

**IS THERE NO WAY TO THE TRUTH? COPYRIGHT LIABILITY
AS A MODEL FOR RESTRICTING FAKE NEWS**

*Michael P. Goodyear**

TABLE OF CONTENTS

I. INTRODUCTION	279
II. THE STATE OF FAKE NEWS: THE FIRST AMENDMENT AND § 230	283
A. <i>The Protections of the First Amendment</i>	283
B. <i>The Shield of § 230</i>	287
III. REGULATION BY EDGE PROVIDERS	291
IV. LESSONS FROM ONLINE COPYRIGHT LAW.....	294
A. <i>The Digital Millennium Copyright Act</i>	295
B. <i>Courts on Vicarious Liability</i>	298
C. <i>Shortcomings of the DMCA</i>	300
D. <i>Lessons for Fake News</i>	301
V. CONCLUSION.....	305

I. INTRODUCTION

Fake news is hardly new; it has long been a common tactic of politics to shift the truth and ignore questions.¹ Indeed, the publication of fake news stretches back to the birth of the printing press, if not earlier,² but the rise of the Internet and social media has fundamentally changed the possibilities around truth and fake news. The vast majority of Americans get at least some of their news from the Internet.³ Seven in ten Americans use social media.⁴ At the same

* J.D., University of Michigan Law School (2020); A.B., University of Chicago (2016). I would like to thank Ashley Tan for her wonderful insights into the worlds of media and intellectual property law, and for her continued mentorship and friendship. Thank you also to the editors of the Harvard Journal of Law & Technology for their careful and thoughtful comments and edits during this unprecedented time.

1. Joel Timmer, *Fighting Falsity: Fake News, Facebook, and the First Amendment*, 35 CARDOZO ARTS & ENT. L.J. 669, 672 (2017).

2. See Jackie Mansky, *The Age-Old Problem of “Fake News,”* SMITHSONIAN MAG. (May 7, 2018), <https://www.smithsonianmag.com/history/age-old-problem-fake-news-180968945> [<https://perma.cc/L4WB-ZNR4>].

3. See *Digital News Fact Sheet*, PEW RSCH. CTR. (July 23, 2019), <https://www.journalism.org/fact-sheet/digital-news> [<https://perma.cc/SUP2-AZ5K>]; see also Peter Suci, *More Americans Are Getting Their News from Social Media*, FORBES (Oct. 11,

time, traditional journalism has declined, and there are fewer reporters despite a proliferation of thousands of online news sources and blogs that still need content to fill them.⁵ Now the marketplace is full of false information that is packaged to look true.⁶ Compared to traditional speech via word of mouth, print, or broadcast, the dissemination of information over the Internet is distinct in that it combines content filters, insular online communities, amplification of fringe ideas, the rapidity of idea dissemination, and profit incentives that encourage fake news.⁷

Even if fake news has existed for centuries, the modern concept is far different and more dangerous. In the past few years, we have become inundated with purposefully adopted false information that quickly and efficiently seeps through society.⁸ For example, misinformation likely played a significant role in the outcome of the 2016 presidential election.⁹ In the lead-up to the 2016 election, a BuzzFeed News study found that fake news stories generated more user activity than did legitimate news stories by well-reputed sources like the New York Times and the Washington Post.¹⁰ Pope Francis endorsing President Donald J. Trump,¹¹ Hillary Clinton running a sex trafficking ring from a pizza parlor,¹² and Clinton selling weapons to the Islamic State¹³ — all are false, but were widely shared online. In the aftermath of the 2016 election, fake news has continued to grow.¹⁴

2019, 10:35 AM), <https://www.forbes.com/sites/petersuciu/2019/10/11/more-americans-are-getting-their-news-from-social-media/#e1aee33e1791> [https://perma.cc/C46X-3WBA].

4. *Social Media Fact Sheet*, PEW RSCH. CTR. (June 12, 2019), <https://www.pewresearch.org/internet/fact-sheet/social-media> [https://perma.cc/GY7G-JCN4].

5. See Leonard Downie, Jr. & Michael Schudson, *The Reconstruction of American Journalism*, COLUM. JOURNALISM REV. (Nov./Dec. 2009), https://archives.cjr.org/reconstruction/the_reconstruction_of_american.php [https://perma.cc/8TCC-ZDD3]; Michael Griffin, *How News Has Changed*, MACALESTER (Apr. 10, 2017), <https://www.macalester.edu/news/2017/04/how-news-has-changed> [https://perma.cc/8W7X-SU7A].

6. Brittany Vojak, Note, *Fake News: The Commoditization of Internet Speech*, 48 CAL. W. INT'L L.J. 123, 130 (2017).

7. Nabihah Syed, *Real Talk About Fake News: Towards a Better Theory for Platform Governance*, YALE L.J.F. 337, 337, 345–53 (2017).

8. *Id.* at 337.

9. See Timmer, *supra* note 1, at 670–71.

10. Craig Silverman, *This Analysis Shows How Fake Election News Stories Outperformed Real News on Facebook*, BUZZFEED NEWS (Nov. 16, 2016), <https://www.buzzfeednews.com/article/craigsilverman/viral-fake-election-news-outperformed-real-news-on-facebook> [https://perma.cc/LXA3-ASPP].

11. Mike Isaac, *Facebook Mounts Effort to Limit Tide of Fake News*, N.Y. TIMES (Dec. 15, 2016), <https://nyti.ms/2hKDeO2> [https://perma.cc/N9AJ-SZMU].

12. Amanda Robb, *Anatomy of a Fake News Scandal*, ROLLING STONE (Nov. 16, 2017, 3:07 PM), <https://www.rollingstone.com/politics/politics-news/anatomy-of-a-fake-news-scandal-125877> [https://perma.cc/NQ32-4YPS].

13. Hannah Ritchie, *Read All About It: The Biggest Fake News Stories of 2016*, CNBC (Dec. 30, 2016, 2:04 AM), <https://www.cnbc.com/2016/12/30/read-all-about-it-the-biggest-fake-news-stories-of-2016.html> [https://perma.cc/XX2R-XEKP].

14. See, e.g., Timmer, *supra* note 1, at 670–71.

Fake news is not limited to the electoral realm either: “The harmful information that spreads on Facebook includes the myths and lies about vaccination and links to autism. It contains myths and lies about the scientific fact of global warming. These are issues that are crucial to our wellbeing.”¹⁵ One recent incident of fake news even claimed that the Turkish army had invaded and occupied Greek territory across the Evros river, which separates the two countries.¹⁶ The World Economic Forum went so far as to conclude that online misinformation creates “digital wildfires” that pose a global problem.¹⁷

By removing the necessity of a publisher, the Internet increased opportunities to directly share content with a vast audience.¹⁸ Two of the primary reasons for such articles are the purposeful spreading of fake news to support a position or sow chaos and the creation of profit-generating clickbait.¹⁹ Some of these peddlers of fake news stories were “fake news websites that only publish hoaxes or . . . hyperpartisan websites.”²⁰ In addition, fake news pays — enticing headlines, even if false, generate traffic, which in turn drives increased advertising revenue as more people visit the website.²¹ One such story — whose headline read “BREAKING: ‘Tens of Thousands’ of Fraudulent Clinton Votes Found in Ohio Warehouse” — was shared by six million people and generated \$5000 in advertising revenue for the creator and poster of the story through Google advertisements on the story’s website.²² Additionally, it is significantly more expensive to create true stories, which require reporting and research, than false ones.²³

15. Nicky Woolf, *Obama is Worried About Fake News on Social Media — and We Should Be Too*, GUARDIAN (Nov. 20, 2016), <https://www.theguardian.com/media/2016/nov/20/barack-obama-facebook-fake-news-problem> [https://perma.cc/782Z-7FB3].

16. Tasos Kokkinidis, *Athens Dismisses Reports that Turkey Occupies Greek Land*, GREEK REP. (May 23, 2020), <https://greece.greekreporter.com/2020/05/23/athens-dismisses-reports-that-turkey-occupies-greek-land> [https://perma.cc/6295-NB4Q].

17. Baz Ratner, *Digital Wildfires*, WORLD ECON. F. (2018), <https://reports.weforum.org/global-risks-2018/digital-wildfires> [https://perma.cc/3QGJ-7RTD].

18. See Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1603 (2018).

19. See, e.g., Timmer, *supra* note 1, at 674 (one example of the latter is finding over one hundred pro-Trump fake news sites run by Macedonian teenagers as for-profit click-farms).

20. Silverman, *supra* note 10.

21. Vojak, *supra* note 6, at 124.

22. Scott Shane, *From Headline to Photograph, a Fake News Masterpiece*, N.Y. TIMES (Jan. 18, 2017), <https://nyti.ms/2jyOcpR> [https://perma.cc/B46D-EGK8]; see also Dan Evon, *Tens of Thousands of Fraudulent Clinton Votes Found in Ohio Warehouse*, SNOPE (Sept. 30, 2016), <https://www.snopes.com/clinton-votes-found-in-warehouse> [https://perma.cc/7VPE-N7QU] (confirming that the original article was false).

23. Noah Feldman, *Fake News May Not Be Protected Speech*, BLOOMBERG (Nov. 23, 2016, 1:22 PM), <https://www.bloomberg.com/opinion/articles/2016-11-23/fake-news-may-not-be-protected-speech> [https://perma.cc/8RKM-Q9DK].

Fake news is undoubtedly a problem in the United States, yet there are few legal constraints to stop it. Individuals who post fake news are immunized under the First Amendment.²⁴ The Communications Decency Act (“CDA”), codified as 17 U.S.C. § 230, prevents websites that host users’ fake news from being held accountable.²⁵ The First Amendment and § 230 thus operate in tandem to provide a significant shield for fake news, protecting it as free speech and protecting hosting platforms from liability for defamation. In response to this framework, scholarship on fake news has focused on how the First Amendment and § 230 create a powerful shield for fake news,²⁶ how the First Amendment and § 230 regime could be modified,²⁷ how online content providers should regulate fake news posted on their websites rather than the government,²⁸ and how online content providers are self-regulating.²⁹ This Article, instead, will focus on a pre-existing model for regulating fake news on websites, the Digital Millennium Copyright Act (“DMCA”), and will discuss principles from the DMCA that could be expanded into the fake news context, whether for website self-regulation or future federal law.

Scholarship that contemplates using the DMCA to regulate fake news has largely focused on government regulation. For example, Lee Royster argued that the DMCA notice and takedown regime should be

24. See *infra* Section II.A.

25. See Communications Decency Act of 1996, 47 U.S.C. § 230 (2018); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 328 (4th Cir. 1997) (holding that § 230 granted AOL an affirmative defense of immunity and that AOL was not liable for defamatory statements posted on the platform); see also *infra* Section II.B.

26. Clay Calvert et al., *Fake News and the First Amendment: Reconciling a Disconnect Between Theory and Doctrine*, 86 U. CIN. L. REV. 99, 99–100 (2018) (arguing that, under the free speech theory of the First Amendment, the government should not censor fake news); see Philip M. Napoli, *What if More Speech Is No Longer the Solution? First Amendment Theory Meets Fake News and the Filter Bubble*, 70 FED. COMM’NS L.J. 55, 58–59, 97–98 (2018) (arguing that modern models of information dissemination fundamentally alter the status quo of First Amendment doctrine protecting false speech); see also Ari Ezra Waldman, *The Marketplace of Fake News*, 20 U. PA. J. CONST. L. 845, 845 (2018) (arguing that the First Amendment has always been about ideas, not facts, and that interpreting the First Amendment to protect fake news as incorrect facts is historically incorrect).

27. See Andrea Butler, Note, *Protecting the Democratic Role of the Press: A Legal Solution to Fake News*, 96 WASH. U. L. REV. 419, 437–40 (2018) (suggesting the modification of the § 230 regime to reinstate common law distributor liability); Daniela C. Manzi, Note, *Managing the Misinformation Marketplace: The First Amendment and the Fight Against Fake News*, 87 FORDHAM L. REV. 2623, 2649–51 (2018) (recommending the regulation of journalists).

28. Timmer, *supra* note 1, at 703; see Vojak, *supra* note 6, at 152–53 (arguing that a new category of commoditized free speech should be created under First Amendment doctrine).

29. See generally Klonick, *supra* note 18.

used by courts in imposing liability for fake news.³⁰ Alternatively, Emma Savino argued that the § 230 regime should be modified by Congress to hold edge providers³¹ responsible and suggested the DMCA notice and takedown regime as a possible model.³² Similarly, Andrew Schuyler suggested that the DMCA could provide a useful model for imposing liability on edge providers for libel posted by third parties, even suggesting a congressional bill modeled after the DCMA for this purpose.³³ This Article will instead examine the utility of DMCA principles for both government regulation and self-regulation of fake news by edge providers, and will pull not only from the DMCA itself, but also case law and the recently released Copyright Office report on the DMCA's efficacy.

In Part II, this Article will lay out the current legal framework for fake news on the Internet under the First Amendment and § 230. Part III will discuss how websites are starting to self-regulate, looking at the particular mechanisms they are adopting. After laying this groundwork for fake news regulation, this Article will then turn to the DMCA as a model for regulation of proscribed online activity that holds websites accountable. In Part IV, this Article will first describe the confines of the DMCA, related case law, and the Copyright Office's recent findings on § 512 efficacy. It will then discuss ten principles from this law that could serve as guidelines for regulating fake news, whether by websites themselves or through government action. Finally, Part V concludes and looks to the future.

II. THE STATE OF FAKE NEWS: THE FIRST AMENDMENT AND § 230

A. The Protections of the First Amendment

First Amendment protections for free speech present an overwhelming problem for the regulation of fake news.³⁴ Speech on the Internet enjoys “the same level of constitutional protection as

30. Lee K. Royster, Note, *Fake News: Potential Solutions to the Online Epidemic*, 96 N.C. L. REV. 270, 290–94 (2017).

31. See U.S. Telecom. Ass'n v. FCC, 825 F.3d 674, 690 (D.C. Cir. 2016) (quoting Verizon v. FCC, 740 F.3d 623, 628 (D.C. Cir. 2014)) (“Edge providers, like Netflix, Google, and Amazon, ‘provide content, services, and applications over the Internet.’”).

32. Emma M. Savino, Note, *Fake News: No One Is Liable, and That Is a Problem*, 65 BUFF. L. REV. 1101, 1167 (2017).

33. Andrew J. Schuyler, Note, *Regulating Facts: A Procedural Framework for Identifying, Excluding, and Deterring the Intentional or Knowing Proliferation of Fake News Online*, 2019 ILL. J.L. TECH. & POL'Y 211, 228–39 (2019).

34. Timmer, *supra* note 1, at 675–76.

traditional forms of speech.”³⁵ The Supreme Court has said that false statements are less valuable than true statements and that this gives them less protection under the First Amendment,³⁶ but it has only said this in the context of defamation or other legally cognizable harms.³⁷ For pure content where there is no cognizable or provable harm to an individual, the First Amendment’s goal is the protection of speech — whether true or false — and this principle has been upheld repeatedly by the Supreme Court.³⁸

Overall, free speech is broadly protected under the heightened strict or intermediate scrutiny standards elucidated by the Court.³⁹ To meet strict scrutiny, the government must show that its restriction on speech is narrowly tailored to meet a compelling government interest.⁴⁰ To meet intermediate scrutiny, the government must show that its restriction is substantially related to an important government interest.⁴¹ But where speech is unprotected, Congress has much more leeway.⁴² The Supreme Court has generally defined the confines of the First Amendment by carving out certain types of unprotected speech, such as obscenity,⁴³ fighting words,⁴⁴ child pornography,⁴⁵ and incitement of imminent lawless action.⁴⁶ However, such carve-

35. Bethany C. Stein, *A Bland Interpretation: Why a Facebook “Like” Should Be Protected First Amendment Speech*, 44 SETON HALL L. REV. 1255, 1267 (2014); see also *Reno v. Am. C.L. Union*, 521 U.S. 844, 870 (1997).

36. *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 52 (1988) (“False statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas.”); *Brown v. Hartlage*, 456 U.S. 45, 60 (1982) (“[F]alsehoods are not protected by the First Amendment in the same manner as truthful statements.”).

37. *United States v. Alvarez*, 567 U.S. 709, 719 (2012).

38. *N.Y. Times v. Sullivan*, 376 U.S. 254, 271 (1964) (“[E]rroneous statement is inevitable in free debate, and . . . it must be protected.”); *NAACP v. Button*, 371 U.S. 415, 444–45 (1963) (“[T]he Constitution protects expression and association without regard to . . . the truth, popularity, or social utility of the ideas and beliefs which are offered.”); *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940) (“[I]n spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.”).

39. See VICTORIA L. KILLION, CONG. RSCH. SERV., IF11072, *THE FIRST AMENDMENT: CATEGORIES OF SPEECH I* (2019).

40. *Johnson v. California*, 543 U.S. 499, 505 (2005); Ozan O. Varol, *Strict in Theory, but Accommodating in Fact?*, 75 MO. L. REV. 1243, 1245–47 (2010).

41. *United States v. Virginia*, 518 U.S. 515, 533 (1996).

42. See KILLION, *supra* note 39, at 1.

43. *Miller v. California*, 413 U.S. 15, 36–37 (1973) (holding that obscene material is not protected by the First Amendment).

44. *Virginia v. Black*, 538 U.S. 343, 359 (2003) (citing *Cohen v. California*, 403 U.S. 15, 20 (1971)) (“We have consequently held that fighting words — ‘those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction’ — are generally proscribable under the First Amendment.”).

45. *New York v. Ferber*, 458 U.S. 747, 763 (1982) (“Recognizing and classifying child pornography as a category of material outside of the protection of the First Amendment.”).

46. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (affirming that speech that incites imminent lawless action can be proscribed without violating the First Amendment).

outs have been limited, and the Supreme Court has generally been guided in First Amendment cases by a fear of allowing the government to become the ultimate arbiter of free speech.⁴⁷ Even if the rigidity of heightened scrutiny has been criticized as weakening over time,⁴⁸ these are still high bars to meet. This is the rationale for why the Supreme Court has repeatedly upheld the protection of false speech under the First Amendment.⁴⁹

Most recently, this principle was upheld in 2012 in *United States v. Alvarez*,⁵⁰ where the Supreme Court held that it was unconstitutional to criminalize making false claims to military honors.⁵¹ The Court noted that its chief concern was not that one cannot tell the difference between truth and lie, but that the ends of free speech and discourse “are not well served when the government seeks to orchestrate public discussion through content-based mandates Only a weak society needs government protection or intervention before it pursues its resolve to preserve the truth.”⁵² Although this was a plurality opinion, all of the Justices appeared to be skeptical of giving the government the authority to broadly police false speech.⁵³

The First Amendment protections of false information have been largely premised on two related bases: the concepts of the marketplace of ideas and counterspeech. The marketplace of ideas model explains how free speech should advance democracy by allowing us to engage with alternative possibilities and, only after full consideration of these possibilities, arrive at the best possible truth.⁵⁴ Relatedly, First Amendment doctrine has placed a strong emphasis on the idea of “counterspeech,” wherein more speech is an effective remedy against misinformation in the marketplace of ideas.⁵⁵ As Justice Jackson succinctly put it in *Thomas v. Collins*: our “forefathers did not trust any government to separate the true from the false for us.”⁵⁶ Instead, “the best test of truth is the power of the thought to get

47. Vojak, *supra* note 6, at 145.

48. *See, e.g.*, Varol, *supra* note 40, at 1247–48.

49. *See* Vojak, *supra* note 6, at 145–46.

50. 567 U.S. 709 (2012).

51. *Id.* at 730.

52. *Id.* at 728–29.

53. Richard L. Hasen, *A Constitutional Right to Lie in Campaigns and Elections?*, MONT. L. REV. 53, 69 (2013).

54. *See* Leonard M. Niehoff & Deeva Shah, *The Resilience of Noxious Doctrine: The 2016 Election, the Marketplace of Ideas, and the Obstinance of Bias*, 22 MICH. J. RACE & L. 243, 250 (2017).

55. Napoli, *supra* note 26, at 58. The counterspeech doctrine first appeared in *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) (“If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.”).

56. *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring).

itself accepted in the competition of the market.”⁵⁷ Under this principle, the marketplace is capable of distinguishing between truth and lies, which in turn helps ensure the functioning of a proper democracy.⁵⁸ Therefore, more falsity requires more speech to counter it.⁵⁹

But encapsulated in these theories of the marketplace of ideas and counterspeech are several problematic assumptions, including that: (1) people have the ability to discern truth and falsities;⁶⁰ (2) individuals and the market itself value truth over lies;⁶¹ (3) there can never be too much speech;⁶² and (4) enough individuals that are exposed to the false information will also be exposed to the truth.⁶³ These assumptions already faced serious critiques, such as that the rational audience is more of a mythical ideal than reality,⁶⁴ but technological and economic changes have further eroded the efficacy of these assumptions. Driven by economic pressures, true original journalism has declined in favor of recycling stories.⁶⁵ The Internet has eroded former gatekeeping and distribution barriers that would have stalled false stories from reaching the masses.⁶⁶ Interactive media and the collection of personal data have created socio-cultural bubbles that feed consumers exactly what they want to hear.⁶⁷ Thus, individuals are less likely to be exposed to factual counterspeech that can remedy the falsities they have read.⁶⁸ This trend is exacerbated because many individuals use news aggregators and social media as their primary sources for news⁶⁹ and the Internet allows false speech to spread much faster than it previously could.⁷⁰

57. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

58. Napoli, *supra* note 26, at 60.

59. *Id.* at 61.

60. Lyriisa Barnett Lidsky, *Nobody's Fools: The Rational Audience as First Amendment Ideal*, 2010 U. ILL. L. REV. 799, 801 (“The first of these assumptions is that audiences are capable of rationally assessing the truth, quality, and credibility of core speech.”); Napoli, *supra* note 26, at 61.

61. Napoli, *supra* note 26, at 61; Alvin I. Goldman & James C. Cox, *Speech, Truth, and the Free Market for Ideas*, 2 LEGAL THEORY 1, 18 (1996) (“[I]f consumers have no very strong preference for truth . . . then there is no reason to expect that the bundle of intellectual goods . . . will have maximum truth content.”).

62. *McConnell v. FEC*, 540 U.S. 93, 258–59 (2003) (Scalia, J., concurring) (“Given the premises of democracy, there is no such thing as *too much* speech.”).

63. Napoli, *supra* note 26, at 61.

64. *Id.*

65. *Id.* at 69–70.

66. *Id.* at 71–74.

67. *Id.* at 74–77.

68. *Id.* at 77–79.

69. *Id.* at 81.

70. *Id.* at 85–87.

Overall, this has created a marketplace of ideas that is poorly equipped to allow truth to prevail.⁷¹ The marketplace of ideas has never aligned particularly well with actual human behavior.⁷² The stickiness of bias, in particular, has undermined this model.⁷³ The marketplace of ideas model faced criticism well before the launch of social media,⁷⁴ but critiques against it have become especially robust in the past few years — with the 2016 election highlighting all of its shortcomings.⁷⁵ Online, individuals can easily avoid contrary ideas, are easily restricted to one set of ideas by algorithms that reinforce biases, and must navigate a vast sea of sources to find the truth.⁷⁶ Arguably, the marketplace of ideas justification does not address the First Amendment challenges in the context of online speech.⁷⁷ Yet, despite these valid criticisms, the First Amendment protection of false online speech persists due to the weight of precedent and the firmly rooted belief that more speech is better.⁷⁸

B. The Shield of § 230

Given First Amendment constraints, defamation would appear to be one of the only legal remedies against fake news,⁷⁹ yet this is also an illusory restraint. Defamation suits can be successfully carried out against traditional active publishers, such as the New York Times or Washington Post, that publish their own content on their own websites, and those that publish content under their label, such as book publishers like Random House or Brill.⁸⁰ Traditionally, there was also the “republication rule,” which states that one who “writes or speaks a defamatory statement made by another is liable as if he or she were the speaker.”⁸¹ But due to § 230, defamation actions cannot be carried out against passive online publishers, such as Facebook, that primarily do not create or post content but allow others to post

71. *Id.* at 88–93.

72. Niehoff & Shah, *supra* note 54, at 268.

73. *See generally id.*

74. *See, e.g.,* FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 25–30 (1982).

75. *See* Niehoff & Shah, *supra* note 54, at 268; *see also* Len Niehoff, *The Marketplace of Ideas Has Crashed*, DETROIT NEWS (Dec. 1, 2016), <http://www.detroitnews.com/story/opinion/2016/12/01/marketplace-ideas/94692632> [<https://perma.cc/L6FT-XY3W>].

76. Syed, *supra* note 7, at 340.

77. *Id.* at 337, 339–40.

78. Erwin Chemerinsky, *False Speech and the First Amendment*, 71 OKLA. L. REV. 1, 14–15 (2018).

79. Timmer, *supra* note 1, at 687.

80. *See* Benjamin C. Zipursky, *The Monsanto Lecture: Online Defamation, Legal Concepts, and the Good Samaritan*, 51 VAL. U. L. REV. 1, 18–19 (2016).

81. *Id.* at 4.

content to their platforms instead.⁸² Under § 230, “interactive computer service providers” are immunized from liability for content posted on their websites by their users,⁸³ including defamatory content.⁸⁴ These “interactive computer service providers” include website hosting services like Bluehost, social media websites like Facebook and Twitter, search engines like Google, and message boards like Reddit.⁸⁵ Congress created such an immunity for content providers and applications, also known as edge providers, “to provide a legal framework for the Internet to flourish in [the area of] political discourse.”⁸⁶ There were worries that holding edge providers liable for what their users post would potentially chill online speech and innovation.⁸⁷

This provision of the CDA was upheld by the courts, which found that requiring edge providers “to police the huge volume of electronic traffic would certainly chill the growth of the then-expanding Internet and other technological advancements.”⁸⁸ Prior to the enactment of § 230, edge providers could be held liable for content posted by their users. The court in *Cubby, Inc. v. CompuServe, Inc.*⁸⁹ held that edge providers that did not review any of the content posted on their platform could not be held liable for the posted content.⁹⁰ The corollary to this holding was announced in *Stratton Oakmont, Inc. v. Prodigy Services Co.*,⁹¹ wherein the court held that if an edge provider regulated the content posted on its platform at all, it was liable for all posted content that was not removed.⁹²

Spurred by the decisions in *Cubby* and *Stratton Oakmont*, Congress adopted § 230 as part of the CDA shortly thereafter in 1996.⁹³ Section 230 explicitly says that:

82. *Id.* at 14.

83. *See* 47 U.S.C. § 230 (2018).

84. *See* Zeran v. Am. Online, Inc., 129 F.3d 327, 327 (4th Cir. 1997).

85. *See* Vojak, *supra* note 6, at 150–51.

86. *See* Joshua N. Azriel, *Social Networks as a Communications Weapon to Harm Victims: Facebook, Myspace, and Twitter Demonstrate a Need to Amend Section 230 of the Communications Decency Act*, 26 J. MARSHALL J. COMPUT. & INFO. L. 415, 420 (2009).

87. *Id.*

88. Heidi Frostestad Kuehl, *Free Speech and Defamation in an Era of Social Media: An Analysis of Federal and Illinois Norms in the Context of Anonymous Online Defamers*, 36 N. ILL. U. L. REV. 28, 39 (2016). Note that although § 230 survived, most of the CDA was struck down in *Reno v. ACLU*, 521 U.S. 844 (1997).

89. 776 F. Supp. 135 (S.D.N.Y. 1991).

90. *Id.* at 140.

91. 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).

92. *Id.* at *4.

93. Neville L. Johnson et al., *Defamation and Invasion of Privacy in the Internet Age*, 25 SW. J. INT'L L. 9, 11 (2019).

No provider or user of an interactive computer service shall be held liable on account of . . . any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers . . . objectionable, whether or not such material is constitutionally protected.⁹⁴

In *Zeran v. America Online, Inc.*,⁹⁵ the Fourth Circuit, relying on the recently enacted § 230, explicitly rejected the contention from *Cubby* and *Stratton Oakmont* that edge providers could be held liable for content posted by their users, even if that edge provider had notice that defamatory content had been posted on its platform.⁹⁶ In rejecting notice as the basis for liability for edge providers, the Fourth Circuit noted that:

[L]iability upon notice reinforces service providers' incentives to restrict speech and abstain from self-regulation Each notification would require a careful yet rapid investigation of the circumstances surrounding the posted information, a legal judgment concerning the information's defamatory character, and an on-the-spot editorial decision whether to risk liability by allowing the continued publication of that information.⁹⁷

The court determined that a review requirement would create an impossible burden due to the sheer number of postings.⁹⁸ The court also noted that since edge providers would be subject to liability only for the publication of content, not its removal, they would be incentivized to remove content whether it was defamatory or not.⁹⁹

Fake news is not explicitly listed in § 230 as a category of speech for which edge providers are immunized, but the standard for covered "objectionable" speech has been stretched to include anything the provider or user deems objectionable, whether objectively so or not.¹⁰⁰ This provides a broad swath of content for which edge providers are protected.¹⁰¹ In addition, the requirement that the edge provider acts in

94. 47 U.S.C. § 230(c)(2)(A).

95. 129 F.3d 327 (4th Cir. 1997).

96. *Id.* at 332–33 (finding that this would impermissibly treat edge providers as publishers under § 230).

97. *Id.* at 333.

98. *Id.*

99. *Id.*

100. Timmer, *supra* note 1, at 694–96.

101. *Id.*

“good faith” encompasses traditional “editorial functions,” which include the deletion of inaccurate information.¹⁰² Indeed, courts have not yet found bad faith in the moderation of content by edge providers and have suggested that, to qualify as bad faith, courts might require an egregious motivation behind the moderation, such as anticompetitive goals or being unable to articulate a reason at all.¹⁰³ Therefore, § 230 gives edge providers, including social media platforms, significant protection from liability for removing or limiting fake news on their websites.¹⁰⁴ In addition, due to their private relationships with consumers, edge providers have considerable discretion in dealing with users.¹⁰⁵ This allows edge providers to regulate fake news, or not, with almost ironclad protection.¹⁰⁶

Scholars have argued that the online space creates particularly pernicious forms of speech harms.¹⁰⁷ Yet, even if unregulated free speech has the potential to cause enormous harm to the United States,¹⁰⁸ under current First Amendment doctrine, the government cannot step in without violating rights to the freedom of speech, regardless of its efficacy for furthering democracy.¹⁰⁹ Even incorporating limitations to such regulations would likely fall short of the heightened scrutiny standards for speech that is protected under the First Amendment.¹¹⁰ Section 230 fills any remaining gaps in the liability shield, making edge providers immune from liability for content posted by their users and nullifying government enforcement authority in this space. Although President Trump tried to limit the scope of § 230 in a May 28, 2020 executive order,¹¹¹ those limitations are unlikely to be upheld in court¹¹² unless Congress specifically revises the statute,¹¹³ effectively leaving § 230 as the current law.

102. *Id.* at 695–96.

103. Eric Goldman, *Online User Account Termination and 47 U.S.C. § 230(c)(2)*, 2 U.C. IRVINE L. REV. 659, 665 (2012).

104. Timmer, *supra* note 1, at 698.

105. Amélie Heldt, *Let’s Meet Halfway: Sharing New Responsibilities in a Digital Age*, 9 J. INFO. POL’Y 336, 351 (2019).

106. Timmer, *supra* note 1, at 703.

107. See, e.g., Mary Anne Franks, *Sexual Harassment 2.0*, 71 MD. L. REV. 655, 678, 681–83 (2012) (arguing that online space amplified sexual harassment speech harms); Danielle Keats Citron & Helen Norton, *Intermediaries and Hate Speech: Fostering Digital Citizenship for Our Information Age*, 91 B.U. L. REV. 1435, 1460–68 (2011) (describing harms in the context of online hate speech).

108. Qasim Rashid, *In Harm’s Way: The Desperate Need to Update America’s Free Speech Model*, 47 STETSON L. REV. 143, 145 (2017).

109. See Feldman, *supra* note 23.

110. Timmer, *supra* note 1, at 684.

111. Exec. Order No. 13,925, 85 Fed. Reg. 34,079 (May 28, 2020).

112. See John Koestier, *Trump’s Executive Order Is “Illegal,” Section 230 Author Says*, FORBES (May 28, 2020, 8:09 PM),

III. REGULATION BY EDGE PROVIDERS

Given the legal straitjacket on government regulation, edge providers could fix the problems created by the online marketplace of ideas themselves. Putting the entire burden of policing fake news on edge providers poses separate issues of abuse.¹¹⁴ However, this may be one of the few paths forward because a clear and robust application of First Amendment doctrine in the online content sphere and the retraction of § 230¹¹⁵ remain unfulfilled goals.

The United States is matching the global trend of governments handing off the regulation of online content to edge providers, albeit through a different strategy.¹¹⁶ While Sweden and Germany opted to assign responsibility to edge providers for not taking down illegal content,¹¹⁷ for example, the U.S. Congress hoped that the immunity provided by § 230 would “encourage service providers to self-regulate the dissemination of offensive material over their services.”¹¹⁸ However, large websites have historically been some of the most recalcitrant about regulating online content.¹¹⁹ While all media platforms have some influence on our opinions, Facebook and other major social media platforms in particular have an outsized impact.¹²⁰ Large digital platforms such as Google, Facebook, Amazon, and Apple are among the most powerful corporations in the world, “exceeding (as of August 2019) more than four trillion dollars in

<https://www.forbes.com/sites/johnkoetsier/2020/05/28/trumps-executive-order-is-illegal-section-230-author-says/#13e0c51a6703> [<https://perma.cc/6NU3-H74E>].

113. See Molly Wood, *The Regulation That Helped Build the Internet May Be in Trouble*, MARKETPLACE TECH (May 29, 2020), <https://www.marketplace.org/shows/marketplace-tech/trump-executive-order-social-media-legal-protections> [<https://perma.cc/AG79-ENAY>] (interviewing professor Jeff Koseff regarding President Trump’s executive order and the possibility of Congress revising § 230).

114. See Kyle Langvardt, *Regulating Online Content Moderation*, 106 GEO. L.J. 1353, 1355–57 (2018).

115. See Syed, *supra* note 7, at 337, 356–57.

116. See generally Katharina Kaesling, *Privatising Law Enforcement in Social Networks: A Comparative Model Analysis*, 11 ERASMUS L. REV. 151 (2018) (comparing different models in Europe).

117. See *id.* at 152. The United Kingdom and Russia have looked favorably upon Germany’s law, the Act to Improve the Enforcement of Rights on Social Networks, and have suggested replicating it in their own countries.

118. *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997).

119. See, e.g., Richard Waters & Hannah Murphy, *Facebook’s Reckoning? The Global Battle to Regulate Social Media*, FIN. TIMES (Apr. 12, 2019), <https://www.ft.com/content/5a84179e-5d05-11e9-939a-341f5ada9d40> [<https://perma.cc/9XE3-W49V>].

120. See Olivia Solon, *2016: The Year Facebook Became the Bad Guy*, GUARDIAN (Dec. 12, 2016, 6:00 AM), <https://www.theguardian.com/technology/2016/dec/12/facebook-2016-problems-fake-news-censorship> [<https://perma.cc/YCL4-ZJ4A>].

market capitalization.”¹²¹ Although such platforms have denied that they could have affected the 2016 election,¹²² they actively market their platforms to political advertisers, including reportedly for the purpose of influencing voters.¹²³ In the past, platforms such as Facebook, Twitter, and Reddit have championed themselves as protectors of free speech,¹²⁴ and have notably been recalcitrant about removing controversial posts, such as patently false posts by politicians.¹²⁵ However, that policy was partially revised by Facebook in September 2020 to prohibit political advertisements that delegitimized the 2020 election or prematurely proclaimed a victor.¹²⁶

But since 2016, social media companies have begun to take more responsibility for the information propagated through their platforms.¹²⁷ Online platforms are starting to self-regulate by creating and enforcing rules and punishing those who break them.¹²⁸ No doubt this is partially due to public pressure from consumers and governments, both in the United States and worldwide.¹²⁹ Yet, despite the lack of laws requiring edge providers to regulate fake news on their platforms, these self-regulation measures share remarkable similarities with governmental regulations.¹³⁰ Because edge providers use algorithmic black boxes to moderate content posted on their platforms, their private regulation is as obfuscated as some forms of

121. STIGLER COMM. ON DIGIT. PLATFORMS, FINAL REPORT 6 (Sept. 2019), <https://research.chicagobooth.edu/stigler/media/news/committee-on-digital-platforms-final-report> [<https://perma.cc/69LS-HY9N>].

122. Casey Newton, *Zuckerberg: The Idea that Fake News on Facebook Influenced the Election Is “Crazy,”* VERGE (Nov. 10, 2016, 9:10 PM), <https://www.theverge.com/2016/11/10/13594558/mark-zuckerberg-election-fake-news-trump> [<https://perma.cc/G8E7-7ZAA>].

123. David Zurawik, *Fake News a Symptom of Sickness in Media Ecosystem*, BALTIMORE SUN (Nov. 18, 2016, 3:59 PM), <https://www.baltimoresun.com/opinion/columnists/zurawik/bs-ae-zontv-fake-news-20161118-story.html> [<https://perma.cc/9LM6-9HU8>].

124. Syed, *supra* note 7, at 343.

125. Hannah Murphy, *Mark Zuckerberg Says Facebook Will Not Censor Politicians*, FIN. TIMES (Oct. 17, 2019), <https://www.ft.com/content/760c8782-f114-11e9-ad1e-4367d8281195> [<https://perma.cc/T4LY-HPBT>] (describing Facebook’s decision to “exempt politicians from fact checking”).

126. FACEBOOK, INFORMATION ON ADS ABOUT SOCIAL ISSUES, ELECTIONS OR POLITICS IN THE UNITED STATES DURING 2020 ELECTION, <https://www.facebook.com/business/help/253606115684173> [<https://perma.cc/9Q8B-LAR5>].

127. Alex Heath, *Facebook Is Going to Use Snopes and Other Fact-Checkers to Combat and Bury “Fake News,”* BUS. INSIDER (Dec. 15, 2016, 12:00 PM), <https://www.businessinsider.com/facebook-will-fact-check-label-fake-news-in-news-feed-2016-12> [<https://perma.cc/XFC2-326X>] (quoting Mark Zuckerberg admitting that Facebook has a “greater responsibility than just building technology that information flows through”).

128. Heldt, *supra* note 105, at 350.

129. *See id.* at 350–51.

130. *See id.* at 354.

government regulation.¹³¹ Although these online platforms frequently post their content policies (i.e., the rules),¹³² it is the actual *application* of content moderation that is the black box.¹³³ No major platform had posted its internal content moderation guidelines until recently,¹³⁴ and even these internal moderation guidelines do not provide a full picture of how content moderation is actually applied in practice.¹³⁵ Yet, as scholar Kate Klonick found by piecing together portions of these guidelines, edge providers have been self-regulating posted content in the spirit of the First Amendment and the free-expression cultural norms of their users.¹³⁶

Generally, when content is prohibited under their standards, edge providers take down or moderate that content and restrict or delete accounts.¹³⁷ Edge providers currently regulate posted content through a combination of algorithms coded to catch particular unwanted things and human evaluation.¹³⁸ The human component in moderating content is significant, with Facebook employing three tiers of moderation and several thousand content moderators.¹³⁹ Human content moderators are already applying complex internal standards to the facts of each piece of content presented to them, much like how lawyers or judges apply law to the facts of a case.¹⁴⁰

Edge providers have also been increasing their scrutiny for fake news. They have been re-tooling their filter algorithms to catch fake news and downgrade it in their search results.¹⁴¹ For example, in the

131. See generally Katherine Fink, *Opening the Government's Black Boxes: Freedom of Information and Algorithmic Accountability*, 21 INFO. COMM. & SOC'Y 1453 (2018).

132. See, e.g., FACEBOOK, FACEBOOK TERMS AND POLICIES, <https://www.facebook.com/policies> [<https://perma.cc/HXS7-NRE7>]; TWITTER, TWITTER RULES AND POLICIES, <https://help.twitter.com/en/rules-and-policies/twitter-rules> [<https://perma.cc/5HB6-569P>].

133. Langvardt, *supra* note 114, at 1377.

134. See Catherine Buni & Soraya Chemaly, *The Secret Rules of the Internet*, VERGE (Apr. 13, 2016), <https://www.theverge.com/2016/4/13/11387934/internet-moderator-history-youtube-facebook-reddit-censorship-free-speech> [<https://perma.cc/EMD4-LQ6U>]; see also Monica Bickert, *Publishing Our Internal Enforcement Guidelines and Expanding Our Appeals Process*, FACEBOOK (Apr. 24, 2018), <https://about.fb.com/news/2018/04/comprehensive-community-standards> [<https://perma.cc/C6JD-SXYQ>].

135. Langvardt, *supra* note 114, at 1356.

136. Klonick, *supra* note 18, at 1601–02, 1632.

137. Heldt, *supra* note 105, at 351–53.

138. Klonick, *supra* note 18, at 1635–39; STIGLER COMM. ON DIGIT. PLATFORMS, *supra* note 121, at 164–65.

139. Klonick, *supra* note 18, at 1639–41.

140. *Id.* at 1644.

141. See, e.g., Chaim Gartenberg, *Google News Initiative Announced to Fight Fake News and Support Journalism*, VERGE (Mar. 20, 2018, 11:00 AM), <https://www.theverge.com/2018/3/20/17142788/google-news-initiative-fake-news-journalist-subscriptions> [<https://perma.cc/6ALC-7T6Z>] (describing Google's tactics to fight fake news in its search results); Barbara Ortutay, *YouTube Is Cracking Down on "Fake News" with New Text Previews*, USA TODAY (July 9, 2018, 9:56 PM), <https://www.usatoday.com/story/tech/2018/07/09/youtube-cracks-down-fake-news/769861002> [<https://perma.cc/DTP4->

wake of the 2016 election, Facebook promised to start fact-checking, labeling, and removing fake news from its platform.¹⁴² Facebook's tactics include creating easier reporting mechanisms, partnering with third-party fact-checking organizations, lowering the ranking of fake news on users' news feeds, and devising algorithms to detect fake news and accounts.¹⁴³ It now also blocks advertisements from Facebook pages that repeatedly share false stories.¹⁴⁴

Some scholars and public interest organizations have questioned whether edge providers regulating posted content is the optimal solution.¹⁴⁵ A study by the Stigler Center at the University of Chicago Booth School of Business found that edge providers have "weak incentives to prioritize quality content and limit false information" because § 230 immunizes them from liability for maintaining or even promoting false content.¹⁴⁶ The study recommended modifying § 230 to better align it with modern edge providers, and especially social media platforms, that monetize their content with advertisements driven by their own algorithms.¹⁴⁷ Despite these downsides to self-regulation with the current First Amendment and § 230 liability shields, however, self-regulation by edge providers is, at present, the primary option for restricting the dissemination of fake news.

IV. LESSONS FROM ONLINE COPYRIGHT LAW

Up to now, scholarship on the regulation of edge providers regarding fake news moderation has focused on the constraints of the First Amendment and § 230,¹⁴⁸ as well as the recent self-regulation practices of edge providers themselves.¹⁴⁹ But legal scholarship has largely overlooked the fact that there is an existing model for holding edge providers responsible for user-generated content: the DMCA.

ZG56] (describing how YouTube is making authoritative news sources more prominent on their website and including text previews to counter fake news).

142. Alex Heath, *supra* note 127.

143. See Adam Mosseri, *Working to Stop Misinformation and False News*, FACEBOOK (Apr. 7, 2017), <https://www.facebook.com/facebookmedia/blog/working-to-stop-misinformation-and-false-news> [<https://perma.cc/5DG3-8BUB>]; see also Timmer, *supra* note 1, at 699–701.

144. Shannon Liao, *Facebook Now Blocks Ads from Pages That Spread Fake News*, VERGE (Aug. 28, 2017, 2:11 PM), <https://www.theverge.com/2017/8/28/16215780/facebook-false-viral-hoaxes-trump-malicious-suspicious> [<https://perma.cc/F9E6-BWKD>].

145. See, e.g., Langvardt, *supra* note 114; Jillian C. York & Corynne McSherry, *Content Moderation Is Broken. Let Us Count the Ways.*, ELEC. FRONTIER FOUND. (Apr. 29, 2019), <https://www.eff.org/deeplinks/2019/04/content-moderation-broken-let-us-count-ways> [<https://perma.cc/P4GT-8ZXR>].

146. STIGLER COMM. ON DIGIT. PLATFORMS, *supra* note 121, at 10.

147. *Id.* at 20.

148. See, e.g., Napoli, *supra* note 26, at 58–59, 97–98; Vojak, *supra* note 6, at 128.

149. See generally Klonick, *supra* note 18.

The DMCA is not the only existing legal regime that requires edge providers to remove certain content from their websites. For example, the Allow States and Victims to Fight Online Sex Trafficking Act (“FOSTA”), which was signed into law in 2018, assigns liability to edge providers that either intentionally promote or facilitate prostitution or recklessly disregard that its conduct contributed to sex trafficking.¹⁵⁰ Indeed, FOSTA explicitly carves out online sex trafficking from the broad protection of § 230.¹⁵¹ While FOSTA and other laws may also provide insights into how to regulate fake news, the DMCA has the benefit of having existed for over twenty years, providing a well-tested regime that has thus far been overlooked as a model for regulating fake news.

The DMCA model is not fully replicable at present due to the constraints of the First Amendment and § 230, which prevent Congress from passing federal legislation establishing such a regime. But analyzing this system still provides ten significant principles for the regulation of fake news.

A. The Digital Millennium Copyright Act

The DMCA was enacted in 1998.¹⁵² Among its many provisions, Title II addresses online copyright infringement liability.¹⁵³ Title II, codified as 17 U.S.C. § 512, creates a system that limits liability for online service providers¹⁵⁴ by providing a safe harbor against copyright infringement liability.¹⁵⁵ The scope of § 512 includes both Internet service providers and edge providers.¹⁵⁶ For our purposes, the most critical provision of the DMCA is § 512(c), which focuses on user-posted content. This provision states:

A service provider shall not be liable for monetary relief, or . . . injunctive or other equitable relief, for infringement of copyright by reason of the storage at

150. 18 U.S.C. § 2421A(b)(2) (2018); *see also* Emily J. Born, Note, *Too Far and Not Far Enough: Understanding the Impact of FOSTA*, 94 N.Y.U. L. REV. 1623, 1624, 1633–37 (2019).

151. 47 U.S.C. § 230(e)(5) (Section 230 has no effect on civil or criminal claims for sex trafficking.).

152. U.S. COPYRIGHT OFFICE, THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998: U.S. COPYRIGHT OFFICE SUMMARY 1 (Dec. 1998), <https://www.copyright.gov/legislation/dmca.pdf> [<https://perma.cc/UVT2-S65B>].

153. *Id.* at 8.

154. *Id.*

155. JULIE E. COHEN ET AL., COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 619 (4th ed. 2015).

156. 17 U.S.C. § 512(k)(1)(B) (2018) (The DMCA broadly defines a service provider as “a provider of online services or network access, or the operator of facilities therefor.”).

the direction of a user of material that resides on a system or network controlled or operated by or for the service provider, if the service provider . . . does not have actual knowledge that the material . . . is infringing; . . . is not aware of facts or circumstances from which infringing activity is apparent; or upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material.¹⁵⁷

In other words, to qualify for this safe harbor, service providers must promptly block access to user-posted content or remove it once they are notified that the content is infringing a copyright. These notifications must come from the copyright owner or their authorized representative.¹⁵⁸

As overarching conditions, the DMCA also requires that service providers (1) have an official repeat infringer policy, inform subscribers of this policy, and take reasonable steps to enforce it; and (2) do not interfere with standard technical measures applied by copyright owners.¹⁵⁹ Courts have allowed variation in the exact shape of these repeat infringer policies. The number of allowed strikes has varied from two up to thirteen.¹⁶⁰ In certain cases, the conditions for banning users were not required to be listed,¹⁶¹ and, for one smaller website, the repeat infringer policy was not even required to be written down as long as there was a consistent methodology.¹⁶² The key terms in § 512(i) — “repeat infringement” and “reasonably implement”¹⁶³ — are partially ambiguous. However, the overall framework of the DMCA suggests that repeat infringers should be defined by the number of times a user has been identified as an infringer.¹⁶⁴ Meanwhile, the DMCA suggests that reasonable implementation requires a joint effort between copyright holders and service providers to identify copyright infringers.¹⁶⁵

157. *Id.* § 512(c)(1).

158. *Id.* § 512(c)(3).

159. *Id.* § 512(i).

160. *BMG Rights Mgmt. LLC v. Cox Commc'ns, Inc.*, 881 F.3d 293, 299 (4th Cir. 2018) (wherein Cox used a thirteen-strike policy, although it was found to have not been implemented correctly); *Perfect 10, Inc. v. Giganews, Inc.*, 993 F. Supp. 2d 1192, 1197 (C.D. Cal. 2014) (wherein Giganews used a two-strike policy).

161. *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1102–06 (W.D. Wash. 2004).

162. *Ventura Content, Ltd. v. Motherless, Inc.*, 885 F.3d 597, 615–16 (9th Cir. 2018).

163. 17 U.S.C. § 512(i).

164. See Andrew Sawicki, Note, *Repeat Infringement in the Digital Millennium Copyright Act*, 73 U. CHI. L. REV. 1455, 1482–83 (2006).

165. *Id.* at 1485.

The DMCA also establishes elaborate structures for the notice-and-takedown regime required under § 512(c). Like § 230 of the CDA, the DMCA states that service providers “shall not be liable to any person for any claim based on the service provider’s good faith disabling of access to, or removal of, material or activity claimed to be infringing . . . regardless of whether the material or activity is ultimately determined to be infringing.”¹⁶⁶ But this liability shield is dependent on the service provider faithfully carrying out the entire DMCA takedown regime. Once the content is removed, the service provider must notify the subscriber that it has been removed.¹⁶⁷ If the subscriber wishes to protest this takedown, he or she can file a counter-notice attesting that he or she has a good faith belief that it was mistakenly removed or disabled.¹⁶⁸ The service provider must then reinstate the content between ten and fourteen days later, unless the copyright owner or their authorized representative responds within ten days seeking a court order to compel the removal of the infringing activity for good.¹⁶⁹

There is also a framework for fining users who make an insincere takedown notice claim. The DMCA provides that any person who knowingly misrepresents content or activity as infringing shall be liable for damages, including costs to the alleged infringer and attorney’s fees.¹⁷⁰ The U.S. Court of Appeals for the Ninth Circuit has also determined that “fair use” must be considered before sending the takedown notice.¹⁷¹ Although it is but one of sixteen limitations on the rights of copyright owners, fair use is perhaps the greatest exception to copyright infringement.¹⁷² Fair use is the copying of copyrighted material for a transformative purpose such as criticism, comment, news reporting, teaching, scholarship, or research.¹⁷³ If the copyright owner thinks the content is fair use, they cannot send a takedown notice unless they want to risk liability.¹⁷⁴

166. 17 U.S.C. § 512(g)(1).

167. *Id.* § 512(g)(2)(A).

168. *Id.* § 512(g)(2)(B), (g)(3).

169. *Id.* § 512(g)(2)(C).

170. *Id.* § 512(f).

171. *Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1157 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 2263 (2017); Joe Mullin, *Supreme Court Turns Down EFF’s “Dancing Baby” Fair Use Case*, ARS TECHNICA (June 19, 2017), <https://arstechnica.com/tech-policy/2017/06/supreme-court-wont-hear-dancing-baby-copyright-case> [<https://perma.cc/98NR-U2XS>].

172. COHEN ET AL., *supra* note 155, at 563.

173. 17 U.S.C. § 107 (2018); *see also* *What Is Fair Use?*, STAN. U. LIBRS., <https://fairuse.stanford.edu/overview/fair-use/what-is-fair-use> [<https://perma.cc/2LJF-7P75>].

174. *See* Katherine Trendacosta, *YouTube’s New Lawsuit Shows Just How Far Copyright Trolls Have to Go Before They’re Stopped*, ELEC. FRONTIER FOUND. (Aug. 21, 2019), <https://www.eff.org/deeplinks/2019/08/youtubes-new-lawsuit-shows-just-how-far-copyright-trolls-have-go-theyre-stopped> [<https://perma.cc/F978-22V7>].

B. Courts on Vicarious Liability

The DMCA has not operated in a vacuum of statutory law. It has also been extensively addressed by the courts, which have provided valuable precedents for holding edge providers liable. In particular, case precedents have established rules for the vicarious liability of edge providers. This is directly applicable to the context of fake news, where the motives of edge providers can play a significant role in whether fake news is maintained on their platforms. Before addressing how these principles could be adopted in the fake news context, this Article first lays out the holdings of the most important cases on vicarious liability under the DMCA: *A&M Records, Inc. v. Napster*,¹⁷⁵ *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*,¹⁷⁶ and *Viacom International, Inc. v. YouTube, Inc.*¹⁷⁷

Napster was the first large scale peer-to-peer file-sharing service.¹⁷⁸ As a platform that allowed users to easily connect with others who had files they wanted, it quickly became used for sharing MP3 music files, which violated the copyrights embedded in those audio files.¹⁷⁹ In *A&M Records, Inc. v. Napster*, Napster argued that it was immune from suit as a service provider under the DMCA because it was merely providing a communications system, not the copyrighted files.¹⁸⁰ The Ninth Circuit held that Napster was a vicarious infringer because it failed to control infringing activities and both (1) had the ability to supervise but did not and (2) benefitted financially from forbearing from regulation.¹⁸¹ Therefore, service providers have a duty to actively police their users; otherwise, they could be held liable for vicarious copyright infringement.¹⁸²

Four years later, the holdings from *Napster* were further explained in *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*¹⁸³ The Supreme Court held that “one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or affirmative steps taken to foster infringement, is liable

175. 239 F.3d 1004 (9th Cir. 2001).

176. 545 U.S. 913 (2005).

177. 676 F.3d 19 (2d Cir. 2012).

178. *Napster*, 239 F.3d at 1011.

179. *Id.* at 1013–14.

180. *Id.* at 1021 (“[A] computer system operator cannot be liable for contributory infringement merely because the structure of the system allows for the exchange of copyrighted material.”).

181. *Id.* at 1024 (“Napster’s failure to police the system’s ‘premises,’ combined with a showing that Napster financially benefits from the continuing availability of infringing files on its system, leads to the imposition of vicarious liability.”).

182. *Id.* at 1023 (“Napster had the right and ability to police its system and failed to exercise that right to prevent the exchange of copyrighted material.”).

183. 545 U.S. 913 (2005).

for the resulting acts of infringement by third parties.”¹⁸⁴ The Court drew a distinction for liability purposes between a service that was passively used for infringing activities and a service that encouraged such behavior, with the latter being worse.¹⁸⁵

While Napster and Grokster were software platforms rather than content-generating edge providers, the issues in those cases were placed in an edge provider context in *Viacom International, Inc. v. YouTube, Inc.* Viacom alleged that YouTube induced third-party copyright infringement on its website.¹⁸⁶ In response, the Second Circuit looked to four factors to determine if there was vicarious liability:

- (A) Whether . . . YouTube had knowledge or awareness of any specific infringements . . . ;
- (B) Whether . . . YouTube willfully blinded itself to specific infringements; (C) Whether YouTube had the “right and ability to control” infringing activity within the meaning of § 512(c)(1)(B); and
- (D) Whether any clips-in-suit were syndicated to a third party and, if so, whether such syndication occurred “by reason of the storage at the direction of the user” within the meaning of § 512(c)¹⁸⁷

Although the case settled out of court, the U.S. Court of Appeals for the Second Circuit implied that the DMCA safe harbor was intact as long as edge providers complied with these requirements.¹⁸⁸ On remand, the District Court for the Southern District of New York echoed the decision in *Grokster* by holding that “[k]nowledge of the prevalence of infringing activity, and welcoming it, does not itself forfeit the safe harbor. To forfeit that, the provider must influence or participate in the infringement.”¹⁸⁹ The Southern District of New York also pointed to § 512(m), which provides that the DMCA safe harbor cannot be conditioned on “a service provider monitoring its service or affirmatively seeking facts indicating infringing activity.”¹⁹⁰ So edge providers do not have a duty to police all posted

184. *Id.* at 919.

185. *Id.* at 923–24 (“[F]rom the moment Grokster and StreamCast began to distribute their free software, each one clearly voiced the objective that recipients use it to download copyrighted works, and each took active steps to encourage infringement.”).

186. *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 28–29 (2d Cir. 2012).

187. *Id.* at 42.

188. *Id.*

189. *Viacom Int’l Inc. v. YouTube, Inc.*, 940 F. Supp. 2d 110, 118 (S.D.N.Y. 2013).

190. 17 U.S.C. § 512(m); *Viacom*, 940 F. Supp. 2d at 120.

content as long as they comply with the DMCA safe harbor requirements.

C. Shortcomings of the DMCA

While the DMCA regime has persisted for two decades, it is certainly not infallible.¹⁹¹ The goals of § 512 were to establish legal certainty for online service providers in order to encourage the proliferation of Internet content and protect the legitimate interests of authors.¹⁹² For example, there is a danger of trolls filing unsubstantiated removal requests, although this has been tempered by establishing liability for fake takedown notices.¹⁹³ Overall, the DMCA seems to have been a positive development. Recommendations for improvements to the DMCA can also better inform how to craft regulations for fake news.

In a recent study on the efficacy of the § 512 regime, the Copyright Office found that while online service providers thought the regime worked quite well, authors found it difficult to counter copyright infringement.¹⁹⁴ The Copyright Office made several recommendations to improve the § 512 regime moving forward.¹⁹⁵ Three of these recommendations are relevant to creating a parallel takedown regime for fake news. First, unwritten repeat infringer policies are currently allowable under § 512 case law; however, they do not have the same deterrent effect, so policies should be written and posted.¹⁹⁶ Second, Congress should clarify what qualifies as actual and “red flag” knowledge — “awareness of facts or circumstances from which infringement is apparent”¹⁹⁷ — for online service providers, as well as willful blindness, and consider adding a reasonableness requirement that could account for different types of online service providers (e.g., Facebook versus an individually run blog).¹⁹⁸ Third, Congress should modify the process and requirements for providing takedown notice to edge providers to make the

191. See, e.g., Corynne McSherry, *Platform Censorship: Lessons from the Copyright Wars*, ELEC. FRONTIER FOUND. (Sept. 26, 2018), <https://www.eff.org/deeplinks/2018/09/platform-censorship-lessons-copyright-wars> [<https://perma.cc/L4DS-LD35>] (noting that the DMCA regime has had many challenges, which should be learned from if fake news is to be regulated by edge providers); see also *infra* Section IV.D.

192. U.S. COPYRIGHT OFFICE, SECTION 512 OF TITLE 17: A REPORT OF THE REGISTER OF COPYRIGHTS 18–20, (May 2020) [hereinafter COPYRIGHT OFFICE REPORT], <https://www.copyright.gov/policy/section512/section-512-full-report.pdf> [<https://perma.cc/6BKK-KB9J>].

193. See *infra* Section IV.D.(6).

194. See COPYRIGHT OFFICE REPORT, *supra* note 192, at 64–83.

195. See generally *id.* at 83–197.

196. See *id.* at 156.

197. See *id.* at 3.

198. See *id.* at 145–50.

takedown easier and more efficient.¹⁹⁹ These three recommendations for improving the DMCA notice and takedown regime are important to keep in mind when applying the DMCA framework to fake news.

D. Lessons for Fake News

At present, the regulation of fake news by edge providers is amorphous and often opaque. The DMCA, case law on vicarious copyright liability, and the Copyright Office's recent recommendations provide principles for better regulation of fake news by edge providers. If the First Amendment and § 230 framework is relaxed in the future, then these principles can also serve as models for the governmental regulation of fake news and vicarious liability for edge providers. Ten trends emerge that can inform our understanding of how to best regulate fake news online.

- (1) The DMCA does not provide absolute immunity for edge providers from copyright infringement, like that which currently exists for edge providers in the context of fake news. Instead, there is a safe harbor from liability, but only if a certain set of requirements are met. If the First Amendment and § 230 constraints on liability are relaxed, this framework could prove replicable in the fake news context. This would not create overly broad liability for edge providers for posted fake news, but it would establish certain minimum procedures they must take to better reign in the proliferation of fake news.
- (2) The DMCA framework, as specified in § 512(m) and reinforced in *Viacom*, places the burden on copyright owners to notify the edge provider of infringing material on their website.²⁰⁰ Therefore, there is no active duty for the edge provider to monitor all content that is posted on its platform. However, while copyrights are granted to individuals, the problems posed by fake news are much broader; therefore, this model could be expanded to allow any user to notify edge providers of posted fake news. Some edge providers, such as Facebook, are already utilizing this approach,

199. *See id.* at 158 (“[T]he bespoke nature of each OSP’s webform, combined with DMCA pages that are not readily accessible from the homepage and do not always contain direct contact information for the OSP’s designated agent, results in significant increases in the time and effort that must be invested by a rightsholder to submit a takedown notice.”).

200. 17 U.S.C. § 512(m); *Viacom Int’l Inc. v. YouTube, Inc.*, 940 F. Supp. 2d 110, 120 (S.D.N.Y. 2013).

allowing users to mark posts as “false news.”²⁰¹ This model has the advantage of mobilizing a massive number of users to monitor and notify edge providers, which decreases the burden of monitoring costs.

In addition, the Copyright Office provided recently updated guidance on § 512 suggesting that notice procedures should be relatively quick and simple. This principle would also be helpful for notifying an edge provider of fake news. The notification system could be established by edge providers even without modifications to the First Amendment and § 230 regime. But, if this regime were relaxed, implementing a notification framework would mean that edge providers would not have a duty to review all content. They would only be responsible for reviewing content flagged by the notification system.

- (3) Another advantage of the DMCA framework is that it establishes clear rules. The DMCA proscribes any user action that infringes on a copyright.²⁰² Fake news is not as simple to define as copyright infringement, and there is an abundance of proposed definitions.²⁰³ No matter which definition is accepted,²⁰⁴ it is vital that one is recognized as the standard. The Copyright Office’s recommendation for written policies supports such a move. A clear statement of the conduct prohibited under a fake news definition, whether by the government or edge providers, would provide an explicit *ex ante* rule. This serves the dual purpose of notifying all users about prohibited conduct and also what content must be blocked by edge providers after notification. Removing such ambiguity would more effectively demarcate proscribed conduct, both for users and edge providers.
- (4) The DMCA, like § 230, provides a liability shield for edge providers that remove content in good faith.²⁰⁵ Making edge providers liable for any erroneous removal of permitted content would pose an enormous risk to edge providers. This liability shield encourages edge providers to remove content,

201. FACEBOOK, HOW DO I MARK A FACEBOOK POST AS FALSE NEWS?, <https://www.facebook.com/help/572838089565953> [https://perma.cc/A3XQ-6KJ2].

202. See 17 U.S.C. § 512(c).

203. Axel Gelfert, *Fake News: A Definition*, 38 *INFORMAL LOGIC* 84, 94–109 (2018).

204. See, e.g., *id.* at 108 (arguing for the definition of fake news to be: “the deliberate presentation of (typically) false or misleading claims *as news*, where the claims are misleading *by design*”).

205. 17 U.S.C. § 512(g)(1).

whether it be copyright-infringing or fake news, with no fear of liability backlash. Critically, both statutes provide for a liability shield only where the edge provider has acted in “good faith” in taking down the content, decreasing the possibility that edge providers would selectively delete content to further a certain agenda.

- (5) To give the original poster a rebuttal, the DMCA provides a mechanism for subscribers to counter a takedown notice.²⁰⁶ Such a counter-notice right could be implemented in the regulation of fake news as well, allowing the original poster to offer evidence that his content is not fake news and therefore should not be removed from the website. This system would operate as a check on improper takedown notices, whether due to overzealousness or malicious intent, and allow the original poster to offer a rebuttal rather than the content being removed immediately upon notice. While these counter-notices have had success under the DMCA, it is rare for counter-notices to be filed.²⁰⁷ Modifying the procedure for counter-notices — e.g., by making the process less intimidating for the posters — would help improve this feature.²⁰⁸ In addition, counter-notices provide a transparency function which sheds greater light on takedown notices and helps edge providers develop their ability to ascertain erroneous takedown notices.²⁰⁹ By addressing the shortcomings of the DMCA counter-notice procedure, a counter-notice system could serve as a significant check on the takedown of bona fide content.
- (6) Another check on taking down too much content is imposing a punishment for bad faith takedown notices. The DMCA provides for liability for those that submit materially misrepresentative takedown notices,²¹⁰ which is a significant risk to anyone that does not own the copyright or tries to remove another work that does not actually infringe on their copyright. The Copyright Office’s report on § 512 found that many stakeholders wanted increased penalties to serve as a greater deterrent.²¹¹ The same system could be implemented

206. *Id.* § 512(g)(2)(B), (g)(3).

207. Annemarie Bridy & Daphne Keller, Comments on Notice of Inquiry for Section 512 Study at 27–28 (Mar. 31, 2016), <https://www.regulations.gov/document?D=COLC-2015-0013-86005> [<https://perma.cc/3YL7-7SFH>].

208. *See id.* at 29.

209. *Id.* at 30.

210. 17 U.S.C. § 512(f).

211. COPYRIGHT OFFICE REPORT, *supra* note 194, at 5.

for fake news, either on an edge provider basis or on a legal basis if the First Amendment and § 230 regime were relaxed. This would check those bad faith takedown notices that might be focused on limiting access to a countervailing viewpoint. Critically, it would not punish good faith but incorrect takedown notices for fake news. However, this introduces a difficult burden of proof, especially if subjective intent is considered.²¹² Some scholars have even suggested that a more stringent test should be used, such as imposing liability for both knowing and reckless takedown notices.²¹³

- (7) In addition to takedown notices, DMCA case law has encouraged active policing where possible. This principle, from *Napster* and *Viacom*,²¹⁴ is directly in line with Congress' current hopes that edge providers will self-regulate. Whether the government can mandate self-regulation of fake news or not, the importance of self-regulation by edge providers is already well-established in the copyright context. It has been recognized as a fundamental principle in countering fake news as well.
- (8) In *Viacom*, the Second Circuit also strongly disfavored edge providers' willful blindness to infringing activities on their websites.²¹⁵ While this was not a standalone rule and was instead part of a multi-factor test, it is still a helpful principle for fake news. YouTube was aware of infringing activities but complied with the DMCA safe harbor requirements, so it was shielded from liability. Similarly, while willful blindness would be a helpful consideration in evaluating edge provider liability if the First Amendment and § 230 shield is loosened, providing for a safe harbor would still be the absolute rule protecting edge providers. Following the Copyright Office's recommendations in its § 512 report — which clarified the willful blindness standard and the DMCA's knowledge requirements more broadly and added a reasonableness requirement that would allow more flexibility depending on the type of edge provider — could also improve the efficacy of such a liability system for fake news.

212. See Lydia Pallas Loren, *Deterring Abuse of the Copyright Takedown Regime by Taking Misrepresentation Claims Seriously*, 46 WAKE FOREST L. REV. 745, 762, 766–67, 769 (2011).

213. See, e.g., *id.* at 774–75.

214. *A&M Recs., Inc. v. Napster, Inc.*, 239 F.3d 1004, 1023 (9th Cir. 2001); *Viacom Int'l Inc. v. YouTube, Inc.*, 940 F. Supp. 2d 110, 120 (S.D.N.Y. 2013).

215. *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 42 (2d Cir. 2012).

- (9) Courts have taken a hard stance on edge providers that fail to supervise content posted on their platform if the edge provider profits from it.²¹⁶ If the First Amendment and § 230 regime were relaxed, this principle could provide an important model for crafting fake news vicarious liability. This model would place stricter scrutiny on those edge providers that are directly or indirectly profiting from fake news, such as by making advertising income from traffic generated by these fake news articles. This model would disincentivize edge providers from facilitating the proliferation of fake news because trafficking fake news would be prohibitively risky instead of being profitable.
- (10) Finally, the courts in *Grokster* and *Viacom* distinguished passive use of an edge provider's platform and active encouragement of infringing activities by edge providers.²¹⁷ This dichotomy would similarly be helpful for differentiating websites that are used as conduits of fake news, such as Facebook, and those that primarily propagate fake news, such as the Gateway Pundit.²¹⁸ To the extent that fake news sites allow others to directly post content and encourage the content to be fake news, this dichotomy is especially helpful in allocating liability to the worst actors.

V. CONCLUSION

Most thoughts on how to address the problem of fake news focus on either reforming the First Amendment and § 230 regime or self-regulation by edge providers. Yet these suggestions look towards the future without considering the past. The DMCA provides a ready framework for regulating fake news and establishing vicarious liability of edge providers for the proliferation of fake news. The DMCA framework is far from perfect,²¹⁹ but it is a workable system that has functioned better than suggested alternatives.²²⁰

216. See, e.g., *Napster*, 239 F.3d at 1024.

217. *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 923–24 (2005); *Viacom*, 940 F. Supp. 2d at 118.

218. See Paul Farhi, *What is Gateway Pundit, The Conspiracy-Hawking Site at the Center of the Bogus Florida 'Crisis Actors' Hype?*, WASH. POST (Feb. 23, 2018, 4:43 PM), https://www.washingtonpost.com/lifestyle/style/what-is-gateway-pundit-the-conspiracy-hawking-site-at-the-center-of-the-bogus-florida-crisis-actors-hype/2018/02/23/dded562a-174e-11e8-b681-2d4d462a1921_story.html [https://perma.cc/2BPV-CX65].

219. See, e.g., STIGLER COMM. ON DIGIT. PLATFORMS, *supra* note 121, at 193 (finding that edge providers respond overzealously to takedown notices); Katherine Trendacosta, *Reevaluating the DMCA 22 Years Later: Let's Think of the Users*, ELEC. FRONTIER FOUND. (Feb. 12, 2020), <https://www.eff.org/deeplinks/2020/02/reevaluating-dmca-22-years-later>

Copyright infringement and fake news are quite distinct, and what has worked for the DMCA will not necessarily work for fake news. However, the ten principles elucidated from § 512 and related case law are informative for future fake news regulation. The end goals are the same: reducing the amount of proscribed behavior on the Internet. They provide guidance to edge providers for structuring their own self-regulation regimes. Furthermore, if the First Amendment and § 230 framework were relaxed, these principles will readily provide insights for crafting federal laws on fake news and involving edge providers in the solution. Either way, to develop creative constraints on modern day fake news, we should look back at our history under the DMCA to move forward into the future.

lets-think-users [<https://perma.cc/F8HK-EHR7>] (discussing some of the shortcomings of the DMCA).

220. Trendacosta, *supra* note 219 (quoting Professor Rebecca Tushnet) (“The system is by no means perfect, there remain persistent problems with invalid takedown notices used to extort real creators or suppress political speech, but like democracy, it’s better than most of the alternatives that have been tried.”).