Feature

KEY POINTS

- The phenomenon of fake news is not new, but it manifests itself in different ways and with different and more far-reaching effects in the age of the Internet and social media.
- The resultant problems have spread to financial markets.
- It is possible to meet the challenges of fake news by a combination of one or more of the measures of: voluntary action by intermediaries; criminal proceedings against substantive wrongdoers; and traditional courses of action.
- At the end of the day, however, it seems likely that stronger measures may be required, such as the regime of regulation and fines which is being contemplated in Germany.

Author Richard Spearman QC

Fake news and financial market blues

The ancient proverb that "There is nothing new under the sun" applies as much to the phenomenon of "fake news" as it does to anything else. However, in common with their effect on many other problems in the modern age, the impact of e-media in this area has been profound. What is new on a practical level are matters such as the scale and effectiveness of distortions of the truth, and, in legal terms, when it comes to giving effect to the rights or interests which are adversely affected by misinformation, problems such as accountability and lack of remedies.

In this article, Richard Spearman QC considers possible solutions to the problem, including regulation.

NATURE OF THE PROBLEMS

The New Zealand Law Commission analysed the nature of the problems in *News Media Meets New Media: Rights, Responsibilities and Regulation in the Digital Age* back in December 2011.

With regard to the practical problems of "reach" and "spread", the Commission stated:

> 'Before the advent of the web, the risk of causing harm to others through the exercise of free speech was most commonly a question that concerned the news media rather than ordinary citizens. However, now that everyone has the ability to publish, these risks – and potential liabilities – are much more widely shared … Then there is the difficulty of spread. Once published, a piece of information can "go viral"; it may be taken up and repeated by others.'

With regard to the main legal problems of "uncertainty" and "enforcement", it stated:

> 'The law imposes constraints on certain types of speech and in some circumstances provides remedies for those harmed by others' speech. However most of these laws were drafted in the pre-digital era and questions now arise as to how effective they remain … If an infringing publication has taken place, who can be held accountable, and against whom will criminal sanctions or civil remedies lie? Possible defendants are any media company responsible for the publication; the editor of the relevant publication (if there is one); the individual who wrote and/or uploaded the item in question; the host of the website on which the item has appeared; and (possibly) the internet service provider (ISP). The current law is complex and unclear. The answer may well be different for the purpose of different rules … Sometimes, even if the law clearly has been broken, there may be problems enforcing it. The fact that the internet has no geographical boundaries and that, once published, information can be stored and accessed from a practically limitless number of places making it difficult, if not impossible, to remove, are among the challenges posed.'

Traditionally, propaganda was the preserve of governments, and the mass communication of distorted messages was beyond the capabilities of anyone other than political parties or large media organisations. The public were able to familiarise themselves with these sources of information and, at least over time, to assess their reliability. In the age of the Internet and social media, it is much more difficult to decide which sources are trustworthy and which are not. Among other considerations: there is in practical terms no limit on the number of sources of widely available information; it is relatively easy to imitate the news format; and skilful operators may be adroit at duping artificial intelligence and manipulating algorithms so as to give their reports a spurious appearance of credibility. People are under no compulsion to believe everything that they read, let alone to repeat and spread it to others who may rely on them as a source of reliable information when they have not troubled to carry out any due diligence themselves or, perhaps, to exercise even basic powers of assessment of whether what they have read is trustworthy. Nevertheless, the grim reality is that the behaviour of many less sophisticated individuals, and significant numbers of those who have the ability and the resources to know better, has become conditioned by the power and convenience of the Internet: intermediaries such as Google and Facebook are perceived, in general, as providers of beneficial services, and it is understandable that users may find it hard to sort the wheat from the chaff.

RELEVANCE TO FINANCIAL MARKETS

The problem of fake news has spread to financial markets, where it is rooted in, or spurred on by, the prospect of financial gain. It may manifest itself as an electronic version of long-standing market manipulation ploys, such as the unethical "pump and dump" promotion of share prices, the propping up or inflation of stock values by false claims relating to company assets (for example, stories of medical or technological breakthroughs which do not, in truth, exist), or the unjustified

denigration of competitors or takeover targets. It also allows money to be made in other ways: authors may be paid for writing untrue or slanted reports (although this fact, let alone who has paid them, will typically not be apparent); and because for many websites "clicks equal profits", and the attraction of fake news can be an effective means of increasing traffic. The problem is being taken seriously by the Securities and Exchange Commission at least: on 10 April 2017 it announced a crackdown on alleged stock promotion schemes, which led to charging 27 individuals and entities with misleading investors into believing they were reading "independent, unbiased analyses" on websites such as Seeking Alpha, Benzinga and Wall Street Cheat Sheet.

THE SOLUTIONS IN OUTLINE

The possible solutions to the problem are those considered by the New Zealand Law Commission in *Rights, Responsibilities and Regulation in the Digital Age*, namely: voluntary action, criminal proceedings, substantive claims, amenability to injunctions and, maybe, regulation.

Voluntary action

One difficulty about relying on voluntary actions by intermediaries is that reducing or eliminating fake news may be contrary to their commercial interests. Revenues and profits are influenced by content availability and traffic volumes, and there are costs associated with policing content or investigating and acting on complaints. In addition, identifying what is false and what is not may be far from straightforward. However, there is no doubt that there are effective measures that can be taken by intermediaries, as they themselves accept. In the run up to the general election in the UK on 8 June 2017, for example, Facebook announced that it was taking measures which included: use of its systems 'to recognise … inauthentic accounts more easily by identifying patterns of activity – without accessing the content itself'; that it had suspended 30,000 accounts in France before the first-round presidential election and planned to remove tens of thousands of further accounts; and that 'to help people spot false news we are showing tips to everyone on Facebook on how to identify if something they see is false'.

Criminal proceedings

Criminal prosecutions may be effective against wrongdoers and, perhaps, have a chilling effect on others. But their deployment, whether against individual wrongdoers or even intermediaries, may be problematic. So far as concerns the UK, the Report of the Leveson Inquiry into the culture, practices and ethics of the British press states: '… the ability of the UK to exercise legal jurisdiction over content on Internet services is extremely limited and dependent on many things … which are rarely aligned. These include: the location of the service provider; the location of the servers on which material is held; and international agreements and treaties.' Further, Max Hill QC, the independent reviewer of counterterrorism legislation, expressing views which could equally be applied to fake news, recently told a conference on terrorism and social media that it would not help for Parliament to criminalise companies such as Google and Facebook because they "don't do enough" to remove extremist material online, on the grounds (in part) that it is hard to determine in this context either what is "enough" or what sanctions would be appropriate.

Substantive claims

So far as substantive claims are concerned, the traditional tortious remedies for economic loss and claims based on reliance on online material may be capable of providing an effective response. In *Taberna Europe CDO II Plc v Selskabet AF1 (formerly Roskilde Bank A/S (In Bankruptcy))* [2016] EWCA Civ 1262, the claimant purchased from a third party subordinated loan notes issued by the defendant bank, having regard to an "investor presentation" on the defendant's website. When no payments were made on the loan notes, the claimant claimed damages from the defendant on the basis that it had been induced to purchase the loan notes by misrepresentations made by the defendant in that "investor presentation". The defendant succeeded on appeal on the ground, among others, that, in answer to the claimant's claim, it was entitled to rely on disclaimers in the "investor presentation" to the effect that no representation was made as to any information therein. On different facts, a claim against the operator of a website based on reliance on fake news made available on that website might well succeed.

Where fake news involves defamation, in principle a claim will be available against the author(s) of the defamatory words. However, they may be hard to identify or locate, and, even if they can be served with proceedings, they may lack the resources to provide appropriate compensation. More effective protection for the victims of libel would be available if intermediaries such as search engines were treated as publishers for the purposes of the law of libel (just as search engines are treated as data controllers for the purposes of the law of the protection of the personal data of data subjects: see *Google Spain SL and Google Inc v Agencia Espanola de Proteccion de Datos and Mario Costeja Gonzalez* Case C-131/12 [2014]). However, to date that is not the approach that has been taken by the English law of libel (see, for example, *Tamiz v Google Inc* [2013] EWCA Civ 68).

One aspect of fake news that has given rise to debate in recent months concerns online paid stock-promotion campaigns. Such activities typically involve articles being published on investment websites without the appropriate disclosure of payment, in order to promote a company's stock and affect investor decisions. Once the truth is uncovered, these stories ultimately lead to losses for investors. In such circumstances, and depending always on the particular facts, there is no reason, in principle, why an investor should not have legal remedies not only against the false information provider, but also against

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Biog box
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the operator of the investment website, and, it may be, the company itself if it knew about the fake news or failed to police it.

Indeed, where English law applies, recourse to a claim for conspiracy may be appropriate and helpful. The tort of conspiracy is closely related to the concept of joint liability in tort, but it is of potentially wider application so far as concerns establishing liability against a person who (for example): (a) only joins in at a late stage in participation in the events which give rise to the occurrence of the wrongful acts; or (b) plays only a minor role in enabling those acts to be perpetrated. In essence, four elements are required for an unlawful means conspiracy to be made out, namely: (1) a combination of two or more persons; (2) to take action which is unlawful in itself; (3) with the intention of causing damage to a third party; (4) who suffers the damage (see *Kuwait Oil Tanker v Al Bader* [2002] 2 All ER (Comm) 271, Nourse LJ at [108] and [110]). In *Dar Al Arkan Real Estate Development Com. v Al Refai & Ors* [2013] EWHC 1630 (Comm), for example, the claimants complained that criticisms of them had been published on a website and in an email, and they brought claims for defamation, malicious falsehood, breach of confidence, conspiracy, procuring breach of contract and unlawful interference with business. In dismissing an application to strike out the claim by one of the defendants on the ground that this defendant was merely a provider of public relations services and advice, Andrew Smith J rejected a contention that the liability of this defendant depended on knowledge of and control over the publication (or continuing publication) of the specific defamatory words complained of. The decision itself concerns, in essence, a claim for "conspiracy to defame", but the reasoning would appear to be capable of being applied to a claim for "conspiracy to publish false information".

The limits of injunctions

The need to face up to the argument that injunctions have no sensible place in the age of the Internet was recognised in *PJS v News Group Newspapers Ltd* [2016] UKSC 26. In that case, the Court of Appeal discharged an interim injunction which it had granted at an earlier hearing to protect private information, because, in the intervening period, the story, including the names of those involved, had been published in the USA, Canada and Scotland, on Internet websites and on social media. On the second occasion, the reasoning of Jackson LJ involved an acceptance that 'the Internet and social networking have a life of their own'. The claimant appealed to the Supreme Court, which, by a majority, allowed the appeal and ordered the continuation of the interim injunction until trial or further order. Lord Mance said at [45]:

> 'At the end of the day, the only consideration militating in favour of discharging the injunction is the incongruity of the parallel – and in probability significantly uncontrollable – world of the internet and social media, which may make further inroads into the protection intended by the injunction.'

Regulation

In Germany, and in spite of strenuous arguments to the contrary about the threat to freedom of expression and the dangers of turning intermediaries into policemen and censors who may feel impelled to err on the side of caution in denying access to statements of doubtful reliability, the view has been taken that strong measures are required. Against the background that research in Germany has shown that Facebook and Twitter are not complying with a code of conduct that they signed in 2015 concerning deletion of hate speech, the German government has resolved to extend to at least some forms of fake news the country's proposed laws relating to hate speech, defamation, threats and incitement. In outline, under the new Network Enforcement Act, which comes into force on 1 October 2017, social networks will have 24 hours to delete or block criminal content and seven days to deal with less clear-cut cases, as well as an obligation to report back to the person making the complaint as to how the complaint was handled. The regime will provide for fines of up to €50m for a company and up to an additional €5m for its chief representative in Germany, and Germany would like it to become Europe-wide.

That would be in keeping with the protection afforded by European legislation in other areas. The Recitals to the General Data Protection Regulation, which comes into effect on 25 May 2018, state that technological developments and globalisation 'require a strong and more coherent data protection framework in the Union, backed by strong enforcement', and the sanctions which may be imposed under it include fines of up to the higher of 2% of worldwide turnover and €10m in respect of some breaches and up to double those figures in respect of others.

CONCLUSION

In the case of fake news, the harmful consequences are clear and serious. Intermediaries seem best placed to bring harmful actions to an end, but also appear unwilling to shoulder their responsibilities voluntarily. It is unsurprising if regulation is regarded as the only answer. Achieving compliance may not be an especially easy matter for intermediaries, but their difficulties are a product of the business models that they have chosen to adopt. ■

Further Reading:

- The right to be forgotten: search engines today, banks tomorrow? [2014] 8 JIBFL 514.
- Market manipulation: a wrong without a remedy? [2016] 2 JIBFL 67.
- LexisPSL: Financial Services: FCA warns over fake emails.