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# Fake news and copyright

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## 1. Introduction

As is well-known, new technologies have profoundly changed the way content is produced, shared, and disseminated. One of the most recent (and worrying) of these changes is the phenomenon of “fake news”. It has attracted extensive attention, especially since disinformation and intentional misrepresentation of real information have started to affect individual decision-making in the political sphere.<sup>1</sup> Disinformation indeed can be exploited as a powerful instrument to manipulate public opinion and undermine the democratic process as it can be used even to influence the outcome of elections. There is a widespread belief that fake news may have altered the outcome of important democratic events such as the UK Brexit referendum and the 2016 US presidential election.<sup>2</sup> Also, the recent COVID-19 pandemic has spurred disinformation regarding its origin, spread and prevention: the “infodemic” and misinformation in the fight against COVID-19 can be just as harmful to human health and public safety as the pandemic itself.<sup>3</sup>

Not only the motivation for fake news production is sociopolitical or ideological.<sup>4</sup> The fabrication of this kind of content has become somehow industrialized, mechanized, and geared up by entrepreneurs “deceiving Internet users with false information while earning significant sums of money”.<sup>5</sup> There is growing evidence indicating the emergence of a digital advertising ecosystems that provide a strong supportive environment for fake news creation, especially within social networks.<sup>6</sup> Information users can therefore be subject to the negative impact of the increasing power that “social media companies, such as Google, Apple, Facebook and Amazon, have gained in controlling who publishes what to whom, and how the publications

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<sup>1</sup> See *e.g.*, Joel Timmer, *Fighting Falsity: Fake News, Facebook, and the First Amendment*, 35 *Cardozo Arts & Ent. L. J.* 669, 670 (2017).

<sup>2</sup> Hunt Allcott & Matthew Gentzkow, *Social Media and Fake News in the 2016 Election*, 31 *Journal of Economic Perspectives* 211 (2017); Mark Scott, *Cambridge Analytica helped ‘cheat’ Brexit vote and US election, claims whistleblower*, *Politico*, 27 March 2018.

<sup>3</sup> Tanya Lewis, *Nine COVID-19 Myths That Just Won’t Go Away*, in *Scientific American*, 18 August 2020.

<sup>4</sup> Lion Gu, Vladimir Kropotov, and Fyodor Yarochkin, *Fake News and Cyber Propaganda: The Use and Abuse of Social Media*, *TREND MICRO* (June 13, 2017).

<sup>5</sup> Amy Kristin Sanders & Rachael L. Jones, *Clicks at Any Cost: Why Regulation Won’t Upend the Economics of Fake News*, 2 *Bus. Entrepreneurship & Tax L. Rev.* 339 (2018).

<sup>6</sup> See for example Victor Pickard, *Confronting the Misinformation Society: Facebook’s “Fake News” Is a Symptom of Unaccountable Monopoly Power*, in Melissa Zimdars & Kembrew McLeod (eds.) *2020 Fake News: Understanding Media and Misinformation in the Digital Age*, at 123; Stephanie Ricker Schulte, *Fixing Fake News: Self-Regulation and Technological Solutionism*, in Zimdars – McLeod, above in this *fn.*, at 133; Robert Size, *Publishing Fake News For Profit Should Be Prosecuted As Wire Fraud*, 60 *Santa Clara L. Rev.* 29, 40 (2020); Joshua A. Braun - Jessica L. Eckland, *Fake News, Real Money: Ad Tech Platforms, Profit-Driven Hoaxes, and the Business of Journalism*, 7 *Digital Journalism* 1, 1 (2019); Lesley Chiou - Catherine Tucker, *Fake News and Advertising on Social Media: A Study of the Anti-Vaccination Movement*, 23 *Nat’l Bureau of Econ. Research, Working Paper No. 25223* (2018); Dan Tynan, *How Facebook Powers Money Machines for Obscure Political ‘News’ Sites*, *The Guardian* (Aug. 24, 2016); Katherine Haenschen & Paul Ellenbogen, *Disrupting the Business Model of the Fake News Industry*, *Freedom to Tinker*, December 14, 2016; Abby Ohlheiser, *This is How Facebook’s Fake-News Writers Make Money*, *Wash. Post* (Nov. 18, 2016).

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are monetized”.<sup>7</sup> At the same time, a real disruptive industry of fake news has been allowed to grow and flourish as an independent business creature in the news market.<sup>8</sup>

The debate about how regulators should respond to this phenomenon is hot. There is a long history of government interventions in news markets through competition policy tools, state aid and regulation. Governments have recently tried to make online platforms liable for sustaining and spreading intentionally misleading content and have enacted anti-fake news laws<sup>9</sup> – yet, it remains to be seen if these methods are really effective at reducing online disinformation.<sup>10</sup> It seems necessary to design and implement measures targeting fake news’ business models to oppose the vicious circle which leads to their creation, and prevent such news from becoming “an attractive economic option”.<sup>11</sup> However, such measures may be difficult to introduce in jurisdictions such as the US which strongly protect free speech.

Said that, can copyright play a role in the fight against fake news? What is the relationship between such news and copyright in the first place? Some of this news in theory fall within the protected subject matter and may meet the requirements for protection. Yet, despite fake news being potentially eligible for protection, we propose to remove any copyright which may arise on grounds of public interest. As is known, when a work is protected by copyright, right holders have an incentive to exploit it, as the monopoly granted to them often allows to maximise profits out of the work, for example via licensing. This may encourage creators of this news to spread them exponentially across multiple channels to reach wide audiences, especially via the Internet and social media. Excluding copyright could therefore help make fake news less appealing. The compelling reason to deny copyright is that such news does not contribute to the well-being of societies and therefore should not be incentivised by offering a monopoly which helps the creators increase profits. Indeed, fake news can seriously challenge democratic values and undermine national security, also causing fears for users’ privacy and autonomy, which are at the heart of individuals’ right to dignity. If instead we assume that copyright subsists in this kind of content, and the right owner opts to enforce it, is also important to clarify which defences may be relied on by fact-checkers, *i.e.*, organisations and individuals who check fake news’ accuracy, and therefore might be caught in legal fights started by the creators of such news.

The article is structured as follows. Section 2 provides a definition and taxonomy of fake news and highlights the profitable business model on which it is based. Section 3 then focuses on different approaches followed in the US and Europe when it comes to regulating speech and tackling disinformation. The analysis then shifts to copyright issues. Section 4 makes the point that various forms of fake news – a short article as well as a digitally modified photograph and a doctored video – can be considered copyright subject matter and may satisfy the requirements for protection. Section 5 focuses on some exceptions which could be invoked by fact-checkers to escape copyright liability, *i.e.*, the fair use doctrine under US law and several exceptions

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<sup>7</sup> Álvaro Figueira & Luciana Oliveira, The current state of fake news: challenges and opportunities, 121 *Procedia Comput. Sci.*, 817, 818 (2017).

<sup>8</sup> *Ibidem*, at 819.

<sup>9</sup> Giovanni Pitruzzella & Oreste Pollicino, *Disinformation and Hate Speech: A European Constitutional Perspective* 97-130 (Bocconi University Press 2020) (analysing and comparing anti fake news laws recently adopted or discussed in different countries).

<sup>10</sup> Alberto Alemanno, How to Counter Fake News? A Taxonomy of Anti-fake News Approaches, 9 *European Journal of Risks Regulation* 1 (2018); BBC News, Social media firms fail to act on Covid-19 fake news.

<sup>11</sup> Kshetri, Nir & Voas, Jeffrey, The Economics of “Fake News”, 19 *IT Professional* 8, 10 (2017).

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under EU (and UK) law. In Section 6 then the paper argues that this type of news could and should be stripped of copyright on public interest grounds. Section 7 concludes. In considering the legal and policy issues raised in this article, we take into account different jurisdictions, especially the US, the UK and the European Union (EU).

## 2. The concept and nature of fake news

Fakes news can be created and shared in very different ways. It can take the form of literary works (*e.g.*, newspaper articles, tweets, blog posts etc.), pictures or videos. But can a precise definition be given? Is there a test that can guide lawyers, academics, policymakers and platforms to consistently determine what this phenomenon is?

According to the EU High Level Expert Group on Fake News and Online Disinformation (HLEG), ‘disinformation’ may be a more adequate term than ‘fake news’ for at least two reasons: (1) the problem is not limited to news specifically but covers the spread of false or misleading information more generally including through fake accounts, videos and other fabricated media, advertising and other organized information operations; (2) the term ‘fake news’ has been adopted by politicians to criticise information that is against their interests.<sup>12</sup> HLEG defines disinformation as “false, inaccurate, or misleading information designed, presented and promoted to intentionally cause public harm or for profit” and adds that the risk of harm includes “threats to democratic political processes and values, which can specifically target a variety of sectors, such as health, science, education, finance and more.”<sup>13</sup> HLEG also distinguishes the notion of disinformation from that of “misinformation”, *i.e.*, “misleading or inaccurate information shared by people who do not recognize it as such”,<sup>14</sup> and excludes from the notion of disinformation all issues related to illegal forms of speech such as hate speech, incitement to violence, etc., as well as parody. While we agree that the notion of ‘disinformation’ is a more accurate term than ‘fake news’, we will predominantly use the latter throughout this article.

A possible way of conceptualizing some important distinctions between different types of manipulative and problematic information is to take an analytical approach to fake news and disinformation, focusing on three parameters: (i) the content’s factual truth; (ii) the intent and strategic goals associated with the content’s generation and initial sharing; and (iii) the harm caused by the content’s release into the public sphere. While each of these factors is difficult to ascertain in practice and heavy reliance on any one of them can be somewhat unsound, a broad taxonomy can be developed through these three factors. The presence of some harm coupled with some level of factual inaccuracy raises regulatory issues, which may sometimes be satisfactorily addressed through existing laws (*e.g.*, defamation laws). Yet, there is the need of effective ad hoc legal and regulatory remedies where factual inaccuracy and harm are coupled with the calculated aim to manipulate, fabricate and propagate false or deceitful information. As mentioned, some laws have recently been introduced at national level - and it remains to be seen if these laws can do the job for which they have been devised.

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<sup>12</sup> European Commission, A multi-dimensional approach to disinformation, Final report of the High Level Expert Group on Fake News and Online Disinformation (12 March 2018), <https://ec.europa.eu/digital-single-market/en/news/finalreport-high-level-expert-group-fake-news-and-online-disinformation>, at 10.

<sup>13</sup> *Idem*.

<sup>14</sup> *Idem*.

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An authoritative taxonomy of fake news has been recently presented, with several categories being identified including (a) satire, (b) fabrication, (c) manipulation, (d) propaganda, and (e) false content of connection.<sup>15</sup> The common feature of these categories is the determination made by the creators to depict these forms of fake news as real and ultimately deceive the public. (a) Satire is used in order to present content that is fake, under a humoristic perspective. While it is generally performed by comedians with the actual purpose to entertain the public opinion, there is the risk that people can mistake satire for real news.<sup>16</sup> (b) News fabrication refers to contents “which have no factual basis but are published in the style of news articles to create legitimacy”<sup>17</sup> and with the specific intent to deceive or mislead the audience. This type of content is usually created by partisan groups and published on websites, blog or on social media platforms, attempting to imitate credible media through the “semblance of objectivity and balanced reporting”.<sup>18</sup> This category generally refers to text-based items. (c) Manipulated content is defined as the “manipulation of real images or videos to create a false narrative”<sup>19</sup> or misrepresent reality. There are various techniques and methods of manipulation of visual news: with the advent of digital photos and powerful image manipulation software it is possible to add or delete features or alter the original characteristics in order to catch the audience’s eye. (d) Propaganda includes fabricated stories “that aim to harm the interests of a particular party and usually has a political context”.<sup>20</sup> (e) Finally, false context of connection occurs where valid content is combined with untrue content – one example being the headline of a news story that does not reflect the content provided in the article.<sup>21</sup> In the part of the paper focusing on the copyright analysis, we will provide examples of fake news which can be considered fabrication, manipulated content and propaganda.

Fake news is predominantly channeled through web platforms and deliberately displays false content for the purpose of imitating ordinary news of widespread import. They may be published for political reasons, or just for trolling. But as mentioned, there is also often a profit purpose.<sup>22</sup> Publishers of this news can make serious money from advertising and marketing campaigns which generate huge amount of traffic. The fake news business model frequently uses Facebook and other social media platforms (as well as hundreds of other ad networks) to increase the amount of time audiences spend reading such news. The system often creates a lucrative incentive structure for both creators and publishers.<sup>23</sup> This also means that “the more widely a piece of disinformation can be spread, the better the chances of it capturing the public imagination and achieving its objective—whether that is to discredit an opponent, sow discord or to generate profit”.<sup>24</sup>

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<sup>15</sup> Zannettou, S., Sirivianos, M., Blackburn, J. and Kourtellis, N., *The Web of False Information: Rumors, Fake News, Hoaxes, Clickbait, and Various Other Shenanigans*, 11 *Journal of Data and Information Quality*, 1 (2019); Tandoc Jr, E.C., Lim, Z.W. and Ling, R., *Defining “fake news” A typology of scholarly definitions*, 6 *Digital Journalism* 137 (2018).

<sup>16</sup> Tandoc et al., above fn. 15, at 141.

<sup>17</sup> *Ibidem*, at 143.

<sup>18</sup> *Ibidem*.

<sup>19</sup> *Ibidem*, at 144.

<sup>20</sup> Zannettou et al., above fn. 15, at 10-4.

<sup>21</sup> See House of Commons Digital, Culture, Media and Sport Committee, *Disinformation and ‘fake news’: Interim Report*, 2018, at 7 (defining the various types of false information).

<sup>22</sup> Braun & Eckland, above fn. 6.

<sup>23</sup> *Ibidem*, at 7-8.

<sup>24</sup> *Digital Shadows, The Business of Disinformation: A Taxonomy*, (2017) available at <http://info.digitalshadows.com/rs/457-XEY-671/images/DigitalShadows-TheBusinessofDisinformationFakeNews.pdf>.

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The system usually works as follows.<sup>25</sup> An individual publishes false information on a website, then pays an ad network to advertise a link to the post. The network thus profits from advertising on its platform, earning money based on how many persons click on the link and/or see the ads. Thus, social media users click on the advertised links and visit the fake news website, generating an impression for each display ad on the site. The website earns revenues from the resulting advertising impressions, which may amount to millions of page views and tens of thousands of dollars per months.<sup>26</sup> Social media's business model is essentially based on users' engagement, interaction, content creation and consumption,<sup>27</sup> meaning that the more users read, click, share, and engage with content, the more profit the platform obtains.<sup>28</sup> As a result, social media platforms may not pay much attention to the source or veracity of the information.

## 3. Tackling disinformation: diverging approaches between EU and US

As mentioned, fake news has recently been a serious challenge for many countries, thus becoming national security issues. This is also why several countries started to set rules aimed to curb this phenomenon. Yet regulating fake news, especially on-line, is not an easy task. Generally, in almost all democratic systems, the use of both new and old forms of information media has not only posed problems of boundary definition – it has also often resulted in attempts to contain and control information flow.<sup>29</sup> The experience of democratic countries with provisions designed to monitor and control the flow of information, reveals that restricting media freedom may not withstand constitutional scrutiny. Many regulatory instruments implemented in various countries over the past decade to police digital media were often criticized for their inability to reconcile technological progress, protection of economic interests and other conflicting interests.<sup>30</sup> Regulatory issues and possible action plans against fake news are made even more complex by national differences in constitutional guarantees, platform immunities and monitoring obligations. These aspects have further contributed to diverging approaches between countries, especially Europe and United States.

It should be preliminarily reminded that in the past sixty years laws regulating speech in Europe have evolved differently from how they developed in the US. While in the US courts have often watered down any restrictions on the ability of the media to publish inaccurate information, in Europe courts have followed a more cautious approach which focuses on the value of human dignity and pluralism. As a result, online speech and fake news' regulation may encounter more resistance in the US than in Europe. Indeed, the right of the press and of speakers to freely communicate is so strongly protected in the US that it makes disinformation hard to attack. The US 'free marketplace of ideas' model of protection does not easily fit into the European context.

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<sup>25</sup> Katherine Haenschen & Paul Ellenbogen, above fn. 6.

<sup>26</sup> Ibidem.

<sup>27</sup> Nir Kshetri & Jeffrey Voas, The Economics of "Fake News", above fn. 11, at 10.

<sup>28</sup> Ibidem.

<sup>29</sup> Manuel Castells, *The Power of Identity* 320 (2nd ed., 2010); Carl J. Couch, *Mass Communications and State Structures*, 27 Soc. Sci. J. 111 (1990).

<sup>30</sup> See e.g. the controversy over the constitutionality of the US Communication Decency Act of 1996 in *Reno v. American Civil Liberties Union*, see 521 U.S. 844 (1997); and the French case *Loi Fillon*: see Conseil constitutionne [Constitutional Council] decision no. 96-378 DC, Jul. 23, 1996, *Journal Officiel de la République Française*, Jul. 27, 1996, at 11400.

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This becomes clear when comparing the wording of the First Amendment of the US Constitution with Article 10 of the European Convention on Human Rights (ECHR),<sup>31</sup> which places emphasis on the limits to freedom of expression and rejects the view of free speech as an absolute right. It may therefore be easier to fight fake news in Europe than it is in the US.

Also, while the First Amendment to the US Constitution addresses mainly the active dimension of speech, *i.e.*, the speaker's right to impart information freely, the ECHR (Article 10) and the EU Charter of Fundamental Rights (Article 11) emphasise the passive dimension of speech, namely the audience's right to be pluralistically informed and receive information. In this respect, it could be argued that false news and misleading or deceitful information do not fall within the scope of European free speech protection. European courts for instance would never adopt the approach adopted by the US Supreme Court in *Gertz*, where it was held that "[u]nder the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction ... on the competition of other ideas."<sup>32</sup> The European Court of Human Rights (ECtHR) – the ECHR's guardian – follows a different approach, especially when it comes to information channeled via Internet. The assumption behind the ECtHR reasoning is that the web raises new problems for the protection of fundamental rights and the measures which regulate traditional media do not effectively work in the digital environment; and that a new balance between freedom of expression and other conflicting human rights must be sought, with such balance often being tipped in favor of more restrictions on freedom of expression.

While in the US any regulation of speech and expression, as we have seen, is difficult to implement because of First Amendment concerns, the EU did launch a number of actions to verify the feasibility of legislative intervention aimed at limiting the dissemination of fake content,<sup>33</sup> with Germany and France recently introducing specific laws.<sup>34</sup> Amongst the measures adopted by the EU, we should mention: the establishment of the above High Level Expert Group, which was set up in January 2018 to develop an EU strategy and includes forty representatives of social media platforms and media organizations, academia and journalism, as well as members of civil society;<sup>35</sup> the Code of Practice on Disinformation, agreed by representatives of online platforms, leading social networks, advertisers and advertising industry, all committed on a voluntary basis to a set of standards to counter disinformation practices in different fields of action;<sup>36</sup> and the implementation of an Action Plan to step up efforts to counter disinformation in Europe.<sup>37</sup>

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<sup>31</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature Nov. 4, 1950, 213 U.N.T.S. 221, Europ. T.S. No. 5

<sup>32</sup> *Gertz*, 418 U.S. 323 (1974), at 339-340.

<sup>33</sup> Commission Recommendation (EU) 2018/334 of 1 March 2018 on measures to effectively tackle illegal content online C/2018/1177, OJ L 63, 6.3.2018.

<sup>34</sup> See above fn. 9.

<sup>35</sup> European Commission, A multi-dimensional approach to disinformation, Report of the independent High-Level Group on fake news and online disinformation, 2018.

<sup>36</sup> The Code is accompanied by an annex laying down a set of best practices. See the webpage <https://ec.europa.eu/digital-single-market/en/news/code-practice-disinformation>.

<sup>37</sup> European Commission and High Representative of the Union for Foreign Affairs and Security Policy, Joint Communication to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions Action Plan against Disinformation, Brussels, 5.12.2018 JOIN(2018) 36 final.

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## 4. Fake news, copyright subject matter and originality

We will now focus on the question whether fake news would be eligible for copyright protection and satisfy the relevant requirements, especially originality. The analysis does not cover issues related to the illegal or anyway controversial nature of this subject matter, which will be addressed in the Section 6.

As a general remark, news (and facts) *per se* cannot be copyrighted.<sup>38</sup> The principle is enshrined in international copyright law as the Berne Convention does not offer protection to “news of the day” and “miscellaneous facts having the character of mere items of press information”.<sup>39</sup> This means that, for example, the mere news that in January 2021 a mob of US President Donald Trump supporters stormed violently Capitol Hill in Washington DC cannot be protected by copyright. The rationale for this is clear. That is a simple fact. We need to avoid the monopolisation of mere facts and the attribution of exclusive rights over them to just one entity. This does not mean that journal articles which have given that announcement and commented on the news are not protected by copyright: they indeed constitute a way of expressing (and commenting on) those facts – and therefore may be protectable as literary works. This was also confirmed in the old UK case *Walter v. Steinkopff*,<sup>40</sup> a dispute about journalistic copying, where North J. recognized copyright in news articles but also noted that copyright does not protect the substance of news, just its form.<sup>41</sup> For our ease of reference in this paper, we will keep calling these articles ‘news’ even though technically they are ‘narrations of news’.

The issue of whether news should be protected by copyright has been reinvigorated more recently by the proliferation of news aggregators, *i.e.*, entities which take articles from online newspapers and put them together in their own platform for easy viewing by people.<sup>42</sup> Publishers have strongly complained, and lobbied governments asking for protection. While one may argue that considering news as protectable by copyright, and allow publishers to enforce the latter, may in some circumstances be akin to monopolising basic information, the recent move by the EU legislature may go exactly into such direction. As is known, the 2019

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<sup>38</sup> As far as US law is concerned, see *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340, 111 S. Ct. 1282 (1991).

<sup>39</sup> Article 2(8) of the Berne Convention for the Protection of Literary and Artistic Works. See also Will Slauter, *Who Owns the News? A History of Copyright* (Stanford University Press 2019), at 170-172 (also noting that “the committee report from the 1908 [Berne Convention] conference suggests that ‘news of the day’ was excluded not on the grounds of public policy—such as the desire for news to circulate freely—but because delegates saw it as being outside the scope of literary and artistic copyright. Indeed, the committee mentioned that news could conceivably be protected by other means—such as by laws relating to unfair competition—but that news was inappropriate subject matter for copyright”).

<sup>40</sup> *Walter v. Steinkopff* [1892] 3 Ch 489 (with North J. finding that newspapers had no implied licence to copy verbatim reports which were published in other papers).

<sup>41</sup> See also Slauter, above fn. 39, at 176 (highlighting how the newspaper *The Times* commented on *Walter v. Steinkopff* and distinguished between events and news of events). Such editorial – Slauter reminds us – noted that “news was already the product of labor and skill” and that “news is not a spontaneous product; it does not make itself; it is not found ready-made. It is a creation of man’s industry, and bears the same relation to facts and events that a manufactured article does to raw material. Facts by themselves are not news. They have to be converted into news by the process of speaking or writing”). Yet, in his book Slauter also notes that the line distinguishing the news/facts and the verbal or visual representation of them can often be blurred (see at 12-13).

<sup>42</sup> See Doh-Shin Jeon, “Economics of News Aggregators”, TSE Working Paper, n. 18-912, April 2018.



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Directive on Copyright in the Digital Single Market (DSM)<sup>43</sup> has introduced the widely discussed ‘publishers’ right’; this *sui generis* right allows the press to benefit for two years from part of the earnings received by news aggregators and social networks when they retrieve and make available to consumers their publications (it is basically a royalty right offered to publishers).<sup>44</sup> While the DSM Directive specifies that the new right does not apply in respect of the use of “very short extracts”, the exact meaning and scope of such exemption is far from clear (how short should the extract be? Would a five lines extract be exempted?). This is why such protection has attracted criticism.<sup>45</sup> In particular, should the expression “very short extracts” be interpreted too narrowly, it is feared that the right might constitute an obstacle to the dissemination of mere facts, thus contravening the (above mentioned and) fundamental principle of copyright law, *i.e.*, that what is protected is not a fact but the way it is expressed.<sup>46</sup>

The introduction of this new right does not even come as a big surprise. For example, that news headlines and extracts may be protected by copyright had already been confirmed in the UK by the High Court and the Court of Appeal in *Newspaper Licensing Agency v Meltwater Holding*, where it was found that mere newspapers’ headlines and extracts are protected by copyright and that users of online media-monitoring services violate publishers’ copyright unless they get a licence.<sup>47</sup> It should also be reminded that in some countries, especially in the US, publishers have historically pushed for, and obtained, some form of protection of the facts upon which their news articles are based. In the seminal 1918 case *International News Service v. Associated Press*,<sup>48</sup> the US Supreme Court affirmed the common law quasi-property doctrine of misappropriation, giving newsgatherers protection against competitors for free riding on their efforts and investments in intangible assets, including information. More specifically, the Court affirmed certain exclusive rights over (commercially valuable) factual details of news after publication, aimed at stopping unfair competition. After the doctrine fell into desuetude, several US state law jurisdictions revived, further developed and repositioned it into their unfair competition laws.<sup>49</sup>

Said that, what about the subject matter we are addressing in this article, *i.e.*, fake news disseminated via the Internet and social media? Here, an argument could be made that, because

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<sup>43</sup> Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on Copyright and Related Rights in the Digital Single Market and Amending Directives 96/9/EC and 2001/19/EC, 2019 O.J. (L 130) 92.

<sup>44</sup> See Art. 15 Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.

<sup>45</sup> Stavroula Karapapa, *The Press Publishers’ Right in the European Union: An Overreaching Proposal and the Future of News Online*, in Enrico Bonadio & Nicola Lucchi, *Non-Conventional Copyright – Do New and Atypical Works Deserve Protection?* (Edward Elgar, 2018), at 316-339.

<sup>46</sup> This principle has not prevented the introduction of rules protecting facts via a (quasi) copyright regime. The 1996 EU Database Directive does exactly so, as it offers non-creative databases a *sui generis* right which exclusively protect investments in obtaining, verifying and presenting data. The introduction of this right has been criticised, also outside the EU: see e.g. James Boyle, *The Public Domain – Enclosing the Commons of the Mind* (Yale University Press, 2008), at 208-220.

<sup>47</sup> *Newspaper Licensing Agency Ltd and others v Meltwater Holding BV and others* [2010] EWHC 3099 (Ch); *The Newspaper Licensing Agency and others v Meltwater Holding BV and others* [2011] EWCA Civ 890. That very short literary works can be protected by copyright was also confirmed by the CJEU in *Infopaq*, where it held that the reproduction of an extract of a protected work comprising 11 words amounts to copyright infringement (Case C-5/08, *Infopaq Int’l A/S v. Danske Dagblades Forening*, 2009 E.C.R I-6569).

<sup>48</sup> *International News Service v. Associated Press* (248 U.S. 215).

<sup>49</sup> On these judicial developments, see Shyamkrishna Balganesh, ‘Hot News’: The Enduring Myth of Property in News, 111 *Colum. L. Rev.* 419 (2011).

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such news is ‘creatively fabricated’, it would not only fall within the scope of copyright subject matter – it would also satisfy the originality requirement, whether we apply the originality test under US law (as affirmed in *Feist v. Rural*),<sup>50</sup> the EU ‘intellectual creation’ test under *Infopaq*<sup>51</sup> or other rules such as the UK ‘skill, labour and judgment’ standard.<sup>52</sup> Indeed, fake news amounts to a non-factual and made-up story,<sup>53</sup> and therefore is as creative and original as fiction – although it is not presented as such to audiences.<sup>54</sup>

An analogy could be made with the 1990 US case *Nash v CBS*,<sup>55</sup> which dealt with the issue of whether a book based on false facts can be copyright protected. Jay Robert Nash wrote two books about John Dillinger, an American gangster of the Great Depression era, arguing that Dillinger had not been murdered by the FBI as all had thought. He wrote instead that Dillinger was alive and had survived an FBI’s operation. After the defendant, CBS, aired a show incorporating Nash’s claims about Dillinger, the former sued on copyright infringement grounds. Even though the court (the 7th Circuit) found that copyright did not extend to the historical events themselves, it finally held that copyright subsisted in Nash’s presentation and exposition of those events. While the type of work in *Nash v CBS* is different from the subject matter we are focusing here (*i.e.*, fake news predominantly disseminated via the Internet and social media), the point made by the court may be used to support the argument that modern fake news, particularly the way the underlying events are (creatively) narrated, is protected against copying, especially verbatim copying.<sup>56</sup>

Against this background, we will now analyse three relatively recent fake news which have been widely disseminated online and have attracted attention from international media and the public – and verify whether copyright may apply. These cases have been selected with the purpose of identifying trends and highlighting possible commonalities and differences in the unfettered expansion of fake news and disinformation. We have focused on scenarios that – we believe – broadly epitomise the main copyright issues posed by the various categories of disinformation. As mentioned, photos and videos are included within the perimeter of analysis of this section, although strictly speaking they should often be considered as additional contents which lend emotion and apparent legitimacy to the written part of false stories and contribute to driving their growth.<sup>57</sup> Images are here important as they are often combined with the text of the news to deceive readers, with their creators being aware that people tend to accept pictures and videos as the correct narration because “people believe what they see—and see what they believe”.<sup>58</sup> In this way, images can reinforce existing prejudices.<sup>59</sup>

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<sup>50</sup> See again *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340, 111 S. Ct. 1282 (1991) (explaining the two requirements for originality).

<sup>51</sup> See again Case C-5/08, *Infopaq Int’l A/S v. Danske Dagblades Forening*, 2009 E.C.R. I-6569.

<sup>52</sup> See for example *Ladbroke v. William Hill* [1964] 1 All E.R. 465, 469 (Eng.).

<sup>53</sup> See Joshua Humphrey, *The Plague of Fake News and the Intersection with Trademark Law*, *Cybaris An. Intell. Prop. L. Rev.* 126, 141 (2017).

<sup>54</sup> Cathay Y.N. Smith, *Truth, Lies, and Copyright*, 20 *Nev. L. J.* 201, 203, 213 (2019).

<sup>55</sup> *Nash v. CBS, Inc.*, United States Court of Appeals for the Seventh Circuit 899 F.2d 1537 (1990).

<sup>56</sup> See the comment on *Nash v CBS*, published in the website of the Copyright Alliance, available at [https://copyrightalliance.org/ca\\_faq\\_post/fake-news-copyright](https://copyrightalliance.org/ca_faq_post/fake-news-copyright).

<sup>57</sup> Laura Mallonee, *How Photos Fuel the Spread of Fake News*, *Wired*, 21 December 2016.

<sup>58</sup> *Ibidem*.

<sup>59</sup> *Ibidem*.

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## The news about Pope Francis Endorsing Donald Trump for President

In the run up to the 2016 US Presidential election, a short article entitled “Pope Francis Shocks World, Endorses Donald Trump for President, Releases Statement” was widely circulated on the Internet and social media.<sup>60</sup> The piece begins by claiming that news outlets worldwide were reporting on the news that Pope Francis had made the decision to support Donald Trump in the race to the Presidency, also incorporating the following (false) statement from the Vatican: “I have been hesitant to offer any kind of support for either candidate in the US presidential election but I now feel that to not voice my concern would be a dereliction of my duty as the Holy See.” The short article also reported that sources within the Vatican knew that the Pope had taken into account the idea of making public his concern in the American election but apparently were totally in the dark until the above statement was released. It ended by reminding readers: “Stay tuned to WTOE 5 News for more on this breaking news”.

This is a typical and textbook example of fake news. What about copyright then? Could this news be protected as literary work? The expression ‘literary work’ means any work, other than a dramatic or musical work, which is written, spoken or sung (this is the definition given by the UK Copyright Act).<sup>61</sup> The US Copyright Office clarifies that a literary work is “a work that explains, describes, or narrates a particular subject, theme, or idea through the use of narrative, descriptive, or explanatory text ... Generally, literary works are intended to be read”. The Pope Francis’ story clearly falls within these definitions. It is also fixed in a tangible medium (as is known, fixation is a requirement for protection in several jurisdictions, including UK and US) and satisfies – it seems – the originality requirement. One may even say: it is highly original as the story has been entirely fabricated!

## The digitally modified photograph of Angela Merkel in Saudi Arabia

In May 2017 the German chancellor made headlines for being one of the female politicians who had chosen not to wear a headscarf when visiting an Arab country. A photo showing Angela Merkel during her state visit in Saudi Arabia was widely disseminated on the Internet and social media. The photo was digitally modified (Merkel’s hairs were blurred out) so as to send the message that the Saudi Arabian state TV (the photo was taken from that TV footage) did not want to show Angela Merkel’s head without the headscarf.

The modified photograph is clearly a fake.<sup>62</sup> Could it be protected by copyright? One may argue that the digital intervention has transformed the photo itself, turning it into an original (and fixed) derivative work, which attracts a new copyright, that is independent from the rights protecting the original picture. A hypothetical defendant who has copied and profited from the fake photo would try to push the argument that the digital modification – *i.e.*, blurring out Angela Merkel’s hairs – is a minor alteration which does not substantially alter the original image, and that therefore the fake picture is not an original work which deserves copyright – hence the reproduction and exploitation of the modified photo would not constitute an infringement of a non-existing copyright. Predicting how this imaginary dispute would be solved is difficult, the final decision also depending on several factors such as the subjective

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<sup>60</sup> The news can be read at <https://www.factcheck.org/2016/10/did-the-pope-endorse-trump/>.

<sup>61</sup> Sec. 3(1) of the UK Copyright, Designs, Patents Act (CDPA).

<sup>62</sup> Evan Bartlett, This Photo of Angela Merkel’s Hair Blurred Out on Saudi State TV is a fake, 4 May 2017.

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assessment carried out by individual judges in different countries. Under EU law for example it would depend on whether the judge believes that the digital modification in question constitutes an ‘intellectual creation’ under *Infopaq*,<sup>63</sup> while in the UK the court would likely need to be convinced that the alteration entails enough ‘skill, labour and judgement’.<sup>64</sup> In the US the focus would be on whether the alteration of the photograph has entailed a modicum of creativity.<sup>65</sup>

The creator of the Angela Merkel fake picture used, and modified, a previously created image, taken from the Saudi Arabian state TV. This raises the issue of whether the copyright over such image is infringed. Yet, the digital transformation of the image might actually save the creator of the fake photograph from liability, especially in countries such as the US where transformative fair use has often been affirmed by courts (in Europe the chances to win a transformative use case would be lower). In *Cariou v. Prince*,<sup>66</sup> for example, the US Court of Appeal held that artist Richard Prince’s blatant appropriation (and slight digital modification) of Patrick Cariou’s photographs of Jamaican Rastafarians was fair use, and that a number of his works were transformative fair uses of Cariou’s pictures. Therefore, the decision whether the use and adaptation of a fake photograph which appropriates a previous picture amounts to copyright infringement will depend on the jurisdiction where the legal action is taken and in particular the facts of each case and the subjective analysis carried out by judges. Indeed, it is well-known that fair use and fair dealing cases are often unpredictable, fact-specific and frequently produce conflicting decisions.

### The Video of Venice Dolphins

In early March 2020 Italy was the first country which entered total lockdown due to the Covid-19 outbreak. A video (apparently taken with a smartphone or tablet, and) claiming to show not only small fishes but also dolphins in Venice’s canals, started being massively shared on the Internet and social media. The news was picked up by several international media outlets, including MSN News, Gulf News and Go News India, with some of them including the footage. The part of the video showing the dolphins had not been taken in Venice, though. It had been taken in the Italian island of Sardinia, hundreds of thousands of miles from Venice, and then merged together with footage showing small fishes in a Venice canal.<sup>67</sup>

Would such doctored video be capable of attracting copyright or being protected by a related right? In general, videos fall within the protectable subject matter in most jurisdictions. The UK CDPA for example protects films, which include not only movies produced by cinema majors, but also recordings “on any medium from which a moving image may by any means be produced”.<sup>68</sup> Therefore, a recording like the dolphin video is in theory protected by copyright in UK (as well as other common law jurisdictions including US),<sup>69</sup> while in other countries,

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<sup>63</sup> *Infopaq Int’l A/S v. Danske Dagblades Forening*, 2009 E.C.R. I-6569.

<sup>64</sup> See above fn. 63.

<sup>65</sup> See again *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340, 111 S. Ct. 1282 (1991).

<sup>66</sup> *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013).

<sup>67</sup> See also Natasha Daly, Fake Animal News Abounds on Social Media as Coronavirus Upends Life, National Geographic, 22 March 2020.

<sup>68</sup> Sec. 5B(1) CDPA.

<sup>69</sup> Title 17 USC, Chapter 1, defining “motion pictures” as “... works consisting of a series of related images which, when shown in succession, impart an impression of motion ...”. Also, the US Copyright Office notes that “[m]otion pictures are works that contain a series or related images that are intended to be shown with a projector,

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e.g., in the EU, this type of videos are protected by a related right<sup>70</sup> (the difference between ‘copyright’ and ‘related right’ is predominantly terminological as both offer their owners similar exclusive rights). It should also be reminded that in most countries, including the EU, UK and US, videos do not need to be original to be protected by copyright or a related right, as these are not considered as typical authorial rights.<sup>71</sup> Therefore, *amateur* videos taken with smartphones and tablets, as the dolphins video here highlighted, are also protected.

Copyright infringement issues may also arise here. In general, infringement occurs where the video incorporates copyrighted elements of previous footages produced by third parties. This seems to have happened with the video of the Venice canal. Indeed, it was found out that the dolphins’ footage had been taken from another video made by members of the Luna Rossa sailing team during their training for the America’s Cup of 2021 in Sardinia.<sup>72</sup> As a general remark, it should be noted that whether a video may be considered as infringing upon the rights owned by the creator of an earlier video, will (again) depend on several factors including how much has been taken (substantiality test) and the way this test – and other rules such as *de minimis* – are interpreted by judges.

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These three examples of fake news have shown us something – *i.e.*, that the multiform expressive ways and shapes such news take (journal articles, photographs and videos) in principle fall within the copyright subject matter and may satisfy the requirements for protection, namely fixation and originality, where such tests are required. While modified pictures sometimes might not reach the originality threshold, particularly where the upstream work which is appropriated is not sufficiently altered, journal articles which incorporate fake news are often created from scratch and therefore may be highly original. As far as videos are concerned, there is not even an originality requirement to satisfy,<sup>73</sup> which would make copyright protection easy to obtain.<sup>74</sup> As mentioned, with regards to all these types of fake news, there may arise infringement issues in some circumstances.

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digital display, or other device. When the images are shown in successive order, they create an impression of movement that is perceptible to the eye” (see US Copyright Office at <https://www.copyright.gov/registration/motion-pictures>).

<sup>70</sup> Articles 3(1)(c) and 9(1)(c) Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version).

<sup>71</sup> In UK this issue was discussed in *Hyde Park Residence Ltd v Yelland* [2000] EWCA Civ., a case about ownership of copyright in video tapes taken by Princess Diana before her death: the court noted that “ownership and subsistence of copyright were not in dispute”, because “as section 1 of the 1988 Act makes clear, copyright is a property right”, which was owned by the security company. See also Lionel Bently et al., *Intellectual Property Law* (Oxford University Press, 5th Ed. 2018) at 85-86. The issue was also debated in the US case *Southwest Casino and Hotel Corp. v. Flyingman, No. CIV-07-0949 (W.D. Okla. Aug. 28, 2008)*, a casino started a copyright infringement suit over the use of their surveillance video. The defendant noted that the video was not sufficiently creative to attract copyright.

<sup>72</sup> See Matthew Holroyd, *Debunked: Video does NOT show dolphins in Venice’s canals*, EuroNews (September 7, 2020).

<sup>73</sup> This does not mean that any video will be protected. Indeed, protection will not be offered to videos which are copied from a previous video. See for example Sec. 5(b)(4) CDPA, stating that “copyright does not subsist in a film which is, or to the extent that it is, a copy taken from a previous film”.

<sup>74</sup> But see the debates in UK and US courts over this requirement for videos: above fn. 87.

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## 5. Can fact-checking be exempt from copyright liability?

It is worthwhile to delve into the issue whether the use by fact-checkers of fake news may be considered exempt from copyright liability – assuming that copyright subsists in this type of works, and the right holders decide to enforce it. Fact-checking is carried out not only by ad hoc organisations, but also by the press, governance watchdog groups, social networks, academics and activists.<sup>75</sup>

How does fact-checking work? There are essentially two ways to detect fake news.<sup>76</sup> The first is to rely on human ability to distinguish between true and false facts. Journalists and other communicators often follow this method. The second approach is based on the use of automated and algorithmic electronic programs which check the news sources.<sup>77</sup> Generally, automated fact-checking rely on a monitoring system that regularly examines major magazine and newspapers as well as broadcast news, “using subtitle feeds as well as text to speech conversion”,<sup>78</sup> and looking for common elements, keywords, signs and symbols that typically are found in fake news so as to be able to detect semantically similar words and phrases.<sup>79</sup> This approach is often based on a combination of stylometric features and text-based word vector features both used to categorize the content of a piece of news –<sup>80</sup> which makes it possible to analyse the text’s elements and verify “the authenticity or authorship of text, based on the linguistic style of writing”<sup>81</sup> (such as lexical usage, syntactic structures and phraseology analysis).

Automated and machine learning based fact-checking does pose challenges, though, especially on social media. Indeed, some content can be so hyperrealistic that algorithms may not be able to perceive with a sufficient degree of certainty what is manipulated and what is not.<sup>82</sup> After all, any process of fact-checking frequently requires a preliminary or a subsequent manual

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<sup>75</sup> For detailed analysis on how fact-checking works see e.g. Herley Shaori Al-Ash & Wahyu Catur Wibowo, Fake News Identification Characteristics Using Named Entity Recognition and Phrase Detection, in 10th International Conference on Information Technology and Electrical Engineering 12 (2018); Karishma Sharma et al., Combating fake news: A survey on identification and mitigation techniques, 10 ACM Transactions on Intelligent Systems and Technology 21 (2019); Kai Shu et al, Fake News Detection on Social Media: A Data Mining Perspective, ACM SIGKDD Explorations Newsletter 19.1, 22 (2017); Niall J. Conroy et al., Automatic deception detection: Methods for finding fake news, 52 Proc. Assoc. Inf. Sci. Technol., 1 (2015); Yimin Chen et al., Towards News Verification: Deception Detection Methods for News Discourse Towards News Verification : Deception Detection Methods for News Discourse, HICSS2015 (2015).

<sup>76</sup> Figueira & Oliveira, above fn. 7, at 820.

<sup>77</sup> Idem.

<sup>78</sup> Lucas Graves, Understanding the Promise and Limits of Automated Fact-Checking. Technical report, Reuters Institute, University of Oxford, 2018.

<sup>79</sup> Georgi Karadzhov et al., Fully Automated Fact Checking Using External Sources (2017). On automated fact-checking, see also Thorne J., Vlacos A., Automated Fact Checking: Task formulations, methods and future direction, In: Proceedings of the 27th International Conference on Computational Linguistics, 3346-3359 (2018); Katarina Kertysova, Artificial Intelligence and Disinformation: How AI Changes the Way Disinformation is Produced, Disseminated, and Can Be Countered, 29 Security & Human Rights 55 (2019).

<sup>80</sup> On this, see Kai Shu et al, above fn. 91, at 26.

<sup>81</sup> Harita Reddy et al., Text-Mining-Based Fake News Detection Using Ensemble Methods, 17 Int. Journal of Automation & Computing, 210, 212 (2020).

<sup>82</sup> Juan Cao et al, Exploring the Role of Visual Content in Fake News Detection, in Kai Shu et al. (eds.) Disinformation, Misinformation, and Fake News in Social Media Emerging Research Challenges and Opportunities, at 141. See also Kai Shu et al, above fn. 91, at 22 (noting that fake news detection “makes existing detection algorithms from traditional news media ineffective or not applicable”).

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human intervention to source statistics and primary research to assess that sources are reliable and that claims are truthful.<sup>83</sup> Despite the rapid development of sophisticated and automated verification tools, it is still difficult to imitate the sensitive contextual assessments required in human-made fact-checking activities.<sup>84</sup> Some automatic fact-checking tools are able to verify a series of simple factual claims – where clear data is available – but only under human guidance. For example, fake news detection on social media platforms is often based on a double hybrid model which includes human classification and machine learning, and is capable of screening any type of content (photo, video or text) as well as the dynamics of news propagation (such as linked media, user reactions, and relations between users).<sup>85</sup> Therefore, social media platforms generally use and trust a combination of automatic systems for checking the most repetitive content and human review for the multifaceted cases.<sup>86</sup>

An interesting model has been adopted by Facebook. It is based on a mix between feedback from users who flag potentially false content and the use of multiple machine learning models to continuously check the content of the platform.<sup>87</sup> When false, altered, partly false or missing content is identified, Facebook takes action. If an image or information circulating on the platform appears doubtful – especially if it does not cite a source – one of the first activities carried out by Facebook is to study the comments;<sup>88</sup> and such process may eventually detect inconsistent information or lead to questions about the authenticity of a content.<sup>89</sup> Another model is used by Full Fact, *i.e.*, a British charity which checks and corrects facts reported in the news. What this charity does is to collect information from news sites, live TV or social media platforms that may include claims that need to be checked.<sup>90</sup> Once they collect all the input information available as text, they split it down to individual sentences, which constitute their atomic unit for fact checks. Such sentences are then passed through a number of steps to make them useful in the process of fact checking.<sup>91</sup>

While the process of verifying whether text-only news may be relatively standard, checking if images and videos are truthful is more cumbersome: here there arises the need to check whether the image matches other elements, such as the date it was caught and distributed, various details within it, weather conditions etc. Fact-checkers also seek to acquire the original files incorporating the image in order to verify if they have been altered.

Said that, we now assess whether certain exceptions to copyright may apply to fact-checking, namely (i) the general fair use doctrine under US law, and several defences under EU (and UK) law, namely (ii) transient use; (iii) text and data mining; (iv) criticism and review; (v) and public security. Relying on these exceptions would be important as it may enable fact-checkers, including those who use automated processes run by platforms, to do their work without

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<sup>83</sup> Andreas Vlachos and Sebastian Riedel, Fact checking: Task definition and dataset construction, In: Proceedings of the ACL 2014 Workshop on Language Technologies and Computational Social Science, (2014) at 18.

<sup>84</sup> Graves, above fn. 94.

<sup>85</sup> Figueira & Oliveira, above fn. 7, at 820.

<sup>86</sup> Kertysova, above fn. 95.

<sup>87</sup> Facebook, How Our Fact-Checking Program Works, available at <https://www.facebook.com/journalismproject/programs/third-party-fact-checking/how-it-works>. See also Figueira & Oliveira, above fn. 7, at 820.

<sup>88</sup> Facebook, How Our Fact-Checking Program Works, above fn. 103.

<sup>89</sup> *Idem*. See also Tarleton Gillespie, Platforms Throw Content Moderation at Every Problem, in Zimdars - McLeod (eds.), above fn. 6 (illustrating the Facebook content moderation strategies).

<sup>90</sup> See the webpage at <https://fullfact.org/automated>.

<sup>91</sup> *Idem*.

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infringing the copyright over the news whose accuracy is assessed as well as other news which may be used for comparison purposes.

As is known, the US fair use doctrine allows limited use of copyrighted material without the need to obtain the right owner's authorisation. An accurate fair use analysis should be based on the distinction between expressive and non-expressive use of copyright material. While the former may not be exempted from copyright infringement, the latter is often deemed sufficient to escape liability.<sup>92</sup> Existing US case law involving certain tech companies helps understand such distinction and could also be applied *mutatis mutandis* to fake news fact-checking scenarios. Two relevant cases are *Kelly v. Arriba*<sup>93</sup> and *Perfect10 v. Amazon*.<sup>94</sup> In both cases the defendants provided image search engines services. The plaintiffs Kelly and Perfect10 owned copyright covering certain images that had been reproduced in thumbnail form, stored on defendants' servers, and shown to Internet users who used Arriba and Amazon services. The courts held that the defendant's activities were transformative fair uses – and considered the image search engines managed by the defendants as simple tools. The courts found that they were not vehicles used to convey expression and the use of the copyright material by Arriba and Amazon was merely instrumental, being absent any artistic or aesthetic purpose.<sup>95</sup>

US courts came up with similar findings in two other cases, namely *Authors Guild v Google*<sup>96</sup> and *A.V. ex rel. Vanderhye v iParadigms*.<sup>97</sup> The first dispute focused on the Google Books Library Project, which consists of scanning and making searchable the book collections of major research libraries. The court found that making copies when the aim is to allow the easy search and identification of books that contain a term of searchers' interests is transformative and therefore fair. Such service – the court added – does not displace or substitute books because it is not an instrument that people use to read the books – it just facilitates their search. The second case focused on the plagiarism detection service Turnitin (the program consists of checking the submitted documents against its database made of large quantities of papers and material). Again, no copyright infringement was found by the judge because the use of digital copies of copyright works by the programme was considered totally unrelated to expressive content, transformative, and therefore incapable of producing a market substitute. More precisely, the court held that Turnitin does not use the papers for their creative meaning and even though it stores the whole document, it does not publish a full copy of it for other people to access and see it.

Against this background, it could be argued that the activities carried out by fact-checkers – namely, collection and monitoring of fake news aimed at controlling their accuracy (which may entail their reproduction) may in principle interfere with the scope of rights copyright laws give to right holders. Yet, such uses could be deemed as non-expressive, non-creative and transformative uses of copyright works and thus constitute fair use under US law. Indeed, who carries out fact-checking does not use fake news for creative aims – rather, such use is quite

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<sup>92</sup> Benjamin Sobel, *Artificial Intelligence's Fair Use Crisis*, 41 Colum. J.L. & Arts 45 (2017); Daryl Lim, *AI & IP: Innovation & Creativity in an Age of Accelerated Change*, 52 Akron Law Review, 849 (2019).

<sup>93</sup> *Kelly v. Arriba and Perfect10 v. Amazon (Kelly v. Arriba Soft Corp)*, 336 F.3d 811 (9th Cir. 2003).

<sup>94</sup> *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007).

<sup>95</sup> For the first judicial acknowledgment of non-expressive fair use in the US, see *Sega Enterprises Ltd. v. Accolade, Inc.*, 977 F.2d 1510 (9th Cir. 1992).

<sup>96</sup> *Authors Guild, Inc. v. Google, Inc.*, 954 F. Supp. 2d 282 (S.D.N.Y. 2013); *Authors Guild v Google Inc.*, 804 F (3d) 202 (2nd Cir 2015).

<sup>97</sup> *A.V. ex rel. Vanderhye v. iParadigms, L.L.C.*, 562 F.3d 630 (4th Cir. 2009).



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mechanical and focused on a specific purpose, *i.e.*, to control whether the news which is being checked is accurate or false.

What about Europe? An exception that potentially might exempt certain mechanical and non-expressive uses of copyright works by fact-checkers is the transient copy exception under the Info-Society Directive.<sup>98</sup> This provision exempts temporary acts of reproduction provided that they are transient or incidental, an essential part of a technological process, enable the lawful use of a work and have no independent significance. It allows the reproduction of a copyright work if the copy is necessary to carry out technological and mechanical tasks of no autonomous value – with the classic example being the temporary copy of a webpage stored in the browser’s cache. One may thus note that this exception might cover scenarios where fact-checking entities collect and monitor fake news, provided that the copies of said material are transient and not permanent. Yet, it is doubtful whether fact-checkers make just transient copies of fake news, as the need to monitor and assess them may require a relatively long period of time.

The text and data mining exception under the 2019 EU Directive on Copyright in the Digital Single Market<sup>99</sup> might also be relevant here. Text and data mining activity allows the extraction and use of significant amounts of digitally available information<sup>100</sup> – it is considered a useful defence in several fields, *e.g.*, it may help find business and scientific research opportunities in corporate documents, social media feeds, medical records, academic articles and many other sources of text-based data. According to recent literature,<sup>101</sup> text and data mining may also be useful when it comes to detecting fake news. Said that, could fact-checkers that carry out such mining activities invoke this exception? In theory, ‘yes’, but it should be noted that the data mining exception under the EU Directive is limited. First, such activity can be carried out freely only by research organisations and cultural heritage institutions for the purposes of scientific research.<sup>102</sup> Thus, only fact-checkers which belong to these categories – *e.g.*, academics engaged in research projects – would be able to rely on this defence. Another provision of the Directive in principle allows text and data mining activities for business and for-profit entities.<sup>103</sup> Yet, it does not apply if copyright owners have reserved the right to mine – which means that the exception could be overridden by the copyright owners’ indication that they do not want to allow such activity.<sup>104</sup> Therefore, fact-checkers which carry out fake news detection for profit purposes (and several actually do) may not be able to use this exception.

There is another defence under EU law which may be relied on by fact-checkers, *i.e.*, the exception for criticism and review under the Info-Society Directive. What this defence allows are uses of a copyrighted work aimed at criticising and reviewing it, provided that the latter has already been lawfully made available to the public; that the source, including the author’s name,

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<sup>98</sup> See Article 5(1) Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society.

<sup>99</sup> See Articles 3 and 4 of Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market.

<sup>100</sup> See Article 2(2) of Directive (EU) 2019/790 which define text and data mining.

<sup>101</sup> Harita Reddy et al., Text-Mining-Based Fake News Detection Using Ensemble Methods, 17 International Journal of Automation and Computing, 210 (2020); Kai Shu et al, above fn. 91.

<sup>102</sup> See Article 3 of Directive 2019/790. The UK CDPA also provides a text and data mining exception, which is limited to the copying of works for the sole purpose of research for a non-commercial purpose: see Section 29A of the CDPA.

<sup>103</sup> See Article 4 of Directive 2019/790.

<sup>104</sup> Eleonora Rosati, Copyright as an Obstacle or an Enabler? A European Perspective on Text and Data Mining and its Role in the Development of AI Creativity, 27 Asia Pacific L. Rev. 198 (2019).

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is acknowledged; that such uses are in accordance with fair practice; and to the extent required by the specific purpose.<sup>105</sup> The UK CDPA also contains a similar exception.<sup>106</sup> Fact-checking of fake news may often meet the requirements set forth in these provisions. First, the false story which is checked has obviously been made available to the public. Indeed, the very reason why the news is used is to verify that it is accurate, and – if it is not – to inform the public (which has already been exposed to such news) about the checking process and its outcome. In this sense, it could be noted that the copying of the fake news is directed at supporting or illustrating the criticism and review. The use of the false news for fact-checking purposes seems also fair. The Info-Society Directive and CDPA do not provide a legal definition of what is fair or unfair under this exception. Courts have here discretion based on the specific facts of the case and the aim for which the copyrighted work is used. Said that, one may argue that fact-checking of news which is not done for mere commercial aims is fair as its only purpose is to verify whether the news is accurate, thus providing some social, cultural or informational benefits, with no direct or indirect economic interest. Also, the fact that checkers may reproduce and show the false news in its entirety does not make the use of the copyrighted work unfair – such use is indeed necessary for said purpose. It is generally accepted that in certain circumstances it is fair to reproduce and/or make available the whole copyrighted work for review or criticism purposes (this is often the case for visual works such as photographs or videos).<sup>107</sup>

The public security exception under the Info-Society Directive might also be relevant here.<sup>108</sup> It exempts uses of copyrighted works “for the purposes of public security or to ensure the proper performance or reporting of administrative, parliamentary or judicial proceedings”. Thus, one may note that fact-checkers do use and reproduce the information in question to pursue a public interest, *i.e.*, to find out whether such facts are true or false – and that therefore they are exempt from copyright liability under this exception. That activities which aim at verifying whether a news is false protect a public interest is confirmed by an old English out-of-court dispute of 1733, highlighted by Will Slauter in his book “Who Owns the News? A History of Copyright”.<sup>109</sup> Slauter reminds us that at that time a satirical London paper named *Grub-Street Journal*, which mocked politicians and news writers, was accused of copying third parties’ contents. Indeed, such journal regularly incorporated news taken from other London newspapers – and the editor would search different reports of the same fact and then reproduce brief excerpts one next to the other, acknowledging the source. By setting side by side different versions of the same stories, the *Grub-Street Journal* brought to light the inaccuracies and discrepancies that characterised the press of the time. When blamed for unfair practices, the *Journal’s* editor justified such behaviour on grounds of public utility, clarifying that “[o]ur method of comparing the articles of one paper with those of another is not only not piratical, but extremely useful, and even necessary to put a stop to the currency of false news”.<sup>110</sup>

That said, current EU case law on the public security exception may make such defence difficult to apply to fact-checkers. In fact, in *Eva-Maria Painer*<sup>111</sup> the exception was interpreted narrowly by the CJEU. The Court held that private organisations (in that case, a newspaper

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<sup>105</sup> Article 5(3)(d) of the Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society.

<sup>106</sup> Section 30(1).

<sup>107</sup> Bently et al., above fn. 71, at 247.

<sup>108</sup> See Article 5(3)(e).

<sup>109</sup> Slauter, above fn. 39, at I of the Introduction.

<sup>110</sup> Slauter, above fn. 39, at I of the Introduction.

<sup>111</sup> Case C-145/10 *Eva-Maria Painer v Standard Verlags GmbH and Others*, para 88.

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publisher) cannot be permitted to confer on themselves the protection of public security. Only the competent public authorities can be considered as appropriate and responsible for pursuing that target of general interest – which entails that any other entity cannot autonomously decide to use copyrighted works by invoking public security.<sup>112</sup> The CJEU accepted that a private entity might in certain cases contribute to the fulfilment of a public security objective. However, such initiative – the Court explained – must be taken within the framework of a decision or action started by the competent national authorities to ensure public security as well as via an agreement and in coordination with those authorities, although it is not necessary to wait for a specific, current and express call to action on the part of said authorities.<sup>113</sup> It follows that, unless fact-checkers operate in cooperation with the relevant authorities (for example, the judiciary), as mentioned, this exception may not apply here.

### 6. Excluding copyright eligibility for fake news on public interest grounds?

We have seen that fake news is in principle eligible for copyright protection and may be capable of meeting the relevant requirements. But we have also seen that certain users of fake news, namely fact-checkers, might escape liability for copyright infringement by relying on specific exceptions.

We now address the issue whether copyright over fake news could be denied based on their illegal nature. The debate on whether works whose content is unlawful or ethically unacceptable should attract copyright is not new. Some commentators believe that copyright regimes should not be bothered about the illegal/immoral nature of the work, and thus remain ‘neutral’.<sup>114</sup> The main justification for a neutrality-based approach is based on the belief that it is beyond copyright law’s mandate to act as a censor, and that failing to protect works based on their content could produce a chilling effect on creativity and place a heavy burden on those who decide which works should obtain protection.<sup>115</sup>

And indeed judges in several countries have often confirmed that works displaying illegal or immoral contents do deserve copyright. For example, in Italy a fascist anthem,<sup>116</sup> Adolf Hitler’s book “Mein Kampf”<sup>117</sup> and an obscene parody<sup>118</sup> have been considered as protected by copyright. Porn-related works, especially movies, are also relevant here, with courts in many

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<sup>112</sup> Paras 111-112 of the decision.

<sup>113</sup> Paras 113 of the decision.

<sup>114</sup> On this discussion see *e.g.* Enrico Bonadio & Nicola Lucchi, Copyright and Pornography, in Bonadio & Lucchi eds., *Non-Conventional Copyright*, above fn. 56, at 418-431.

<sup>115</sup> See Eldar Haber, Copyright Protection of Illegal Works, in Bonadio & Lucchi eds., *Non-Conventional Copyright*, above fn. 56, at 409-410.

<sup>116</sup> *Ponti DeLaurentis S.p.A. vs Pellegrino*, Court of Appeal of Rome, 10 October 1957.

<sup>117</sup> Court of Bologna (Pretura), 20 April 1971, *Civil Justice* 1971, 694.

<sup>118</sup> *Susanna Tamaro and Soc. Baldini e Castoldi vs. Soc. Comix and Soc. P.D.E.*, Court of Milan, 29 January 1996.

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countries, including US,<sup>119</sup> France,<sup>120</sup> Taiwan<sup>121</sup> and again Italy,<sup>122</sup> confirming that such works can be protected by copyright.

That copyright should be neutral *vis-a-vis* the content of the work was also confirmed by a WTO Panel's decision in the US-China dispute over enforcement of intellectual property (IP) rights,<sup>123</sup> which found that China's denial of copyright protection for works that do not meet China's 'content review' standards is not in line with the TRIPS Agreement. The Panel in particular held that copyright and government censorship address different rights and interests, and that while copyright protects private rights, government censorship addresses public interests. Therefore, censorship regulations – the Panel further noted – cannot eliminate rights that are inherent in a copyrighted work.

What about fake news, then? If we fully follow the 'neutrality' approach to copyright, we would conclude that such news should be deemed protectable by copyright, despite them having the aim (and being capable) of misleading huge amounts of people. Really? Should copyright law turn a blind eye to the risks posed by this phenomenon and allow creators of this kind of content to rely on its substantive and enforcement rights to maximise profits? We believe this should not be the case, as the dangers produced by fake news are greater than those created by, *e.g.*, a book which is based on false facts (like in *Nash v CBS*) or a porn movie.<sup>124</sup> Indeed, as we have seen, fake news is often produced with the purpose of poisoning the political and social discourse, for example by discrediting a public figure or a political movement. Take the false information over the digitally modified Angela Merkel's photograph: millions of social media users took seriously the idea that Saudi Arabia TV had censored the picture of the unveiled German leader, thus contributing to creating and strengthening an anti-arab and anti-muslim sentiment. This is more dangerous than publishing and distributing books that are based on false facts, as the readers of such books choose to buy the product, which is therefore not imposed on them. The same is true of scandalous or ethically controversial content such as pornographic works, which are actively searched by readers and viewers. Modern fake news is different. False articles as well as fabricated or misleading pictures and videos can easily and rapidly reach millions of people via social media feeds, leaving them passively exposed to untrue and distorted facts, with consequences and repercussions which are potentially far-reaching and extremely harmful. The social alarm of fake news is rooted in its inherent nature: *i.e.*, it is shown and presented not as fiction, but as true facts to deceive people and push them to rely on and trust such false information. The negative effects of this distortion of truth may further be amplified by traditional media picking up the fake news. This happened with the video claiming that dolphins had appeared in Venice's waters: the doctored video was picked up several traditional media outlets, thus magnifying its impact.

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<sup>119</sup> There are two US porn-related leading cases supporting this view. The first is *Mitchell Bros. Film Group v. Cinema Adult Theatre* (604 F.2d 852 (5th Cir. 1979), cert. denied, 445 U.S. 917 (1980)); and the other is *Jartech v. Clancy*, 666 F.2d 403 (9th Cir. 1982).

<sup>120</sup> *Dauphin Pirate* case (TGI de Lyon, ch. 10 cab. 10 J, decision of 7 February 2017).

<sup>121</sup> Taiwan Intellectual Property Court Criminal Judgment 101 *Xing- Zhi-Shang-Yi-Zi* No. 74 (2012). For an analysis of the case see Chen, Ping-Hsun, An Unresolved Question in the First Adult Video Copyright Case of the Taiwan Intellectual Property Court, 3 NTUT J. of Intell. Prop. L. & Mgmt. 56 (2014).

<sup>122</sup> *Imp. Valerio Basaglia*, Italian Supreme Court, 2 June 1995 n. 908.

<sup>123</sup> WTO case DS362 China — Measures Affecting the Protection and Enforcement of Intellectual Property Rights, report of 26 January 2009.

<sup>124</sup> See also Ned Snow, Content-Based Copyright Denial, 90 Ind. L.J. 1473, 1523 (2015) (arguing that works whose creation and dissemination pose significant harms to society at large justify content-based copyright denial).

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That fake news should be denied copyright on these grounds has been recommended by US scholar Cathay Smith. Smith interestingly notes that “facts that deceive are bad for society because they distort history, falsely shape our views of society, and provide misinformation for posterity”.<sup>125</sup> Copyright should therefore be rejected – the argument goes – as the public interest in promoting efficiency, fairness, and production of socially valuable works is here overriding.<sup>126</sup> More specifically, Smith proposes to apply the factual estoppel doctrine to consider fake facts as unprotectable – and does so by pointing to a series of US cases which have explicitly or impliedly relied on that doctrine<sup>127</sup> (in common law jurisdictions ‘estoppel’ is a doctrine that is invoked in some circumstances to prevent a person from relying on certain rights or some facts which are different from earlier facts).

Smith also raises economic issues, noting that “authors of fake facts should not be able to benefit from their deception”.<sup>128</sup> Indeed, as we have seen, fake news is often created to attract clicks and thus increase profits, even where there is no intention to pollute the political discourse (the Venice dolphins video belongs to this category). One of the above news-related decisions - *Davies v. Bowes* (1913)<sup>129</sup> - also stressed the economic element within the unfairness analysis. In that old dispute a writer for the New York newspaper *The Sun* had published a fictional story of a courtroom scene, which purported to be a ‘real life drama’ in a little town in Massachusetts. Yet, the story had been presented as if it were a journalistic report of a real fact. Another author thought that the account was true and used it as the basis for a play called ‘Kindlining’. The first writer took legal action, arguing that the play constituted a violation of his right to dramatize the work. Judge Hough did not grant the injunction as he found that presenting a fiction as news and profiting from the defendant’s adaptation of his story was immoral. In particular, he noted: “it is a matter of morals that he who puts forth a thing as verity shall not be heard to allege for profit that it is fiction. ... because [the story] was printed as news; it was presented to the public as matter of fact and not of fiction; the readers of the Sun were invited to believe it”.<sup>130</sup>

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<sup>125</sup> See Smith, above note 54, at 237.

<sup>126</sup> *Ibidem*, at 242.

<sup>127</sup> See amongst others *Oxford Book Co. v. Coll. Entrance Book Co.*, 98 F.2d 688, 691 (2d Cir. 1938) (holding that “historical facts are not copyrightable per se nor are errors in fact”); *Mosley v. Follett*, No. 80 Civ. 5628, 1980 WL 1171, at 1, 3 (S.D.N.Y. Nov. 5, 1980) (finding that the defendant had reasonably relied on the author’s representations that the work was not fictional; and focusing on such reliance and finally holding it reasonable due to the categorisation of the author’s work by the Library of Congress as non-fiction and to the treatment of the work by reviewers as non-fiction); *Marshall v. Yates*, No. CV-81-1850-MML, 1983 WL 1148, at 2 (C.D. Cal. 26 October 1983) (embracing the reasonable reliance requirement for factual estoppel). Smith also cites cases which explicitly refused the requirement that the defendant needs to show reliance, holding instead that such reliance is not conclusive when it comes to applying the factual estoppel doctrine: see *Arica Inst., Inc. v. Palmer*, 970 F.2d 1067, 1069 (2d Cir. 1992); *Houts v. Universal City Studios, Inc.*, 603 F. Supp. 26, 31 (C.D. Cal. 1984); and cases which have refused to apply or rejected this doctrine: see *De Acosta v. Brown*, 146 F.2d 408, 409 (2d Cir. 1944); *Penguin Books U.S.A., Inc. v. New Christian Church of Full Endeavor, Ltd.*, No. 96 CIV. 4126(RWS), 2000 WL 1028634, at 3 (S.D.N.Y. 25 July 2000); *Gerald Brittle v. Warner Bros. Entm’t, Inc.*, No. 3:16-cv- 00908-JAG (E.D. Va., 28 August 2017).

<sup>128</sup> See Smith, above fn. 54, at 227.

<sup>129</sup> *Davies v. Bowes*, 209 F. 53, 55 (S.D.N.Y. 1913) (noting that the journalist who had produced the false news published his article as news and the defendants relied on the article as news; and finding that said journalist was factually estopped from arguing that his news merited the kind of copyright that fiction usually attracts).

<sup>130</sup> See Slauter, above fn. 39, at 243.

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The inherent immorality of false news' exploitation could also be relied on to invoke the 'unclean hands' doctrine. This is an equitable defence typical of common law jurisdictions such as the US, in which the defendant claims that the plaintiff should not obtain a remedy and profit when the latter has acted unethically or in bad faith, or has anyway carried out an illegal activity.<sup>131</sup> It could be another legal route to prevent creators of fake news from actually benefiting from copyright, and thus being incentivised to produce and circulate them in the first place. The UK CDPA could similarly be helpful if a dispute on copyright protection of fake news reaches a British court: Section 171(3) states that no copyright provisions in that statute will affect "any rule of law preventing or restricting the enforcement of copyright, on grounds of public interest".<sup>132</sup> This provision does not state that controversial subject matter is not eligible for copyright on grounds of public policy.<sup>133</sup> It instead contains a saving in respect of any rule of law preventing or restricting copyright enforcement if this is necessary to protect a public interest. And in the UK case *Hyde Park Residence Ltd v Yelland* it was held that the aim of this provision is to allow the courts not to enforce any copyright where the work is injurious to public life.<sup>134</sup> One may then say: what is more "injurious" than polluting the political discourse by disseminating fake news and/or extracting profits out of such activity?

The above arguments seem solid. After all, many would agree that no law should protect the interests of creators of works which are unanimously considered harmful to society. Illegal acts which are particularly serious and/or hateful (not only fake news but also child pornography, for example) should not be rewarded by copyright regimes.<sup>135</sup> As has been noted, these works are undesired, and granting them protection would contribute to creating social injustice and could be perceived as a sort of governmental approval of the underlying illegal and/or abhorrent act.<sup>136</sup> And one of the ways such unlawful or unacceptable acts could be discouraged is exactly to block any possible legal incentive given by copyright law, particularly the prospect of maximising profits.

The main objection to this point is that refusing to grant fake news copyright, or make it unenforceable, would potentially increase the dissemination of such news. Absent copyright – the argument goes – the news could be freely reproduced, even verbatim, and made available

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<sup>131</sup> The doctrine is rooted in history. In the old UK case *Holman v Johnson* (1775) 1 Cowp 341, an English contract law case focusing on the principles behind illegal transactions, Lord Mansfield famously noted: "No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. In another more recent case, *Euro-Diam Ltd v Bathurst* [1988] 2 All ER 23, 27-28, an English case concerning a contract of indemnity insurance, noted that *Ex turpi causa* "applies if, in all the circumstances, it would be an affront to the public conscience to grant the plaintiff the relief which he seeks because the court would thereby appear to assist or encourage the plaintiff in his illegal conduct or to encourage others in similar acts".

<sup>132</sup> Sec. 171(3) CDPA. The public interest exception to copyright infringement was accepted in *Ashdown v Telegraph Group Ltd* [2001] EWCA Civ 1142. While such defence may not have survived the CJEU's decisions in *Spiegel Online* (C-516/17) and *Funke Medien* (C-469/17), after Brexit it might revive again.

<sup>133</sup> See also Laddie, Prescott and Vitoria, *The Modern Law of Copyright and Design*, Lexis Nexis 2011, para [21]-[20].

<sup>134</sup> *Hyde Park Residence Ltd v Yelland* [2000] 3 W.L.R. 215 [2001] Ch. 143.

<sup>135</sup> This is not the case of less serious illegal activities such as unauthorised street art or graffiti. See generally Enrico Bonadio, *The Cambridge Handbook of Copyright in Street Art and Graffiti* (Cambridge University Press 2019) (arguing that the fact that such artworks are created without the authorisation of the owner of the tangible support (e.g., a wall) should not be conclusive when it comes to copyright subsistence).

<sup>136</sup> See Haber, above fn. 115, at 410-412.

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to the public, by media outlets and any other person interested in circulating it, without any fear of incurring liability for copyright infringement: which would amplify rather than neutralize the negative effects produced by this phenomenon.

There are valid responses to this objection, though. As mentioned, as creators of fake news may be often incentivised by the prospect of obtaining profits (which copyright enables them to maximise), leaving fake news without protection may – symmetrically – contribute to discouraging their production and dissemination. While there is no reported case yet where creators of fake news have explicitly relied on copyright to maximise their profits (for example, via licensing), it cannot be ruled out that one of the motivations which push these creators to produce such news comes from being aware that copyright is there and may be exploited should the need arise. Rejecting copyright may thus help in the fight against the spread of fake news. It could also be argued that denying copyright would not have the effect of increasing the circulation of fake news – this is because other restrictions (especially those arising from recent anti-fake news laws) may apply which also aim at discouraging such dissemination. But this is not to say that failing to guarantee copyright would be here useless because there are other laws which do that job. Quite the contrary. A regime which combines the *absence* of copyright and the *presence* of rules which fight fake news would have more chances to reduce the amount of false information which regularly flood the web and reach people’s social media feeds.

## 7. Concluding remarks

Fake news is a worrying phenomenon, and its negative impact on society is undeniable. Governments are starting to react, but further actions may be needed to tackle and finally defeat it, even where such actions may interfere with the right to free expression. As we have seen, this may be more likely to materialize in Europe than in the US.

The expressive ways fake news takes shape – including journal articles, photographs and videos – constitute in principle protectable subject matter and may often satisfy the requirements for copyright protection, *i.e.*, fixation and originality, where relevant. The three examples we gave – the article claiming that Pope Francis supported Donald Trump, the digitally modified photograph depicting Angela Merkel and the doctored video showing dolphins in Venice – are just a few examples of the many types of fake news that may be eligible for protection and meet the relevant requirements.

While there has been no reported case where the creator of a fake news has relied on copyright, for example to object to its exploitation, it cannot be ruled out that copyright-based objections (which have not reached courts and thus have remained confidential) have already been made, possibly with the aim of safeguarding the economic profits which such news may produce. That is why the discussion animated in this paper is not merely academic. And that is why the decision not to protect fake news via copyright – which could be taken by the legislature or even by courts while developing their case law (especially in common law jurisdictions) – may have a deterrent effect. If fake news people are aware that they cannot rely on copyright in any manner whatsoever, they may be less inclined to produce and disseminate such content in the first place. It should be reminded that producers of false news are often motivated by financial

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incentives.<sup>137</sup> Content that goes viral on social media platforms can generate significant revenue from advertising when users click and access the content. In an effort to effectively mitigate this phenomenon, denying copyright may contribute to breaking the circle of transmission of this kind of information and the business model upon which it is based. In other words, the absence of copyright exclusivity may have the effect of discouraging the creation and dissemination of fake news, as it would erode the related financial incentive.<sup>138</sup> As has been noted, “if the work is unprotected it is more difficult to reap rewards from its distribution, which means that it is likely to be less widely distributed”.<sup>139</sup>

Rejecting copyright protection for fake news would also be in tune with the utilitarian theory of IP, which – as is known – is popular in the US and enshrined in its Constitution: Section 1(8) of such Constitution tells us that IP protection is necessary “to *promote* the progress of science and useful arts” (emphasis added). This has also been a feature of UK copyright law for centuries. The 1710 Statute of Anne (the first copyright act in the world) was entitled “An Act for the *Encouragement* of Learning” (emphasis added). But is “promoting” and “encouraging” fake news what copyright laws should aim at? The answer is certainly ‘no’. Jurisdictions which do not explicitly embrace IP utilitarian theories, but predominantly follow a natural rights-based approach (such as continental European countries), could also justify the decision to exclude copyright protection for fake news. Fairness-related grounds could here be relied on. After all, how could one reasonably claim that copyright laws should protect the ‘natural’ right to mislead people and take economic advantage of such cheating?

Fake news does not benefit society. It hurts it. And it does so badly, undermining the very social and political fabric which brings together and unites people and the organisations they form. Explicitly denying copyright in fake news would contribute to discouraging behaviours which, despite being creative and sometimes highly original, are harmful and do not contribute to society – and it would do so by removing any economic incentive and/or reaffirming principles of fairness and common sense. Should copyright in fake news be affirmed instead, exceptions, including some of the defences highlighted in this article, could (and should) be available to entities and individuals who perform fact-checking tasks.

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<sup>137</sup> See Kshetri & Voas, *The Economics of “Fake News”*, above fn. 11, at 9.

<sup>138</sup> Snow, above fn. 124, at 148.

<sup>139</sup> See Norman Siebrasse, *A Property Rights Theory of the Limits of Copyright*, 51 U. Toronto L.J. 1, 11 (2001).