EDITORIAL

FAKE NEWS, INTERNET AND METAPHORS (TO BE HANDLED CAREFULLY)

*Oreste Pollicino**

"The internet is a new free marketplace of ideas".

This is the preferred metaphor[1] of those who within scholarly and public debate take the view that the issue of fake news need not be addressed (and confronted) by public authorities (and public law). The main idea behind this thesis is that whereas in the world of atoms, as Justice Holmes wrote in 1919, the "best test of truth is the power of the thought to get itself accepted in the competition of the market"[2], this is even more true in the world of bits, as the internet is amplifying the free exchange of and competition between ideas and opinions. Consequently, according to the marketplace of ideas paradigm, if it is true that under the First Amendment there is "no such thing as a false idea"[3] in the material world, this is even truer in the digital word, thanks to the enhanced opportunity to express thoughts. In other words, public authorities should not have any role in dealing with the ever growing phenomena of fake news on the internet, because web users are (optimistically) supposed to have all the tools they need in order to select the most convincing ideas and true news, disregarding news that is not convincing or fake. This constitutes an expression of complete trust in the capacity for self-correction of the market for information.

* Full Professor of Constitutional Law, University of Milan "Bocconi"

[1] US Supreme Court, *Reno* v. *American Civil Liberties Union*, 521 U.S. 844 (1997),

[2] *Dissenting opinion* Justice Holmes in the US Supreme Court case *Abrams v. United States, Abrams v. United States*, 250 U.S. 616 (1919).

[3] US Supreme Court, *Gertz v. Welch*, 418 U.S. 323 (1974).

Is there any alternative reading of the possible relationship between public powers, regulation, and truth on the internet? Or should public law decline to play any role in the matter?

In order to try to answer to the questions mentioned above, it is necessary to take a step back: what is hidden behind the label fake news?

A first tentative answer could include within the definition all information or news that shares a certain level of falsehood. Such information may be entirely made up or only partially false.

Obviously, as for the right to be forgotten saga and many other issues which are experiencing a second lease of life in the digital era, the debate surrounding fake news is not new to the age of the internet. It is "just" a question of the different degree of relevance and intrusiveness of this issue. It is evident that the global nature of the "new" technology, the fact that virtually every internet user is able to became an editor and to spread and (especially) share (even false) information and the corresponding much greater potential impact of falsehoods on the internet are exponentially amplifying the urgent need to verify the sources of information in the post-truth digital era.

The real challenge is how such a process of verification should be conducted

According to the champions of the free market of ideas metaphor, since by definition scarcity of resources is an analogue and not a digital limit, with the result that there is no need to protect pluralism of information on the internet, legal rules (and especially public law) should take a step back in the name of the alleged self-corrective capacity of the information market. Just as the economic market knows no test of product "validity" but allows demand to drive supply, relying on the market to distinguish between viable and shoddy products, the best way of dealing with the phenomenon of fake news in the information market is to secure the widest possible dissemination of all news, including news from contradictory and unreliable sources.

The thesis is not so convincing, in my opinion, for at least three reasons.

First of all, whilst it may be the case that the problem of scarcity of technical resources does not affect the internet, our attention and time continue to be scarce "products". In fact, while the amount of information available is growing, the 24 hours in

the day cannot be extended. Against this background, when faced with this information overload the temptation for users will be to search for news, information and ideas that enhance their previous thoughts and preferences, leading to the process of group polarisation succinctly described by Cass Sunstein[4]. In other words, in the world of bits, much more than in the word of atoms, deliberation tends to move groups, and the individuals comprising them, towards a more extreme point in the direction indicated by their own predeliberation judgments. The result seems to be that, quite paradoxically, despite (or perhaps better, precisely due to) the unlimited amount of information on the internet, there is a less pluralistic exchange of different opinions than in traditional media where the scarcity of sources is still an issue.

Secondly, it is reasonable to ask whether the marketplace of ideas metaphor is well suited to the scope (and limits) of protection for free speech under the European constitutionalism paradigm. First, as is well known, protection for freedom of expression in Europe is more limited than in the US. Regarding this issue it is sufficient to compare the wording of the First Amendment of the US Constitution with Article 10 of the European Convention on Human Rights. However, it is not simply a question of differences in scope, but also of difference in focus. Whilst the First Amendment addresses mainly the active dimension to the right to express freely one's own thoughts, Article 10 of the European Convention (but also Article 11 of the Charter of Fundamental Rights of the European Union) emphasises the passive dimension to the right to be pluralistically informed. In this respect, it could be argued that fake news is not constitutionally covered by the European vision of free speech. Or to put it differently, the European courts would find it very difficult to accept the view of the US Supreme Court according to which, as alluded to above, "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas"[5].

[4] C. Sunstein, *Republic.com* (2002).

[5] US Supreme Court, Gertz v. Welch, 418 U.S. 323 (1974)

Thirdly, metaphorical language fits in very well with legal reasoning[6], but it should be handled properly (and with care).

Metaphor implies knowledge transfer across domains (from the Greek *meta pherein*, to "carry over"). This means that we have two relevant constitutive domains: the source domain and the target domain. The free market of ideas metaphor carries over from the source domain of economic activity to the target domain of speech a systematic set of entailments that supersedes the limitations of the older free speech model. In order to understand it fully, it is important not to forget the features of the source "market" domain when Holmes used the metaphor in 1919 and the US Supreme Court subsequently adapted it to the internet in 1997. Holmes wrote in a period of *lasser faire* Capitalism, in which the liberal state and market competition were at their zenith. If Holmes was sceptical about any external verification of the truth and removal of news proven to be false, the concept of a free market provided a meaningful alternative model for the notion that truth, just as economic wellbeing, could result from competition between (true and false) ideas and information. Similarly, when the US Supreme Court borrowed the metaphor, referring to the internet as the "new market place of ideas", the economic market of the web (during its period of genesis) was absolutely free and not in any way affected by dominant positions, not to speak of monopolies or oligopolies. Within this context, the metaphor of the free marketplace of ideas and the proposed test for the truth (competition in the absence of any public control) made perfect sense. By contrast, today the same metaphor seems to completely decontextualised given that the economic market, as the source domain from which the metaphor has been taken, is far from "free": as is well known in the DG Competition in Brussels and in every national competition authority, the internet is characterised by huge market failures which require not only *ex post* intervention but also *ex ante*, by public authorities. Against this background, if fake news is arguably the most significant and pervasive source of failure in the marketplace of ideas, one can surely not exclude the possibility of intervention by public

[6] See from a US perspective, S.L. Winter, *A clearing in the forest. Law, life and Mind* (2001) and more than thirty years earlier, from a European perspective, A. Giuliani, *La nuova retoricae la logica del linguaggio normativo*, in Riv. Intern. Filosofia dir., XLVII, IV, 3-4, 1970, 374-390.

authorities because, in contrast to the US Supreme Court's definition of the internet as the "new free marketplace of ideas", the source domain of the digital relevant market is anything but a free market, being characterised by economic concentration and the strength of (a few) private operators.

Nobody is advocating for a "public tribunal of the true" or for enhancing the liability regime of new (and old) social platforms.

The only point should be quite clearly made is that metaphors (also) in digital law should be managed with care. Otherwise the concrete risk is, as it has been tried to prove above, to be lost in legal metaphors.