REGULATING FACTS: A PROCEDURAL FRAMEWORK FOR IDENTIFYING, EXCLUDING, AND DETERRING THE INTENTIONAL OR KNOWING PROLIFERATION OF FAKE NEWS ONLINE

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* J.D., University of Illinois College of Law, 2019; B.S., University of Central Florida, 2013. This note is dedicated to my grandmother and birthday twin, Gloria Lopez, whom I miss very much. I want to thank my parents, Gregg and Wendy, for pushing me to make full use of my talents and intellect, my older brother and sister, Christopher and Rebecca, who challenge me every day, and my grandmother, Nancy, for seeing my unrealized potential. I also want to thank Professor Arden Rowell for her insight and guidance, and the JLTP editors for their work in editing this Note.

I. INTRODUCTION

"[W]herever the people are well informed they can be trusted with their own government."[1] But how can the people be well informed in a world where misinformation is intentionally circulated? With one of the defining features of the 2016 election being the rise of "fake news,"[2] Thomas Jefferson's words are especially relevant.

Virtually non-existent before the 2016 election, the term 'fake news' quickly became part of the national lexicon.[3] And while definitions of fake news differ, for purposes of this Note the term fake news refers to false assertions that are republished "in the guise of a genuine news story."[4] Fake news stories were spreading like wildfire during the 2016 election.[5] This sometimes deliberate but always intense proliferation of misinformation developed on the Internet, and was expedited by social media platforms such as Facebook and Twitter.[6] These sites accelerated the spread of half-truths, deceptive narratives, and patently false allegations, i.e. fake news.[7]

When confronted with a fake news story, it can be hard to distinguish between fake news that is just barely fake, or news that is fake for an arguably legitimate reason such as satire.[8] "In its purest form, fake news is completely made up, [and] manipulated to resemble credible journalism and attract maximum attention . . . ."[9] Sometimes, the purpose of a fake news story is arguably legitimate: to generate revenue via advertisement.[10] For example, "a man running a string of fake news sites from Los Angeles told National Public Radio that he made as much as $30,000 a month from advertising that rewards

1. *Letter from Thomas Jefferson to Richard Price*, FOUNDERS ONLINE, http://founders.archives.gov/documents/Jefferson/01-14-02-0196 (last visited Feb. 17, 2018).

2. Anthony J. Gaughan, *Illiberal Democracy: The Toxic Mix of Fake News, Hyperpolarization, and Partisan Election Administration*, 12 DUKE J. CONST. L. & PUB. POL'Y 57, 59 (2017).

3. Alison Flood, *Fake News Is 'Very Real' Word of the Year For 2017*, THE GUARDIAN (Nov. 1, 2017 8:01 PM), https://www.theguardian.com/books/2017/nov/02/fake-news-is-very-real-word-of-the-year-for-2017.

4. Gaughan, *supra* note 2, at 66.

5. *Id*.

6. *Id*.

7. *Id*.

8. Elle Hunt, *What Is Fake News? How to Spot It and What You Can Do to Stop It*, THE GUARDIAN (last modified Dec. 17, 2016, 5:00 PM), https://www.theguardian.com/media/2016/dec/18/what-is-fake-news-pizzagate.

9. *Id*.

10. *Id.*

high traffic."[11] In another case, teenagers in a town in Macedonia operated over 100 pro-Trump "fake news websites"[12] and claimed to have made up to $2,500 a day from advertising on just one website.[13] Humor and satire sites such as The Onion (arguably a "legitimate" fake news publication) have been generating advertisement revenue by publishing outlandish stories for years.[14]

But, what separates the two is that quality of "truthiness" that fake news embodies.[15] In fact, the most successful fake news stories, as with humor, are deliberately pitched to seem just ridiculous enough to be true.[16] Examples of typical fake news stories include: "Transgender tampon now on the market," "Pope Francis at White House: 'Koran and Holy Bible are the same,'" and "U2's Bono rescued during terror attack, issues sick message to victims."[17] Fake news is often hosted on websites that follow the design conventions of online news media, with bland titles such as "Civic Tribune" and "Life Event Web."[18] These are meant to offer a "semblance of legitimacy" as the stories are expected to travel online via social media.[19]

It is this believable veneer coupled with the ability to instantly share anything on social media that makes fake news a serious problem for our democratic society and the economy.[20] And what makes this problem difficult to address is that fake news can affect elections, companies, and individuals.[21] For that reason, this Note will focus on the latter: individuals. In doing so, this Note argues that the Federal Communications Commission (FCC) could facilitate the identification and removal of fake news online through a proposed regulatory framework and that these regulations would dissuade intentionally or knowingly proliferating fake news stories online without violating the First Amendment. Part II first provides a history of early federal legislation in the area of fake news, the common law of defamation, and relevant past FCC regulations. Part II then looks at current efforts to address fake news by Congress, the international community, and the private sector.

Part III begins by touching on the FCC's current statutory authority in regulating broadband Internet service providers (ISPs) and how the FCC could draw on this power to regulate fake news. Drawing on this authority, Part III then suggests expanding libel law to embrace a regulatory framework using the Digital Millennium Copyright Act's (DMCA) notice-and-takedown procedure as an archetype, while simultaneously incorporating historical and modern lessons from Part II. Next, Part III contemplates whether the FCC could create

11. *Id.*
12. *Id.*
13. *The Fake News Machine: Inside a Town Gearing Up for 2020*, CNN MONEY, http://money.cnn.com/interactive/media/the-macedonia-story (last visited Feb. 18, 2019).
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. Micah Zenko, *The Problem Isn't Fake News from Russia. It Is Us.*, FOREIGN POL'Y (Oct. 3, 2018, 3:22 PM), https://foreignpolicy.com/2018/10/03/the-problem-isnt-fake-news-from-russia-its-us/.
21. *Id.*

such a procedure from its current mandate. Finally, Part III considers the regulation's First Amendment implications. Part IV recommends that Congress pass a comprehensive bill affirmatively granting the FCC a new mandate in facilitating the identification, exclusion, and deterrence of fake news online, modeled after the DMCA's notice-and-takedown procedure.

II. BACKGROUND

In the 2016 election, fake news spread at an alarmingly fast rate, sometimes in as little as two days.[22] This is partly due to the sharing of fake news stories on social media, which has facilitated the spread of fake news like never before.[23] The reach of fake news is even more staggering as it is estimated that millions of Internet users viewed fake news stories during the 2016 election.[24] To further complicate the matter, "[t]he public has proven to be remarkably gullible when it comes to fake news circulated on the Internet."[25] A recent study found that "Americans over age 60 were much more likely to visit a fake news site than younger people."[26] At the same time, another study found that young people, who tend to be more technologically sophisticated than older Americans, are "easily duped" by fake news stories.[27] Since the quality of self-government depends on voters making informed choices, the public's inability to distinguish truth from fact is particularly troubling for a democracy.[28] Along with societal implications, fake news can cause economic harm.[29]

Six weeks before Election Day, a Republican legislative aide in Maryland created a fake Internet newspaper in order to circulate a completely fabricated story that Ohio Democrats had been caught in a criminal conspiracy to commit election fraud.[30] More than six million people shared the story on the Internet.[31] Because the fake news story had been so widely publicized, the Ohio election authorities were forced to launch an investigation into the allegations.[32] Eventually the authorities debunked the story, but the damage had already been done.[33] Taxpayer dollars were needlessly spent and the creator of the fake news

22. Gaughan, *supra* note 2, at 67; Sapna Maheshwari, *How Fake News Goes Viral: A Case Study*, N.Y. TIMES (Nov. 20, 2016), https://www.nytimes.com/2016/11/20/business/media/how-fake-news-spreads.html (examining a fake news story and how quickly it spread).

23. Gaughan, *supra* note 2, at 67.

24. *Id*.; Ahiza Garcia & Justin Lear, *5 Stunning Fake News Stories That Reached Millions*, CNN (Nov. 2, 2016), http://money.cnn.com/2016/11/02/media/fake-news-stories.

25. Gaughan, *supra* note 2, at 68.

26. Benedict Carey, *'Fake News': Wide Reach but Little Impact, Study Suggests*, N.Y TIMES (Jan. 2, 2018), https://www.nytimes.com/2018/01/02/health/fake-news-conservative-liberal.html.

27. Gaughan, *supra* note 2, at 68; Patricia Reaney, *Teens More Resilient, Tech Savvy Than Older Millennials: Study*, REUTERS (June 19, 2013), http://www.reuters.com/article/us-millennials-poll-idUSBRE95I1J420130619; Brooke Donald, *Stanford Researchers Find Students Have Trouble Judging the Credibility of Information Online*, STAN. NEWS CTR. (Nov. 22, 2016), https://ed.stanford.edu/news/stanford-researchers-find-students-have-trouble-judging-credibility-information-online.

28. Donald, *supra* note 27.

29. Gaughan, *supra* note 2, at 69.

30. *Id*. at 69–70.

31. *Id*. at 70.

32. *Id*.

33. *Id*.

story earned about $22,000 in online advertising revenue.[34] Seeing as fake news has significant societal and economic consequences,[35] something must be done to dissuade its creation and propagation.

In order to determine how to combat fake news and promote factually correct information, it is important to first examine past legislation and regulations that have addressed similar subject matter. As such, this Section identifies historically relevant federal laws, Supreme Court cases, and federal regulations, while addressing whether they could be extended to apply to fake news as we understand it today. It also looks at current efforts to combat the rise of fake news by Congress, social media companies, and other nations.

A. Historical Paradigms of Fact Regulation

The ease with which fake news spreads and its ability to reach millions of Internet users in a matter of days is a problem for America's society and its economy.[36] "Vice President Al Gore once celebrated the Internet as the 'information superhighway,' but instead of becoming a powerful instrument for the distribution of facts, the Internet has confused and misled Americans as much as it has informed them."[37] As Apple CEO Tim Cook recently said, "[t]he bigger issue is that some of these tools are used to divide people, to manipulate people, to get fake news to people in broad numbers so as to influence their thinking."[38] For this reason, in looking for a solution, it is important to begin with history.

1. The Alien and Sedition Acts: 18th Century Fake News Legislation

While many people may think of fake news as a 21st century trend, in fact, it has been around since this America's founding in the 18th century.[39] Early U.S. newspapers spread news "with little regard for accuracy."[40] Benjamin Franklin, editor of the Pennsylvania Gazette, even suggested "that printers should simply print whatever came in over the transom in hopes that 'when Truth and Error have fair Play, the former is always an overmatch for the latter.'"[41] It was this specter of fake news that fueled passage of the Sedition

34. Gaughan, *supra* note 2, at 70; Ovetta Wiggins, *Aide to Md. Lawmaker Fabricated Article on Fraudulent Votes for Clinton*, WASH. POST: MD. POLITICS (Jan. 18, 2017), https://www.washingtonpost.com/local/md-politics/aide-to-md-lawmaker-fabricated-article-on-hillary-clinton-rigging-the-election/2017/01/18/5219bd0c-ddd7-11e6-acdf-14da832ae861_story.html.

35. Wiggins, *supra* note 34.

36. *See* Gaughan, *supra* note 2, at 74 (noting the serious political implications for the U.S., of the spread of fake news, misinformation, and false allegations over the internet).

37. *Id.*

38. Erik Ortiz, *Apple's Tim Cook Says Dividing People a Greater Issue Than Russian Facebook Ads*, NBC NEWS (Nov. 1, 2017), https://www.nbcnews.com/tech/apple/apple-s-tim-cook-says-dividing-people-greater-issue-russian-n816536.

39. Jordan E. Taylor, *Why Trump's Assault on NBC and "Fake News" Threatens Freedom of the Press—and His Political Future*, WASH. POST: MADE BY HIST. (Oct. 12, 2016), https://www.washingtonpost.com/news/made-by-history/wp/2017/10/12/why-trumps-assault-on-nbc-and-fake-news-threatens-freedom-of-the-press-and-his-political-future/?utm_term=.900721a94151.

40. *Id.*

41. *Id.*

Act in 1798,[42] less than ten years after Congress had passed, and the states had ratified, the First Amendment, which states in part that "Congress shall make no law . . . abridging the freedom of . . . the press."[43]

Seemingly violating this "freedom of the press" clause of the First Amendment,[44] the United States Congress passed the Sedition Act, which "made it a crime to publish or utter 'any false, scandalous[,] and malicious writing or writings against the government of the United States, . . . with intent to defame . . . or to bring [it] . . . into contempt or disrepute.'"[45] Against the backdrop of the "Quasi-War" with France, "arch-Republican printer Benjamin Franklin Bache published a letter from the French Foreign Minister Charles-Maurice de Talleyrand that tried to smooth over some of the diplomatic challenges facing the two nations."[46] Federalist commentators saw the letter as "lies from a foreign adversary" and in response, pounced on Bache for printing it.[47] "On the floor of the House of Representatives, Federalist George Thatcher [even] denounced Bache as a foreign agent acting under the 'order of the [French] Executive Directory.'"[48]

The Federalists, led by President John Adams, thus "used Talleyrand's missive to push the so-called Alien and Sedition Acts, which limited the freedom of the press and the movement of foreign nationals," basing its passage on the premise that "the First Amendment never intended to protect false news."[49] Whatever the basis, the Sedition Act became a vehicle for the Federalist government to stifle Republican dissent[50] and essentially prohibited public opposition to the government.[51] "After Adams signed the Sedition Act into law, his government quickly prosecuted printers and others for critical statements and reprinting news with which they disagreed."[52]

The Sedition Act ultimately led to the electorate revolting against the Federalists and their perceived attempt to limit press freedom.[53] This contributed to President Adams' failed reelection bid and the national decline of the Federalist party.[54] Moreover, "in a final, ironic twist, Federalist writers and printers quickly found themselves victims of their own legislation after Thomas

42. *Id*.

43. U.S. CONST. amend. I; *Freedom of Religion, Speech, Press, Assembly, and Petition*, NAT'L CONST. CTR., https://constitutioncenter.org/interactive-constitution/amendments/amendment-i (last visited Feb. 18, 2019).

44. David Jenkins, *The Sedition Act of 1798 and the Incorporation of Seditious Libel into First Amendment Jurisprudence*, 45 AM. J. LEGAL HIST. 154, 154 (2001).

45. Gregg Costa, *John Marshall, the Sedition Act, and Free Speech in the Early Republic*, 77 TEX. L. REV. 1011, 1025 (1999).

46. Taylor, *supra* note 39.

47. *Id*.

48. *Id*.

49. *Id*.

50. Costa, *supra* note 45, at 1025–26.

51. *The Alien and Sedition Acts*, USHISTORY.ORG, http://www.ushistory.org/us/19e.asp (last visited Dec. 6, 2017) [hereinafter *Alien and Sedition Acts*].

52. Taylor, *supra* note 39.

53. *Id*.

54. *Id*.

Jefferson won the presidency and began prosecuting his adversaries at an even higher rate than the Adams administration had done."[55]

In the end, the Sedition Act expired by its own terms on March 3, 1801.[56] "[It] clearly violated individual protections under the first amendment of the Constitution; however, the practice of 'judicial review' whereby the Supreme Court considers the constitutionality of laws was not yet well developed."[57] Thus, because prosecution for lies about the government are outlawed in the United States and since that kind of speech is clearly protected by the First Amendment, the Sedition Act teaches us that any attempt at fake news legislation must pass muster under the First Amendment.[58]

2. Defamation: A Common Law Doctrine Effective Against Fake News

At common law, defamation, which is defined as "harm to the reputation or good name of another by the making of a false statement to a third person,"[59] has been recognized since the sixteenth century.[60] "Defamation law developed not only as a means of allowing an individual to vindicate his good name, but also for the purpose of obtaining redress for harm caused by such statements."[61] Originally, defamatory statements were presumed to be false and the truth served as a complete defense to a defamation suit.[62] Therefore, "to state a cause of action for defamation, one needed to allege only the unprivileged publication of a false and defamatory statement that damaged the plaintiff."[63] Even an opinion could be subject to a defamation suit as there were generally no restrictions on that type of actionable statement.[64]

Later, the common law addressed this issue by "incorporating the privilege of 'fair comment' as an affirmative defense to a defamation action.[65] The fair comment defense provided a speaker with legal immunity for 'the honest expression of opinion on matters of legitimate public interest when based upon a true or privileged statement of fact.'"[66] One could invoke fair comment only if his or her statement was a matter of public concern, based upon true or privileged facts, represented the speaker's actual opinion, and was not made for

55. *Id*.

56. *The Alien and Sedition Acts: Defining American Freedom***,** CONST. RIGHTS FOUND., http://www.crf-usa.org/america-responds-to-terrorism/the-alien-and-sedition-acts.html (last visited Mar. 26, 2019).

57. *Alien and Sedition Acts*, *supra* note 51.

58. Flemming Rose, *History Proves How Dangerous It Is to Have the Government Regulate Fake News*, WASH. POST: WORLDPOST (Oct. 3, 2017), https://www.washingtonpost.com/news/theworldpost/wp/2017/10/03/history-proves-how-dangerous-it-is-to-have-the-government-regulate-fake-news/?utm_term=.30188e155734.

59. *Defamation*, BLACK'S LAW DICTIONARY (10th ed. 2014).

60. William A. Williams, *A Necessary Compromise: Protecting Electoral Integrity Through the Regulation of False Campaign Speech*, 52 S.D. L. REV. 321, 330 (2007) (citing Milkovich v. Lorain Journal Co., 497 U.S. 1, 11 (1990)).

61. Milkovich v. Lorain Journal Co., 497 U.S. 1, 12 (1990).

62. Williams, *supra* note 60, at 330 (citing Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 777 (1986); *Milkovich*, 497 U.S. at 13).

63. Williams, *supra* note 60, at 330.

64. *Id*.

65. *Milkovich*, 497 U.S. at 13.

66. *Id*.

the sole purpose of causing harm.[67] "Thus under the common law, the privilege of 'fair comment' was the device employed to strike the appropriate balance between the need for vigorous public discourse and the need to redress injury to citizens wrought by invidious or irresponsible speech."[68]

Traditionally a matter of state statutory and common law, defamation jurisprudence expanded to the federal level with the landmark case of *New York Times Co. v. Sullivan* in 1964.[69] There, the Supreme Court held that "the First Amendment's guarantee of free speech applied with equal force—via the Fourteenth Amendment—to laws enacted by either the federal government or by states," essentially federalizing the common law of defamation, "at least with respect to the defamation of public officials."[70] Furthermore, the Court held that the "[a]llowance of the defense of truth, with the burden of proving it on the defendant . . . [was] inconsistent with the First and Fourteenth Amendments."[71] According to the Court, the First Amendment instead guarantees

> a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.[72]

And with that, the Supreme Court constructed "a rule for public official defamation cases that today remains basically identical to the rule articulated more than forty years ago."[73]

Subsequent cases expanded the *New York Times* standard, making *New York Times* and its progeny an extremely narrowly-tailored test that is highly protective of speech.[74] The final significant development of the *New York Times* standard came in the 1990 case of *Milkovich v. Lorain Journal Co.*, which made an important distinction between fact and opinion.[75] Before, the lower courts "were divided over the question of whether or not a statement of opinion, as opposed to a statement of fact, was constitutionally immunized from a defamation action."[76] This division stemmed from dictum in *Gertz v. Robert Welch Inc.*:

> Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact.[77]

67. *Id.*
68. *Id.* at 14.
69. Williams, *supra* note 60, at 331.
70. *Id.*
71. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279 (1964).
72. *Id.* at 279–80.
73. *See* Williams, *supra* note 60, at 333–36 (tracking the evolution of the *New York Times* standard).
74. *Id.*
75. *Id.* at 336.
76. *Id.*
77. Gertz v. Robert Welch, Inc., 418 U.S. 323, 339–40 (1974).

In resolving this split, the *Milkovich* Court stated that the proper inquiry in a defamation suit was whether a statement was "sufficiently factual to be susceptible of being proved true or false" with reference to "a core of objective evidence."[78] "This test was based primarily on [*Philadelphia Newspapers, Inc. v. Hepps*], which the *Milkovich* Court read to stand for the proposition that 'a statement on matters of public concern must be provable as false before there can be liability under state defamation law.'"[79]

Accordingly, the question was not "whether a statement itself sounded in fact or opinion, but whether it contained a demonstrably false 'factual connotation'" because wholesale an opinion exemption would be unnecessary due to the safeguards already incorporated into the *New York Times* standard.[80] "Therefore, the Court believed that the 'breathing space' required by the freedom of expression was 'adequately secured by existing constitutional doctrine without the creation of an artificial dichotomy between "opinion" and fact.'"[81]

As it stands today, the *New York Times* standard requires that a valid defamation statute must:

> 1) apply only to statements that may be proven false by reference to objective evidence, and which are not obviously intended as hyperbole; 2) place the burden of proving both falsity and actual malice upon the plaintiff in a civil suit, or upon the state in criminal proceeding; 3) establish the evidentiary burden as clear and convincing evidence in civil cases, and beyond a reasonable doubt in a criminal prosecution; and 4) define "actual malice" as a statement made with knowledge of its falsity or with reckless disregard of whether or not it is false.[82]

In addition, when a court applies and interprets such statutes it must be aware that:

> 1) the reckless disregard prong of the actual malice test is judged on a subjective standard; 2) when ruling on a motion for summary judgment or for a directed verdict, the court must take into consideration the evidentiary burden that will be required at trial; and 3) although falsity and actual malice are questions of fact at trial, the New York Times standard requires independent appellate review of judgments or convictions under such statutes.[83]

This underscores how the *New York Times* standard is "highly protective of speech"[84] and its approach, particularly the distinction between fact and opinion, should be incorporated into any regulation designed to dissuade fake news.

78. Milkovich v. Lorain Journal Co., 497 U.S. 1, 21 (1990).
79. Williams, *supra* note 60, at 337 (quoting *Milkovich*, 497 U.S. at 19).
80. *Id*.
81. *Id*.
82. *Id*. at 338.
83. *Id*.
84. *Id*.

3. The Fairness Doctrine: FCC Mandate to Cover Issues in a Fair Manner

In 1949, the Federal Communications Commission (FCC or Commission) instituted the Fairness Doctrine, a policy requiring broadcast licensees to cover issues of public importance and to do so in a fair manner.[85] It consisted of two basic requirements:

> (1) that every licensee devote a reasonable portion of broadcast time to the discussion and consideration of controversial issues of public importance; and
>
> (2) that in doing so, [the broadcaster must be] fair—that is, [the broadcaster] must affirmatively endeavor to make . . . facilities available for the expression of contrasting viewpoints held by responsible elements with respect to the controversial issues presented.[86]

Concerning controversial issues of public importance, broadcasters had an affirmative duty "to determine what the appropriate opposing viewpoints were . . . and who was best suited to present them. If sponsored programming was not an option, the broadcasters had to provide it at their own expense."[87]

The FCC's statutory power to create the Fairness Doctrine came from the Communications Act of 1934, which requires the FCC, "from time to time, as public convenience, interest or necessity requires" to promulgate "such rules and regulations and prescribe such restrictions and conditions . . . as may be necessary to carry out the provisions of" the Communications Act.[88] In *National Broadcasting Co. v. United States*, the Supreme Court held that this mandate granted the FCC broad powers to ensure that broadcast stations operate in the public interest.[89] And "[i]n the spirit of this broad mandate," the FCC issued a report that "affirmatively established the duty of broadcast licensees to cover controversial issues of public importance in a fair and balanced manner."[90] That duty became known as the Fairness Doctrine.[91]

"In reviewing particular broadcasts for potential violations of the Fairness Doctrine, the FCC looked to whether the licensee had acted 'reasonably and in good faith to present a fair cross-section of opinion on the controversial issue.'"[92] The FCC took no action against harmless errors and honest mistakes and "the merits of the actual competing viewpoints presented were not under review by the agency."[93] The consequences for failure to comply with the Fairness Doctrine ranged from "a requirement that time be granted to unaired

85. KATHLEEN ANN RUANE, CONG. RESEARCH SERV., R40009, FAIRNESS DOCTRINE: HISTORY AND CONSTITUTIONAL ISSUES, 1, 2 (2011).

86. *Id.* at 2 (citing *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 29 FED. REG. 10426 (1964)).

87. *Id.*

88. *Id.* (quoting 47 U.S.C. § 303 (2012)).

89. Nat'l Broad. Co. v. United States, 319 U.S. 190, 219 (1943).

90. RUANE, *supra* note 85, at 2 (citing 13 FCC Rep. 1246 (1949)).

91. *Id.*

92. *Id.* at 3 (quoting *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 29 FED. REG. 10416 (1964)).

93. *Id.*

viewpoints, to punishment as severe as a loss of license or a substantial demerit in a comparative renewal proceeding."[94]

An attempt to reinstate the Fairness Doctrine, even in the context of fake news online, would likely be met with a constitutional challenge.[95] Those opposing the doctrine would argue that it violates the First Amendment.[96] The Supreme Court case of *Red Lion Broadcasting Co., Inc. v. Federal Communications Commission*, decided in 1969, addressed such an argument.[97] The two questions that the *Red Lion* Court addressed were "whether the FCC had the authority to create and to enforce the Fairness Doctrine" and "whether requiring broadcasters to cover issues of public importance and to present opposing views on those issues fairly violated the broadcasters' First Amendment rights to free speech."[98]

Concerning the first question, the Court "held that the Fairness Doctrine was a legitimate exercise of the FCC's congressionally delegated authority" because "Congress [had] granted the power to choose broadcast licensees to the FCC and instructed the agency to consider the public interest when exercising that power."[99] Additionally, the Fairness Doctrine did not impinge upon the broadcasters' First Amendment right to freedom of speech because of the scarcity of radio frequencies.[100] As the Court stated:

> Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.[101]

Therefore, the Supreme Court upheld the constitutionality of the Fairness Doctrine.[102]

In the 1980s, and in light of developments in First Amendment law, the FCC began examining its application of the Fairness Doctrine and questioned its continued necessity.[103] Although the Commission acknowledged the Supreme Court's upholding of the doctrine as constitutional, it nevertheless determined that that constitutionality had become suspect.[104] Ultimately, after studying "the effect of its enforcement of the Fairness Doctrine upon

94. *Id.* (citing *Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning Alternatives to the General Fairness Doctrine Obligations of Broadcast Licensees*, 2 FCC Rcd. 5272 (1987)).
95. *Id.* (citing 13 FCC Rept. 1246 (1949)).
96. *Id.*
97. *Id.* at 4 (citing Red Lion Broad. Co., Inc. v. FCC, 395 U.S. 367 (1969)).
98. *Id.*
99. *Id.* at 4–5.
100. *Id.* at 5.
101. Red Lion Broad. Co., Inc. v. FCC, 395 U.S. 367, 390 (1969) (citations omitted).
102. RUANE, *supra* note 85, at 5.
103. *Id.* (citing *General Fairness Doctrine Obligations of Broadcast Licensees, Report*, 50 FED. REG. 35418 (1985)).
104. *Id.*

broadcasters" the FCC "came to the conclusion that the doctrine chilled speech substantially."[105]

This chilling effect arose under the second prong of the Fairness Doctrine.[106] Specifically, "broadcasters most often were determined to have violated the doctrine by failing to provide all valid opposing viewpoints air time on a given issue."[107] And because "[b]roadcasters rarely faced enforcement for failing to address issues of public importance in the first place . . . [they] could avoid the expense of defending enforcement actions by simply refusing to cover issues of public importance."[108] With this in mind, any regulation directed at fake news online should be crafted so as to avoid any chilling effect on free speech.

B. Modern Efforts in the Fight Against Fake News

1. The Honest Ads Act: Congress Steps in the Right Direction

Driven by concerns about potential Russian meddling in the 2016 election, Senators Amy Klobuchar, Mark Warner, and John McCain "introduced new campaign finance legislation . . . that would force greater disclosure about the political advertising that runs online."[109] The Honest Ads Act's purpose "is to enhance the integrity of American democracy and national security by improving disclosure requirements for online political advertisements in order to uphold the United States Supreme Court's well-established standard that the electorate bears the right to be fully informed."[110] But, it is not without its shortcomings.[111]

The Act advocates for the same standards as radio and television when it comes to political ads.[112] However, the tagline most TV viewers and radio listeners see and hear "is but one bread crumb in a convoluted money trail."[113] Plus, "[i]ts twists and turns can require physically inspecting public files at every individual television station in the country" and "[i]t can be impossible to sort out what or whom many political action committees truly represent."[114] Yet, the bill is in fact a step in the right direction as it is necessary in the greater scheme of "align[ing] new technologies with current regulations."[115]

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105. *Id.* (citing *General Fairness Doctrine Obligations of Broadcast Licensees, Report*, 50 FED. REG. 35422 (1985)).

106. *Id.* at 6.

107. *Id.*

108. *Id.*

109. Byron Tau, *Proposed 'Honest Ads Act' Seeks More Disclosure About Online Political Ads*, WALL ST. J. (Oct. 19, 2017, 5:12 PM), https://www.wsj.com/articles/proposed-honest-ads-act-seeks-more-disclosure-about-online-political-ads-1508440260.

110. Honest Ads Act, S. 1989, 115th Cong. (2017).

111. Adam Sharp, *'Honest Ads' on Social Media One Step to An Honest Political System*, THE HILL (Oct. 31, 2017, 10:20 AM), http://thehill.com/opinion/technology/357973-honest-ads-on-social-media-one-step-to-an-honest-political-system.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

2. The Private Sector Solution to Fake News Stories

In the private sector, Facebook will soon be flagging "stories of questionable legitimacy with an alert that says, 'Disputed by 3rd party fact-checkers.'"[116] Google is also taking similar precautions saying that websites that spread fake news stores would be banned from using its online advertising service.[117] "Facebook, Google, and other websites facilitated the dissemination of news—fake and real alike—to a degree impossible in previous eras."[118] These decisions are thus clear signals that Internet companies can "no longer ignore the growing outcry over their power in distributing information to the American electorate."[119]

3. International Responses to the Fake News Epidemic

The international community has taken a harder stance, especially Italy's antitrust chief Giovanni Pitruzzella who has suggested that "[European Union] countries set up a network of independent agencies to tackle the spread of false information online."[120] He argues that "tackling fake news should not be left up to social media companies, but instead . . . by the state through independent authorities with the power to remove fake news and impose fines, coordinated by Brussels, similar to the way the EU regulates competition."[121]

On the other hand, European Commission President Jean-Claude Juncker has called on social media firms to do more to combat fake news since it is in the companies' interests to do so because "credibility is their most important asset."[122] In addition, Germany is planning a law to address fake news and hate speech on social media and will impose fines of up to €500,000 for websites that violate the law.[123] Finally, the Czech Republic has "announced that it would be launching a center to monitor fake news in 2017."[124] It remains to be seen which approach will be the most effective, but the international community is making some degree of progress in fighting fake news.[125]

III. ANALYSIS

Before examining any regulations designed to identify, remove, and deter the intentional or knowing propagation of fake news, it is important to assess why the FCC is the ideal agency for this undertaking and what authority it has,

116. Hunt, *supra* note 8.

117. Nick Wingfield, Mike Isaac, & Katie Bennernov, *Google and Facebook Take Aim at Fake News Sites*, N.Y. TIMES: TECH. (Nov. 14, 2016), [hereinafter Wingfield], https://www.nytimes.com/2016/11/15/technology/google-will-ban-websites-that-host-fake-news-from-using-its-ad-service.html.

118. Gaughan, *supra* note 2, at 68.

119. Wingfield, *supra* note 117.

120. Zoya Sheftalovich, *Italy Joins Calls for Fake News Crackdown*, POLITICO: EUR. EDITION (Dec. 30, 2016, 7:13 AM), https://www.politico.eu/article/italy-joins-calls-for-fake-news-crackdown.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

if any, to do so. Then it is possible to begin crafting a regulatory framework stemming from this authority. This Section thus addresses the FCC's jurisdiction and proceeds to contemplate a regulatory scheme that would be modeled after the notice-and-takedown procedure in the DMCA while simultaneously integrating key aspects of the background examples cited above. This Section then considers whether the regulations would raise First Amendment considerations. It therefore argues that the intentional or knowing proliferation of fake news online could be effectively curbed without violating the First Amendment.

A. The FCC: An Independent Agency with Authority Over Internet Service Providers That Could Create Fake News Regulations

Congress established the Federal Communications Commission as an independent agency headed by five commissioners, only three of whom can be from the same political party.[126] As an independent agency, the FCC arguably has greater freedom from presidential control or political influence than executive agencies, "including especially the lack of presidential removal power with respect to independent agencies," which could insulate it from certain political pressures that are otherwise exerted on executive agencies.[127]

Indeed, direct presidential authority over executive agencies is firmly established.[128] Examples of this include President Obama's frequent use of published presidential directives[129] and a President's direct authority over all executive actors.[130] In contrast, concerning independent agencies, Presidents have taken care to just make "suggestions" to independent agencies, which is consistent with what distinguishes executive and independent agencies.[131] However, that does not mean that the agency is immune from presidential influence as the FCC eventually took President Obama's views and suggestions on how to best implement net neutrality rules into consideration.[132] In fact, the battle over net neutrality challenges this presupposition that the FCC would be insulated from political influence.[133]

Under President Obama, in 2015, the FCC established rules that reclassified broadband Internet service providers (ISPs) as common carriers and

126. MULTICHANNEL VIDEO COMPLIANCE GUIDE: BROADBAND LAW & REG., 2004 WL 4110825, ¶¶ 100, 101 (2013).

127. Randolph J. May, *Defining Deference Down, Again: Independent Agencies, Chevron Deference, and Fox*, 62 ADMIN. L. REV. 433, 436 (2010).

128. Kathryn A. Watts, *Controlling Presidential Control*, 114 MICH. L. REV. 683, 729 (2016).

129. *Id*.

130. *Id*. at 686.

131. *Id*. at 729 (citing *Net Neutrality: President Obama's Plan for a Free and Open Internet*, WHITE HOUSE, https://www.whitehouse.gov/net-neutrality [http://perma.cc/2LCN-RT4Z]) ("I respectfully ask [the FCC] to adopt the policies I have outlined here, to preserve this technology's promise for today, and future generations to come.").

132. *Id*. at 734.

133. *See Protecting and Promoting the Open Internet*, WC Docket No. 14–28, Report and Order on Remand, Declaratory Ruling, and Order, 30 F.C.C. Rcd. 5601 (2015) (classifying broadband ISPs as common carriers) [hereinafter *Title II Order*]; *but see Restoring Internet Freedom*, Declaratory Ruling, Report and Order, WC Docket No. 17–108, F.C.C. Rcd. 17–166 (Jan. 4, 2018) (reclassifying broadband ISPs as information service providers) [hereinafter *Restoring Internet Freedom Order*].

subject to Title II of the Communications Act.[134] This gave the FCC the authority to regulate broadband ISPs in the same way that they regulate telephone utilities.[135] The Chair of the FCC at that time, Tom Wheeler, is a member of the Democratic Party.[136] Under President Trump, in 2018 the FCC reversed the 2015 classification of broadband ISPs as common carriers and reinstated the information service classification.[137] The Chair this time around is a Republican, Ajit Pai.[138] This switch in leadership shows that although the FCC is an independent agency, it is still susceptible to some influence by political allegiances. When it comes to interpreting the provisions of statutes it is charged with administering, the FCC is provided *Chevron* deference by courts.[139]

Generally, in considering whether an agency correctly interpreted a statute that it is tasked with administering, a court conducts its analysis according to the *Chevron* framework.[140] At step one, a court examines "whether Congress has directly spoken to the precise question at issue."[141] If it did, "that is the end of the matter" and the court must enforce the "unambiguously expressed intent of Congress."[142] If, however, the statute is silent or ambiguous, the court moves to step two, where "the question . . . is whether the agency's answer is based on a permissible construction of the statute."[143] In resolving step two, if Congress delegated authority to the agency to fill in gaps in a statute, courts give "controlling weight" to reasonable agency interpretations of a statutory ambiguity.[144] Still, an important threshold question is whether *Chevron* deference applies at all.[145] Under *Chevron* "step zero", the initial inquiry is "whether Congress has delegated authority to the agency to speak with the force of law."[146] If Congress has, the *Chevron* framework of review applies.[147]

134. *Title II Order*, 30 FCC Rcd. 5601 (2015).

135. *See generally* Elizabeth D. Lauzon, *Construction and Application of Communications Act of 1934 and Telecommunications Act of 1996 – United States Supreme Court Cases*, 32 A.L.R. FED. 2D 125 (2008) (summarizing important Supreme Court cases that interpret and apply the Communications Act of 1934).

136. Margaret Harding McGill & Alex Byers, *FCC Chairman Tom Wheeler to Resign*, POLITICO (Dec. 15, 2016, 9:15 AM), https://www.politico.com/story/2016/12/fcc-chairman-tom-wheeler-to-resign-232676.

137. *Restoring Internet Freedom Order*, WC Docket No. 17–108, F.C.C. 17–166 ¶ 20 (Jan. 4, 2018).

138. Margaret Harding McGill, *FCC Chairman Declines NRA Gun Award*, POLITICO (Mar. 1, 2018, 6:53 PM), https://www.politico.com/story/2018/03/01/fccs-aji-pai-declines-nra-gun-award-381975.

139. *See generally* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980–86 (2005) (discussing the reasoning the Court took to arrive at its decision).

140. *See, e.g.*, Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837 (1984) (the seminal case for analyzing agency interpretation of Congressional statutes).

141. *Chevron*, 467 U.S. at 842.

142. *Id*. at 842–43.

143. *Id*.

144. *Id*. at 844–45. *See generally* VALERIE C. BRANNON & JARED P. COLE, CONG. RESEARCH SERV., R44954, CHEVRON DEFERENCE: A PRIMER 16–17 (Sept. 19, 2017), https://fas.org/sgp/crs/misc/R44954.pdf (analyzing *Chevron* step two).

145. VALERIE C. BRANNON & JARED P. COLE, CONG. RESEARCH SERV., R44954, CHEVRON DEFERENCE: A PRIMER 4 (Sept. 19, 2017), https://fas.org/sgp/crs/misc/R44954.pdf.

146. *Id*. (citing Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 191 (2006)); Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 836 (2001).

147. *Id*.

Step zero "analysis often turns on the formality of the administrative procedures used in rendering a statutory interpretation."[148] With the FCC, it has the authority to administer the Communications Act.[149] It does so through rulemaking and adjudication.[150] Therefore, the *Chevron* framework of review applies.[151]

The Supreme Court addressed the FCC and the Internet, in *National Cable & Telecommunications Association v. Brand X Internet Services*, stating the issue was the FCC's determination that Internet access services were "information services," rather than "telecommunications services."[152] The Supreme Court affirmed this determination, affording the FCC *Chevron* deference.[153] The Court reasoned that the Act's definitions of "information services" and "telecommunications services" were ambiguous and held that the agency's interpretation was permissible.[154] As a result, when it comes to interpreting the provisions in the Communications Act of 1934 and those of other Act's that the FCC is charged with administering, courts should defer to FCC interpretations.[155] That said, a further consideration is that the FCC is one of only a handful of agencies that have authority over some aspect of the Internet.[156]

Congress describes its national Internet policy as it relates to the FCC in section 230(b) of the Telecommunications Act of 1996 (Telecommunications Act or Act), specifically stating that it is the policy of the United States "to preserve the vibrant and competitive free market that presently exists for the Internet"[157] and "to promote the continued development of the Internet."[158] Pursuant to these Congressional directives, the FCC has offered guidance and insight into its approach to regulating the Internet and broadband.[159]

148. *Id.*

149. *Brand X*, 545 U.S. at 980 ("Congress has delegated to the Commission the authority to 'execute and enforce' the Communications Act . . . and to 'prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions' of the Act.") (quoting 47 U.S.C. 151, 201(b)).

150. *See* 47 U.S.C. 151, 154(i) ("The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions."); 47 U.S.C. 201(b), 303(r) (The Commission shall "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of" the Communications Act); *see also* Brief for the Federal Respondents at 33–34, City of Arlington v. FCC, 569 U.S. 290 (2013) (No. 11-1545).

151. *See* United States v. Mead Corp., 533 U.S. 218, 229 (2001) ("We have recognized a very good indicator of delegation meriting *Chevron* treatment in express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed.") (emphasis added).

152. *Brand X*, 545 U.S. at 975.

153. *Id.* at 998.

154. *Id.* at 992–97.

155. *Id.* at 980–86.

156. Mohana Ravindranath, *Who's in Charge of Regulating the Internet of Things?*, NEXTGOV (Sept. 1, 2016), http://www.nextgov.com/emerging-tech/2016/09/Internet-things-regulating-charge/131208/.

157. Telecommunications Act of 1996 § 230(b)(2), Pub. L. No. 104-104, 110 Stat. 138 (codified at 47 U.S.C. § 230(b)(2) (2018)).

158. Telecommunications Act of 1996 § 230(b)(1), Pub. L. No. 104-104, 110 Stat. 138 (codified at 47 U.S.C. § 230(b)(1) (2018)).

159. *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 20 FCC Rcd. 14986 (2005).

In addition, section 706(a) of the Act, charges the FCC with "encourag[ing] the deployment on a reasonable and timely basis of advanced telecommunications capability"—broadband—"to all Americans."[160] According to the D.C. Circuit, this section of the Telecommunications Act has been reasonably construed by the FCC as a positive grant of authority to regulate broadband Internet access service providers.[161] It was under this authority, in concert with reclassifying broadband ISPs as telecommunications services, that the FCC adopted three bright-line rules prohibiting blocking, throttling, and paid-prioritization.[162]

As the FCC recently returned to classifying broadband ISPs as information service providers, it also returned to a transparency rule that the FCC first adopted in 2010.[163] That transparency rule required fixed and mobile ISPs to "publicly disclose accurate information regarding the network management practices, performance, and commercial terms of its broadband Internet access services sufficient for consumers to make informed choices."[164] When the FCC reclassified ISPs under Title II in 2015, it implemented additional reporting obligations[165] as well as exempted small providers under the Small Provider Waiver Order.[166] For these the Commission found legal support in section 706.[167] On the other hand, in returning broadband ISPs to their previous classification as information service providers, the FCC removed these "enhanced" reporting obligations and, just as the FCC had done in 2010, it relied on section 257 of the Communications Act as the legal authority.[168]

Section 257 directs the FCC to "identify[] and eliminat[e] . . . market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services, or in the provision of parts or services to providers of telecommunications services and information services."[169] Furthermore, the FCC has specifically interpreted section 257(c)[170] of the Communications Act as charging the Commission with the duty of identifying and eliminating marketplace barriers, which "implicitly

160. Telecommunications Act of 1996 § 706(a), Pub. L. No. 104-104, 110 Stat. 153 (codified at 47 U.S.C. § 1302(a) (2018)).

161. Verizon v. FCC, 740 F.3d 623, 655–58 (D.C. Cir. 2014).

162. *Title II Order*, 30 FCC Rcd. 5607–09, ¶¶ 15–24 (2015).

163. *Restoring Internet Freedom Order*, WC Docket No. 17-108, FCC 17-166 (Jan. 4, 2018), ¶ 210; *see Preserving the Open Internet*, 25 FCC Rcd. 17905, 17972–80, 17981, ¶¶ 124-35, 137. (2010) (laying out the transparency rule's required disclosures by ISPs) [hereinafter *Open Internet Order*].

164. *Open Internet Order*, 25 FCC Rcd. at 17937, ¶ 53.

165. *Title II Order*, 30 FCC Rcd. at 5672, ¶ 163.

166. *Small Business Exemption From Open Internet Enhanced Transparency Requirements*, GN Docket No. 14-28 Order, 32 FCC Rcd. 1772 (2017).

167. *Title II Order*, 30 FCC Rcd. at 5672, ¶ 297.

168. *Restoring Internet Freedom Order*, WC Docket No. 17-108, FCC 17-166 (Jan. 4, 2018), ¶ 209 (citing 47 U.S.C. § 257 (2018)).

169. Telecommunications Act of 1996 § 257(a), Pub. L. No. 104-104, 110 Stat. 77 (codified at 47 U.S.C. § 257(a) (2012)).

170. 47 U.S.C. 257(c) states that "[e]very 3 years following the completion of the proceeding required by subsection (a), the Commission shall review and report to Congress on—(1) any regulations prescribed to eliminate barriers within its jurisdiction that are identified under subsection (a) and that can be prescribed consistent with the public interest, convenience, and necessity; and (2) the statutory barriers identified under subsection (a) that the Commission recommends be eliminated, consistent with the public interest, convenience, and necessity."

empowers the Commission to require disclosures from those third parties who possess the information necessary for the Commission and Congress to find and remedy market entry barriers."[171] Thus, according to the FCC, the disclosure requirements in the transparency rule will help "both identify and address potential market entry barriers in the provision and ownership of information services and the provision of parts and services to information service providers."[172] Such information services include Internet applications and services that enable access to email and the ability to establish home pages, email and online storage applications, cloud-based storage, and spam protection.[173]

In sum, the FCC appears to be the ideal agency when it comes to reducing the amount of fake news online.[174] It is an independent agency that is accountable to Congress rather than the president thereby reducing the prevalence of the undeniable political pressures that exist in most executive agencies.[175] Further, it has authority to regulate broadband ISPs under sections 706 and 257 of the Communications act regardless of whether broadband ISPs are classified as telecommunications carriers under Title II or otherwise as information service providers.[176] Yet, examining the DMCA and its notice-and-takedown procedure, it is arguably far better for Congress to pass a comprehensive bill that grants the FCC a comparable authorization.

B. The Proposed Regulatory Scheme Modeled After the DMCA's Notice-and-Takedown Procedure Termed Notice-and-Correction-or-Exclusion

The Digital Millennium Copyright Act implemented two 1996 treaties: The World Intellectual Property Organization (WIPO) Copyright Treaty and the WIPO Performances and Phonograms Treaty.[177] In particular, Title II of the DMCA, the Online Copyright Infringement Liability Limitation Act (OCILLA), established safe harbor provisions that protect online service providers (OSPs) (a group which includes Internet service providers (ISPs)) from monetary liability under copyright law.[178] This has prompted virtually every Internet company in the United States that hosts third-party user content, such as Amazon, AOL, CNN, eBay, Facebook, Google, MySpace, YouTube, and numerous startups, to "adopt and implement a DMCA policy to fall within the safe harbors."[179] Accordingly, this Section explains the most relevant safe harbor provision, section 512(c), and suggests analogous rules for the

171. *Restoring Internet Freedom*, WC Docket No. 17-108, FCC 17-166 (Jan. 4, 2018), ¶ 232.
172. *Id.* ¶ 233.
173. *Id.*
174. *What We Do*, FED. COMM. COMMISSION, https://www.fcc.gov/about-fcc/what-we-do (last visited Feb. 18, 2019).
175. *See* Sidney A. Shapiro and Richard Murphy, *Constraining White House Political Control of Agency Rulemaking Through the Duty of Reasoned Explanation*, 48 UC DAVIS L. REV. 1457, 1459 (2015) (characterizing the White House as the powerful political actor in exerting political pressures on agencies).
176. 47 U.S.C. §§ 257, 1302.
177. Kevin J. Wleklinski, *Searching for an Out: Rojadirecta, Myvidster, and the Knowledge Components of the Information Location Tool Exemption of § 512(d)*, 18 MARQ. INTELL. PROP. L. REV. 455, 463–64 (2014).
178. Edward Lee, *Decoding the DMCA Safe Harbors*, 32 COLUM. J.L. & ARTS 233, 235–36 (2008).
179. *Id.*

identification, exclusion, and deterrence of fake news online while integrating key aspects of the background examples from Part II.[180]

1. Section 512(c) of the DMCA Provides the Policy Foundation for the Proposed Regulatory Scheme

Section 512(c) protects OSPs from liability for the "passive storage or hosting of material posted by users."[181] The full text of section 512(c) is worth providing here for convenience of the reader:

> (c) Information residing on systems or networks at direction of users.—
>
> (1) In general.—A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider, if the service provider—
>
> (A)(i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing;
>
> (ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or
>
> (iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;
>
> (B) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and
>
> (C) upon notification of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.[182]

As relevant to section 512(c), an online service provider is defined as "a provider of online services or network access, or the operator of facilities therefor."[183] This definition is so broad that it is difficult to imagine the existence of an online service that would not fall under that definition.[184] To qualify for protection under section 512(c), service providers must designate an agent to receive copyright infringement notices, register that agent through the Copyright Office's online registration system, and make the agent's contact information

180. 17 U.S.C. § 512 (2018).

181. *Id.* at 253.

182. 17 U.S.C. § 512(c) (2018) (replicating the same language in Section 512(c)(1)(A) and (C) that can be found in Section 512(d)(1) and (3), which sets forth the requirements for the safe harbor for activity involving location tools).

183. 17 U.S.C. § 512(k)(1)(B) (2018).

184. *In re* Aimster Copyright Litig., 252 F. Supp.2d 634, 658 (N.D. Ill. 2002), *aff'd*, 334 F.3d 643 (7th Cir. 2003).

available on the Copyright Office's electronically generated directory.[185] Upon notification of claimed infringement, a service provider must "respond[] expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity."[186]

In order to be effective, a takedown notice must be in writing and meet the following criteria: (1) contain claimant's physical or electronic signature; (2) identify the allegedly infringed copyrighted work; (3) sufficiently identify the allegedly infringing material to permit its removal or limit access; (4) provide information sufficient for the service provider to contact the complaining party; (5) contain "a statement that the complaining party has a good faith belief that use of the material is not authorized . . . ;" and (6) contain a statement that the information in the notice "is accurate and, under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed."[187] For the most part, a notice that fails to include all of the relevant material above will be inadmissible.[188]

Additionally, section 512(g) creates a "counter-notice" or "put-back" procedure.[189] In response to infringement notices, a subscriber (the alleged infringer) can contest the claimed infringement via a counter-notice.[190] The counter-notice must contain many of the same elements as the claimant's notice, except it is to contain "a statement under penalty of perjury that the subscriber has a good faith belief that the material was removed or disabled as a result of mistake or misidentification of the material to be removed or disabled."[191] Upon receipt of the counter-notice, the service provider must provide a copy to the claimant and inform them "that it will replace the removed material or cease disabling access to it in 10 business days."[192] At this point, the service provider must replace the removed material or cease disabling access to it "not less than 10, nor more than 14, business days following receipt of the counter notice" unless its designated agent receives notice from the claimant that such person has filed an action seeking a court order.[193]

The policy behind these safe harbor provisions is to protect service providers from claimants and subscribers.[194] Moreover, by protecting service providers from copyright infringement liability provided that they follow the above procedures, OCILLA looks to strike a balance between the competing interests of copyright owners and digital users.[195] Thus, when it comes to fake news, because of the competing interests of Internet companies, journalists, the

185. 17 U.S.C. § 512(c)(2) (2018); 37 CFR § 201.38 (2014). *See generally* U.S. Copyright Office, *DMCA Designated Agent Directory*, http://www.copyright.gov/onlinesp (providing access to the designated agent directory).

186. 17 U.S.C. § 512(c)(1)(C) (2018).

187. *See* 17 U.S.C. § 512(c)(3) (2018) (detailing the elements of notification).

188. 17 U.S.C. § 512(c)(3)(B) (2018).

189. 17 U.S.C. § 512(g)(1) (2018).

190. 17 U.S.C. § 512(g) (2018).

191. 17 U.S.C. § 512(g)(3)(C) (2018).

192. 17 U.S.C. § 512(g)(2)(B) (2018).

193. 17 U.S.C. § 512(g)(2)(C) (2018).

194. S. REP. NO. 105-190, at 50 (1998).

195. *Id.*

public, and the First Amendment, it would be better for Congress to pass a comprehensive bill with the aim of reducing the intentional or knowing proliferation of fake news similar the same way that OCILLA achieved its goal of holding copyright infringers accountable while protecting Internet related industry groups from liability. Such a bill could use the notice-and-takedown procedure as an archetype.

2. The Notice-and-Correction-or-Exclusion Procedure

From the DMCA's notice-and-takedown procedure, while at the same time including key aspects of the background examples in Part II, a procedure meant to quickly identify, remove, and deter the proliferation of fake news could be created. In fact, such a procedure, called notice-and-correct, has already been suggested.[196] But, as an initial matter, the right area of law to incorporate fake news must be determined.

The DMCA expanded copyright law by extending liability to the act of making copyrighted works available on the Internet.[197] The safe harbor provisions were thus meant to "protect qualifying service providers from liability for all monetary relief for direct, vicarious and contributory infringement."[198] So what crime would fake news fall under? Looking abroad, fake news could be criminalized as has been proposed in the Philippines.[199] Germany has already gone so far as requiring social media companies to delete hate speech and misinformation.[200] But, a preferable option would be to expand American defamation law, specifically libel law, because unlike slander, libel is defined as written or otherwise recorded defamatory statements.[201] Interestingly, President Trump appears to support such expansion as he has already suggested that libel laws be changed to cover what he perceives as fake news.[202]

Therefore, with the expansion of libel law a notice-and-correction-or-exclusion procedure could be created to expedite the identification and removal

196. *See* Konrad Niklewicz, *Weeding out Fake News: An Approach to Social Media Regulation*, WILFRIED MARTENS CENTRE FOR EUR. STUDIES 1, 41 (2017), https://www.martenscentre.eu/sites/default/files/ publication-files/mc-weeding_out_fake_news_v3_web.pdf (proposing a notice and correct procedure).

197. *See* 17 U.S.C. § 506(a)(1)(C) (2018) ("Any person who willfully infringes a copyright shall be punished as provided under section 2319 of title 18, if the infringement was committed—(C) by the distribution of a work being prepared for commercial distribution, by making it available on a computer network accessible to members of the public, if such person knew or should have known that the work was intended for commercial distribution.").

198. S. REP. NO. 105-190, at 40 (1998).

199. Darrell M. West, *How to Combat Fake News and Disinformation*, BROOKINGS (Dec. 18, 2017), https://www.brookings.edu/research/how-to-combat-fake-news-and-disinformation/.

200. Melissa Eddy & Mark Scott, *Delete Hate Speech or Pay Up, Germany Tells Social Media Companies*, N.Y. TIMES (June 30, 2017), https://www.nytimes.com/2017/06/30/business/germany-facebook-google-twitter.html.

201. *See Libel*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("A defamatory statement expressed in a fixed medium, esp. writing but also a picture, sign, or electronic broadcast.").

202. Flemming Rose & Jacob Mchangama, *History Proves How Dangerous It Is To Have the Government Regulate Fake News*, WASH. POST: WORLDPOST (Oct. 3, 2017), https://www.washingtonpost.com/news/theworldpost/wp/2017/10/03/history-proves-how-dangerous-it-is-to-have-the-government-regulate-fake-news.

of fake news online.[203] This is particularly important given the speed at which fake news stories spread online.[204] It could also deter pernicious publishers from peddling fake news stories through the threat of defamation lawsuits that they are likely to lose. For example, in September 2016, now-First Lady Melania Trump "filed a libel lawsuit in Maryland State court against [a blogger] for publishing an online article referring to her as a 'high-end escort' (among other things)."[205] While the blogger originally "denied all wrongdoing and described the lawsuit as 'a direct affront to First Amendment principles and free speech,'" he eventually settled the dispute, issued a formal retraction and apology, and paid a substantial settlement.[206] Therefore, expanding libel law is a viable proposition.

At the same time however, a notice-and-correction-or-exclusion procedure must incorporate key lessons from historical and modern instances of the regulation of fake news derivatives. First, the continued use of the *New York Times* standard in defamation suits, particularly its distinction between fact and opinion,[207] is best because it is "highly protective of speech."[208] Second, any law or regulation to be fashioned must take cues from the Fairness Doctrine and avoid chilling free speech.[209] Third, as the proposed Honest Ads Act points out, in order to be effective it is necessary for a notice-and-correction-or-exclusion regulation to align new technologies with the regulations.[210]

3. Sections 706 and 257 of the Communications Act Authorize the Promulgation of the Notice-and-Correction-or-Exclusion Procedure

Given the complexities of a notice-and-correction-or-exclusion procedure and the considerable number of potentially interested parties, it would be ideal for Congress to pass a comprehensive bill. However, it is arguably already possible for the FCC to promulgate rules that contain the proposed notice-and-correction-or-exclusion procedure through rulemaking.[211] The power to issue rules is derived from the grant of legislative rulemaking authority by Congress to the specific agency, which can be a specific grant or a general grant.[212] And in *Verizon v. FCC*, the D.C. Circuit determined that the FCC's authority to adopt regulations is based largely on the provisions in Title I of the Communications

203. *See* Niklewicz, *supra* note 196.

204. *See* Maheshwari, *supra* note 22 (illustrating how quickly a fake news stories spread online).

205. David O. Klein & Joshua R. Wueller, *Fake News: A Legal Perspective*, KLEIN, MOYNIHAN, TURCO LLP (May 1, 2017), http://www.kleinmoynihan.com/fake-news-a-legal-perspective/.

206. *Id.*

207. Williams, *supra* note 60, at 337.

208. *Id.* at 338.

209. RUANE, *supra* note 85, at 2 (citing *General Fairness Doctrine Obligations of Broadcast Licensees, Report*, 50 FED. REG. 35422 (1985)).

210. Sharp, *supra* note 111.

211. Office of the Federal Register, *A Guide to the Rulemaking Process*, OFF. OF FED. REG. 1, 2 (Jan. 2011), https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf.

212. *Id*.

Act of 1934, which grant the agency general, rather than specific, authority.[213] This general grant of authority is referred to as the FCC's "ancillary jurisdiction."[214]

Three provisions provide the basis for the FCC's ancillary authority: section 2(a) of the Communications Act, which gives the FCC jurisdiction over "all interstate and foreign communications by wire or radio;"[215] section 1, which requires the FCC to endeavor to "make available . . . to all the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service;"[216] and section 4(i), which grants the FCC authority to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions."[217] From these provisions, the Supreme Court conceptualized the FCC's ancillary jurisdiction in *United States v. Southwestern Cable Co.*[218] There, the Court held that FCC regulations "reasonably ancillary to the effective performance of the Commission's various responsibilities" are appropriate.[219] The Court also emphasized the expansive nature of such regulations.[220]

But, ancillary authority does not grant the FCC "unrestrained authority."[221] The FCC's ancillary authority is "incidental to, and contingent upon, specifically delegated powers under the [Communications] Act."[222] For example, under the D.C. Circuit's test articulated in *Verizon*, the FCC may regulate "interstate and foreign communications by wire or radio" if it can link its exercise of ancillary authority to an express delegation of "ancillary jurisdiction," not just a "policy statement[]," and show that the regulation is not inconsistent with some principle found to be embodied in the Act.[223] The test therefore turns on whether the FCC's rules are "ancillary . . . to the effective performance of its statutorily mandated responsibilities."[224] So, with respect to a rule that would establish the proposed notice-and-correction-or-exclusion procedure, it would need to be ancillary the effective performance of a statutorily mandated responsibility. One possibility is section 706(a) of the Communications Act.

Section 706(a) of the Communications Act requires the FCC to "encourage the deployment on a reasonable and timely basis of advanced

213. Verizon v. FCC, 740 F.3d 623, 629, 631 (D.C. Cir. 2014), *aff'g in part, vac'g in part sub nom. In the Matter of Preserving the Open Internet Broadband Indus. Practices*, Report and Order, FCC 10-201, 25 FCC Rcd. 17905 (2010).

214. *Id.* at 632.

215. 47 U.S.C. § 152(a) (2018).

216. 47 U.S.C. § 151 (2018).

217. 47 U.S.C. § 154(i) (2018).

218. United States v. Sw. Cable Co., 392 U.S. 157, 178 (1968).

219. *Id.*

220. *Id.*

221. FCC v. Midwest Video Corp., 440 U.S. 689, 706 (1979) [hereinafter Midwest Video II].

222. Comcast Corp. v. FCC 600 F.3d 642, 653 (D.C. Cir. 2010) (quoting Nat'l Ass'n of Regulatory Util. Comm'rs, 533 F.2d 601, 612 (D.C. Cir. 1976)).

223. Verizon v. FCC, 740 F.3d 623, 643 (D.C. Cir. 2014), *aff'g in part, vac'g in part sub nom. In the Matter of Preserving the Open Internet Broadband Indus. Practices*, Report and Order, FCC 10-201, 25 FCC Rcd. 17905 (2010).

224. *Comcast*, 600 F.3d at 644.

telecommunications capability to all Americans . . . ."[225] In *Verizon*, the D.C. Circuit Court held that the FCC adequately explained that the Telecommunications Act of 1996 vests it with affirmative authority to enact measures encouraging the deployment of broadband infrastructure.[226] In addition, the Court determined that the FCC may regulate "interstate and foreign communications by wire or radio."[227] Accordingly, pursuant to that statutorily mandated responsibility and as broadband networks are increasingly becoming the primary media for all types of information, commerce, and entertainment,[228] facilitating the identification and removal of fake news online and deterring publishers from peddling fake news stories through the assistance of initiating defamation lawsuits is reasonably ancillary to section 706(a)'s mandate.

However, in order to use section 706(a) as the express delegation of authority, broadband ISPs must be classified as common carriers under Title II,[229] which they currently are not.[230] Instead, they are classified as information service providers under Title I.[231] Still, it is possible for the FCC to establish ancillary jurisdiction over information service providers under 17 U.S.C § 257 *et seq*.[232] The FCC is drawing on section 257 to impose disclosure requirements on broadband ISPs in order to assist potential customers in making purchasing decision.[233] By the same token, the FCC could use section 257 as justification for promulgating rules that implement the notice-and-correction-or-exclusion procedure.[234]

Section 257(a) instructs the FCC to identify and eliminate "market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services,"[235] and section 257(c) requires the FCC to submit reports to Congress about such market barriers.[236] Regarding section 257(c), the FCC has interpreted it

> as contemplating that the Commission will perform an ongoing market review to identify any new barriers to entry, and that the statutory duty to 'identify and eliminate' implicitly empowers the Commission to require disclosures from those third parties who possess the information necessary for the Commission and Congress to find and remedy market entry barriers.[237]

225. 47 U.S.C. § 1302(a) (2018).
226. *Verizon*, 740 F.3d at 637–38.
227. *Id.* at 639.
228. Rob Frieden, *Déjà Vu All Over Again: Questions and a Few Suggestions on How the FCC Can Lawfully Regulate Internet Access*, 67 FED. COMM. L.J. 325, 370 (2015).
229. United States Telecom Ass'n v. FCC, 825 F.3d 674, 697–98 (D.C. Cir. 2016).
230. *In the Matter of Restoring Internet Freedom Order*, 33 FCC Rcd. 311, 319 (2018) [hereinafter *Restoring Internet Freedom Order*].
231. *Id.* at 318.
232. *See* 47 U.S.C § 257 (2018) (illustrating that it is possible for the FCC to establish ancillary jurisdiction).
233. *Restoring Internet Freedom Order*, *supra* note 230 at 445–46.
234. *See* 47 U.S.C § 257 (demonstrating the statute that could be used as justification).
235. 47 U.S.C. § 257(a) (2018).
236. 47 U.S.C. § 257(c) (2018).
237. *Restoring Internet Freedom Order*, *supra* note 230 at 446.

Undoubtedly, fake news is hindering entry into the online journalism marketplace[238] and "might be undermining the overall value of [the journalism] craft."[239]

In addition, fake news has been found to affect more than just journalism.[240] "Dozens of fake news sites have cropped up on the Internet that are creating artificial and unflattering news articles about small businesses."[241] In one case, an "alleged fake-news site called Channel23News" had "published articles falsely claiming that [a] restaurant was selling human meat and [that] its owner had been arrested."[242]

As a result of that story, the restaurant "was forced to cut staff hours to save costs as patronage declined."[243] These instances make it clear that fake news is becoming a market entry barrier for journalism entrepreneurs and other small businesses in the provision of information services provided by broadband ISPs.[244] As such, the promulgation of rules by the FCC that implement the notice-and-correction-or-exclusion procedure can be said to be reasonably ancillary to section 257's mandate that the FCC identify and eliminate "market entry barriers for entrepreneurs and other small businesses in the provision . . . of . . . information services."[245] In the end, should a court agree that the FCC has the authority to regulate the proliferation of fake news online in the proposed manner, a major hurdle would have been cleared. Still, the most difficult one to overcome would be the First Amendment.

C. First Amendment Considerations

On the back end of the notice-and-correction-or-exclusion procedure, the main First Amendment implication is its effect on free speech. When it comes to government regulation of speech, "the most important factor is the government's reason for regulating."[246] If the government is regulating speech

238. *See, e.g.*, Nina Berman, *The Victims of Fake News*, COLUM. JOURNALISM REV. (Fall 2017), https://www.cjr.org/special_report/fake-news-pizzagate-seth-rich-newtown-sandy-hook.php (presenting numerous accounts of how fake news have affected various people and professions).

239. *Fake News Creates a Serious Problem for Journalists, New Study Finds*, CISION (Sept. 12, 2017), https://www.cision.com/us/about/news/2017-press-releases/fake-news-creates-serious-problem-journalists-new-study-finds.

240. *See* Kristine Maloney, *Real Dangers of Fake News*, INSIDE HIGHER ED (Dec. 8, 2016), https://www.insidehighered.com/blogs/call-action-marketing-and-communications-higher-education/real-dangers-fake-news (showing how dangerous fake news can be in the context of attempting to determine what is real news and what is fake news).

241. Don Reisinger, *Fake News Sites Are Targeting More Small Businesses With Viral Stories*, FORTUNE (May 30, 2017), http://fortune.com/2017/05/30/fake-news-sites-local-businesses.

242. *Id*.

243. Craig Silverman and Sara Spary, *Trolls Are Targeting Indian Restaurants With A Create-Your-Own Fake News Site*, BUZZFEED NEWS (May 29, 2017, 1:58 PM), https://www.buzzfeed.com/craigsilverman/create-your-own-fake-news-sites-are-booming-on-facebook-and.

244. *See id*. (demonstrating the viral nature of fake news stories).

245. 17 U.S.C. § 257 (2018).

246. Leslie Kendrick, *Speech, Intent, and the Chilling Effect*, 54 WM. & MARY L. REV. 1633, 1640 (2013) (citing LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-3, at 794 (2d ed. 1988) (describing First Amendment doctrine); Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 413–14 (1996); Larry Alexander, *Free Speech and Speaker's Intent*, 12 CONST. COMMENT. 21, 22 (1995) (making a normative case for this position); John Hart Ely, *Flag*

in a content-neutral restriction unrelated to the message, it will likely pass First Amendment muster.[247] For example, "a law regulating parades out of concerns about noise and traffic would likely be upheld."[248]

If, however, the government is regulating because of the content, First Amendment issues arise.[249] Based on the previous example, a regulation "to prohibit a parade because of its controversial message would be deeply suspect."[250] That regulation "must either survive strict scrutiny or it must be found to regulate one of a set of categories of unprotected expression."[251] One such unprotected category is defamation.[252] Consequently, because the notice-and-correction-or-exclusion procedure ought to be seen as an expansion of defamation (libel) law, First Amendment issues should not arise. Nevertheless, the chilling effect of defamation law in the United States is a matter of contention and is thus beyond the scope of this Note.

IV. RECOMMENDATION: NOTICE-AND-CORRECTION-OR-EXCLUSION IN ACTION

Following the 2016 election, where fake news spread quickly,[253] was expedited by the Internet,[254] and can reach millions of Internet users in that short span of time,[255] it is clear something needs to be done. The best course of action would be expanding libel law since libel actions are already the most invoked causes of action against fake news publishers.[256] Further, United States libel law already has many advantages, chief being the truth is an absolute defense.[257] And with respect to the First Amendment's free speech protections, the plaintiff must prove that the libelous statements were published with varying degrees of intent.[258] Actual malice[259] is required for false and defamatory statements about a public official or figure regarding a matter of public concern.[260] "False and defamatory statements about private figures on matters of public concern require negligence for compensatory damages and actual malice" for punitive

Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis, 88 HARV. L. REV. 1482, 1496–97 (1975)).

247. Kendrick, *supra* note 246, at 1640 (citing LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-2, at 791–92 (2d ed. 1988)).

248. Kendrick, *supra* note 246, at 1640.

249. *Id.*

250. *Id.* at 1641.

251. *Id.*

252. *Id.*

253. Maheshwari, *supra* note 22.

254. Gaughan, *supra* note 2, at 67.

255. Ahiza Garcia & Justin Lear, *5 Stunning Fake News Stories That Reached Millions*, CNN (Nov. 2, 2016, 5:30 PM), http://money.cnn.com/2016/11/02/media/fake-news-stories.

256. Klein & Wueller, *supra* note 205.

257. *See* J. R. Harrington, *Truth As a Complete Defence in an Action for Libel*, 4 NOTRE DAME L. REV. 436, 438 (1929) ("[T]he truth of the defamatory charge is a complete defense in an action of libel.").

258. Kendrick, *supra* note 246, at 1642.

259. *See id.* (defining actual malice as meaning "the speaker either knew the statement was false or was gravely reckless toward this risk.").

260. *Id.* at 1642.

damages.[261] And "[f]alse and defamatory statements about anyone regarding a matter of private concern may be governed by more permissive common law standards."[262]

Consequently, in expanding libel law to extend liability to the intentional or knowing proliferation of fake news online, similar to the DMCA's extension of copyright law,[263] safe harbor provisions similar to OCILLA must exist to protect qualifying OSPs from liability for all monetary relief for direct, vicarious, and contributory defamation. This would be crafted in the vein of section 512(c) and it would protect OSPs from liability for the passive storage or hosting of material posted by users who intentionally or knowingly proliferate fake news provided the OSP qualifies.[264]

To qualify for protection under a defamation protection provision, an OSP must designate an agent to receive falsehood or defamation notices, register that agent through an FCC online registration system, and make the agent's contact information available on an electronically generated FCC directory. Upon notification of a claimed falsehood or defamation, the OSP must respond expeditiously to remove, or disable access to, the material that is claimed to contain the falsity.

In order to be effective, a falsehood or defamation notice must be in writing and meet the following criteria: (1) contain claimant's physical or electronic signature; (2) identify the allegedly false or defamatory work; (3) sufficiently identify the allegedly false or defamatory work to permit its removal or limit access; (4) provide information sufficient for the OSP to contact the complaining party; (5) provide clear and convincing evidence, or contain a statement that the claimant has clear and convincing evidence, that a material fact in the work is factually untrue or defamatory; and (6) contain a statement that the information in the notice "is accurate and, under penalty of perjury, that the complaining party is authorized to act on behalf of the claimant."[265] At this point, the OSP should review the notice and those notices that fail to include all of the relevant material above should be inadmissible.[266]

Next, the OSP should be required to send a copy of the notice to the publisher of the false or defamatory work along with any provided evidence. Once notified, the publisher may choose to do nothing and face the possibility of being fined or banned by the OSP or correct the cited allegedly false or defamatory statement. Moreover, there should be a provision, akin to OCILLA's section 512(g) counter-notice or put-back procedure, that allows the

261. *Id.*

262. *Id.*

263. *See* 17 U.S.C. § 506(a)(1)(C) (2018) ("Any person who willfully infringes a copyright shall be punished as provided under section 2319 of title 18, if the infringement was committed—(C) by the distribution of a work being prepared for commercial distribution, by making it available on a computer network accessible to members of the public, if such person knew or should have known that the work was intended for commercial distribution.").

264. *See* 17 U.S.C. § 512(c) (2018) (describing OSP liability protection for passive storage or hosting of copyrighted material).

265. *See* 17 U.S.C. § 512(c)(3) (2018) (detailing the elements of notification).

266. 17 U.S.C. § 512(c)(3)(B) (2018).

publisher to contest the alleged falsehood or defamatory statement via a counter-notice.

The counter-notice must contain many of the same elements as the claimant's notice, except it should instead contain either clear and convincing evidence that the cited work or assertion is in fact true, or provide a statement, under penalty of perjury, assenting to the possession of such evidence. Upon receiving the counter-notice, the OSP must provide a copy to the claimant and inform them that it will replace the removed material or cease disabling access to it in 10 business days. At this point, the service provider must replace the removed material or cease disabling access to it not less than 10, nor more than 14, business days following receipt of the counter notice unless its designated agent receives notice from the claimant that they have filed a defamation lawsuit. And with respect to libel lawsuits under a proposed expansion of libel law, the notice provided to the publisher should fulfill the actual malice and knowledge requirements of a libel lawsuit.[267]

Lastly, two important exemptions must exist concerning the scope of the fake news definition. First, "editorial" (opinion based) publications and verifiably satirical publications should not be included in the definition of fake news. This recommended regulatory scheme is meant to hold liable only those publications that make certifiably false assertions under the guise of factual news reporting. And in an era where most viewers cannot tell the difference between editorial programming and the actual "news,"[268] this distinction may help audiences differentiate between the two. Second, profiles, comments, and forum posts should not be included in the definition of fake news. Section 230 of the Communications Decency Act of 1996 (CDA) is applicable here as it already "protects online publishers from defamation claims . . . where the subject information was 'provided by' another Internet user."[269] These exemptions must exist to balance the interest of fair public commentators in journalism and the public.

Putting it all together, this is how the notice-and-correction-or-exclusion procedure would work in practice based off of the DMCA notice-and-correction procedure in section 257(c):[270]

1. Acme News, for all intents and purposes, is not a legitimate news organization nor is in the business of satire or parody. Acme publishes a story on their website about Bob claiming that he was born in Florida. The story is shared on multiple online websites including Facebook.
2. Bob, having been born in Missouri, finds Acme's story while browsing Facebook.

267. *See* Kendrick, *supra* note 246, at 1642 (stating that actual malice means that "the speaker either knew the statement was false or was gravely reckless toward this risk").

268. Paul Farhi, *Sean Hannity Thinks Viewers Can Tell The Difference Between News and Opinion. Hold on a Moment.*, WASH. POST (Mar. 28, 2017), https://www.washingtonpost.com/lifestyle/style/sean-hannity-thinks-viewers-can-tell-the-difference-between-news-and-opinion-hold-on-a-moment/2017/03/27/eb0c5870-1307-11e7-9e4f-09aa75d3ec57_story.html.

269. Klein & Wueller, *supra* note 205.

270. *See* 17 U.S.C. § 257(c) (2012) (detailing the notice-and-takedown procedure of the DMCA).

3. Carla, Bob's lawyer, sends a letter to Facebook's *designated agent* (registered with the FCC)[271] including:
   a. contact information;
   b. the title of the story;
   c. the address of the story;
   d. a statement that he has *clear and convincing evidence* that a material fact in Acme's story (his place of birth) is factually untrue and provides the true account;
   e. a statement that the information in the notification is accurate;
   f. a statement that, under penalty of perjury, Carla is authorized to act for the claimant;
   g. her signature.
4. Facebook disables access to Acme's story, excluding it from appearing on its platform.
5. Facebook sends Acme a copy of Bob's complaint along with his statement or evidence and tells Acme that Facebook users will be unable to access the story. At this point, Acme may choose one of the following courses of action:
   a. Do nothing and face the possible eventuality of being fined or banned from having its website accessed through Facebook (or other OSP) if it is found to be a repeat infringer.
   b. Correct the information to the satisfaction of Bob's notice.
6. Acme also has the option of sending a counter-notice to Facebook, if it feels the story was taken down unfairly. The notice must include:
   a. contact information;
   b. identification of the removed story;
   c. (1) *clear and convincing evidence* that the material fact in question is true, (2) a statement, under penalty of perjury, that Acme has such clear and convincing evidence, or (3) a statement, under penalty of perjury, that the work is merely editorial or Acme is a satirical publisher and thus the work itself is satire;
   d. a statement consenting to the jurisdiction of Acme's local United States Federal District Court, or, if outside the United States, to a United States Federal District Court in any jurisdiction in which Facebook is found;
   e. Acme's signature.
7. If Acme does file a valid counter-notice, Facebook notifies Bob, then waits 10–14 business days for a lawsuit to be filed by Bob.
8. If Bob does not file a lawsuit, then Facebook may re-enable Facebook users' access to Acme's story.

Congress and the FCC need to develop regulations to identify, remove, and deter the intentional or knowing proliferation of fake news. The above

271. *See, e.g.*, *DMCA Designated Agent Directory*, U.S. COPYRIGHT OFF., http://www.copyright.gov/onlinesp (last visited Mar. 26, 2019) (providing access to the designated agent directory).

recommended notice-and-correction-or-exclusion procedure provides a method for the FCC to facilitate those goals and ensure the public is well informed, that broadband infrastructure is developed, and entry into the Internet marketplace is not hindered by fake news.

V. CONCLUSION

Sooner or later the United States will have to confront the rise of fake news, preferably while it is still in its infancy. The speed and breadth with which fake news spreads is alarming and should concern everyone, especially Congress. Ensuring an informed electorate is a paramount concern and safeguards must be placed through federal law or regulation. These need to materialize soon because there is currently nothing protecting the electorate from the intentional and knowing proliferation of fake news online. The notice-and-correction-or-exclusion procedure is a quick means of identifying and removing fake news online and would act as an effective deterrent for the intentional or knowing proliferation of fake news stories by fake news publishers.

Ideally, the procedure would be implemented through an Act of Congress in order to legitimately craft legislation that strikes a balance between the interests of online service providers, online users, and the First Amendment. Further, in order to expand defamation law in the proposed manner, an Act of Congress is required. In the alternative, the procedure could be realized through informal rulemaking by the FCC. The authority for this can be drawn from either section 706 or section 257 as reasonably ancillary to each's respective mandate.

What is more, the term fake news should refer only to deliberately false claims republished in the guise of a genuine news story. Publications that are verified as editorial or satirical would not fall under the definition in order to protect fair comments. And while the consequences of fake news have been made clear following the 2016 election, the federal government must act carefully to strike a balance between protecting freedom of speech and protecting the electorate against the threats of fake news.