

Legal Dilemma of Fake News Management after ‘Marketplace of Ideas’

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DOI: <https://doi.org/10.18196/jkm.12782>

Article Info

Article history:
Received 21 Sep 2021
Revised 5 Oct 2021
Revised 14 Oct 2021
Accepted 15 Oct 2021

ABSTRACT

The ‘marketplace of ideas’ metaphor has gone over a whole century since its birth, and its significance is far-reaching. The protection of freedom of speech in its theory is now manifested as high tolerance of fake news. Germany, France, the United Kingdom, Singapore, Russia, and Malaysia are among the countries attempting to address the worldwide issue of false news. Many nations have included false news regulation into necessary measures such as government management and even legal systems, as can be shown. In the United States, it is difficult to control fake news by legal means, which can only be exerted through extremely limited litigation liability and industry self-discipline. In addition, the transformation of media technology has destroyed the theoretical basis of the ‘marketplace of ideas’. Due to the struggle between the two parties in the United States, fake news has become a ‘floating signifier’ and a discourse tool to attack political opponents. The century-old theory of ‘marketplace of ideas’ is in urgent need of reflection and reconstruction.

Keywords: Fake News; First Amendment; Marketplace of Ideas; The Law Governing.

ABSTRAK

Metafora ‘pasar ide’ telah berlangsung lebih dari satu abad sejak kelahirannya, dan signifikansinya sangat luas. Perlindungan kebebasan berpendapat dalam teorinya kini dimanifestasikan sebagai toleransi yang tinggi terhadap berita palsu. Jerman, Prancis, Inggris, Singapura, Rusia, dan Malaysia termasuk di antara negara-negara yang berupaya mengatasi masalah berita palsu di seluruh dunia. Banyak negara telah memasukkan peraturan berita palsu ke dalam tindakan yang diperlukan seperti manajemen pemerintah dan bahkan sistem hukum, seperti yang dapat ditunjukkan. Di Amerika Serikat, sulit untuk mengontrol berita palsu dengan cara hukum, yang hanya dapat dilakukan melalui tanggung jawab litigasi yang sangat terbatas dan disiplin industri sendiri. Selain itu, transformasi teknologi media telah menghancurkan landasan teoretis ‘pasar ide’. Akibat perebutan dua partai di Amerika Serikat, berita palsu menjadi ‘floating signifier’ dan alat wacana untuk menyerang lawan politik. Teori ‘pasar ide’ yang berusia seabad sangat membutuhkan refleksi dan rekonstruksi.

Kata Kunci: Berita Palsu; Amandemen Pertama; Marketplace Ide; Hukum yang Mengatur.

INTRODUCTION

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In 1919, Justice Oliver W. Holmes argued in *Abrams v. the United States* that the best test of truth was whether it would be accepted in the marketplace. Now, the metaphor of ‘marketplace of ideas’ has gone beyond a full century. As a widely accepted ‘prominent learning’ in the western ideological tradition, its theory still has a strong and lasting influence on American press (Lin, 1991). In order to better pursue the truth, it has strengthened the protection of freedom of speech with the egalitarian principle, which is reflected in a high tolerance for opposing opinions and false information to some extent. To this day, Fake news flooded on social media is still under its protection.

Since the 2016 US election, ‘Fake News’ was named the Hot Word of the Year in Collins Dictionary, raising deep concerns about the ‘post-truth era’. Due to President Trump’s frequent use of the term, ‘fake news’ has become a ‘floating signifier’, a tool of discourse used to undermine political opponents. In this year’s new outbreaks, the spread of false information contributed to the anxiety and the spread of racism in the network. The World Health Organization called the new coronavirus a ‘large-scale information epidemic (Infodemic)’ (Hao & Basu, 2020). Although all levels of American society have launched governance actions against fake news, many measures (especially legal measures) are regarded as censorship and restriction of speech and are challenging to put into practice based on the basic concept of the ‘marketplace of ideas’. Therefore, some people question whether the right to own guns, born in the musket era, is still applicable to today’s technological environment with high-performance automatic assault weapons. Similarly, the market theory of ideas is proposed when the electronic media has just emerged and mainly relies on interpersonal communication and print media to disseminate information. In this era, it’s time to reconsider whether it can effectively transfer to today’s completely different media environment.

The First Amendment to the US Constitution, enacted by Congress in 1791, began the national history of constitutional protections for free speech. In 1919, after more than one hundred and twenty years of development, Justice Holmes wrote in his judgment in *Abrams v. America*: ‘The best test of truth is the power of a kind of thought that makes itself recognized in market competition’. For the first time, this expression formally put forward the concept of ‘freedom of thought market’, making a great contribution to free speech.

The theory of the market of thought can be traced back to 1644, when John Milton delivered a speech ‘On Freedom of Press’ in the British House of Commons. He called freedom of speech ‘the most important freedom of all freedoms’ and believed that the degree of openness of freedom of speech measured the degree of social freedom. Even though opinions are not always true, we still need to know the truth from multiple information (Milton, 1958). In his opinion, Milton mainly focused on the issue of ‘freedom of the press’, which covered a relatively narrow area, but his idea did lay the foundation for the formation of a ‘marketplace of ideas’. In 1859, John Stuart Mill published ‘On Liberty’, which took the theory to new heights. Mill believed that everyone had the equal right to express their opinions freely and oppose the suppression of the majority opinion to the minority opinion. ‘Suppose,’ he wrote, ‘that all humankind, minus one, has one opinion, and only one has the opposite. It is no more justified for humankind to silence that one than for that one (if he had a right) to silence humankind’ (Mill, 1959). It is emphasized that in the realm of thought, the concepts of freedom and democracy cannot be equated. It is the premise of democracy that everyone has the right to express their opinions freely. Only by ideologically ensuring the free expression of opinions and not being persecuted for holding minority opinions can we maintain social order in a way that the minority obeys the majority in action. A similar point of view was Adam Smith’s ‘invisible hand’ metaphor, which emphasized that in a free market system, capital would be reasonably utilized if people were given natural freedom and allowed to compete (Guangxin, 2008). Scholars such as Milton, Mill, Adam Smith, etc. all believed that human reason and the right to freedom could make truth more evident in the competition with fallacy.

Based on these theories, Holmes greatly enriched the connotation of the theories. His opinion was the first to make it clear that ‘the free expression of ideas is our (United States) preeminent constitutional value and defined national trait’ (Healy, 2013), and was considered ‘the greatest words on freedom of speech ever written by an American’ (Miklejohn, 2003). He believed that the collision of multiple ideas would form a market, and a strong market itself could distinguish between true and false. Ideas could achieve the ultimate expectation of people’s pursuit of perfection through free competition. He also proposed that the government follow the principle of ‘obvious and immediate danger’ in punishing speech, reducing the scope of government control by emphasizing the urgency

of danger, which was conducive to the free operation of the marketplace of ideas. Thomas Healey, in his study of the formation of Holmes's ideas, wrote that 'Almost a century later, his dissenting opinions still do more to shape our view of freedom of speech than any other document' (Miklejohn, 2003). Although there have been critics, the idea of a marketplace of ideas has permeated the collective consciousness and judicial practice of the United States, becoming the most frequently used rationale for the Supreme Court's invocation of the First Amendment.

In *Whitney v. California*, Justice Louis Brandeis further developed Holmes's theory, linking the marketplace of ideas to the democratic process. He wrote in a joint opinion: 'Thinking freely and speaking freely is an indispensable way to explore and disseminate political truth. The surest way to ensure security is to ensure that people are free to discuss dilemmas and solutions. The best remedy for a bad idea is a good one'. 'Brave, confident men,' he argued, 'who inject the forces of freedom and reason into the healthy functioning of democratic government, are confident enough to believe that most speech cannot pose a clear and immediate danger unless the danger is imminent before it has been fully discussed. If time is sufficient, falsehood and fallacy should be exposed through discussion, evil should be avoided by education, and we should rely on more speech as a corrective and remedial measure instead of forcing others to be silent'. Brandeis believed that citizens could actively participate in the democratic process of governing their country only if they were free to speak out and criticize their government. Keeping the government's direct control of speech to a minimum and testing the authenticity of information through the marketplace of ideas is essential to the functioning of democracy. Therefore, providing 'more speech' can ensure that audiences get enough information (including false information) using counter-speech and become insiders and participants in the democratic process (Napoli, 2017). Then, they will naturally judge the authenticity of it. This is an effective approach, but the problem is that belief in the power of the marketplace of ideas itself justifies the existence of disinformation.

METHODS

This study relies on qualitative data. Qualitative research is characterized by the use of language to communicate data results. Qualitative research is used to look into, discover, characterize, and explain social effects that cannot be explained, quantified, or defined using a quantitative technique. Qualitative research aims to get a comprehensive understanding of phenomena such as behavior, perceptions, motives, and actions experienced by study participants by using descriptions in the form of words and language, in a natural setting, and by employing diverse natural methodologies (Moelong, 2005).

Qualitative research generates information by interpreting different viewpoints from various sources, including all participants in the study, not just the researchers (Gunawan, 2016). (1) reality is subjective and multiple; (2) the researcher interacts with the researched; (3) not value-free and biased; (4) informal, developing decisions, using personal words, using accepted words in qualitative; and (5) the factors identified together are reciprocal, dynamic design, context-bound, theory developed to understand..

RESULT AND DISCUSSION

Limited Legal Liability for Fake News

There may still be some legal liability when fake news causes specific harm to individuals or society. As one form of new media, online media has become the choice of many people to access information (Lestari, 2019). However, today's internet use and its future potential are questioned due to governments' widespread adoption of internet shutdowns in many countries (Safitri & Noviadhista, 2020). However, because the marketplace of ideas theory greatly loosens the limits on speech, the legal consequences are minimal, with only a few types of false speech explicitly listed as not protected by the First Amendment.

Strict Restrictions on Government Regulation

The governance of fake news is considered ‘content-based regulation’, restricting the expression of speech based on specific opinions, information, or topics. ‘Content-based regulation’ gives the government the right to control the dissemination of specific information instead of letting the public make value judgments and choices in the free dialogue of multiple viewpoints, which obviously contradicts the marketplace of ideas theory. Thus, Supreme Court has stated that ‘Due to the significant impact of government prejudice and information suppression, regardless of its effectiveness in promoting other interests, ‘content-based’ discriminatory regulations should be subject to strict scrutiny’. The Supreme Court’s attitude towards this was directly reflected in the case *United States v. Alvarez* of 2012. The defendant in the case, Xavier Alvarez, lied about his 25 years in the military and his Congressional Medal.

According to the relevant provisions of the Stolen Valor Act, he should be fined and imprisoned for less than one year. However, the Supreme Court ultimately ruled that the law was unconstitutional by a 6-3 majority. In the majority opinion, justices said that speech limited by Stolen Valor Act was only false statements and would not pose a serious and imminent danger, and that criminal penalties for such speech are inappropriate. ‘One of the costs of the First Amendment is that it protects not only speech that we admire but also speech that we hate. Although the defendant’s lies were outrageous, his right to speak was also protected by the Constitution’. Judge Anthony m. Kennedy thought, except in rare extreme circumstances, restrictions on speech based on its content should be strictly reviewed. The government must prove that regulating the behavior of the speech is based on enough narrow interests, and restricted speech and alleged damage exist between the actual ‘direct causal relationship’. However, in the field of intangible thought, whether ‘government interest’ or ‘direct causality’ is extremely difficult to prove, so ‘content-based regulation’ is almost ineffective. Some scholars even directly described the ruling of *United States v. Alvarez* as ‘The Constitutional Right to Lie’, believing that this case legally endowed citizens with the right to lie (Zenor, 2016)).

General false speech is still difficult to be effectively controlled. In order to regulate the political speech which occupies the core position in the freedom of speech, it needs to be subjected to strict constitutional review. In 2007, in the case *Rickert v. State Pub. Disclosure Comm’n*, Washington State tried to implement a state law to regulate election speech, giving state government agencies the power to review the authenticity of political campaign speeches and fine political candidates who deliberately spread false facts. But the law was eventually ruled unconstitutional by the state Supreme Court. The court held that it regulated both defamatory and non-defamatory false speech, which was over-broad and not narrowly tailored (Jiang, 2018). The constitutional electoral system has already included solutions to false speech (Rickert, 2007). That is, confrontational speech is taken as a more effective mechanism to deal with false facts. Because in political elections, candidates’ erroneous facts cannot escape the attention and correction of their political opponents.

As for the regulation of fake news websites and social media, in March 2017, a New York democrat Congressman Adriano Espaillat proposed a bill that calls for ‘opposing fake news and the alternative facts’. However, so far, there has been no substantial progress. The ‘Capitol Hill’ commented that the resolution is not expected to pass the Republican-controlled House of Representatives.

Limited liability for producers of fake news

The legal liability of fake news governance is mainly limited to malicious false information that an individual or organization intentionally damages the reputation of other individuals or other organizations. In *Hustler Magazine v. Falwell*, the Supreme Court’s position stated that ‘malicious statements of false facts (at the societal level) may damage an individual’s reputation that cannot be easily repaired by the competition between true and false statements’ (Skelton, 1988). For other public figures or political issues, the production and dissemination of fake news are exempt from such liability.

- 1) Liability for defamation: Defamation is the most prone type of lawsuit for fake news in the common law environment. False statements that damage the reputation of others may need to bear corresponding legal liability. However, according to the rules established by the case *New York Times v. Sullivan* in 1964, defamation lawsuits are often difficult to deal with false news

about ‘public figures effectively.’ To be compensated, a public figure must prove ‘unequivocally and convincingly’ the defendant’s ‘actual malice’. It is not difficult to see the difficulty of such a proof. Under this premise, the false criticism and accusation of public figures can be protected legally. In contrast, the public figures themselves have basically lost the legal protection of the right of reputation. The case actually gave people the right to defame public figures, which is one of the main reasons why fake news is rampant in politics. For the general public and ‘involuntary public figures’, a series of precedents since the Goetz case in 1974 show that the definition and application of ‘actual malice’ have been tightened, and the courts have gradually shifted from trying to protect free speech to striving to balance free speech with citizens’ right to reputation. Liability for defamation is mainly at the civil level. At present, most states have adopted decriminalization policy, except for 15 states that still maintain criminal statutes for defamation.

- 2) Liability for seditious speech: Some false and exaggerated statements of fact are seditious and may harm social stability and national security. In 1919, in the case of Schenker, Justice Holmes established the famous ‘clear and present danger’ principle, which held that speech should not be easily suppressed unless there was an immediate present danger, and that inflammatory speech could be limited only if this principle was satisfied. In the *Brandenburg v. Ohio* case in 1969, this principle continued to be limited. To be convicted, the speech must cause ‘imminent illegal behavior’, emphasizing that the government should punish the ‘illegal act’ to which the speech was directed, not the speech itself. The vagueness of the word ‘dangerous’ became operable, thus providing a looser environment for the protection of free speech. In recent years, international terrorism has quietly extended to cyberspace. In order to deal with its highly permeable propaganda, the United States has also tried to take some measures to deviate from the ‘main line’ of freedom of speech in the judiciary. In *Holder v. Humanitarian Law Program* (2010) and *United States v. Mehanna* (2013), for example, the court passed a review of the Anti-Terrorism Act (18 USC§2339). It maintained the principle of conviction based on independent advocacy. That is to provide support or material resources in the case of intention or knowing that a specific violent crime will be committed. However, in the case of AHF in 2012, the court curtailed the censorship doctrine and blocked the anti- terrorism act’s restrictions on free speech. There is a certain inconsistency in the court’s understanding of the limitation of inflammatory speech, which reflects the difficult balance between national security and freedom of speech in the United States (Yujiang, 2016).
- 3) Liability for deceptive business practices: In legal practices involving false advertising, defendants often argue that commercial speech is protected by the First Amendment. Although in recent years, the Supreme Court has gradually improved the principles of commercial speech in order to protect true and legal advertisements from government restrictions more firmly, the Supreme Court has not commented on commercial information for product advertisements that are prone to social problems (such as tobacco and alcohol advertisements). There are some concessions in the supervision of this kind of supervision, which is designed to ‘protect consumers from misleading, deceptive or aggressive sales practices’. In addition to commercial advertising itself, some false news also alleged an ‘unfair and deceptive trade practice’ (Manne & Sperry, 2021), the Federal Trade Commission (FTC) has investigative powers. It can take certain measures to punish it, such as applying for an injunction in the court or ordering it to pay consumer compensation (pay relevant profits to the government for the public interest). In 2011, the FTC filed a lawsuit against ten fake news websites in federal courts all over the country. They were suspected of using the names and logos of mainstream media such as ABC, CBS, CNN and making false reports to attract consumers to buy a weight loss product. After a settlement, the defendants eventually paid the FTC millions of dollars to stop the deceptive practices and add marketing logos to their respective websites (Federal Trade Commission, 2011). However, to be able to regulate fake news, the FTC would have to prove that it was a ‘commercial practice.’ This is precisely the point where the FTC has a hard time making a convincing argument, especially if people do not pay to read information.

Liability of Internet Service Providers (ISP)

Internet service providers generally do not need to monitor the content published on their web pages by third parties under legal regulations and do not have to undertake general censorship and management obligations for fake news. Article 230 of the ‘Communication Content Correction Act’ (CDA) in 1996 and a series of precedents given by the court afterward indicate that network service providers, as providers or users of interactive computer services, should not be regarded as publishers. They have the right to customize their content policies, not delete defamatory or inflammatory information posted by third parties, and be exempt from most infringement legal liabilities. Therefore, this clause is also widely regarded as the platform’s ‘exemption gold medal’.

However, there are actually many ambiguous provisions in the content of Article 230 of the CDA, such as how to define whether the platform participates in the production of false information and whether the platform disseminating fake news can be regarded as a ‘publisher’ in a broad sense and included in the exemption scope, etc. These issues have reserved much space for the court’s interpretation and judgment in actual operation. Judging from past online defamation cases applicable to Article 230 of the CDA, the court has almost overwhelmingly adopted an expanded interpretation of the content of the clauses, incorporating platform dissemination and publishing behaviors into a safe haven, along with the exception object extended from Internet service providers to users. The scope of exemption has been expanded repeatedly, and the restrictions have been shrinking (Jinxi, 2015). For example, in the case *Chillen v. AOL*, the central issue was whether the AOL platform was responsible for removing defamatory information about individuals and issuing clarifications. In this regard, the court held that taking into account the legislative purpose of CDA Section 230, government intervention should be minimized to maintain the openness and diversity of online platform communication. It can be said that social media can enjoy the benefits provided by CDA Section 230 without undertaking the corresponding self-discipline responsibility (Jinxi, 2015).

The Failure of ‘More Speech’ and the ‘Marketplace of Ideas’ Under the Technological Change

The marketplace of ideas theory has certain presuppositions. First, individuals can distinguish between true and false information. Just as consumers in a commodity market can correctly distinguish between high and low values, people in the marketplace of ideas can distinguish between true and false information. Second, participants in the thought market attach more importance to true information than false information. Third, people exposed to a sufficient amount of false information will also be exposed to the same amount of accurate information as to compensation.

If these assumptions are true, then the marketplace of ideas will have the desired effect in helping to select true information and satisfying citizens’ right to know. However, there is growing evidence that algorithmic social media enhances and exploits people’s innate predilligence for misinformation. The speed, depth, and breadth of fake news spread through social networks far exceed that of real news (Vosoughi, Roy, & Aral, 2018). The technological and structural changes in the media ecosystem destroy the possibility of real news defeating fake news and challenging the theoretical assumptions from many aspects.

The Continued Fermentation of the Journalism Economic Crisis Has Caused the Decline of the Traditional Journalism Industry

The number of American newspapers, TV news editing rooms and professional news posts is decreasing. The increasing number of social media platforms and the rise of ‘citizen journalism’ have not made up for the lack of traditional media news productivity. However, they have led to a decrease in real news. The reason is that network news reports are filled with a large number of ‘parasitic news’. Network media are short of resources and unable to engage in news production, identify news through algorithms, and constantly recycle and circulate a small number of original reports. Almost the same news story is arranged and reintegrated by one media to form an ‘echo chamber’. A large number of repeated content reduces the audience’s interest and attention, and thus the media income decreases. Research shows that even digital news outlets are facing the same crisis. In early 2019 alone, BuzzFeed, AOL, Yahoo, HuffPost, Vice Media, and Mic announced layoffs, and traditional news Media giant Gannett slashed hundreds of employees (Lee, 2019). The declining economics of

the news business and the high cost of producing real news have led to a decline in the production of such news, creating a vicious circle of news production.

On the other hand, the production of fake news requires neither rigorous investigation and verification nor professional news personnel. Meanwhile, due to the lowering of the Internet entry threshold, the most serious consequence of spreading fake news is that websites are shut down, and it is easy to make a comeback. However, low-cost fake news may attract enough attention and produce considerable political propaganda or short-term economic benefits. Compared with fake news, the production of real news is in an unprecedented decline. People cannot access a comparable amount of true and false information, and the prerequisites for the marketplace of ideas cannot be met.

The Reform of News Check and Distribution Mode Reduces the Passes and Barriers of Fake News Transmission

The traditional 'gatekeeper' is the decision-making mechanism of mass media to help the audience choose information, which effectively limits the spread of false news to a certain extent. For the mass media such as newspapers, broadcast, and cable TV, neutral and objective news reports effectively attract the audience. At the same time, due to the relatively scarce technical and economic resources, it also has a strong gatekeeping ability. Traditional media have prevented the spread and profit of fake news to a certain extent, no matter from the perspective of motivation or ability to do the gatekeeping work. Nowadays, online information—especially online advertising—relies increasingly on algorithm-driven distribution, and sometimes even advertisers themselves do not know where their advertisements are (Laconangelo, 2016). In the process of media check giving way to algorithm check, the content is mainly filtered by machine program, which can neither judge the content that cannot be quantified, nor integrate human values into the check standard (Cundi & Wei, 2018). It is difficult to check the authenticity of news through the algorithm mechanism with the pursuit of popularity as the core, so fake news websites have the same communication conditions and ability as other online content providers.

It is important to emphasize that new social media platforms have the same gatekeeping power as traditional mass media. However, in reality, due to the comprehensive influence of multiple factors such as organization size, technical limitations, media concept, and individual literacy, such a gatekeeping mechanism has not been fully utilized to combat the spread of fake news. American scholar John Naisbitt pointed out that 'Uncontrolled and unorganized information no longer constitutes a resource in the information society. On the contrary, it becomes the enemy of information workers' (Guoying, 2011). Judging from the current media environment, when the news gatekeeper's power declines, Brandeis's expectation of 'more speech' is likely to mean false speech.

The Technical Characteristics of Social Media Promote the Accurate Positioning and Rapid Spread of Fake News

First, the highly personalized media environment of social media can deliver content precisely to the target audience. Cambridge Analytica was employed by the Trump campaign to conduct psychological, demographic, and geographic analysis of voters using massive social media data, and then use the data to accurately deliver campaign messages to users of Facebook and other platforms (Lavowsk, 2017). The key is that interactive social media provides audience data streams, promoting audience targeting and personalization in an unprecedented range. Viral transmission among people and automatic forwarding of robot accounts helped spread fake news widely. In this process, the personalized push of key information nodes and the repeated invasion of information can quickly strengthen people's cognition, thus forming the circular transmission of information and changing people's views on real things. By comparing the flow sources of 690 traditional news websites and 65 fake news websites, some scholars found that social media recommendations only accounted for 10.1% of the total flow of traditional news websites, while 41.8% of the total flow of fake news websites. This suggests that social media plays an important role in spreading fake news (Allcot & Gentzkow, 2017).

The credibility of the information is primary. Therefore, the audience is a completely 'rational audience'. However, this notion can only exist ideally in First Amendment theory. In reality, human reason is limited with 'Confirmation Bias.' People generally prefer the information that can verify the hypothesis rather than negate it, so they always seek the information consistent with their existing

cognition intentionally or unintentionally, lacking the process of rational screening of information. In the new media environment, audiences trust the ideology-oriented media much more than the mainstream media, conducive to more consumption and acceptance of fake news. In addition to the inherent long-term behavior and psychological model of human beings, the continuous development of the external world, the complex information, and the uncertainty of the information environment are far beyond the scope of the human brain to deal with. All these factors hinder the realization of a 'rational audience' to a certain extent.

Justice Antonin Scalia once affirmed that 'more speech' requires that 'people know where speech comes from' (Morgan, 2012). In social media, the credibility of the information-sharing subject replaces the reputation of the source media and becomes the way for consumers to distinguish between true and false news. Compared with news with an accurate source but low author's credibility, news from an unknown source written by a reputable author may be more recognized by the public and more likely to be consumed and shared. Once there is fake news in it, the possibility of its spread greatly increases. Coupled with big data and cloud computing, social media will recommend content for users based on their already revealed preferences. A single background information flow forms a so-called 'filter bubble', reducing the possibility of people verifying information from multiple channels. As a result, people are increasingly unable to tell whether news is true or not, and the marketplace for ideas does not work effectively.

Second, speed of dissemination is also critical to establishing an effective dialogue mechanism. When Brandeis stated the 'marketplace of ideas' theory, he pointed out that only if there was 'enough time' to spread could 'more words' be used to remedy the misinformation properly. The advancement of media technology has greatly compressed the news production cycle and promoted news's instant update and circulation. Compared with the era of Brandeis, the time people have to resist fake news through dialogue has been greatly reduced. Although both real and false news spread faster under the same technical conditions, as discussed above, fake news is more likely to be shared and thus has a better spread effect.

Global Social Platforms Promote the Cross-Border Flow of Fake News

The transnational development of social media makes international communication transcend the scope of sovereign countries and evolve into supranational global communication (Zhi & Xuemeng, 2019). Under the influence of the empowerment of new media technology, the main channel for international audiences to obtain information shifts from traditional media to social media and helps social media gradually become an important front for international communication and political communication. Multiple subjects such as different countries, media, non-governmental organizations, and individuals have been involved in the global information flow and political participation, reconstructing a bottom-up, decentralized or decentralized, and flattening new international communication order (Zhi & Xuemeng, 2019). In this context, American politics has transcended territorial boundaries and become a global issue. With the participation of multiple subjects, a large number of fake news websites appeared quietly outside their borders with the help of the hot topic of the US election due to the incentive of low cost and short-term benefits. An investigation by Buzz Feed and Britain's newspaper Guardian revealed that more than 100 fake news websites originated in a small Macedonian town called

Vales. Most sites are riddled with pro-Trump fake news and are heavily rewarded by automated advertising engines such as Google AdSense for their high flow. Young people who set up websites influence each other in the real society and form the characteristics of cluster development (Subramanian, 2017). Of course, political factors, not just economic incentives, may also be the reason for the cross-border variation of fake news. For example, the news 'Russian influence on the US election through hacking and information manipulation', which spread in the American society, reflects this possibility. The globalized nature of social media builds the concept of 'global village' and makes it possible for all kinds of political and economic forces in the world to easily intervene in the domestic information market of the United States through the platform built by social media. Like a boomerang thrown out, fake news finally flew back in the name of freedom of speech and hit the United States, which vigorously promotes freedom of speech

The Battle of 'Fake News' Discourse Undermines the 'Marketplace of Ideas'

The term 'fake news' has become ubiquitous due to US political battles, but who has the right to define what is real? What is an accurate portrayal of social reality? These questions are getting less and less answered. 'True' and 'false' are no longer the classification criteria to define whether the information is correct or not, but become the political tools mobilized by parties to fight for the hegemony of social discourse in reality, a tool of discourse struggle. 'More speech' is no longer to supplement the ideological market with adversarial speech, but to directly define fake news, to define political opponents as 'fake news', thereby fundamentally denying the legitimacy and authority of the other party's discourse. In the end, many accusations of 'fake news' have flooded the marketplace of ideas. Instead of purifying it continuously, they ignored the market and completely emptied it.

To construct political identity and create conflicts, the term 'fake news' has become a key factor in the political power struggle between the left and the right in the United States. On the one hand, fake news has been used to associate it with right-wing voters, highlighting their irrational, even idiotic qualities, and criticizing and undermining the legitimacy of right-wing political parties in the United States. The concept began to simmer during the 2016 US election and reached its peak at Mr. Trump's inauguration. For example, before and after the election, BuzzFeed News found that 38% of the posts on the Facebook pages of the three right-wing parties were labeled as 'fake news', while only 20% of the posts on the pages of the left parties were labeled as 'fake news' (Craig & Alexander, 2016). In addition to specific news stories, the left included all right-wing media platforms that supported Trump's presidency as 'fake news' and alerted users in the form of browser plugins and the like. Slate reporter Will Oremus noted that 'some liberal and mainstream media' have begun to 'conflate the lines between fake news, conspiracy theories, and right-wing views, putting them all under the banner of fake news' (Will, 2016).

On the other hand, fake news is used to criticize the liberal media and mainstream media. Trump has said many times that 'fake news' is a political means to attack and discredit his presidency. On January 11, 2017, Trump wrote on Twitter: 'FAKE NEWS -- TOTAL WITCH HUNT!' (Trump, 2017). Since then, he has frequently used the concept of 'fake news' to launch attacks on CNN, New York Times, BuzzFeed News and other mainstream media. On April 27, 2020, Trump continued to tweet that 'fake news' is 'invisible enemy' and 'enemy of the people' (WWW, 2020). Interestingly, the media that Trump is attacking have all published stories linking fake news to Trump and the American right-wing that supports him. In other words, Trump is trying to place fake news in a completely opposite context and construct a connection between fake news and mainstream media to redefine the term and dominate the discourse. In this context, the mainstream media is perceived as biased, deliberately setting the agenda to promote liberalism rather than representing the people objectively and neutrally. Since the right-wing media have called the mainstream media 'corrupt and biased liars' (Jeffrey & Sobiraj, 2014), Trump and his party have only taken advantage of the concept of fake news, further reinforcing the existing discourse of 'do not trust the mainstream (fake news) media' (Trump, 2017).

On May 26, 2020, Trump publicly criticized the postal ballot election measures and incited racist violence on Twitter. The relevant tweets were labeled as 'fact check' by the platform administrator and even blocked. Two days later, the angry Trump immediately signed an executive order requesting the restriction of social media content exemption treatment. However, as it violates Section 230 of the Communications Decency Act, the news has aroused widespread criticism from American society, especially Internet companies. In the battle between the president and media platforms, Mr. Trump lashed out at Twitter for meddling in the election, saying that social media censors carry their political and ideological leanings. Social media, not to be outdone, saw the president's executive order as Trump's counterattack against Twitter by defending the freedom of speech.

Such incidents are not uncommon in American political parties. No one cares about whether the information itself is true or false. Political struggle is the focus of contradictions, and fake news has become a 'floating signifier.' The American right-wing, mainstream media, and liberals, each side, holds its own right to interpret fake news, thus occupying a dominant position over political discourse and imposing their own worldview on society. From the above series of contradictions, their struggle for the legitimacy of political identity and discourse hegemony has gone deep into the category of social system, affecting people's views on truth and democracy, and even affecting the formulation of relevant laws and regulations.

Reflection and Reconstruction of the Metaphor of ‘Marketplace of Ideas

After a century’s long development, Holmes’s “marketplace of ideas’ metaphor faces a severe challenge whether it can continue to survive. In the current era of information explosion and the prevalence of algorithm recommendation technology, an overly free and loose speech environment not only fails to restrict false information but damages the development of social democratic processes. As David Runciman, professor of politics at Cambridge University, puts it, fake news ‘makes Zuckerberg a bigger threat to American democracy than Trump’ (Kidd, 2018).

Around the world, countries are trying to find ways to deal with the global issue of fake news, and many countries have begun to try to solve the problem through appropriate government intervention. For example, Germany first introduced the Social Media Management Act, which requires social media platforms to remove information identified as fake news (as well as other related types, such as hate speech and content involving child pornography), and the platforms could face fines of up to 50 million euros if they violate it. In July 2018, the French parliament passed the ‘Anti-Fake News’ bill proposed by President Emmanuel Macron, allowing candidates to sue and delete controversial news reports during elections. It also requires media platforms to disclose the source and amount of funding for election-related advertisements in order to combat the spread of fake news during elections. In Britain, Theresa May’s government has also tried to find a solution to the problem of fake news by creating a national security communications unit. Its goal is: ‘To combat disinformation (or disinformation) from both government and non-government sources, monitor and locate sources of disinformation, and implement measures against them’ (French, 2020).

On April 1, 2019, Singapore established the Prevention of Online Misinformation and Cyber Manipulation Act, officially initiating the legislative process against online misinformation. The bill allows the government to force individuals and online platforms that publish fake news to correct or take down the news, and platforms that fail to comply could be fined S \$1 million (4.96 million yuan). The bill also states that any website that publishes three or more fake information repeatedly within six months and receives correction instructions must publish a statement announcing that its website has been listed as a source of fake information and cannot receive advertising revenue or other funds (Global Times, 2019). In Russia, media and the Internet that spread false information and have a certain impact on society will be judged as abuse of freedom of opinion and may be fined up to 1 million rubles (RMB 100,000). If the spreading act does not constitute a crime, the disseminator of false information can be fined up to 5,000 rubles (equivalent to 513 yuan) or be detained for up to 15 days (Yu, 2019). Similarly, Malaysia also has a law specifically aimed at the establishment of fake news -- the Anti-Fake News Act, which stipulates that citizens and digital publications who spread fake news online will face a fine of 500,000 ringgit (equivalent to 820,000 yuan) and up to six years imprisonment (Yu, 2019). It can be seen that many countries have incorporated the governance of fake news into mandatory measures such as government management and even legal systems.

Table 1. Legal Measures to Govern Fake News in Different Countries

Country	Governance focus	Law	Other measures
Germany	Hatred, inflammatory speech, false news content	The Social Media Management Act	Government intervention in platforms, fines
France	Fake news in the election	Anti-Fake News Act	Discuss the sources of funds for campaign advertisements on media platforms and allow candidates to sue
Britain	Fake news related to national security	Proposed legislation	Establish a national security communications department
Singapore	Fake news online	Prevention of Internet Fake Information and Internet	Administrative penalties such as government control and fines
Russia	Fake news in social media	Manipulation Act	Fine or administrative detention
Malaysia	Fake news	Proposed legislation	Fines or imprisonment, imposing more responsibilities on online service providers

By contrast, it's not hard to see how the marketplace of ideas metaphor in the United States has made it difficult to enforce laws against fake news. Although some litigation and regulatory measures based on specific hazards can have a certain control effect, their impact is weak in terms of the overall living environment of fake news, and it is futile to control fake news that crosses national boundaries. This caused the American scholars to rethink and re-interpret the theory of thought market.

First of all, legal metaphor is a concept (vehicle) used by jurists from other fields in order to understand or explain a certain legal issue (ontology), to realize the meaning transformation from other knowledge fields to the legal field (Yingtuan, 2020). However, it should be noted that the connotation of metaphor is not unchanged. With the change of the historical background and the different interpretations of the author's intention, transfer may become very complicated. When Holmes introduced the marketplace of ideas into court decisions, it was not clear what the original meaning of the metaphor was, and some people rightly associated Holmes's ideas with Enlightenment thought. In fact, the two are quite different. In the Enlightenment, Milton, Rousseau, and others believed that the truth was a transcendental existence independent of human consciousness, while the truth in Holmes's pragmatism was not absolute. He believed that the truth was empirical and was the product of human consciousness obtained through a free exchange in the thought market. As for the definition of the marketplace of ideas metaphor, judges have never come to a clear conclusion in a hundred years. Scholar Wat Hopkins found in the study, radio, newspapers, television, and other areas of the different media have different thought markets. The degree of openness and protection of each thought market will be affected by specific factors in the field considered by the court (Hopkins, 1996), and specific issues need to be analyzed in detail. In the era of online social media, factors such as diversified personal participation, fragmented virtual communities, and rapid development of artificial intelligence have undermined the basic assumptions of the "marketplace of ideas" metaphor, resulting in many problems like a shortage of real information, insufficient civic rationality, and market failure. Finding the truth in the 'more speech' of the thought market has become increasingly difficult.

Secondly, some scholars have proposed that fake news is not within the scope of protection of the thought market. Previously, people believed that it should be protected due to confusing the concepts of 'facts' and 'opinions' (Napoli, 2018). In 1974, in *Goetz v. Robert Welch, Inc.*, Justice Lewis Powell introduced the concept of the dichotomy of 'fact' and 'opinion'. "There is no such thing as a false opinion in the First Amendment," he explained. "No matter how pernicious an opinion may seem, the basis for its correction should not be the conscience of judges and juries, but the competition of other opinions. However, false statements of fact have no constitutional value" (Napoli, 2018). For Powell, the marketplace of ideas protects questionable ideas, not purposeful lies. 'Ideas' are subjective, and there is no absolute right or wrong. Free discussion and exchange of ideas can promote the democratic process. However, news is a channel to provide factual information to the public and to make informed decisions. That is, false information does not make sense for news. When facts are placed in the thought market to compete with opinions, the function of 'reporting facts' in the news will be difficult to achieve.

Justice William Rehnquist, in his *Hustler v. Farwell* decision, also took a stance that the US Supreme Court espoused the idea of a marketplace of ideas that protects opinions rather than false facts. 'Facts' are objective and unquestionable, and the competition between the 'marketplace of ideas' and the 'marketplace of facts' fundamentally undermines the meaning of the word 'fact,' which will ultimately result in false news under the guise of expressing opinions, to some extent, being protected by the First Amendment (Napoli, 2018). Professor Steven Gey pointed out that if obtaining the truth is the goal of the whole marketplace of ideas, there is no need to disseminate proven disinformation further. Disseminating false information (here refers to the fact statement which is knowingly false in narrow sense) directly harms the purpose of constructing the thought market. The sole purpose of the marketplace of ideas is to advance people's understanding of the nature of the world and the best ways to live in it. Suppose the marketplace of ideas leads human society into a misunderstanding of the nature of the world and its history, thus falling into the predicament of social dysfunction. In that case, it directly violates this tenet (Gey, 2008).

Third, Lyrissa Lidsky argues that the spread of fake news makes no sense for the ideal of democratic self-government. 'If the majority of citizens make policy decisions based on lies or half-truths of propaganda, the sovereignty lies not with the people, but with the purveyors of disinformation. If so, democracy is neither possible nor desirable' (Lidsky, 2010). As Alexander Meiklejohn pointed out, the market for ideas serves the process of democratic self-government, and a

fair democratic society requires voters to understand policies and make informed decisions. But fake news destroys the mechanism for voters to make rational decisions. It is very easy to confuse people's minds and lead voters to make wrong decisions that are not conducive to a democratic society. Deliberately disseminating empirically verifiable false information to voters in public issues was considered by Micklejohn to be unfair and irresponsible, and only responsible, normative facts should be 'fully and fairly stated' (Micklejohn, 1948). In his view, there is no justification for fake news to exist, whether for political purposes or for economic gain, and the marketplace of ideas theory cannot protect it from government censorship.

After a rethink and new interpretation of the marketplace of ideas, some scholars have become deeply concerned. They insist that the marketplace of ideas remains a valid metaphor for protecting fake news from government scrutiny, even when it is known to be harmful to fabricate or spread false news. On this basis, in the face of the incompatibility between the thought market theory and the principles of the First Amendment, Professor Stephen Guy tried to provide a solution from the perspective of the interpretation of the structural rights of the First Amendment. Different from the standpoint of individual rights, which emphasizes the benefits of protecting speech, structural rights focus on the value of freedom not controlled by the government in the legal provisions, which is a constitutional provision that protects the benign interaction between government and citizens while preventing excessive intervention of government power (Gey, 2009).

From the perspective of structural interpretation of rights, the First Amendment contains a 'deep suspicion of the sincerity of government authorities' -- suspecting that it has a specific political tendency and purpose in judging the authenticity of information (Gey, 2009). Simply put, fake news must be protected by the First Amendment, not because it does anything good for truth discovery or democracy, but because a truly democratic, self-governing country cannot allow those temporarily empowered to decide what is true and what is not. Fake news, which is protected, is merely a 'collateral beneficiary of ideological agnosticism' and is part of the interpretation of First Amendment structural rights (Gey, 2009). In this interpretation, the temporary 'ruler' has no right to tell the people what is right, and the truth dominated by the government is opposed, which not only satisfies Micklejohn's assertion of democratic autonomy but also conforms to Holmes's understanding of 'not believing in universal truth'.

After all, since the government should not have the power to determine what is true, who should decide? Rodney Smolla argues that 'In an open culture, the decision should rest with the speaker, not with the government official, whether the person is of high or low status.' (Smolla, 1992). Now that the government is not allowed to censor false information strictly, it means that individuals and media organizations must do more to combat fake news. These efforts can be summarized into three main areas: providing 'more speech', education and self-regulation (Calvert, 2018). First, in the case of fake news, 'more speech' often plays its role through nongovernmental fact-checking organizations or mainstream news outlets. These institutions will actively verify the news released by other subjects, and correct and refute the false content. The Poynter Institute for Media, for example, has teamed up with 39 global news organizations to launch the International Fact-Checking Network, which aims to conduct non-partisan, impartial and transparent news fact-checking (Brenner, 2017).

Second, if government's role in governance is to be seen, it must be at the educational level, by working with schools or communities to improve citizens' digital media literacy. A high level of media literacy is a key factor in the successful fight against fake news, which has been called the 'vaccine of propaganda' by propaganda scholar Nancy Snow (Snow, 2018). For media literacy education to truly enter the classroom and become a compulsory course for students, it requires both capital investment and the country's political will (Bei, 2019). Finally, the effective way to deal with fake news is the self-regulation of media organizations. In 2019, Facebook launched the 'News Tag' function, enabling news from reliable sources to appear prominently on the platform (Bei, 2019). During the New Coronavirus epidemic in 2020, Google also issued Google SOS Alert, which pushed WHO information to the top of search results for coronavirus-related queries (Zhuo, 2018).

While some platforms have begun to take measures to combat fake news, we should also be aware that it is unrealistic for for-profit social media platforms to rely solely on self-management to maximize the public interest. Mr. Trump's executive order on Twitter, while politically motivated, also sends a signal to society that social media platforms need to be appropriately managed by the administration. The US Senate has proposed the Honest Ads Act, which requires social media platforms to disclose information about advertisers, funds, and target audiences of online advertisements (especially political advertisements) to reduce the possibility of foreign forces

interfering in elections. Obama also signed the Counter-Propaganda Act into law and established an Information Analysis and Response Center at the State Department to include the collection and identification of foreign government Propaganda and rumors as part of a national strategy preparation. Even if these bills cannot directly regulate false information, they have also played the function of providing ‘more speech’ and supervision by assisting NGOs or regulating media platforms, indirectly achieving their goals. In view of this, in order to establish and improve the management mechanism of social media and make the marketplace of ideas operate effectively, government agencies, platform managers, social organizations, and even individual users should actively act and assume the corresponding main responsibility, which is crucial to both the individual freedom of speech and the process of social democracy. Even so, in the United States, legal governance of fake news is still difficult. The internal governance methods of the marketplace of ideas are far from the effects of laws and regulations and can only be used barely through minimal litigation liability and industry self-discipline. The problem of fake news is difficult to cure. Just as the disputed issue of gun rights, the debate over the market for ideas will continue.

CONCLUSION

After a century of growth, Holmes’ metaphor for a “marketplace of ideas” faces a serious test to see if it can survive. A too free and loose speech environment does not only fail to control misleading information in today’s era of information explosion and the presence of algorithm recommendation technology, but it also harms the development of social democratic processes. Germany, France, the United Kingdom, Singapore, Russia, and Malaysia are among the countries attempting to address the worldwide issue of false news. Many nations have included false news regulation into necessary measures such as government management and even legal systems, as can be shown. On the other hand, in the United States, it is easy to see how the marketplace of ideas concept has made it impossible to enforce rules against fake news. Although some legal and regulatory actions focused on specific dangers may have some control effect, their impact on the general living environment of false news is limited, and controlling fake news that crosses national borders is pointless.

To begin with, a legal metaphor is a notion (vehicle) utilized by jurists from other disciplines to comprehend or explain a specific legal issue (ontology) to realize the meaning transition from other domains of knowledge to the legal field. The truth was a creation of human awareness and was empirical. Second, some academics have argued that false news does not fall within the umbrella of thought market protection. People previously believed it should be preserved due to misunderstanding the terms “facts” and “opinions.” There is no absolute right or wrong when it comes to ‘ideas.’ The democratic process can be aided by open debate and the interchange of ideas. However, news is a medium for disseminating accurate information to the public to make educated judgments; therefore, incorrect information has no place in the news. Third, according to Lyrissa Lidsky, the proliferation of fake news contradicts the concept of democratic self-government. Internal governance measures employed by the marketplace of ideas are far from the impacts that laws and regulations may produce. They can only be applied with considerable caution and industry self-discipline. Fake news is a challenging problem to solve.

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