theory of proof would protect individuals who do not cause the sort of widespread public harm that the FTC should prosecute.

ii. Cash or Value

Further, an “[i]ntent to distribute may be inferred from the . . . price . . . of the drug possessed.”\textsuperscript{188} In \textit{U.S. v. Peebles}, the Eighth Circuit affirmed the jury’s finding of possession with the intent to distribute when police discovered one-quarter of a kilogram of a controlled substance, worth $15,000 to $18,000.\textsuperscript{189} Additionally, courts have considered cash discovered with a controlled substance to be sufficient circumstantial evidence to support a finding of intent to distribute.\textsuperscript{190}

Courts often examine the value of the substance at issue or the presence, or exchanging, of money to support a finding of intent to distribute. After all, the impetus behind distributing controlled substances is to make money—and the same is true of for-profit fake news. The FTC can prove intent to distribute fake news for profit with evidence of the amount of money that is being generated from advertising or the presence of “cash” associated with those businesses. For example, consider the revenue stream of Disinfomedia. Coler admitted that he received between $10,000 and $30,000 per month by circulating knowingly fake stories which he exerted actual or constructive possession over through his ownership and managing of Disinfomedia and through his making of

\textsuperscript{186} \textit{U.S. v. Skipper}, 74 F.3d 608, 611 (5th Cir. 1996).
\textsuperscript{187} \textit{Id.}
\textsuperscript{188} \textit{Savinovich}, 845 F.2d at 838 (holding that evidence of the resale value is probative of intent to distribute).
\textsuperscript{189} \textit{Peebles}, 883 F.3d at 1068.
\textsuperscript{190} \textit{Yancey}, 228 F. Appx. at 269 (quoting \textit{U.S. v. Collins}, 412 F.3d 515, 519 (4th Cir. 2005) (“Intent to distribute can be inferred from, inter alia, the ‘amount of cash seized with the drugs.’”); \textit{U.S. v. Stephens}, 23 F.3d 553, 556 (D.C. Cir. 1994) (recognizing that possession of relatively large amounts of cash may support a finding of intent to distribute); \textit{U.S. v. Maldonado}, 108 F.3d 331 (5th Cir. 1997) (“Possession of drugs coupled with additional evidence such as large quantities of cash may support an inference of intent to distribute.”); \textit{Skipper}, 74 F.3d at 611 (stating a quantity of drugs consistent with personal use does not support a finding of intent to distribute but can if augmented with additional evidence such as large quantities of cash); \textit{U.S. v. Khondaker}, 263 Fed. Appx. 693, 701 (10th Cir. 2008) (holding $2,300 in cash found near the seized drugs gives rise to an inference of intent to distribute).
editorial decisions, effectively exercising control over the stories. Disinfomedia’s monthly income is incredibly similar to the value of the substance possessed in Peebles, which the court held was sufficient to support a finding of intent to distribute. This level of income should thus serve as sufficient evidence for the FTC to establish that Coler intended to distribute fake news for profit.

As an alternative to showing the monthly “value” of fake news, the FTC could use evidence of cash associated with either Jestin Coler or Disinfomedia to prove intent to distribute. Courts often have held that the presence of cash has been sufficient to show intent to distribute. In United States v. Stephens, the court found that additional evidence of $15,000 in cash seized along with a quantity of marijuana exceeding a quantity for personal use was ample evidence to support a finding of intent to distribute. For-profit fake news generates a significant amount of money for the disseminators; the presence and exchange of cash sufficient to prove intent to distribute under 21 U.S.C. § 841(a)(1) should similarly be sufficient to prove intent to distribute in the context of fake news. For example, the FTC could show evidence in the form of bank accounts held in the name of Disinfomedia, financial statements showing the origin of deposits from AdSense, or payments made directly to Coler or his writers from accounts associated with Disinfomedia.

iii. Behavior

Intent to distribute can also be proven by the defendant’s behavior. In United States v. Foster, an expert testified that traveling by train (in an effort to keep luggage close by), purchasing a one-way ticket with cash shortly before departure, carrying a beeper, using hard suitcases and masking agents such as talcum powder (to contain drug odor), and avoiding using their real name are all behaviors typical of drug couriers. The court held that expert testimony regarding the defendant’s behavior was admissible as relevant circumstantial evidence to prove the defendant knew and intended to carry under 21 U.S.C. § 841(a)(1) because these behaviors made it more probable that the fact of consequence was true.

191. Id.
193. “The intent to distribute can be inferred from a number of factors, including but not limited to . . . the amount of cash seized with the drugs.” Id. (quoting Collins, 412 F.3d at 519).
194. U.S. v. Foster, 939 F.2d 445, 451 (7th Cir. 1991); U.S. v. Lopez, 403 Fed. Appx. 362, 374 (11th Cir. 2010); U.S. v. Williams, 541 F.3d 1087, 1089 (11th Cir. 2008) (holding that behavior, such as evidence of flight, is admissible to demonstrate consciousness of guilt and thereby guilt itself).
195. Foster, 939 F.2d at 451.
196. Id.
197. Id.
Under a similar theory, the FTC can support a finding of intent to distribute through evidence that a fake news author: wrote fake news stories under a pseudonym or published anonymously, established a social media presence specifically targeting certain groups of people who are likely to disseminate fake news, or took certain cyber security measures to ensure anonymity in the conduct of their publication. Such factors, even potentially developed through adjudication of many cases, would establish the common behaviors and practices of individuals who operate for-profit fake news publications. The FTC could use these behaviors as circumstantial evidence to counter an argument by a defendant who claims that they were unaware or lacked the intent to disseminate fake news—just as the defendant in Foster attempted to argue.198

iv. Network Engagement

Participation in, and involvement with, distribution activity is not alone sufficient to convict under current legal frameworks, but such evidence is permissible in evaluating the totality of circumstances of the charged offense.199 In U.S. v. Lopez, the court ruled that evidence showing the defendant arranged the sale of 211 kilograms of cocaine to distributors was sufficient to demonstrate knowledge of the general scope and nature of the conspiracy.200 Next, the court in Lopez determined that attending meetings and traveling frequently with coconspirators on flights along with the evidence of arranging deals, was sufficient to satisfy the totality of the circumstances test. Lopez shows that serving as the entity that delivered the drugs into the network of distribution could be used as circumstantial evidence to show the defendant was guilty of intent to distribute. Similarly, a regulation could assign a heightened degree of culpability, under a similar theory of intent to distribute, by a showing that an author engaged with distribution networks to spread their fake news story for financial gain.

Fake news authors are able to widely distribute their stories by engaging with social media—the modern news distribution network—and by targeting users through harvested data that reveals individuals who are more likely to believe and share fake news stories.201 A fake news author who targets their audience—through data harvesting, political ideology, or other means—and engages the specific distribution network by placing their fake news story into those channels, should be said to have intended to distribute. Additionally, the volume of activity of a fake news author could be a factor supporting a finding of intent to distribute.

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200. Id. at 374–75.
201. Clemons, supra note 45.
If the author posts infrequently, then it is unlikely that they would have acted with the requisite intent to widely distribute their falsehoods. However, an author who posts with frequency would demonstrate their intent to distribute by regularly attempting to attract the attention of vulnerable consumers and make money from their promotion of the post.

v. “Tools of the Trade”

Equipment or materials that are “tools of the trade” are admissible as evidence to allow for a reasonable inference that the defendant intended to distribute.\(^\text{202}\) Tools of the trade, items which are commonly used in drug transactions, may be used to support an inference that a defendant in possession of drugs intended to engage in such a drug transaction, rather than to simply engage in personal use.\(^\text{203}\) In \textit{U.S. v. Winder},\(^\text{204}\) the defendant did not dispute that he possessed and had knowledge of the drugs found in the car he was driving at the time of his arrest, but he nonetheless challenged the sufficiency of the evidence to prove intent to distribute. The Tenth Circuit turned to the circumstantial evidence of other key items located in the car: two firearms, ammunition, baggies, and a digital scale. The Court held that the caselaw recognized these items as “tools of the trade” and that they suggested the defendant was engaged in distributing illegal drugs. Thus, the court ultimately affirmed the conviction.

Similarly, the circumstances surrounding the operation of a purveyor of fake news could be used to prove an intent to distribute. In furtherance of the public policy concerns addressed by the proposed FTC regulation,\(^\text{205}\) the FTC can use, as evidence of intent to distribute, the “tools of the fake news trade”—namely, Google AdSense accounts or agreements, payments received from advertising networks, or websites used to publish fake new stories and drive Internet traffic—to show circumstances and “equipment” which demonstrates the defendant had

\(^{202}\) \textit{Savinovich}, 845 F.2d at 837 (holding that because scales are tools of the drug trade, they are probative of intent to distribute); \textit{U.S. v. Billingsley}, 160 F.3d 502, 506 (8th Cir. 1988) (holding that cutting agent, scales, and wrapping supplies found in defendant’s apartment are “tools of the drug trade” and are inconsistent with a finding of personal use, but rather are indicative of intent to distribute); \textit{U.S. v. Brown}, 7 F.3d 648, 656 (7th Cir. 1993) (holding weapons found in conjunction with narcotics may be considered “tools of the trade” and support a finding of intent to distribute); \textit{U.S. v. Espinoza}, 684 F.3d 766, 779 (8th Cir. 2012) (holding evidence of multiple guns and ammunition admissible as “tools of the trade” to prove intent to distribute even when no drugs were found in the home).

\(^{203}\) \textit{Savinovich}, 845 F.2d at 837 (holding that because guns are used in many drug transactions, it may reasonably be inferred that an armed possessor of drugs has more in mind than personal use . . . Thus, guns seized from a defendant’s residence are admissible in trial for intent to distribute).

\(^{204}\) \textit{U.S. v. Winder}, 557 F.3d 1129, 1138 (10th Cir. 2009).

\(^{205}\) Ind. Fed’n of Dentists, 476 U.S. at 454.
more in mind than personal use and intended to distribute fake news to profit from a deceptive, unfair practice.

vi. Multiple Types of Evidence

Combinations of two, three, or more of the aforementioned types of evidence have been held sufficient to establish intent to distribute in cases where one of these types of evidence may not have been sufficient alone.\(^{206}\) The court may, for example, consider a certain quantity as sufficient to prove intent to distribute when augmented by evidence of distribution paraphernalia or “tools of the trade,” large quantities of cash, or the value and quality of the substance.\(^{207}\)

In *United States v. Shaw*, the court found that possessing 0.89 grams of cocaine, or approximately nine doses according to expert testimony, was insufficient alone to establish intent to distribute.\(^{208}\) However, the defendant also possessed $1,776 in cash and a loaded pistol when the cocaine was discovered.\(^{209}\) The court ultimately held that the additional evidence of a significant amount of cash and a loaded weapon—a “tool of the trade”—was sufficient to infer an intent to distribute despite the quantity of cocaine in possession being small.\(^{210}\) In *Shaw*, the court thus considered a combination of the types of evidence to make a finding of intent to distribute.

Similarly, a court can examine a combination of the aforementioned types of evidence (i.e., quantity, cash or value, behavior, and network engagement) when making a determination as to whether a fake news author intended to distribute knowingly false news stories in order to profit from their targeted dissemination. Each inquiry should be fact-specific, with the FTC bearing the burden of proof, just as the burden is on the government under 21 U.S.C. § 841(a)(1) to make a showing of intent to distribute.

**CONCLUSION**

Gone are the days of reliance upon printing presses, distribution centers, and delivery channels to place the news at your front door. There now is greater freedom to distribute information because the Internet and social media have empowered individual actors to inexpensively publish statements within seconds.\(^{211}\) Unlike traditional press distribution and


\(^{207}\) *Id.*

\(^{208}\) *U.S. v. Shaw*, 751 F.3d 918, 922 (8th Cir. 2014).

\(^{209}\) *Id.*

\(^{210}\) *Id.*

\(^{211}\) Benedict, *supra* note 76, at 484.
television broadcasting, the barriers to distribution on the Internet are low—there is no publisher, editor, broadcaster, or cable operator to act as a gatekeeper to the dissemination of information.\footnote{Ed Cook, \textit{Everyone Now is a Publisher}, \textsc{Medium} (May 10, 2019), https://medium.com/@edcook_1690/everyone-is-now-a-publisher-c7b4b1b0c1b7 [https://perma.cc/J9TV-C4LK].} Anyone can establish a legitimate-looking website, create a Google AdSense account, write share-worthy falsehoods, and make money from the distribution of fake news. Now that most people obtain their news online, social media has become the main source of news for many.\footnote{Nicole Martin, \textit{How Social Media Has Changed How We Consume News}, \textsc{Forbes} (Nov. 30, 2018, 4:26 PM), https://www.forbes.com/sites/nicolemartin1/2018/11/30/how-social-media-has-changed-how-we-consume-news/?sh=22a1d68c3c3c [https://perma.cc/2BK8-YVAN].} Through these modern channels of media consumption, the harms of fake news can be spread instantaneously around the globe.\footnote{Chen, \textit{supra} note 8, at 376.} This recent, rapidly developing phenomenon poses serious public policy concerns for a democratic society.

The rulemaking authority of the FTC, this Note argued, provides the best option for stopping the spread of for-profit fake news. By focusing on for-profit fake news, action taken by the FTC is likely to survive a Constitutional challenge because commercial speech receives no First Amendment protection when it is inherently false or misleading. An industry-wide rule promulgated by the FTC should clearly define what constitutes improper conduct, so as to precisely and effectively disincentivize the actions and consequences associated with disseminating fake news.

The FTC should model its rule on a theory of criminal possession with intent to distribute, while penalizing offenders with civil fines instead of criminal prosecution. Possession with intent to distribute provides a useful analogy to the for-profit fake news industry. By focusing on an author’s knowledge of the falsity of the story, actual or constructive authorship, and intent to distribute the falsehoods to as many people as possible to maximize profit, the FTC’s focus will fall solely upon those individuals who pose serious public policy concerns while also not exceeding the scope of the FTC’s authority under the FTC Act. Additionally, criminal possession with intent to distribute jurisprudence is built upon decades of varying theories for proving the elements of intent to distribute, many of which can be analogized to the issue of fake news. Such possession with intent to distribute frameworks thus serves as a strong foundation for the development of an FTC rule addressing the fake news epidemic.