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Marzena Barańska
Jagiellonian University in Kraków, Poland
ORCID: 0000-0003-0026-9803
marzena.baranska@uj.edu.pl

The Subjective Dimension of Fake News

Podmiotowy wymiar fake newsów

ABSTRACT

The universal access to the Internet contributed to the dissemination and popularization of fake news. Their function is quite broad – they can influence the results of political elections, social attitudes and behavior or stock market quotations, and weaken social trust in particular categories of our existence. In the age of the Internet, thousands of new content with manipulated data is circulated every day, without any reliable research that destabilizes the perception of reality. Disinformation is not a new phenomenon, but it has never been such a powerful weapon. The omnipresence of fake news raises questions about the subject side, i.e. senders, content distributors, sources of responsibility for the published material. The aim of this article is an attempt to systematize the concept of fake news and indicate the entities responsible for broadcasting this type of content in the context of applicable law. For this reason, the following hypothesis was adopted: The indifference of approaches in defining the concept of fake news means that the authors and entities distributing content are not aware of the contradiction of the actions taken with generally applicable law. As a consequence, elements of the concept of fake news were distinguished and the entities disseminating this type of content were characterized. The article organizes the state of knowledge regarding fake news and fills the research gap.

Keywords: fake news; Internet; manipulated data; perception of reality; disinformation; generally applicable law

CORRESPONDENCE ADDRESS: Marzena Barańska, PhD, Dr. Habil., Professor of the University, Attorney at Law, Jagiellonian University in Kraków, Faculty of Management and Social Communication, Institute of Culture, Prof. Stanisława Łojasiewicza 4, 30-348 Kraków, Poland.

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INTRODUCTION

The Internet and social media are perceived as the most democratic form of creating and sharing content. Presented in a graphic by F.B. Opper in 1894, fake news was popularized in the 21st century. Although the issues of "fabricated information", "counter-knowledge", "disinformation", "post-truth" and "alternative facts" were debated by the US Congress in 2010, they were not fully regulated. Statements during the election campaign in the USA in 2016, as well as media reports about the withdrawal of Great Britain from the European Union, or content about the COVID-19 pandemic were not devoid of content recognized as false. Clicking, self-replicating bots, astroturfing, cybertufing[1] contributed to the popularization of the term, and in 2017 it was recognized as the word of the year, e.g. in USA, Belgium. Universal access to the Internet means that everyone publishes the content they deem appropriate in a conscious manner or unconsciously, on behalf of himself or to order. Regardless of the form of expression – image, text, film, photo – a joke, satire, gossip, false information are perceived as true statements, often their alleged credibility is determined by the fact of dissemination on the Internet. A report published in 2018[2] shows that 75% of Internet users encounter fake news every day. The frequency of emission, the forms and genres of communication used, the range of impact, the role and significance of Internet users, the effects of disseminating false content have become the subject of many publications around the world.[3] Sociologists, psychologists, cultural studies, media scholars focus the attention, among others, on the global reach of fake news (M. Ziółkowska, J. Allend, B. Howland, D. Rothschild), media bias and popularizing post-truth (R. Rogers, AM Guess, L. Nadarevic), content (M.J. Metzger, P. Shen), factors determining the attribution of credibility to information published on the web by their recipients (G. Pennykuch, D.G. Rand).

The normative approach is also part of the multidisciplinary research trend. Analyzes concerning international and national regulations are dominated by considerations concerning the effectiveness of established laws (B. Baade,[4] S. Theila, U.M. Rodrigues), changes introduced in civil and penal solutions (R.K. Hełm, H. Nasu). There are critical gaps in the literature, in which a rigorous analysis of the concept of fake news and the subjective side is needed to assess the application of the law, verify existing approaches.

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[1] These are specific rent user groups that provide false content.

[2] *Czy żyjemy w rzeczywistości fake newsów?*, March 2018, Flash Eurobarometr 464 K.013/18, p. 3.

[3] According to Google Scholar, approximately 647,000 items have been published on the topic under study.

[4] See B. Baade, *Fake News and International L*aw, "European Journal of International Law" 2019, vol. 29(4).

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This article aims to systematize the concept of fake news and to identify entities responsible for the emission of this type of content through a critical assessment of various regulatory approaches in terms of their normative compliance with the applicable principles of international law. For this reason, the following hypothesis was adopted: The indifferentness of approaches in the field of defining the concept of fake news means that entities distributing content are not aware of the inconsistency of their actions with generally applicable law.

Due to the wide range of issues discussed, attention was focused on seeking answers to the following questions: What associations are caused by the term "fake news"? Who should be indicated as the author, sender of this type of message? Due to the interdisciplinary nature of the analyzed issue, research methods appropriate for the legal sciences and broadly understood social sciences were used. From among the catalog of legal methods, the method of exegesis of legal texts was used, which is necessary to establish the interpretation of the current jurisdiction. The comparative method was helpful in identifying the differences and similarities in the regulatory actions imposed by authorized bodies in the field of fake news regulation. Due to the above, the use of the legal-comparative method was deemed unnecessary, because it contravenes in the context of the analysis of European and national law. As a consequence, elements of the concept of fake news were distinguished and the entities disseminating this type of content were characterized. The article organizes the state of knowledge regarding fake news and, contrary to the widely accepted freedom of speech, indicates the need to verify the existing solutions in order to strengthen the protection and safeguard legitimate interests protected in a jurisdiction against threats.

INTERACTIVITY AS A DETERMINANT OF MEDIA

The universal access to communication channels, data transmitting devices, and the speed of changing publications in the visual, auditory and text layers make it more and more difficult to determine what is true and what is not. Every day, millions of network users participate in the process of exchanging information using the new media. The interest in this form of communication results from the properties of new media, among which the following can be distinguished: "multimedia – that is, the integration of available forms of communication (text, static and graphic images, film, sound); communication – quick information exchange among users; hypertext nature – combining content by means of logical relations network (links), enabling uninterrupted transmission of related information; interactivity – the ability to receive information while responding to it".[5]

[5] J. Jędrzyczkowski, *Prezentacje multimedialne w procesie uczenia się studentów*, Toruń 2006, p. 14. Cf. D. McQuail, *Teoria komunikowania masowego*, Warszawa 2007, p. 149; M. Lister, J. Dovey, L. Grant, K. Kelly, *Nowe media. Wprowadzenie*, Kraków 2009, p. 17.

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New technologies have made that posts, likes, comments, attached photos, videos, etc. are source of knowledge for millions of people, but also an inspiration for posting your own opinions and views on the public and private spheres. "This new medium of communication has transformed society into 'echo chambers' – where people mainly consume information from like-minded voices of their choice – or 'filter bubbles' – where invisible algorithms select information that is likely to be preferred by the user".[6] The multiplicity of disseminated content due to the frequency of its repetition by media users, contributes to uncritical acceptance as certainty or truth.

FAKE NEWS CONCEPT ANALYSIS

The term "fake news" has not been given one absolutely binding definition. In common understanding, it is equated with false, untrue, "false news" or the concept of disinformation.[7] The Cambridge Dictionary explains that fake news is "false stories that appear to be news, disseminated on the Internet or using other media, usually created to influence political views or as a joke".[8] The Polish Language Dictionary considers such stories to be, i.a., "deceptive action aimed at persuading someone to a certain behavior, usually harmful to him and those related to him", "an action or its effect aimed at shocking someone, evoking some emotions or uncontrolled behavior in someone".[9] The normative approach proposed by the European Commission states that it is "verifiably false or misleading information, created, presented and disseminated for the purpose of economic gain or to deliberately deceive the public, and which may cause public harm".[10]

Also in the literature on the subject, there are many approaches to define the concept. N. Mailer, in the biography of Marilyn Monroe published in 1973, used the term "factoid" as "something that appears to be a fact, but is not actually a fact".[11] P. Stachowiak quotes the Oxford Dictionary as the following definition of the fake news phenomenon: "[…] information relating to circumstances or describing circumstances in which objective facts exert less influence on shaping public

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[6] R.K. Helm, H. Nasu, Nasu H., *Regulatory Responses to 'Fake News' and Freedom of Expression: Normative and Empirical Evaluation*, "Human Rights Law Review" 2021, vol. 21(2), p. 315.

[7] False information was part of the strategy during the First World War.

[8] *Fake news*, https://dictionary.cambridge.org/pl/dictionary/english/fake-news [access: 3.12.2020].

[9] *Prowokacja*, https://sjp.pwn.pl/slowniki/prowokacja.html [access: 4.12.2020].

[10] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Tackling online disinformation: a European Approach, COM/2018/236 final, 26.04.2018.

[11] See *Fake news, czyli jak kłamstwo rządzi światem. Raport opracowany przez Agencję Informacyjną Newseria oraz firmę doradczą Public Relations*, 2017, https://biznes.newseria.pl/files/raport-fake-news-newseria.pdf [access: 10.02.2021], p. 4.

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opinion than emotions and personal beliefs".[12] J. Bergman – an American lobbyist – compares it to a "chemical weapon". "Power of impact is to cause a change in the current assessment, approach, perception of events, their assessment, building the confidence of the credibility of the content described, and thus the reaction of the recipients in line with the expectations of the sender of the message".[13]

On the other hand, P. Zakrzewski takes the directional action of the content sender as a starting point, assuming that it is "the intentional dissemination of false information, serving to achieve a certain goal".[14] This concept is echoed by M. Podlecki. In his opinion, these are "Activities referred to as 'disinformation' are described as fully planned, carried out on a large scale, deliberately, most often over a long period of time, and to achieve specific benefits, especially political ones. 'Misinformation' is rather accidental, individual events than a pre-planned action. […] In the network, the two terms are most often used incorrectly interchangeably".[15] It is a neologism, based on joke or disinformation, aimed at eliciting a reaction consistent with the intention of the message sender.

The qualification of content as fake news may be determined by: unintentional reporting errors; rumors that are considered as a source of information; conspiracy theories (these are by definition difficult to verify as true or false and are usually made by people who believe them to be true); satire that is unlikely to be misinterpreted as factual; false statements of politicians; and reports that are false or misleading, but not downright false, from who disseminates them and who receives them.[16]

C. Wardle emphasizes the potential contained in the content of the message causing their intentional interpretation: a false combination causing belief in the content and presentation of the problem, distributing false content based on actual events, fabricating content, manipulating the content and facts (see Fig. 1).

[12] P. Stachowiak, *Kłamstwo? Nie! Post-prawda*, "Przewodnik Katolicki" 2016, vol. 51, www.przewodnik-katolicki.pl/Archiwum/2016/Przewodnik-Katolicki-51-2016/Opinie/Klamstwo-Nie-Post-prawda [access: 17.07.2021].

[13] J. Bergman, *Vera Zasulich: A Biography*, Stanford 1983, p. 261.

[14] P. Zakrzewski, T. Muras, *Praw(n)y sierpowy w starciu z fake newsem*, 2019, https://demagog.org.pl/analizy_i_raporty/prawny-sierpowy-w-starciu-z-fake-newsem-nasz-raport [access: 25.01.2021].

[15] M. Podlecki, *Fake news jako zjawisko (nie tylko) medialne – część I*, "Biuletyn Edukacji Medialnej" 2017, no. 2, pp. 126–127.

[16] C. Jack, *Lexicon of Lies: Terms for Problematic Information*, August 2017, https://datasociety.net/pubs/oh/DataAndSociety_LexiconofLies.pdf [access: 25.01.2021].

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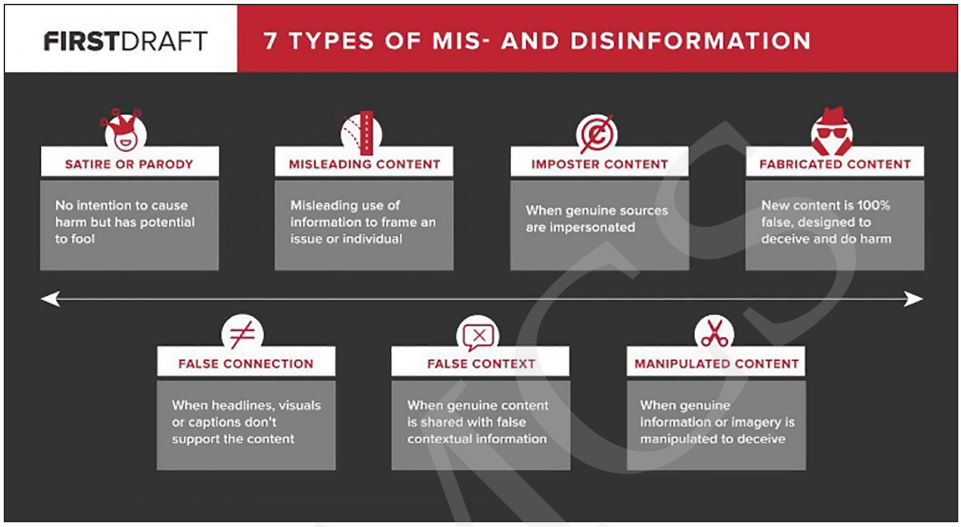


Fig. 1. Seven types of mis- and disinformation

Source: C. Wardle, *Fake news. It's complicated*, 2017, https://medium.com/1st-draft/fake-news-its-complicated-d0f773766c79 [access: 10.02.2021].

The attractiveness of the structure determines the perception, opinion, inference, understanding and often affects further distribution. The constitutive elements of the content constitute "false information, the intention of the sender – untruth, distortions and manipulation in fake news are placed on purpose, and are not the result of ignorance, mistake or incorrect inference".[17] The intention of the sender may be a consequence of the form of expression used in terms of "linguistic, graphic/pictorial or demonstrative (presentation of physical objects)".[18]

To sum up, it should be stated that fake news is information containing content that misleads the recipient, in order to create a belief about their reality and cause a change in behavior, attitudes and views, in accordance with the intention of the message sender, distributed *via* available communication channels.

The indicated criteria allow for the analysis of fake news as tools of communication of the individual and the organization with the external environment in the context of the applicable normative solutions. For this reason, they can be a source of analyzes in the field of civil law, e.g. infringement of personal rights, as well as

[17] K. Kubicka-Żach, *Fake newsy w wypowiedziach kandydatów w wyborach są, choć nie zawsze świadome*, 2020, www.prawo.pl/samorzad/fake-newsy-w-kampanii-wyborczej-raport-helsinskiej-fundacji-praw,498045.html [access: 17.07.2021].

[18] *Encyklopedia szpiegostwa*, transl. K. Wojciechowski, Warszawa 1995, pp. 72–73.

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criminal law – the crime of defamation (Article 212 of the Polish Penal Code)[19] and fraud (Article 286 of the Polish Penal Code).

The variety of approaches makes it possible to identify common features:

- a sender of content can be anyone who disseminates information through available communication channels,
- the knowledge that the recipient of the information obtains on the basis of the body of the disseminated content builds the belief that it is the true goal,
- causing the reaction of the environment adequately to the intentions of the content sender.

The content can have primal or secondary derivation. The authorship of the disseminated material should be considered primal. About the secondary – when a person draws inspiration from another publication.

SUBJECTIVE SIDE OF FAKE NEWS

The sender of the message can be anyone, regardless of age, who disseminates the content on the Internet or other media. Everyone means both an adult and a child. It was assumed that an adult is anyone who is 18 or older. A juvenile is therefore anyone who is under 18.[20] However, the indicated age census or country of origin[21] does not limit the use of media.

Due to the consequences of the results related to the dissemination of content that adversely affects the mental and physical development, especially of juveniles, normative and non-normative boundaries have been set. Both the content published in material and access to the media, especially social media, conditioning the content of information distributed in the media and access to the media by persons under 13 were regulated. The lower age limit determined in this way results from:

- lack of legal capacity, even to the extent limited by persons aged 0–13,
- lack of proper understanding of the content meaning of messages and the effects of their dissemination.

Therefore, the question arises: Can a child under 13 be the sender of the message in the face of the restrictions contained in the regulations of Internet portals?

Due to the universal access to electronic media, it cannot be ruled out that the child, by using an interactive form of communication, becomes the sender and recipient of the content. The regulations constructed by the owners of Internet

[19] Act of 6 June 1997 – Penal Code (cosolidated text, Journal of Laws 2020, items 1444, 1517).

[20] Declaration of the Rights of the Child (1959), proclaimed by the General Assembly, resolution 1386 (XIV), A/RES/14/1386, 20 November 1959.

[21] An example is the Polish-American agreement concerning the stationing of American soldiers in Poland. Under it, Polish jurisdiction will apply to US soldiers stationed in Poland.

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portals, as sources of internal law setting the minimum age of the user at 13, are often abused. The lack of effective data verification mechanisms means that the users are also people below the indicated age rating. The child can therefore be the sender of fake news, as long as he or she uses an online account.

The effects of disseminating false information do not have negative consequences in relation to the sender-child. The exonerative factors are: age excluding the child's responsibility, no guilt, no legal capacity.[22] A child up to the age of 13 does not even have a limited legal capacity, so the child cannot incur obligations and bear the consequences for them. Juveniles aged 13–18 have limited legal capacity. In principle, they can be held liable for the damage caused by their actions, as long as their development corresponds to "a given age" – their peers.[23]

Therefore, taking into account the scope of responsibility of a 13-year-old person, it should be clearly stated that materials published by a juvenile, even if they contain false content and harm the interests of other people, do not have legal effects in relation to their sender, and possibly assign responsibility to their legal guardians. A similar solution applies to incapacitated persons due to the lack of legal capacity.[24] Their user can be anyone who has access to communication channels understood as radio, television, the Internet or social media.

Users can be divided into (1) passive – recipients of the content, and (2) active – senders and recipients of content. While the first group is dominated by people who are readers of the content, in the second group the multitude of published materials is a consequence of, i.a., "oversharing – willingness to be exposed online and publish information about private life"[25] or narcissurfing, i.e. collecting information about oneself on the web. An example of social impact on the Internet is thoughtlessly shared fake news by users of social networks, just because famous people or authorities in a given field have done so before. Spreading false information can also be the result of a peer group, family and the Internet community influence. Members of each of the groups mentioned can distribute the so-called fake news,

[22] Parents are legal representatives of the minor child and are responsible for their behavior and the resulting consequences. A juvenile who is under 13 does not bear any damage caused by him. Assigning blame to a juvenile over 13 depends on the level of psychophysical development if it is lower than in the peer group.

[23] Articles 105 and 106 of the Act of 20 May 1971 – Code of Petty Offenses (Journal of Laws 2019, item 821); Article 8 ff. of the Act of 23 April 1964 – Civil Code (consolidated text, Journal of Laws 2020, item 1740).

[24] M. Barańska, *Zabezpieczenie powództwa w postępowaniu o naruszenie praw niemajątkowych, w tym przez prasę, na gruncie systemów prawnych państw europejskich i pozaeuropejskich. Rerminy, zakres. Ekzpertyza przygotowana dla Ministerstwa Sprawiedliwości*, Warszawa 2019, p. 7 (unpublished).

[25] M. Szpunar, *Koncepcja bańki filtrującej a hipernarcyzm nowych mediów*, "Zeszyty Prasoznawcze" 2018, vol. 61(2), p. 194.

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e.g. on social networking sites, and influence the attitudes, opinions and behavior of other group members with their behavior.[26]

Reposting persons constitute a special category, which means anyone who transmits information to other media users without verification and editing of fake news. Their activity manifests itself primarily in the process of building the belief in the credibility of the content by consciously or unconsciously sending information to other people. The actions of people who send spam, spam links or "advertising farms" should be considered intentional; disseminating news feed articles, clickbait headlines (e.g., exaggerating story details with sensational language, using phrases like "WOW!", "It's worth reading").

Among the indicated entities, the following can be distinguished:

1) authors – private persons publishing content related to the sphere of private or professional life,
2) authors – persons acting on behalf and for the benefit of the organization (employees of a given unit, e.g. journalists, spokespersons),
3) authors of contents posted on internet forums and blogs,
4) anonyms,
5) website administrators.

1. Authors of fake news

The authorship of fake news is an issue that requires verification of existing approaches. Pursuant to the applicable Polish legislation, "the creator is a person whose name was displayed in this capacity on copies of the work or whose authorship was made public in any other way in connection with the dissemination of the work".[27] Usually, the identification is based on the name and surname, but also other markings identifying a given entity, e.g. initials or pseudonyms. In the context of the electronic market, the following should also be considered as such: e-mail address, mobile phone number, IP code.

For content posted on the Internet, authorship is equivalent to the concept of an account user. By providing data that determine the creation of an account on many portals, the user allows for its identification, and therefore the author (excluding posts made on the user's website by other entities). Difficulties in determining authorship arise when the device is accessed by parties other than the owner. This situation occurs both in multi-person households as well as in workplaces and

[26] P. Zegarow, *Dlaczego wierzymy w dezinformację? Analiza mechanizmów psychologicznych*, [in:] *Zjawisko dezinformacji w dobie rewolucji cyfrowej. Państwo. Społeczeństwo. Polityka. Biznes*, ed. M. Wrzosek, Warszawa 2019, p. 37.

[27] Article 8 (2) of the Act of 4 February 1994 on copyright and related rights (consolidated text, Journal of Laws 2020, item 288).

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places of rest. Commonly used, for example, laptops, palmtops, the terms "personal device", "for personal use" do not always have a practical dimension. Hotel guests, employees and employers have the right to freely access the device, which may affect the identification of the author of the content. It is assumed that the responsibility for using the company laptop is borne by the employee who has the right to use the above-mentioned device and/or the organizational unit being the owner or proprietor of the device, e.g. an election committee, editorial office.

2. Journalist, editorial office

In the context of the functioning of press offices, the journalist's liability should be considered from the point of view of the Polish Press Law and other legal acts, in particular the Act of 18 July 2002 on the provision of electronic services.[28] A journalist is a person who prepares a press material, which means "any text or image published or submitted for publication in the press of an informative, journalistic, documentary or other nature, regardless of the media, type, form, purpose or authorship".[29] Columns, press articles, information, comments, essays, reportages are, for example, the genres cited that constitute the subject scope of the term "press material".[30] Providing information in the form of an electronic journal or a discussion portal "is characterized by universal availability and the possibility for network users to post their own opinions or information without the prior consent of the editor or publisher of the online journal".[31] Established in Article 12 of the Press Law, the standards for journalistic integrity and honesty cover both the collection and development phases. "For the assessment of compliance with this standard at the stage of collecting press materials, the most important criteria are: the type and reliability of the source of information (a journalist should not rely on a source which objectivity or credibility raises doubts), checking the truthfulness of the information obtained by referring to all other available sources and making sure that the information is consistent with other known facts, and allowing the person concerned to comment on the information obtained. On the other hand, at

[28] Journal of Laws 2020, item 344.

[29] Act of 26 January 1984 – Press Law (Journal of Laws 2018, item 1914).

[30] Pursuant to Article 7 (2) (1) of the Press Law „the press means periodical publications that do not form a closed, homogeneous whole, appearing at least once a year, bearing a permanent title or name, current number and date, in particular: newspapers and magazines, agency services, permanent telex messages, newsletters, radio programs and television and newsreels; the press is also all the media of mass transmission that exists and arises as a result of technological progress, including broadcasting stations and company tele-and radio stations that disseminate periodical publications by means of print, video, audio or other dissemination techniques; the press also includes teams of people and individuals involved in journalism".

[31] Decision of the Court of Appeal in Warsaw of 27 February 2015, VI ACa 262/14, LEX no. 1711598.

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the stage of using press materials, it is important, first of all, to provide information comprehensively, not selectively, to present all circumstances and not to act 'in accordance with a predetermined thesis', as well as to consider the seriousness of the allegation, the importance of information from the point of view of the justified interest of the society and the need (urgency) of publication".[32] A journalist who invokes opinions, third party reports without first checking their credibility, alike editor-in-chief,[33] publisher[34] – must take into account the responsibility for the published material.[35] From the point of view of the analyzed topic, "the editor-in-chief of a journal published in the electronic form cannot be held responsible for publications made by third parties, for which publication they did not have any impact".[36]

3. Authors of contents posted on internet forums and blogs

It is commonly accepted that "Entries on internet forums, blogs, are not press material".[37] According to the author, it is difficult to unequivocally determine the legitimacy of eliminating blogs or posts on internet portals[38] as press materials, especially since their authors are active, recognizable people, and the popularity of their blogs is an expression of sympathy for occupational professionalism.

Placing certain materials on the portal entitles them to be considered press materials only if it is found that they have been published or submitted for publication in the press, in accordance with the definition of press material provided in Article 7 (2) (4) of the Press Law. "Updating the website on which press materials have been published enables what, in the case of traditional mass media, eg in printed form, enables the publication of a new, subsequent issue of a journal or magazine. For this reason, one should endorse the position taken in the literature,

[32] Decision of the Court of Appeal in Warsaw from 16 June 2015, VI ACa 1034/14, LEX no. 1754025.

[33] See decision of of the Supreme Court of 17 June 2002, IV CKN 925/00; decision of the Supreme Court of 20 February 2004, I CK 339/03.

[34] See Article 38 of the Press Law.

[35] "A journalist who mentions the views of another person and […] statements contrary to the real intention of the person uttering them or in a way that distorts the meaning of the statement, violates Article 12 of the Press Law" (resolution of the panel of seven judges of the Supreme Court of 7 December 1993, III CZP 160/93, LEX no. 9168).

[36] *Ibidem*.

[37] Decision of the District Court in Słupsk of 18 June 2009, VI Ka 202/09, LEX no. 1713151.

[38] The lack of interest on the part of Glogers in qualifying their activity as journalism eliminates the use of solutions concerning, among others: acting in accordance with professional ethics and the principles of social coexistence (Article 10 (1) of the Press Law); authorizing the literally quoted statement (Articles 14 and 14a of the Press Law); taking care of the correctness of the language and avoiding the use of profanity (Article 12 (1) (3) of the Press Law); exercising special diligence and diligence in the preparation of materials (Article 12 (1) (1) of the Press Law).

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which associates the periodicity of publications on the Internet with their continuity, and not the regularity of periods between individual publications. Only the analysis of the frequency of updates on a given internet portal allows us to assess whether the publications posted on it are periodical".[39]

"Whether an Internet publication is a press release, it should be determined by the purpose it is to serve. Since the role and task of the press is to disseminate information, then the periodicity of the message, i.e. cyclical informing the public about certain social, economic, political, educational, cultural, music, film and art facts, etc., under the title, name, an address or even a link will indicate the purpose pursued by the editorial office, publisher or author of a given electronic publication on a website created especially for this purpose".[40] "The legal status of the editorial section of the portal differs from that of the part containing Internet users' comments, which is internet forum, even if these comments were triggered by a press article posted by the author of the portal. Such statements, comments by anonymous authors cannot be considered as press material within the meaning of Article 7 (2) (1) and (4) and (5) of the Act of 1984 – Press Law".[41]

Consequently, many blogs and internet forums meet the requirements to be qualified as press, and therefore it can be considered that people who run blogs and internet forums are journalists.

4. Anonyms

The anonymity of posts made on the Internet does not absolutely prevent the sender from being identified. The IP data identifying the account from which the post comes from are helpful in this regard.[42] Unfortunately, the interested party must initiate criminal proceedings in order to establish this type of data. If it is justified by a legitimate public interest, the prosecutor pursuant to Article 60 of the Polish Criminal Procedure Code on the basis of a motion to initiate proceedings,[43] will take steps to establish the perpetrator's data. Even if the evidence collected in the case does not justify the continuation of the proceedings, the applicant will obtain the data of the potential sender of the content, which may constitute the basis for pursuing claims in a different procedure, e.g. civil for infringement of personal

[39] Decision of the Supreme Court of 28 October 2016, I CSK 695/15, OSNC 2017, no. 6, item 73.

[40] Decision of the Voivodeship Administrative Court in Warsaw of 19 December 2008, II SA/Wa 1885/07. See also decision of the Court of Appeal in Łódź of 18 January 2013, I Aca 1032/12, LEX no. 1280426.

[41] Decision of the Supreme Court of 24 November 2017, I CSK 73/17, LEX no. 2443498.

[42] Internet Protocol is an individual number of each computer or other device that is used to identify the device on the network using IPv4 and IPv6 records.

[43] Act of 6 June 1997 – Criminal Procedure Code (Journal of Laws 1997, items 30, 413, 568, 1086, 1458, 2320; Journal of Laws 2021, item 155).

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rights, unfairness of competitive activities, if the entity disseminates Content that aims to portray a business or its goods or services in a bad light. "In the event of infringement of personal rights by statements of anonymous Internet users posted on internet portals, the administrator's liability should be considered under Article 24 § 1 of the Civil Code in connection with the provision of Article 14 (1) of the Act on the provision of electronic services. Therefore, it is the defendant's responsibility to prove that prior to the service of its claim, it did not know about the incriminating comments of Internet users"[44]

The issue of the inability to indicate the original sender of the content raises many doubts. Hence, it is justified to introduce changes to the provisions of Polish law that allow for the submission of the so-called empty lawsuits. The philosophy of empty lawsuits is based on the possibility of initiating a trial without the necessity to indicate the defendant, whose data, due to the anonymity of the published materials, are impossible to be determined by the applicant in the pleading. The interested party submitting a letter should document the fact of the event causing the dissemination of false information to the network – by attaching an appropriate printout, and prove that despite the actions taken to establish the sender's data, it did not receive a positive response.

It is fundamental to develop procedural solutions for the pursuit of rights by persons aggrieved by the content of posts by anonymous senders and to strengthen the control system for content disseminated on portals. Due to the fact that the telecommunications law protects the data of senders of this type of information, the implementation of changes requires system solutions. fake news broadcasters are not only content creators, but also people who duplicate this type of material.

5. Website administrators

The scope of competences assigned to website administrators is related to, i.a., content management, information security, error monitoring, a guarantee of the permanent operation of the website. "The administrator (host provider) is the entity that provides the hosting service, that is, for the purpose of storing in the memory of servers, space for data posted by third parties (service recipients) and makes this data available. […] The administrators are, among others, owners of social networks; owners of portals that enable users to publish content, including owners of portals that are journals or magazines; organizers of internet forums".[45]

[44] Decision of the Supreme Court of 30 September 2016, I CSK 598/15, LEX no. 2151458.

[45] E. Górnisiewicz-Kaczor, *Zasady odpowiedzialności administratora portalu internetowego za bezprawne treści zamieszczane przez użytkowników*, 2019, https://codozasady.pl/p/zasady-odpowiedzialnosci-administratora-portalu-internetowego-za-bezprawne-tresci-zamieszczane-przez-uzytkownikow [access: 6.12.2020].

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Social networking sites are a special form of internet sites, which are characterized by:

- unlimited range of disseminated content,
- unprofessional dimension of the message sender,
- creativity, intellectual contribution of the content broadcaster (authorship).

According to D.M. Boyd and N.B. Ellison, these types of network services enable users to: 1) construct a public or semi-public profile within a restricted system; 2) articulating a list of other users with whom they have contact; 3) viewing the lists of their (personal) contacts and contact lists of other system users.[46]

The discussion portal "is characterized by universal access and the possibility for network users to post their own opinions or information without the prior consent of the editorial office or the publisher of an online journal".[47] The difference in the method of publishing content results from the fact that the users of the internet portal disseminate the content based on individual decisions in a free form. For this reason, the provision of free Internet access is a service that should be assessed pursuant to Article 12 of the Act on the provision of electronic services, i.e. as a provision of network access. The service provider is not responsible for the content of the data provided both by the contracting authority and the contractor, unless he interferes with its content. "The service of providing a free discussion portal is characterized by universal availability and the possibility for network users to post their own opinions or information without the prior consent of the editorial office or the publisher of the online journal. Therefore, the lack of any influence of the editorial office on the very possibility of publishing comments, not to mention any prior verification of them, excludes the possibility of treating them as press material (e.g., a letter to the editor), and, as a result, the assessment of the defendant's liability based on legal provisions press".[48]

The provision of a part of a website for the purpose of posting information and exchanging views is defined as a hosting service.[49] Pursuant to Article 14 of the Act on providing services by electronic means "the person who does not know about the unlawful nature of the data or related activities while providing the resources of the ICT system for the purpose of storing data by the service recipient, […] is not responsible for the stored data". Following the view expressed in the literature, it was assumed that the storage referred to Article 14 of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of

[46] D.M. Boyd, N.B. Ellison, *Social network sites: Definition, history and scholarship*, "Journal of Computer-Mediated Communication" 2007, vol. 13(1).

[47] Decision of the Court of Appeal in Warsaw of 27 February 2015, VI ACa 262/14, LEX no. 1711598.

[48] Decision of the Supreme Court of 30 September 2016, I CSK 598/15, LEX no. 2151458.

[49] See Decision of the Supreme Court of 8 July 2011, IV CSK 665/10, OSNC 2012, no. 2, item 27.

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information society services, in particular electronic commerce, within the Internal Market (Directive on e-commerce)[50] cannot be reduced solely to the storage of data in the computer's (service provider's server) memory.

Since hosting is one of the information society services, consisting in the storage of information referred to in that provision, it may also be performed in such a way that it is made available on the communication network and the entity providing the hosting service facilitates this access. Therefore, the intermediary's activities consisting in the maintenance of such a network, and in particular providing access to this data, are also covered by the exemption provided in Article 14 of Directive 2000/31/EC and Article 14 of the Act on the provision of electronic services.[51] Pursuant to Article 15 of the Act on the provision of electronic services, the entity that provides the services provided in Articles 12–14 of this Act is not obliged to check the transferred, stored or shared data referred to in these provisions. Therefore, it is not obliged, contrary to the claimant's position, to control the content of statements posted by Internet users on the discussion forum.[52] Therefore, disseminating anonymous publications in the form of opinions or comments on the website in a free form releases from responsibility for their content.[53] The moderators play a special role.[54] The basic rights include the elimination of drastic, false content – that may have a negative impact on network users.

6. Responsibility for the content

Already in 2013, the European Court of Human Rights[55] decided that the responsibility of the portal applies to hateful posts under the text – comments, however, the measure of responsibility is hate speech, which in practice may raise a lot of controversy in the face of the interpretation of terms used in various environments. The Court of Justice rightly observes that "the correspondence between the chosen keyword and the search term entered by an internet user is not sufficient in itself

[50] OJ L 178/1, 17.07.2000.

[51] Decision of the Court of Appeal in Warsaw of 27 February 2015, VI ACa 262/14, LEX no. 1711598.

[52] *Ibidem*. See also decision of the Supreme Court of 8 July 2011, IV CSK 665/10, OSNC 2012, no. 2, item 27; decision of the Court of Appeal in Lublin of 18 January 2011, I ACa 544/10, LEX no. 736495.

[53] Decision of the Court of Appeal in Warsaw of 27 February 2015, VI ACa 262/14, LEX no. 1711598.

[54] Por. J. Kudła, A. Staszak, *Operational Control in the Information Technology System (Postulates de lege ferenda)*, "Studia Iuridica Lublinensia" 2021, vol. 30(2), p. 263 ff.

[55] Judgement of the EctHR of 16 June 2015, *Delfi AS v. Estonia*, application no. 64569/09.

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to conclude that Google knows or has control over the information entered into its system by advertisers and stored on its server".[56]

The regulation of relations with users is conditioned both by acts of European law, e.g. Directive 2000/31/EC and Directive 98/48/EC of the European Parliament and of the Council of 22 July 1998 amending Directive 98/34/EC on the establishment of a procedure for the exchange of information in the field of technical standards and regulations,[57] and Article 8 of the Polish Act on the provision of electronic services.

Clearly defined rules will be the source of the contract between the parties. The basis for the activities undertaken is the regulations or rules of the privacy policy published on the website. Twitter,[58] Facebook,[59] and TikTok[60] agree that they oblige users to authenticity of the content presented, and any deviation will be sanctioned.

According to the position presented in the literature on the subject, the scope of the administrator's responsibility is determined by:

- knowledge they have about the content disseminated and their truthfulness,
- possibility of determining the sender of the message.

In the first case, "As the administrator's knowledge of the incriminating comments of Internet users within the meaning of Article 14 (1) of the Act on the provision of electronic services, you should qualify a situation where the administrator, due to the experience in the field of hosting services, takes into account the real possibility of Internet users making posts with content that violates the interests of specific persons, and this in connection with the content of the press article, under which anonymous Internet users post their opinions and agreeing with it, does not take appropriate action, despite employing workers who also remove posts that violate the economic interests of the administrator (e.g. posts that are advertising or commercial information of Internet users) and despite the knowledge that the system of automatic filtration of the vocabulary used by Internet users is not effective".[61] Due to the above, liability may result from slowness and failure to exercise due diligence.

Binding solutions authorize the selection of content that will not be accepted and their elimination by deleting or moderating. The initiator of the described activities

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[56] Decision of the Court of Justice of 23 March 2010, case C-236/08-238/08, *Google v. LVHM*, EU:C:2010:159, item 117.

[57] OJ EU L 217/18, 5.08.1998.

[58] *Zasady Twittera*, https://help.twitter.com/pl/rules-and-policies/twitter-rules [access: 26.02.2021].

[59] T. Lyons, *Hard Questions: What's Facebook's Strategy for Stopping False News?*, 2018, https://about.fb.com/news/2018/05/hard-questions-false-news [access: 26.02.2021].

[60] *Zasady społeczności*, https://www.tiktok.com/community-guidelines?lang=pl [access: 26.02.2021].

[61] Decision of the Supreme Court of 30 September 2016, I CSK 598/15, LEX no. 2151458.

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is the administrator himself or the person concerned. The administrator's activities can be divided into original and follow-up – after the user has disseminated the posts. The original one is when posts are assessed before they are disseminated, and follow-up when eliminating inappropriate posts: photos, videos, opinions, comments posted by individuals, groups – is done using algorithms, website users, but also moderators. At this point, it should be emphasized that despite the increasing quality of filters and monitoring used, the problem of eliminating false content is still present.

Responsibility for publishing fake news should be considered both from the point of view of civil and criminal law. Due to the above, the behavior of the authors and the reproaching person should be considered differently in the context of:

- active creation of harmful content,
- active and passive dissemination of them,
- active incitement to harmful behavior.

Before taking legal action, the interested party may in writing – addressing a summons – request the removal of untrue content by the website administrator. The administrator's refusal to remove the content does not limit the pursuit of legal claims. Article 14 (1) of the Act on the provision of electronic services provides that the administrator of the internet forum is liable for infringement of personal rights of other people, if he had reliable information about the unlawful nature of posts. "This means that obtaining the knowledge of the service provider about the unlawful nature of the data, henceforth excludes his lack of liability under this regulation for further sharing of these posts, regardless of what is the source of his knowledge, i.e. whether the request of the person affected by such an unlawful post or obtaining this knowledge by the portal administrator spontaneously, eg as a result of the moderator's actions or even in another way".[62]

Similarly, the behavior of the person quoting a statement concerning public affairs should be considered an exonerative factor if:

- the author of the content was referred to and not an anonymous person,
- are confirmed by the facts,
- concerning public affairs.[63]

[62] *Ibidem*.

[63] Public affairs, however, include, first of all, statements of the so-called public persons, i.e. politicians, deputies and senators, councilors, government and local government officials, as well as persons who are or aspire to be moral or religious authorities. This also applies to statements of candidates for state and local government positions, especially those filled by elections; statements about public figures, public institutions, political parties and organizations operating in the public sphere; statements made during public events, as well as statements made in connection with such events. See decision of the Supreme Court of 30 September 2009, II KK 110/09, OSNKW 2010, no. 3, item 27.

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Bringing a civil action obliges – in the current legal state – the interested party to indicate the defendant, i.e. the names and surnames or the names of the parties.[64] With regard to the Internet, it will be difficult to identify the data of Internet users. For this reason, experience shows that personal data is any information relating to an identified or identifiable living natural person. Individual information that, when combined with each other, can lead to the identification of an individual is also personal data.

In order to obtain the necessary information, it's necessary to contact the administrator of a given website, supporting the claim for disclosure of personal data of a given person, Article 23 (1) (2) and (5) of the Personal Data Protection Act.[65] The refusal to provide the data may be appealed against to the Chief Inspector for Personal Data Protection (a complaint against the refusal to provide such data). The administrator's refusal due to the lack of moderation of the pages should be considered effective, but it does not release from the obligation to make the published content available.[66]

In the context of events taking place on the Internet, identifying the author of disseminated content containing false information may cause difficulties in determining the above-mentioned data. Therefore, you can:

- submit a request to oblige the administrator to indicate the data of the sender of the content,
- possibly request the public prosecutor to join the civil proceedings,
- possibly notify the law enforcement authorities in advance of committing a prohibited act in order to undertake investigative activities.

In case of violation of personal rights by statements of anonymous Internet users posted on websites, the administrator's liability should be considered on the basis of Article 24 § 1 of the Civil Code in conjunction with Article 14 (1) of the Act on the provision of electronic services. Therefore, it is the defendant's responsibility to prove that prior to the service of its claim, one did not know about the incriminating comments of Internet users.[67] The development of procedural solutions for the pursuit of rights by persons aggrieved by the content of posts by anonymous senders, counteracting further practices, and strengthening the control system of content disseminated on portals should be considered fundamental. Due to the fact that the telecommunications law protects the data of senders of this type of information, the implementation of changes requires system solutions.

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[64] Article 126 of the Act of 18 November 1996 – Civil Procedure Code (consolidated text, Journal of Laws 2020, items 1575, 1578, 2320; Journal of Laws 2021, item 11).

[65] Act of 10 May 2018 on personal data protection (Journal of Laws 2018, item 1000).

[66] D. Kościuk, J. Kulikowska-Kulesza, *The Right to Public Information: Selected Interpretation Doubts in the Doctrine and Jurisprudence of Administrative Courts*, "Studia Iuridica Lublinensia" 2020, vol. 29(1), p. 129 ff.

[67] Decision of the Supreme Court of 30 September 2016, I CSK 598/15, LEX no. 2151458.

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CONCLUSIONS

The conducted analysis indicates the need for a comprehensive study of the issue. The developed catalog of entities is the result of analyzes carried out at a specific stage of development of technological solutions that imply the positions contained in the normative solutions. Among the message senders, one can distinguish both the authors of the content as well as reposting entities, i.e. transmitting previously received information. Although changes in legal regulations determine the scope of liability of entities conducting economic activity consisting in the provision of electronic services, there are still no comprehensive solutions regarding the regulation and qualification of disseminated anonymous names, which is reflected in the ineffectiveness of possible claims. In the author's opinion, the proposed solutions in the field of filing anonymous lawsuits would not only allow for shaping the awareness and critical approach of media users in the field of content on the web.

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ABSTRAKT

Powszechność dostępu do Internetu przyczyniła się do upowszechnienia i spopularyzowania fake newsów. Ich funkcja jest dość szeroka – mogą wpływać na wyniki wyborów politycznych, postawy i zachowania społeczne czy notowania na giełdzie, a także osłabiać zaufanie społeczne w poszczególnych kategoriach naszej egzystencji. W dobie Internetu codziennie do obiegu trafia tysiące nowych treści ze zmanipulowanymi danymi, bez rzetelnych badań, które destabilizują odbiór rzeczywistości. Dezinformacja nie jest zjawiskiem nowym, ale nigdy nie była tak potężną bronią. Wszechobecność fake newsów stawia pytania o stronę podmiotową, tj. nadawców, dystrybutorów treści, źródła odpowiedzialności za publikowany materiał. Celem niniejszego artykułu jest próba usystematyzowania pojęcia fake news oraz wskazania podmiotów odpowiedzialnych za emisję tego typu treści w kontekście obowiązującego prawa. Z tego względu przyjęto następującą hipotezę: Indyferentność podejść w zakresie definiowania pojęcia fake news sprawia, że autorzy i podmioty dystrybuujące treści nie zdają sobie sprawy ze sprzeczności podejmowanych działań z prawem powszechnie obowiązującym. W konsekwencji wyodrębniono elementy pojęcia fake news oraz scharakteryzowano podmioty upowszechniające tego typu treści. Artykuł porządkuje stan wiedzy dotyczący fake newsów oraz uzupełnia lukę badawczą.

Słowa kluczowe: fake news; Internet; zmanipulowane dane; odbiór rzeczywistości; dezinformacja; prawo powszechnie obowiązujące