

FAKE NEWS: A LEGAL PERSPECTIVE

By David O. Klein and Joshua R. Wueller

The concept of “fake news” has garnered substantial attention in recent years, evolving from its satirical literary origins into a passionately criticized Internet phenomenon. Whether described as rumors, “counterknowledge,” misinformation, “post-truths,” “alternative facts” or just plain damned lies, these false statements of fact typically are published on Web sites and disseminated *via* social media for profit or social influence.

While fake news publishers are regularly taken to task in the court of public opinion, we are unaware of any prior structured discussion of the unique legal issues surrounding the publication of fake news. This article evaluates examples of fake news publications to present a workable definition of “fake news” for purposes of our legal analysis. We then explore many of the legal and regulatory hurdles facing online fake news publishers. This article concludes by discussing some of the legal protections available to fake news publications and publishers of other online content.

WHAT IS “FAKE NEWS”?

Before defining “fake news,” it is important to consider actual examples of fake news and how

fake news publishers operate. In one example, which took place shortly before the most recent US presidential election in a series of events now infamously known as “Pizzagate,” fake news publishers in Macedonia circulated a false political conspiracy theory that former First Lady, Secretary of State, and presidential candidate Hillary Clinton and other prominent Democratic political figures were coordinating a child trafficking ring out of a Washington, DC pizzeria by the name of Comet Ping Pong. The fake news publications were widely shared *via* Facebook and directed readers to Web sites for purposes of generating advertising revenue. In a bizarre turn of events in December 2016, a man who read the fake news publication drove from North Carolina to Washington, DC and shot open

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a locked door at the actual Comet Ping Pong pizzeria with his assault rifle as part of a misguided vigilante investigation. He subsequently was arrested.¹

In another example from early 2017, 20th Century Fox worked with a fake news publisher to create five Web sites, with names such as the *Houston Leader*, which were designed to imitate traditional online news sources. The Web sites published articles featuring false information about prominent public figures (e.g., Lady Gaga and President Donald J. Trump) and controversial topics of public interest (e.g., mental health and vaccinations) and were shared widely *via* Facebook. In mid-February 2017, it was discovered (to sharp public criticism) that 20th Century Fox had orchestrated the creation of these fake news publications in an effort to publicize the Fox feature film “A Cure for Wellness,” by including plot references to the film and promotional hashtags such as #cureforwellness in the subject articles.²

As the above-referenced examples illustrate, the cornerstone of a fake news publication is its falsity—the principal statements of fact communicated in fake news articles are fabricated and untrue. Further, fake news publications are *intentionally* or *knowingly* false. Fake news publishers do not reasonably believe that the stated facts are true. Negligent and reckless false publications of fact (including erroneous publications by mainstream media sources), while potentially legally actionable, fall outside the scope of this article. In addition, although print tabloids and news satire television series receive their fair share of legal attention, our fake news legal analysis set forth herein focuses on articles, videos, and graphics shared *via* the Internet.

The vast majority of fake news articles are written about public figures or controversial current events and shared *via* social media with the hope of going “viral.” By linking social media posts to Web sites that contain banner advertisements and/or other promotional content, many publishers of fake news are able to monetize the resulting Web traffic. In fact, a successful fake news publication can be shared millions of times and generate tens of thousands of dollars in advertising revenue.

For purposes of this article, we define “fake news” as the online publication of intentionally or knowingly false statements of fact. Others have

defined “fake news” to exclude well-known satirical Web sites such as the *Onion*, which uses humor and exaggeration to criticize social and political issues.³ While it is true that obvious satire and parody often are legally protected speech, the underlying legal analysis that is applied to reach this conclusion is a complex and fact-specific endeavor better addressed through case-by-case analysis.

It is important to note that, in recent months, a number of politicians and public figures have repurposed the phrase “fake news” to describe reports from traditional news publishers that they dislike or find unflattering. For example, since taking office in January 2017, the new administration has dismissed apparently factual reports from ABC, *BuzzFeed*, CBS, CNN, MSNBC, NBC, the *New York Times*, and the *Washington Post* as “fake news.”⁴ However, traditional news publications fall squarely outside of our definition of “fake news” because they are not intentionally or knowingly false in nature. In an interesting role reversal, one print publication is contemplating filing a defamation lawsuit of its own against a local politician who repeatedly has described the established community newspaper as “fake news.”⁵

CIVIL LEGAL CONCERNS

Fake news publishers most frequently are sued by private individuals or businesses seeking to collect monetary damages or injunctive relief. Some of the more common civil legal claims and associated defenses are described below.

DEFAMATION

No legal claim is invoked more frequently against fake news publishers than the common law tort of defamation. Generally, defamation is the communication of a false statement of fact that harms another person’s reputation or character. Spoken, unrecorded defamation is known as slander, while defamatory statements that are written or otherwise recorded are defined as libel.

In the United States, truth is an absolute defense to libel and slander claims. Likewise, pursuant to First Amendment free speech protections, each defamation plaintiff must prove that defamatory statements

were published with the requisite intent, which varies depending on the plaintiff's level of public prominence. Harmful, false publications of fact concerning a public figure (e.g., a celebrity or government official) are actionable only if the publisher acted with "actual malice," that is, with either knowledge that the statement is false or reckless disregard for its falsity. Conversely, strictly private figures (e.g., your shy neighbor) do not need to prove actual malice, but rather are required only to prove that defamatory statements were published with negligence. However, if a private figure gains prominence in a specific, limited field or area of controversy, the actual malice standard may apply to such "limited-purpose public figure" for defamatory statements related to that particular field or controversy.⁶

As a practical matter, because our definition of "fake news" is limited to *intentional or knowingly* false statements, it is reasonable to conclude that such statements would satisfy the intent requirement for defamation claims. However, courts generally have afforded ample "breathing space" to defamation claims involving satire or parody. False statements in works of parody and satire typically are actionable only if they could be reasonably understood to describe actual facts about the plaintiff or actual events in which the plaintiff participated. For example, in 1999, the *Dallas Observer* published a false online article about a local district attorney and judge that allegedly arrested and detained a young girl with ankle shackles on potential criminal charges for writing a book report about Maurice Sendak's well-known children's book *Where the Wild Things Are*. In 2004, the Supreme Court of Texas held that, despite the fact that the subject article was not labeled as a satire or parody, no objectively reasonable reader could conclude that the publication's improbable quotes and unlikely events communicated actual facts about the district attorney or judge.⁷

In addition to the constitutional protections described above, a number of states have enacted statutes to deter strategic lawsuits against public participation (SLAPP), which often are filed to silence or intimidate defendants. Some anti-SLAPP laws allow defendants that have lawfully exercised their First Amendment rights in connection with matters of public concern to move for early dismissal of SLAPPs and, in some cases, to recover their attorney fees and costs from SLAPP plaintiffs. While such

protections most often are invoked in response to defamation lawsuits, defendants also may be able to "SLAPPback" against abusive claims for intentional and negligent infliction of emotional distress and other common law claims that seek to curtail speech on issues of public interest. For example, in 2012, *Esquire* successfully invoked Washington, DC's anti-SLAPP statute to dismiss claims of defamation, invasion of privacy, and tortious interference with business relations brought in connection with a fake news article published on its Web site.⁸

Further, Section 230 of the federal Communications Decency Act of 1996 (CDA) protects online publishers from defamation claims and other state and local speech-based torts in situations where the subject information was "provided by" another Internet user.⁹ Importantly, the CDA does not afford protection to the original author of a defamatory or otherwise tortious publication. While courts generally only have extended CDA protection to online publishers whose Web sites are mere "neutral conduits" of *user-generated content* (such as user profiles, comments, and forum posts), the Electronic Frontier Foundation and other digital rights advocates believe that the CDA may extend to information gathered from third-party Web sites and republished online with minimum alteration.¹⁰

Despite the various constitutional and statutory defenses to defamation described above, fake news publishers still regularly are sued for libel. For instance, in September 2016, now-First Lady Melania Trump filed a libel lawsuit in Maryland State court against blogger Webster Tarpley for publishing an online article referring to her as a "high-end escort" (among other things). While Tarpley originally denied all wrongdoing and described the lawsuit as "a direct affront to First Amendment principles and free speech," he recently settled the dispute with Mrs. Trump, issued a formal retraction/apology and agreed to pay a "substantial" settlement amount.¹¹

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Similar to defamation, intentional infliction of emotional distress (IIED) is a common law tort that is regularly alleged against fake news publishers under state law. IIED occurs when a person intentionally or

recklessly engages in extreme or outrageous behavior that causes another person to suffer severe emotional distress. However, unlike defamatory statements, which may be actionable for simply being harmful and false, statements supporting IIED claims must be “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.”¹²

In 1983, *Hustler Magazine* published a satirical liqueur advertisement featuring famed televangelist Jerry Falwell. The ad included Falwell’s photograph along with a fake interview alleging that Falwell’s “first time” was during a drunken incestuous rendezvous with his mother in an outhouse. Falwell sued *Hustler* for alleged IIED (among other things). In 1988, in *Hustler Magazine, Inc. v. Falwell*, the Supreme Court held that the “actual malice” standard applicable to defamation cases was equally applicable to IIED claims brought by public figures. The Court reasoned that *Hustler*’s statements amounted to a parody that was not reasonably believable and, therefore, not published with actual malice.¹³

Generally, courts hearing IIED claims since *Falwell* have given satirical fake news publishers a wide legal berth. For example, in 2007, the Indiana Court of Appeals held that false online claims and fake testimonials concerning an Indiana resident and his water conditioning business were satirical and, therefore, dismissed the plaintiff’s IIED claims against the fake news publisher pursuant to the State of Indiana’s anti-SLAPP statute.¹⁴

In contrast, particularly extreme fake news publications remain susceptible to IIED claims, especially when involving private individuals. In one bizarre case, a man took nude photographs of an aspiring male model; “photoshopped” various overtly sexual elements into the photographs; purchased several Internet domain names featuring the model’s name; published said nude photos on the aforementioned Web sites and his personal photography site; and identified the model’s name, place of residence and employer in the Web sites’ respective text and metatags. In 2014, a federal district court in the State of Virginia held that the plaintiff model’s IIED claim was sufficient to survive the defendant publisher’s motion for summary judgment. Shortly thereafter, the parties settled their dispute out of court for an undisclosed sum.¹⁵

INTELLECTUAL PROPERTY VIOLATIONS

Publishers of fake news and other online content should be aware of the risks associated with the unauthorized use of third-party intellectual property. Most notably, the federal Lanham Act and applicable state unfair competition laws prohibit trademark infringement and false representations of fact in commercial advertising that misrepresent the nature or characteristics of another’s goods, services, or commercial activities.¹⁶ Online publishers should refrain from using third-party names, logos and other identifiers in a way that may confuse consumers as to the origin or sponsorship of products or services. This is especially relevant for fake news publishers that use third-party brands for product endorsement or promotional purposes.

Likewise, the creators of written text, photographs, artwork, and other original works of authorship are granted exclusive rights under federal copyright law to reproduce, distribute, display, and create derivative works from such content.¹⁷ To avoid claims of infringement, publishers using third-party materials should be sure to seek out the permission of content owners or consult intellectual property counsel as to whether the legal doctrines of fair use or public domain apply.

Separate intellectual property rights exist with respect to a person’s name and likeness. The laws of at least 47 states have acknowledged a “right of publicity,” which grants an individual the right to control the commercial use of his or her identity.¹⁸ While the First Amendment and some statutory safe harbors protect the use of an individual’s name and likeness in publications concerning matters of public interest, the person’s prior written consent may be necessary to exploit his or her right of publicity for purely commercial purposes, such as in connection with advertising. As such, online publishers are advised to obtain consent in writing to the commercial use of an individual’s name and likeness, especially if the person is purportedly providing a testimonial or otherwise promoting a product or service.

OTHER SPEECH-RELATED TORTS

In addition to the examples provided above, fake news publishers have faced claims for false light invasion of privacy, fraud, tortious interference, unfair/deceptive

trade practices, and a variety of other civil causes of action. The applicability of these claims to publishers of fake news and other online content—and the various constitutional and statutory defenses associated therewith—depend largely on the specific factual circumstances of each case.

GOVERNMENT REGULATION AND CRIMINAL CONCERNS

In addition to the sampling of civil legal issues described above, fake news publishers are, on occasion, accused of crimes and violations of other governmental regulations, including those explored below.

UNFAIR AND DECEPTIVE TRADE PRACTICES

The Federal Trade Commission (FTC) and state Attorneys General are given broad discretion to investigate questionable trade practices and take appropriate enforcement action. Businesses and individuals found to have engaged in consumer fraud or deception can be permanently enjoined by a court from continuing such conduct in the future and may be ordered to pay civil penalties and provide consumer redress (e.g., disgorgement of related profits to the government for the public's benefit).

For example, in April 2011, the FTC filed lawsuits in federal district courts throughout the country against 10 fake news publishers for allegedly using the names and logos of major news organizations for purposes of deceptively promoting an acai berry weight-loss product. Through settlement agreements, the defendants ultimately agreed to pay millions of dollars to the FTC, halt their allegedly deceptive practices and add certain marketing disclosures to their respective Web sites.

CRIMINAL LIBEL

A remnant of 17th Century British common law, approximately 15 US states and territories still have criminal libel statutes on their books. The exact characteristics of the crime of libel vary from state to

state, but the elements of criminal libel often mirror the elements of civil defamation.¹⁹

In 1964, the Supreme Court in *Garrison v. Louisiana* held that the heightened “actual malice” standard outlined in *New York Times v. Sullivan* applies to both criminal and civil libel cases. The Court reasoned that “it can hardly be urged that the maintenance of peace requires a criminal prosecution for private defamation.”²⁰ Crucially, however, evidence suggests that a number of states have continued to enforce their criminal libel statutes with sporadic results. For example, one study of Wisconsin’s criminal libel law describes three men who were charged with criminal libel for distributing 200 satirical fake news fliers on April Fools’ Day in 2001. Each chose a different legal strategy. The first pleaded guilty and was sentenced to jail time, probation and fines. The second pleaded guilty, but negotiated a reduced sentence of community service and fines. The third man pleaded not guilty and was acquitted of criminal libel. No major news publication reported on the case.²¹ In another matter, police officers searched the home and seized the computer and other written materials of a fake news publisher in 2003 in connection with an alleged violation of Colorado State’s criminal libel statute.²²

In many instances, criminal libel charges have been reduced or dismissed entirely when defendants question the constitutionality of the subject statute. In light of the continued activity in this space, fake news publishers are advised to seek legal counsel in the event that they are investigated or charged for criminal libel.

CYBERBULLYING

Following several tragic suicides in response to online harassment and bullying, many states and localities have enacted cyberbullying laws. Most cyberbullying laws prohibit online harassment and bullying of minors at public schools, while others (such as the State of New Jersey’s cyber-harassment statute) criminalize all online transmissions of lewd, indecent, or obscene material to or about a person for purposes of harassment and the infliction of emotional harm.²³

Much as criminal libel laws, many criminal cyberbullying laws have been found to be content-based restrictions that violate the First Amendment.

For example, in the fall of 2011, six students in the State of North Carolina were arrested and charged with cyberbullying after posting to Facebook and commenting on an allegedly falsified, sexually themed screenshot of a classmate's text message conversation. In June 2016, the Supreme Court of North Carolina determined that the law was unconstitutional, holding that the government had criminalized content-based speech (namely, private, personal, or sexual information pertaining to a minor) in a manner that was not narrowly tailored to the State's asserted interest.²⁴

THE TREND OF DEREGULATION

In 2012, the Supreme Court in *United States v. Alvarez* invalidated the federal Stolen Valor Act of 2005, which criminalized falsely representing oneself as having been awarded military medals or decorations. Favoring counter-speech and refutation over government regulation of false speech, the Court held that interest in truthful discourse alone was insufficient to sustain the criminal statute at issue.²⁵

Some legal scholars describe the *Alvarez* ruling as delineating a "constitutional right to lie."²⁶ While the FTC and Attorneys General have broad discretion to aggressively pursue unfair and deceptive trade practices claims against fake news publishers, defendants in other cases have had increasing success in raising First Amendment defenses to criminal and regulatory claims involving restrictions on false speech.

OTHER ENFORCEMENT CONCERNS

Not all regulations affecting fake news publishers are strictly legal in nature. Many advertising networks, social media companies, and other Internet partners enact and enforce their own restrictions relevant to the publication of fake news.

WEB SITE AND SEARCH ADVERTISING RESTRICTIONS

As described above, fake news publishers often monetize their articles by partnering with advertising networks (e.g., Google AdSense and Media.net)

and marketing affiliate programs (e.g., Amazon Associates) that may place banner advertisements on their Web sites. Further, some publishers supplement their social media traffic by purchasing Internet search advertising, such as Google AdWords.

In response to sharp public criticism of the fake news phenomenon, many Internet advertising companies have updated their program policies to deny services to fake news publishers.²⁷ For example, in November and December 2016, after reviewing 550 suspected fake news Web sites, Google permanently banned approximately 200 AdSense publishers for alleged violations of the updated AdSense Program Policies, which forbid the use of "misrepresentative content" on publisher Web sites.²⁸

Accordingly, publishers of fake news Web sites and other online content should carefully review each partner advertising network and marketing affiliate program's policies and guidelines to ensure their compliance with all applicable content requirements and restrictions. Online publishers whose accounts are suspended by Google or another advertising partner (often without warning and with little or no stated justification), or that are otherwise notified of program policy violations, may consider consulting Internet marketing counsel to take proper remedial action, which may include Web site content revisions and/or submission of appeal correspondence.

SOCIAL MEDIA ACCOUNT POLICIES

As mentioned above, social media is the lifeblood of fake news. Social media platforms allow publishers to disseminate viral fake news media to mass audiences more efficiently and affordably than traditional marketing methods.

Advertisers may purchase ads to appear in Facebook users' News Feeds. However, Facebook recently updated its Advertising Policies to prohibit ad content containing false information. Fake news publishers that violate this policy may have their accounts suspended or deleted entirely at Facebook's discretion.²⁹

In addition, in February 2017, Facebook rolled out new tools for users in France and Germany to self-report suspected fake news publications. Articles confirmed by fact-checking partners to be fake news are tagged as such across the social media platform

and penalized in users' News Feed results to prevent the content from spreading. Facebook is expected to implement similar fact-checking efforts in the United States. While Facebook founder, Mark Zuckerberg, seems averse to banning fake news publications outright, articles identified as fake news stand to have their reach (and earning potential) drastically reduced by Facebook's latest efforts.³⁰

In a recent high-profile case, an actual photograph of Anas Modamani (a Syrian refugee living in Germany) taking a selfie with German Chancellor Angela Merkel was transformed into a fake news publication. Mr. Modamani's selfie photo was placed alongside photos of three other men, with the German headline "Homeless Man Set Alight in Berlin. Merkel Took a Selfie with One of the Perpetrators." After the false image began circulating on Facebook, Mr. Modamani sought an injunction from a German court that would have required Facebook to block its reproduction and circulation. On March 7, 2017, the court denied the injunction, ruling that Facebook had not manipulated the content itself and, therefore, could not be held legally responsible.³¹

BEST PRACTICES

As detailed above, fake news publishers are faced with a variety of serious legal and regulatory concerns. However, publishers who choose to navigate the legal risks associated with fake news may be able to take certain proactive steps to help protect themselves and minimize their legal exposure.

NOTICES AND DISCLAIMERS

When determining whether a person of reasonable intelligence would construe a false statement as describing actual facts, courts often consider whether the subject publisher readily identifies itself as a source of fiction, parody, or satire. Fake news publishers may consider mitigating legal risk by working with experienced Internet marketing counsel to craft appropriate notices and disclaimers, which should be placed conspicuously on their Web sites and social media pages. If applicable, fake news publishers also may wish to include an appropriate copyright notice on their respective Web sites, original articles,

artwork, and other creative materials to inform the public that the subject works are protected by copyright (as discussed below).

COPYRIGHT PROTECTION

Owners of sufficiently original and creative literary and visual art works may consider filing applications for federal copyright registration. While not mandatory, obtaining federal copyright registration enables a copyright owner to sue for copyright infringement in the event of a copyright dispute and may entitle the owner to recover attorney fees and statutory damages of up to \$150,000 per infringed work. It is important to note that for purposes of copyright registration, it is irrelevant whether the facts set forth in a work of authorship are true or false.³²

While multiple issues of printed newspapers and other periodicals can be bundled together for group copyright registration as a collective work, online articles published one at a time must be registered separately. Many Internet publishers find this distinction—combined with the lengthy processing time for standard copyright applications (currently six to ten months) and relatively short lifespan of most online news stories—to be prohibitive to registration of each individual online publication. However, publishers of fake news articles or other online works that are the subject of a pending or prospective copyright dispute can take advantage of the Copyright Office's special handling option, which typically reduces the copyright application processing time to only five business days.

WEB SITE TERMS AND CONDITIONS AND PRIVACY POLICIES

In the Internet age, Web site operators should require their users to agree to abide by the applicable Web site Terms and Conditions (sometimes called Terms of Use or Terms of Service) as part of the registration process in order to enjoy the publisher's online services. When drafted properly, Terms and Conditions form a legally binding contract between the Web site owner/operator and each user and include appropriate notices, restrictions, liability disclaimers, governing law, and other important legal guidelines.

Further, each Web site that collects personally identifiable information (PII) from end users is required by law to have a Privacy Policy. Privacy Policies should let users know what PII the publisher collects, how it uses that information, to whom the publisher may disclose that PII, the security measures taken to protect that information and whether the Web site uses “cookies” to track user activity. Because many of the previously mentioned third-party advertising networks and affiliate marketing programs use cookies, pixel tags, and other technology for behavioral targeting, tracking, and reporting purposes, a well-drafted Privacy Policy is essential.

MEDIA LIABILITY INSURANCE

A variety of media liability insurance policy options exist for writers, including online publishers. While the scope of coverage varies, a number of underwriters offer media liability insurance policies that provide protection in connection with many legal claims faced by online publishers, including defamation, intellectual property infringement and violations of the right of publicity. In light of the substantial risk of legal liability associated with the dissemination of fake news, publishers are well-advised to purchase appropriate media liability insurance coverage.

CONCLUSION

While conducting research for this article at the New York Public Library, we noticed staff members busily hanging posters on the library’s walls. Entitled “How to Spot Fake News,” the infographic on the posters was published in eleven languages by the International Federation of Library Associations and Institutions (IFLA), which encourages libraries to “battle” fake news through education and critical thinking and describes fake news publishers as “charlatans, liars and forgers.”³³

The recent proliferation of fake news has roused the ire and condemnation of fact-checkers and traditional news publishers across the globe. Many believe that fake news undermines our faith in the mainstream media and the very foundation of our democracy. Others claim that fake news publications unethically exploit social media “filter bubbles” or

“echo chambers” through which many Internet users obtain their news. In response, California State lawmakers have introduced legislation to commission new high school “media literacy” curriculum standards to help young people distinguish fake news from its traditional counterpart.³⁴ One epidemiologist has even drawn parallels between the propagation of fake news stories *via* the Internet and the evolution and transmission of infectious diseases.³⁵ Needless to say, fake news publishers will not soon win any Peabody Awards or popularity contests. As media attention and public condemnation of fake news continues to intensify, we predict that more lawmakers, regulators, courts, and private citizens will explore legal and regulatory solutions that balance the societal importance of truth-seeking with the constitutional right to speak freely (and, at times, to lie).

This article presents a definition of fake news for purposes of legal analysis and provides a non-exhaustive survey of the many legal and regulatory issues that face fake news publishers. Because every publication is different, online publishers are advised to speak with an experienced Internet marketing and intellectual property attorney about minimizing their unique legal risks before publishing fake news.

NOTES

1. Craig Silverman, “How the Bizarre Conspiracy Theory Behind ‘Pizzagate’ Was Spread,” *BuzzFeed News* (Dec. 5, 2016), <http://bit.ly/pizzagatefakenews>.
2. Liam Stack, “To Lure Moviegoers, 20th Century Fox Dangles Fake News,” *N.Y. Times*, February 16, 2017, at B1.
3. See Hunt Allcott & Matthew Gentzkow, “Social Media and Fake News in the 2016 Election,” *NBER Working Paper No. 23089* (Jan. 2017), <http://bit.ly/allcot-gentzkow>.
4. See Donald J. Trump, Twitter, <http://bit.ly/trumpfakenews> (last visited Mar. 7, 2017).
5. Bente Birkeland, “When a Politician Says ‘Fake News’ and a Newspaper Threatens to Sue Back,” *NPR* (Feb. 17, 2017), <http://bit.ly/NPRfakenews>.
6. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).
7. *New Times, Inc. v. Isaacks*, 146 S.W.3d 144 (Tex. 2004).
8. *Farah v. Esquire Magazine, Inc.*, 863 F. Supp. 2d 29 (D.D.C. 2012).
9. 47 U.S.C. § 230.
10. Section 230 Protections, Elec. Frontier Found., <http://bit.ly/EFF230> (last visited Feb. 28, 2017); see also Kevin Delaney, “Republication in the Internet Age,” *News Media & the Law* (Summer 2014).
11. Complaint, *Trump v. Tarpley*, No. V424492 (Md. Cir. Ct. Sept. 1, 2016); Dan Morse, “Melania Trump Reaches Settlement in Libel Lawsuit Against Maryland Blogger,” *Wash. Post* (Feb. 7, 2017), <http://bit.ly/trumplibel>; Webster G. Tarpley, “Statement

- Regarding Melania Trump Lawsuit,” *Tarply.net* (Sept. 1, 2016), <http://bit.ly/tarpleystatement>.
12. See Restatement (Second) of Torts § 46 cmt. d (Am. Law Inst. 1965).
 13. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988).
 14. *Hamilton v. Prewett*, 860 N.E.2d 1234 (Ind. Ct. App. 2007).
 15. *Tharpe v. Lawidjaja*, 8 F. Supp. 3d 743 (W.D. Va. 2014); Peter Vieth, “Soccer Coach Settles Case Against Photographer,” *Va. Law. Wkly.* (May 30, 2014), <http://bit.ly/fakenewsIIED>.
 16. 15 U.S.C. § 1125(a); see also Cal. Bus. & Prof. Code §§ 17200–10; N.Y. Gen. Bus. Law § 349.
 17. 17 U.S.C. § 106.
 18. See, e.g., Cal. Civ. Code § 3344.1; N.Y. Civ. Rights Law § 50.
 19. See A. Jay Wagner & Anthony L. Fargo, Int’l Press Inst., “Criminal Libel in the Land of the First Amendment,” 37 n.76 (2015) (citing criminal libel statutes in Florida, Idaho, Illinois, Louisiana, Michigan, Montana, New Hampshire, New Mexico, North Carolina, North Dakota, Oklahoma, Utah, the Virgin Islands, Virginia, and Wisconsin).
 20. *Garrison v. Louisiana*, 379 U.S. 64 (1964) (citations omitted).
 21. David Pritchard, “Rethinking Criminal Libel: An Empirical Study,” 14 *Comm. L. & Pol’y* 303, 327–28 (2009).
 22. *Mink v. Suthers*, 482 F.3d 1244 (10th Cir. 2007) (dismissing the blog publisher’s constitutional claims on lack of standing and mootness grounds for failure to establish a credible fear of criminal prosecution). Subsequently, the General Assembly of the State of Colorado repealed the State’s criminal libel statute. Colo. Rev. Stat. § 18-13-105 (repealed 2012).
 23. See, e.g., N.J. Stat. Ann. § 2C:33-4.1.
 24. *State v. Bishop*, 787 S.E.2d 814 (N.C. 2016).
 25. *United States v. Alvarez*, 567 U.S. 709 (2012) (invalidating as unconstitutional the Stolen Valor Act of 2005, 18 U.S.C. § 704(b)).
 26. Noah Feldman, “The Constitutional Right to Lie,” *Bloomberg View* (June 29, 2012), <http://bit.ly/righttolie>.
 27. AdSense Program Policies, Google, <http://bit.ly/adsensepolicy> (last visited Mar. 7, 2017) (prohibiting Web sites with “misrepresentative content”); AdWords Policies, Google, <http://bit.ly/adwordspolicies> (last visited Mar. 7, 2017) (prohibiting representations that are not “accurate, realistic, and truthful”); Program Guidelines, Media.net, <http://bit.ly/medianetguidelines> (last visited Mar. 7, 2017) (prohibiting “fake news” Web sites); Associates Program Policies, Amazon Associates, <http://bit.ly/associatespolicy> (last visited Mar. 7, 2017) (prohibiting Web sites with “libelous or defamatory materials”).
 28. Scott Spencer, Google, “How We Fought Bad Ads, Sites and Scammers in 2016,” *The Keyword* (Jan. 25, 2017), <http://bit.ly/keywordblog>.
 29. Advertising Policies, Facebook, <http://bit.ly/FBbadpolicies> (last visited Mar. 7, 2017).
 30. Gwenaelle Barzic & Sudip Kar-Gupta, “Facebook, Google Join Drive Against Fake News in France,” *Reuters* (Feb. 6, 2017), <http://bit.ly/reutersfakenews>; Mark Zuckerberg, Facebook (Nov. 19, 2016), <http://bit.ly/zuckerbergfakenews>.
 31. Melissa Eddy, “German Court Refuses to Block Facebook Users from Reposting a Refugee’s Selfie,” *N.Y. Times*, March 8, 2017, at B5.
 32. Compendium of U.S. Copyright Office Practices § 310.2 (3d ed. 2014).
 33. Karolina Andersdotter, “Alternative Facts and Fake News—Verifiability in the Information Age,” *IFLA Blogs* (Jan. 27, 2017), <http://bit.ly/IFLABlogs>.
 34. Melanie Mason, “Fake News 101? Lawmakers Want California Schools to Teach Students How to Evaluate What They Read on the Web,” *L.A. Times* (Jan. 11, 2017), <http://bit.ly/fakenews1aw>.
 35. Adam Kucharski, “Post-Truth: Study Epidemiology of Fake News,” 540 *Nature* 545 (2016).