



Disinformation in democracy or the democracy of disinformation?

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Agustina Del Campo¹

Summary

Disinformation on the Internet has been the object of concern and action by multiple actors. While at first the measures were more targeted to train and cooperate in detecting false news, there are currently more and more measures whose implementation involves censorship, blocks, controls, and persecution. This article critically analyzes some of the measures adopted by the state, Internet companies, and the media in recent years and raises some unanswered questions in the search for answers.

Keywords: disinformation; freedom of expression; democracy

¹ Director of Centro de Estudios en Libertad de Expresión y Acceso a la Información CELE in Universidad de Palermo. She is a lawyer and has a Masters in international law with a specialization in human rights; she is a professor in undergraduate and graduate studies at Universidad de Palermo and Universidad de San Andrés in Argentina. She is a consultant on issues of freedom of expression and human rights on the Internet. She regularly publishes articles, opinions, and books on this matter. She is a consultant in freedom of expression and Internet regulation.

Disinformation is not a particularly new phenomenon. On the contrary, it is a practice that exists among us since democracy itself exists, and even before that. Ideally, the coexistence and correlation with rhetoric, speech, interpretations, actions, and voices necessarily generates different versions, views, and opinions regarding the same acts or facts. And in the worst case, human history is full of chapters in which the distortion of reality for manipulation purposes is evident. Nevertheless, current technology allows misinformation to be more timely than ever — during the last week of an electoral process, for example —, more targeted, since it allows identifying and grouping those who are possibly more inclined to believe and/or disseminate it, and more economically accessible — the networks are massive, international and virtual, and accessing them has very low costs.

From complex situations, such as the 2016 electoral process and campaign in the United States, the now-famous Brexit, or the 2016 October Colombian peace agreement referendum; the problem of fake news on the Internet gained public notoriety. Since then, different actors have developed studies, researches, proposals, policies, regulations, and laws that seek to address this phenomenon. What are the main measures adopted? What is their nature and how do they impact the exercise of other fundamental human rights such as freedom of expression? What are the remaining challenges in this area? In these pages, some ideas around these questions are outlined from three markedly different perspectives: the state, the private sector, and the press. The implications of the policies adopted by each one are also analyzed with the intention of identifying unanswered questions and new problems arising from the solutions, taking into account the dynamic nature of the phenomenon.

Keys to understanding the phenomenon

In the popular lexicon, fake news includes countless situations and circumstances that share a common feature: false information. The falsehood of the information, however, can be attributed to different factors: errors, interpretations, incomplete data, manipulation, scams, etc. At first glance, it can be seen that not all these factors are equally objectionable and that the degree of reproach in some cases may depend on the subject who imparts or shares the information. For example, it is socially (even legally in some cases) reprehensible for a public official to spread false information. This is not the case with an individual who tweets an opinion or news without considering all the aspects or data that are

available regarding that information. Along the same lines, a scam is not the same as wrong advice. The recent case of Pastor Giménez² that had repercussions in the Argentine local media because he allegedly publicized the sale of alcohol sanitizer as a miracle cure for Covid-19 is an example of a scam. The recommendation of a clip on how to make a homemade mask that ends up falling off the face would be an example of a wrong piece of advice. Notwithstanding the differences, the term fake news is often used to refer to all these assumptions, often without any differentiation.

Along the same lines, it should also be noted that the term fake news or even the term disinformation still lacks a legal definition³. On the contrary, the term “fake news” usually includes slander and insults, foreign and national political propaganda, fraud, and disinformation, understood as the dissemination of information knowingly that it is false for the purpose of manipulation, etc. Each of these figures has different elements, as well as different legal treatments. For this article, the term fake news and disinformation are used interchangeably, referring to the phenomenon as a whole.

The right to freedom of expression protects even those who spread false information⁴. None of the International Conventions that contemplate the right to freedom of expression condition its exercise or its protection to its truthfulness. The Office of the Special Rapporteur for Freedom of Expression of the Organization of American States (OAS) and the Inter-American Commission (OEA, 2017), and the UN Rapporteur for freedom of opinion and expression have spoken in favor of the protection of freedom of expression without qualifications. The reasoning behind this protection is that if we demand truthful information under penalty of liability, it would have an inhibiting effect on expression that would undermine access to information, the circulation of ideas and opinions, social control over

² See the case here <https://www.infobae.com/teleshow/infoshow/2020/03/18/imputaron-al-pastor-gimenez-por-posible-venta-de-alcohol-en-gel-como-cura-milagrosa/>

³ Catalina Botero says that the state regulation of the so-called “fake news” should be from the perspective of the right to freedom of expression. In *Libertad de expresión: a 30 años de la Opinión Consultiva sobre la colegiación obligatoria de periodistas: Estudios sobre el derecho a la libertad de expresión en la doctrina del Sistema Interamericano de Derechos Humanos [Freedom of Expression: 30 years after the Advisory Opinion on the compulsory membership in an association prescribed by law for the practice of journalism: Studies on the right to freedom of expression in the doctrine of the Inter-American Human Rights System]*. Retrieved from: http://www.oas.org/es/cidh/expresion/docs/publicaciones/OC5_ESP.PDF.

⁴ Although the debate around due protection to false news or false information in general terms is not new or settled at the regional level, the Colombian Constitution, for example, establishes the guarantee of freedom of expression subject to the veracity of the information. Argentina, for its part, does not qualify the right to freedom of expression and therefore its protection does not depend on the fact that the information or ideas are truthful or accurate. For further information: <https://observatoriolegislativocele.com/constitucion-politica-de-colombia/>

governments, and, ultimately, democracy itself (I/A Court H.R., 1985). Catalina Botero, the former OAS Special Rapporteur on Freedom of Expression, argues that “If the need to report only the truth is imposed in advance, the possibility of conducting the necessary debate to achieve it is denied.” (IACHR, 2017, p.)

Disinformation is fought with more information, not less. However, regardless of their extensive protection, the circulation and dissemination of disinformation cause interference in the public debate, as well as in the formation of opinion, particularly in electoral or emergency contexts. In such circumstances, cycles become briefer and risks increase. One example is the case of the information that circulated in Great Britain during the first weeks of April that argued that Covid-19 could be dispersed through 5G technologies (Schraer and Lawrie, April 6, 2020). This caused a horde of people to tear down or set fire to telephone towers, running the risk of leaving a part of society isolated and with no communication during quarantine. In these situations, it is urgent to react and stop the imminent damage. The key question is how? Counter-speech, checking and verification take time and in many cases do not reach the same level of dissemination as the initial expressions. Meanwhile, how do we deal with the certain risks that misinformation sometimes creates? Below are some of the measures attempted or adopted by states, Internet companies, and the media.

The state: victim and perpetrator of disinformation

The state plays a fundamental role in this discussion. Disinformation from the perspective of the state can be approached in two different ways: 1) analyzing the state as the author and promoter of disinformation, and 2) analyzing the role of the state in the face of disinformation from other actors. Each of these aspects has its own problems.

States can be the main creators and/or disseminators of false information. In an example that sums up both, the week of April 20, 2020, the President of the United States, Donald Trump, publicly declared that light and heat could cure people with Covid-19 and recommended investigating the possibility of injecting some kind of disinfectant in people’s lungs to kill the virus. From there on, the consults about the use of disinfectants to combat the disease became ubiquitous.

Due to the responsibilities of the position and the level of dissemination enjoyed by the expressions of those who hold public office, particularly when they refer to issues related to the exercise of their positions, false news emanating from a public

official should not be taken lightly. The Declaración Conjunta de los Relatores de Libertad de Expresión (2017), [2017 Joint Declaration on Freedom of Expression and “Fake News”, Disinformation and Propaganda] which addresses this issue, among its first paragraphs establishes that public officials have the duty to provide citizens with truthful information. This obligation lies in the public officials’ responsibility due to their position and the people’s right to access public information.

Along the same lines, and linked to this point, the use that some governments or public officials make of the term fake news must also be addressed. In the past, there have been governments that use the term to dismiss and attack independent journalism, silence criticism and thus avoid accounting for their actions. These types of measures also constitute attacks on freedom of expression; they undermine public debate, as well as citizen overview of government acts. The public stigmatization of journalists and the media is a problem with a long history in Latin America and today is common in different parts of the globe.

But states also must create the conditions for information and ideas to circulate freely and for the exercise of Human Rights to be effective in general. Said effectiveness depends on adopting protection measures, trying to avoid obstructing and censoring information and ideas, as well as guaranteeing the exercise of this right free from interference, by implementing proactive measures. The existence of a legal framework that protects people’s rights, including freedom of expression, privacy, equality, and non-discrimination, among others, is part of the protective measures that a state must adopt. This includes setting clear, necessary, and proportionate limitations on abusive expressions. What kinds of measures have different states tried to adopt to protect the rights of society and its members in the face of disinformation? There are two types of actions that should be emphasized: parliamentary and extra-parliamentary.

From 2016 to date, disinformation has occupied the parliamentary agenda across the globe, promoting two types of approaches: on the one hand, the criminalization of the phenomenon and, on the other hand, the liability of intermediaries — companies that facilitate the production and dissemination of third-party content. Not all countries prioritized or interpreted *disinformation* the same and not all tried to address the phenomenon from the same angle. In general, bills and laws stem from some variable of the common definition of disinformation, such as information generated and disseminated knowingly that it is false for the purpose of manipulation, but it is not particularly identified by the subject the

information originates from, that is to say, it can be public or private.

The trend towards the criminalization of disinformation is a global phenomenon. Thus, countries like Singapore⁵ or Russia⁶, among others, have passed laws that enable criminal prosecution of those who spread false news on the Internet. The criminalization of fake news has received widespread criticism from civil society, scholars, and experts (Financial Times, February 3, 2020). Some of the points around which the criticism revolved were the problem of defining fake news, the concept of *mens rea* or intention necessary to configure a crime; the lack of precision regarding if there is damage, and the community factor of dissemination, particularly on social media.

The debate on the liability of intermediaries appeared simultaneously and concurrently at a global level. In many cases, companies were required to evaluate, determine and conceal false content within a specified period under penalty of getting heavily fined. This was the case, for example, of the German law popularly known as NetzDG⁷. These intermediary liability systems create harmful incentives for the protection of freedom of expression, as they entrust Internet companies with the permanent monitoring of the content that circulates on their networks, determining the certainty or falsehood of the information, and establishing the consequent measure on the content. Recently, for example, Singapore forced Facebook to block a website that was critical of the government under the disinformation law⁸, which the company itself described as a clear example of the risks of censorship that this type of law creates for the opposition and critics. Interestingly, these and other laws are being tested during this very particular time in world history in an attempt to control the circulation of false information about the new coronavirus.⁹

Parliamentary activity around fake news in Latin America coincided with an intensification of bills of law throughout the continent that seek to amend the existing legal framework regarding behavior on the Internet. Under the broad um-

⁵ The news article is found here <https://singaporelegaladvice.com/law-articles/singapore-fake-news-protection-online-falsehoods-manipulation/>

⁶ Poynter.org developed this mapping of measures taken around the world to combat disinformation: <https://www.poynter.org/ifcn/anti-misinformation-actions/>

⁷ The law can be accessed here <https://germanlawarchive.iuscomp.org/?p=1245>

⁸ The news is compiled here <https://www.thedrum.com/news/2020/02/19/facebook-expresses-censorship-concerns-after-blocking-singapore-users-access-fake>

⁹ This article describes the application of these types of laws in different countries and how these laws are being taken as a model for other countries that still lack specific regulation: https://www.washingtonpost.com/world/asia_pacific/exploiting-fake-news-laws-singapore-targets-tech-firms-over-coronavirus-falsehoods/2020/03/16/a49d6aa0-5f8f-11ea-ac50-18701e14e06d_story.html.

brella of fake news, some Congresses focused on the creation and debate of bills on defamation, slander, and insults on the Internet, for example, the Argentine and Guatemalan bills regarding the protection of digital identity¹⁰; other countries, like Chile, faced the problem of false information promoted by political candidates or public officials¹¹; others focused on the integrity of elections and the transparency of campaigns¹². A common factor in many bills was the attack on anonymity as a supposedly enabling tool for this and other evils (such as hate speech). Some congresses even addressed more than one of these issues, sometimes in a single bill, sometimes in several. Brazil, for example, debated more than 15 legislative initiatives on this matter during the electoral period in 2018.

Notwithstanding the legislative interest, in Latin America few of the initiatives were successful. In most cases, the bills did not pass the three-part test of the Inter-American System for the Protection of Human Rights to determine the legitimacy of a restriction on freedom of expression. The problem common to almost all the bills on this subject was the lack of clarity and specificity of the proposed measures. The aforementioned lack of definition regarding what constitutes fake news and how to limit them to certain reprehensible statements, excluding those that did not fit in that description, were insurmountable obstacles.

Two trends recently added to the Argentine public agenda in this matter deserve a separate section. On the one hand is “cyber-patrolling,” technically mass surveil-

¹⁰ The Bill presented in Argentina that incorporates article 139 ter into the criminal code, on the crime of digital criminal impersonation or identity theft, 2018, can be read here: <https://observatoriolegislativocele.com/argentina-proyecto-de-ley-que-incorpora-al-codigo-penal-el-articulo-139-ter-sobre-el-delito-de-suplantacion-o-apoderamiento-de-identidad-digital-2018/>.

Other bills of law: Proyecto de Ley Usurpación Digital (2449/18) [Bill of Law on Digital Identity Theft]: <https://observatoriolegislativocele.com/argentina-proyecto-de-ley-usurpacion-digital-2449-18-2018/>. Proyecto de Ley Suplantación de la Identidad Digital (2722/18) [Bill of Law on Digital Criminal Impersonation]: <https://observatoriolegislativocele.com/argentina-proyecto-de-ley-suplantacion-de-la-identidad-digital-2722-18-2018/>. Proyecto de Ley Suplantación de la Identidad Digital (2630/18) [Bill of Law on Digital Criminal Impersonation]:

<https://observatoriolegislativocele.com/argentina-proyecto-de-ley-suplantacion-de-la-identidad-digital-2630-18-2018/>. The bill of law presented in 2017 in Guatemala on fake digital identity can be retrieved here <https://observatoriolegislativocele.com/guatemala-proyecto-de-ley-identidad-digital-falsa-2017/>

The bills of law presented in Chile are: Proyecto de Ley Suplantación de la Identidad Digital –2014 [Bill of Law on Digital Criminal Impersonation]: <https://observatoriolegislativocele.com/chile-proyecto-de-ley-suplantacion-de-la-identidad-2014/>. Proyecto de Ley Suplantación de la Identidad en Redes Sociales - 2015 [Bill of Law on Criminal Impersonation in Social Media] <https://observatoriolegislativocele.com/chile-proyecto-de-ley-suplantacion-de-la-identidad-en-redes-sociales-2015/>

¹¹ This is the 2018 Proyecto de Ley Cesación de Cargo por Difusión de Noticias Falsas [Dismissal for Dissemination of Fake News of 2018]. Retrieved from <https://observatoriolegislativocele.com/chile-proyecto-de-ley-cesacion-de-cargo-por-difusion-de-noticias-falsas-2018/>

¹² It can be seen in Argentina with the 2018 Proyecto de Ley Creación de Comisión de Verificación de Noticias Falsas [Bill of Law for the Creation of a Fake News Verification Committee]. Retrieved from <https://observatoriolegislativocele.com/argentina-proyecto-de-ley-creacion-de-comision-de-verificacion-de-noticias-falsas-2018/>

lance information in open sources, and on the other hand, the use of public order offenses to pursue false information. The phenomenon of “cyber-patrolling,” although recent, is not new. The Ministry of Security of Argentina issued in 2018 Resolution 31/2018, which enables social media cyber patrols for prevention and investigation of possible crimes. This protocol is being reviewed after the Minister of Security, Sabina Frederic, publicly stated that they were using this mechanism to “gauge social humor” during the quarantine (“Polémica revelación...” [Controversial revelation], April 6, 2020). At the same time, some complaints appeared in the media that pointed to “cyber-patrolling” as a means to identify authors and disseminators of fake news, who were later charged with the crime described in article 211 of the Argentine Penal Code¹³ against public order. Active and massive state monitoring of expression on social media constitutes a limitation to freedom of expression and can generate self-censorship (Cels, 2020).

It is striking that part of the legislative efforts in this matter have overlooked the link between the phenomenon of disinformation and other issues such as the protection of personal data — in its relation to the possibility of targeting Internet advertising to certain sectors and actors, for example —; the regulation of electoral campaigns — in many countries the demands for reform fell on the systems of moderation and liability of intermediaries, but not on the responsibility of candidates and other actors during the electoral times —; or net neutrality — and the bubbles created by applications without data cost (Zero Rated) where it becomes more difficult to offer a multiplicity of sources or access to broader information. These alternatives are limited in scope, some to electoral periods, others to specific problems with certain intermediaries, and all of them imply partial solutions to the problem. They would also require a consensus-building process and extensive debate. Nevertheless, they could offer more technically viable solutions.

Regarding more limited measures and with less impact — but still, very valuable —, different organizations have adopted concrete measures to deal with particularly complex situations such as elections. Some of the largest countries in the region held presidential elections between 2018 and 2019. The different

¹³ Article 211 of the Argentine Penal Code, titled *Delitos contra el orden público* [Crimes against public order], describes public intimidation: *Será reprimido con prisión de dos a seis años, el que, para infundir un temor público o suscitar tumultos o desórdenes, hiciere señales, diere voces de alarma, amenazare con la comisión de un delito de peligro común, o empleare otros medios materiales normalmente idóneos para producir tales efectos* [The person who, in order to instill public fear or provoke riots or disorders, signals, sounds alarm bells, threatens to commit a common crime of endangerment, or employs any other material means normally suitable to produce such effects shall receive a term of two to six years in prison.] Retrieved from <http://servicios.infoleg.gob.ar/infolegInternet/anexos/15000-19999/16546/texact.htm#22>

electoral authorities in countries such as Mexico, Brazil, and Argentina have signed agreements with some of the main Internet and media companies to train officials, alert fact-checking systems, streamline communications between the different actors so that the measures adopted by the electoral authority were quickly and effectively implemented by the companies, etc. (Cippec, 2020). The powers of the electoral authorities in each country are different, so each structure functioned differently. In Argentina, the Cámara Nacional Electoral [National Electoral Chamber] was one of the most active actors in the “fight” against disinformation in the 2019 electoral period. The Chamber established alliances¹⁴ with companies and media outlets and ordered measures¹⁵ aimed at giving transparency to the official accounts of the candidates and parties, the electoral advertising in the campaign, the financing of the campaign, etc. Although the effort was made in different countries and through various alliances, and despite having been important contributions to the electoral processes in those countries, these efforts required a great deal of funding, training and coordination, and joint efforts of multiple actors, sometimes difficult to achieve.

Given the limitations that legislators have faced and the problematic practices that some executive bodies have adopted, the question is how to encourage and replicate measures that are less harmful to freedom of expression, privacy, and other rights in the fight against disinformation. What measures could the state adopt in the face of disinformation in the framework of the Covid-19 pandemic, or in the midst of the debate on the Law for legal, safe and free abortion? How can it offer greater transparency guaranteeing the right to privacy and freedom of expression offered by anonymity? What alternatives could the state produce to promote greater transparency of Internet companies in this matter without generating a framework of liability for intermediaries that encourages censorship?

Are companies the new owners of the truth?

Internet companies, especially large global ones, have come under enormous pressure in the last four years to adopt, develop and expand their policies around the disinformation circulating on their networks. This pressure has come both from the state and private sector and has divided the opinion of specialists, in-

¹⁴ Find it here <https://www.telam.com.ar/notas/201905/362445-acuerdo-para-combatir-la-desinformacion-en-las-redes-sociales-durante-las-elecciones.html>

¹⁵ These measures can be seen here <https://drive.google.com/file/d/1P6NQHInffPQR2UzjE9EZhCdI9RzrftnS/view>

cluding on issues like freedom of expression. From 2016 to date, companies such as YouTube, Facebook, and Twitter have adopted numerous and varied responses to complaints of misinformation and demands from states and users to ‘do more.’ This ‘doing more’ is not entirely defined and not everyone who uses the now-famous phrase in Internet governance forums means the same by it.

In 2017, Carlos Cortes and Luisa Isaza carried out an investigation for the Centro de Estudios en Libertad de Expresión (CELE) [Center for Studies in Freedom of Expression] of the University of Palermo aimed at verifying what measures had been announced by Facebook, YouTube and Twitter, what they consisted of and how they had been implemented (if they had been implemented) in Latin America. Consequently, one of the main conclusions was that the information was difficult to access and the implementation, in some cases, unverifiable. Currently, CELE is monitoring this investigation and following the measures implemented in recent electoral periods in Mexico, Brazil, and Argentina. Below are some of the bills of law and the problems they entail, presented in that first trial of 2017, and some of the most current measures, especially in response to the Covid-19 pandemic.

Since the beginning of the problem, companies have gradually incorporated policies of various kinds to deal with the problem of fake news. Although there are some changes regarding the content accepted or prohibited on the platforms, the vast majority of the measures were, for example, for implementing plans and programs aimed at alerting and empowering actors to detect fake news, training journalists, and promoting information about the phenomenon on its platform. Furthermore, they created training programs for the media to achieve better visibility, as well as more effective content.

From a technical point of view, companies have worked to develop technology that allows them to proactively detect unusual user actions and fraudulent accounts. Thus, for example, Facebook began to eliminate thousands of accounts daily for abuses of its policy and Twitter eliminates messages and accounts that disseminate the same content in unison when they operate or appear to operate on a network.

Until the appearance of Covid-19, companies, in general, had a clear position regarding their role in the problem of disinformation: they did not want to decide on the veracity or falsity of the information circulating on their networks. Along these lines, for example, early measures were adopted so that users could question “false” content, they also established alliances with impartial third parties — fact-checkers — to determine the veracity or falsehood of the content. Thus,

for example, Facebook created a network of fact-checkers working with the company. In general, determining the falsehood of information does not involve eliminating the content but marking it as ‘questioned,’ and at most, as in the case of Facebook, the distribution algorithm is affected to reduce its dissemination.

In recent years, companies have gone from a system that depended almost entirely on their users for complaints of content that violated their standards, to a system for proactive activation and enforcement of their terms and conditions of service. This change not only impacted the problem of fake news but also others, such as hate speech, threats, nudity, etc. Along with fake news, this change led Facebook, for example, to detect “possibly” false content and to forward the content directly to third parties for verification, even before anybody reported it or raised an alarm. The decision was always made by specialists in the field: the fact-checkers.

In electoral matters, and under enormous pressure, particularly in the United States, the three companies refused to accept a leading role in determining truthful versus false content. In May 2019, for instance, Twitter, Facebook, and YouTube were under fierce attack for the circulation of a doctored video of US House Minority Leader, Nancy Pelosi¹⁶, and in September 2019 for the circulation of an ad alleging false accusations against Joe Biden, the main Democratic candidate for the 2020 presidential elections¹⁷. Regarding the first case, Twitter decided not to interfere. Facebook submitted the content for fact-checking, and after determining its falsehood, began to adopt measures to stop its circulation, but did not remove it. YouTube determined that the content was contrary to its terms and conditions of service and decided to remove it from the platform.

The second case, which originally appeared on Facebook, provoked a greater reaction in the public and the regulatory debate on Internet platforms. Following the case, Twitter decided not to allow any more paid political advertising of any party on its platform, globally, entirely eliminating the problem, and avoiding again adopting the role of decision-maker regarding the truth or falsity of the information. Facebook, on the contrary, and with a strong speech from its CEO Mark Zuckerberg¹⁸, decided to let the video circulate and not change its policy on public notices or fake news. Notwithstanding this, since 2018 the company had been working on the initiative of the Oversight Board or “Content Board,” a

¹⁶ The news was published here <https://www.nytimes.com/2019/05/24/us/politics/pelosi-doctored-video.html>.

¹⁷ For more information, the press release is <https://www.nytimes.com/2019/10/18/technology/biden-facebook-ad.html>.

¹⁸ See the article here <https://www.washingtonpost.com/technology/2019/10/17/zuckerberg-standing-voice-free-expression/>

body of independent experts who would guide the company's decisions in particularly complex cases. The first iteration of the Oversight Board was launched in May 2020 with international distinguished members, but it is still not in operation and is expected to decide its first case in September 2020.¹⁹

Since the WHO declared the pandemic on March 13, 2020, YouTube, Facebook and Twitter have made public commitments to promoting health and fighting public health misinformation. As part of the execution of said commitment, the platforms have eliminated content from active political leaders (J. Bolsonaro in Brazil or Maduro, in Venezuela, for example); content of social organizations in the United States calling for protests against the quarantine; advertisements for the sale of medical supplies (YouTube), etc. Luisa Isaza (CELE, 2020) says that companies act as if there was consensus on “key issues of contagion” or the manifestations of the disease or the efficacy of the treatments that are being tried. We are undoubtedly seeing a paradigm shift.

The main argument that companies use for the adoption of measures of this type focuses on the assessment of “damage.” The three companies examined have policies that prohibit content capable of causing harm to users' health, and all of them work with networks and committees of experts on users' security to develop and review their policies on the matter. Regardless of the justification, there seems to be a movement in the position of Internet companies against fake news, or at least against the ones that may affect the right to health. They would no longer see themselves faced with the decision to determine the truth or falsehood of information, but rather with determining and assessing the damage. Thus, Twitter, for example, in its May 2020 blog entry, explains the update of the company's measures against disinformation according to this standard.²⁰ In this regard, the heads of Twitter worldwide say that in March the community rules were amended to include protections against information that counteracts recommendations of “health experts” and detailed that from May they would generate alerts and label content that, without being a serious threat to health, could give rise to doubts or confusion among users. The policy is ambiguous in that it does not determine who would be considered a health expert and the measures adopted so far have not been free of problems. Facebook has also removed content from its platforms applying terms of service and conditions dedicated to the protection and security of its users. YouTube has blocked all ads related to the topic.

¹⁹ For further information <https://about.fb.com/news/2020/05/welcoming-the-oversight-board/>.

²⁰ The entry can be read in its entirety in https://blog.twitter.com/en_us/topics/product/2020/updating-our-approach-to-misleading-information.html

The change in practices and outlook of companies in their role against disinformation in the framework of the Covid-19 pandemic, as well as the implementation of drastic measures, such as the prohibition, monitoring, and elimination of content, comes in a particularly complex time for content moderation. Social distancing has forced companies to send their moderators home. The protection of privacy and personal data means that the activity of moderators cannot be carried out remotely and therefore, the ability to moderate content is highly limited. In the absence of natural persons to regulate content, automated detection and blocking systems are being implemented, with the aggravating circumstance that the decisions adopted cannot be reviewed by the ordinary appeal processes. Both Facebook and YouTube announced that their appeal systems would not be working under normal conditions and alerted their users that over-blocking problems could arise in these circumstances.

In times of greater demand and pressure, the advertisements of these companies are irregular and multiple, generally through the companies' own blogs, and the policies adopted, at first glance, are not always reflected in the terms and conditions of service or community rules.²¹ This means that the information about the applied policies is disseminated in multiple places and documents. Monitoring the measures and their implementation becomes particularly complex.

Given the novelty of the situation and the companies' position change in the face of disinformation in health matters, it is difficult to know which policies will remain in force when the crisis ends and which will not. Undoubtedly, the need to take measures other than those implemented so far accounts for some of the main problems of the solutions previously implemented, including the little impact of the checks, continuous dissemination of information classified as false, and the damage that certain misinformation generates.

The Media

Since the phenomenon of disinformation gained public relevance, the answer of various experts in the field of freedom of expression argued that bad information is fought with more information and not with censorship, a statement shared by this author. The solutions that have been proposed regarding the media have been

²¹ The latter is being corroborated in an initiative developed between CELE and Linterna Verde, a Colombian NGO dedicated to these issues. The strategy consists of monitoring changes to the terms and conditions of service and community rules of these companies.

various and of a different nature. On the one hand, there have been investments in journalists' training and creating manuals, best practices, and recommendations so that communicators from different media outlets and perspectives can detect fake news on the media. This type of initiative aimed at preventing the media outlets themselves from inadvertently sharing, spreading, and amplifying fake news. The effort was shared by Internet companies in the face of pressure to find a solution to the problem, as described above.

Faced with the proliferation of projects and initiatives that called for strict control of the circulation of false information, whether state-issued or private, various experts called for refraining from criminalizing or censoring and, instead, empowering professional journalism. In 2017, as a result of what was then perceived as a threat to communitarian, minority, or dissident media, a group of respected civil society organizations in Latin America drew the world's attention to the possible "empowerment of traditional media monopolies to the detriment of independent media, community media and independent critics (...) (Tedic, 2017). The statement also warned about fact-checking on social media and the threat of opening up the space for surveillance, content manipulation, and censorship from within the platforms. Furthermore, it underlined that given the lack of transparency in the algorithms of the main companies, it was necessary to pay careful attention to the fact-checking initiatives that were emerging in alliance with Internet companies.

Fact-checking involves verifying information and allows contrasting facts: the content of a standard, the official number of people below the poverty line, the GDP, the number of representatives and senators who voted for a project, etc. This model has shown that there are other ways of tackling the problem, without the state censoring or criminalizing false expressions. It has also shown that in many cases the verification of facts contributes to electoral transparency and the fact that they exist can also be an incentive for some key actors to avoid this treacherous practice, especially officials or public figures, as well as political candidates. Undoubtedly, the inclusion of fact-checkers in social media has been a great development and has been in many cases effective in denying information, confirming that which is unlikely but true and helping to discern in some cases between opinions and facts.

Fact-checking partnerships between companies and the media have been interesting and fruitful, although within certain limits. Not all news is verifiable and

it is not always possible to discern easily between facts and opinions. There has already been a case in Argentina that sparked off an intense debate due to the interpretation that was made of this distinction. In the case in question, from June 2018, the online newspaper *Primeriando las Noticias* reported: “The IMF demands the liquidation of ANSES [The National Social Security Administration] and selling the shares of the Fondo de Garantía de Sustentabilidad [Sustainability Guarantee Fund].”²² The newspaper depends to a large extent on Facebook for its dissemination and that social media has an agreement with Chequeado to verify the facts reported in certain news items detected as potentially false. Chequeado determined that the information was false, based on the fact that the agreement says nothing about the pension funds and does not condition or assume that they must be liquidated for its validity or realization. *Primeriando las noticias* argued that it was an interpretation of the agreement, and not necessarily a literal quote from the text. Nevertheless, the article, which in few days had received a significant amount of traffic, suddenly stopped circulating. There was no notification to the media outlet or transparency regarding how much the Chequeado rating contributed at that time to the reduction of visibility.

What is relevant in the case of Chequeado and *Primeriando las noticias*, for this article, is not whether the information was false or true in the specific case, but rather that it opens questions that are difficult to answer. What role do fact-checkers play in the current journalism ecosystem and which should they play? How should the limits of verification be defined? How to amplify the results of the data check? And, what measures should be considered in the face of a negative or false check? How do the algorithms that companies use impact these networks? How are the precedents of “falsehoods” incorporated in the circulation of the next piece of news published or disseminated through the social media outlet? On the other hand, even when it is clear that the information is verifiable, in many cases the visibility of this exercise depends on alliances with powerful media outlets in the region. Fake news is often more widespread than verifications, and it is not clear if the same people access fake news as those who access the fact check.

Conversely, the recent adoption of the European Union Copyright Directive, which many mass media outlets and a part of journalism endorse, poses new challenges for the press as a controller of fake news²³. Two aspects seem particu-

²² For the full article <https://latinta.com.ar/2018/07/censura-chequeado-facebook/>

²³ See: <https://www.tedic.org/la-directiva-europea-de-derecho-de-autor-y-su-impacto-en-los-usuarios-de-america-latina-y-el-caribe-una-perspectiva-desde-las-organizaciones-de-la-sociedad-civil/>

larly problematic: 1) Article 17, which requires companies to adopt filters before publication when the content is subject to copyright; and 2) Article 15 which directs news aggregators (such as Google News) to pay publishers for the content they disseminate. For the purposes of this paper, article 15 is particularly relevant as it generates incentives against the diversity and plurality of the media. Forced to pay for content, aggregators will decide which content they choose to promote and which not, probably to the detriment of smaller media outlets, with local approaches, or independent media. Based on a similar rule, Google News has stopped working in Spain since 2015²⁴, to the detriment primarily of smaller players who depend on this platform for their dissemination. If the platforms refused to pay for content and stopped making journalistic content available on their networks, what tools are left in the current scenario to combat misinformation?

Conclusions

Until the Covid-19 pandemic began, companies, who have the *de facto* power to play an active role in controlling disinformation, were reluctant to do so. And those who tried to regulate them from the state legal side, at least in our region, were not successful. The partnership of the three actors described above has managed to gain a relevant place in this conversation, even with proposals and results that can be exported, but they have high costs, long processes, and in some cases ambiguous results.

Since the WHO declaration of the pandemic to date, we have seen new activity on this front from all stakeholders. The state enjoys a growing concentration of powers in the emergency and a perception of urgency that accompanies increasingly more in-depth measures of expression surveillance and control. In the companies, this period has been marked by the automation of all (or almost all) of their processes and the adoption of “emergency” practices around false information or disinformation about the virus. These have included eliminating content even from the presidents of some countries in our region.

Beyond the questions posed throughout this essay, perhaps the most fundamental question is whether there is more democracy in disinformation or are new and more aggressive measures justified to combat it to protect democracy?

²⁴ This can be seen in this article by Solís, A.: https://www.economiadigital.es/tecnologia-y-tendencias/los-motivos-por-los-que-espana-no-tiene-google-noticias_562925_102.html

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