SENATE JUDICIARY COMMITTEE
Senator Hannah-Beth Jackson, Chair
2017-2018 Regular Session

SB 1424 (Pan)
Version: April 26, 2018
Hearing Date: May 8, 2018
Fiscal: No
Urgency: No
TSG

SUBJECT

Internet: social media: false information

DESCRIPTION

This bill would require social media Web sites to disclose to users: (1) how the site determines what content to display to the user, the order in which content is displayed, and the format in which it is displayed; (2) whether the site allows third parties to influence what content the user sees and, if so, how that influence may be exerted; (3) whether the user can alter the settings that determine what content is displayed and, if so, how; (4) whether the site utilizes fact-checkers and, if so, how they operate; and (5) the site's strategic plan to mitigate the spread of false information.

BACKGROUND

The problem of "fake news" has been around at least as long as the printing press. Publishers have produced "fake news," readers have believed "fake news," and, as a result, "fake news" has repeatedly altered the course of history.[1] Nonetheless, the advent of social media brings renewed attention to the issue.

Social media is nearly ubiquitous in modern California life. It delivers content to users in a rapid, relentless stream to devices many Californians carry everywhere and check often. Perhaps most significantly, social media comes with the power to target content to the particular users who may be most susceptible to seeing or hearing it.

There is evidence to suggest that the dissemination of "fake news" through social media influenced the outcome of the 2016 U.S. Presidential election. On the other hand, the Electoral College winner of that election regularly insists, on social media, that such evidence is itself "fake news." The only clear takeaway is that what constitutes "fake news" is in the mind of the beholder.

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[1] *See* Soll, *The Long and Brutal History of Fake News* (Dec. 18, 2016) Politico <https://www.politico.com/magazine/story/2016/12/fake-news-history-long-violent-214535> (as of May 2, 2018).

This bill seeks to rein in the spread of false information through social media. Putting the government in the position of determining what is or is not "false information," could raise significant constitutional concerns around censorship. Instead, this bill would leave that role in the hands of the social media Web site itself. At the same time, however, the bill would require social media Web sites to inform users how those sites determine what content a user sees, including whether or not the sites utilize fact-checkers and what strategic plan the site has to mitigate the spread of "false information." As envisioned by the author, social media consumers would then have a better basis on which to decide for themselves whether the social media Web site they use is adequately monitoring for and weeding out "false information." If not, those users could presumably elect to take their social media business elsewhere.

CHANGES TO EXISTING LAW

Existing federal law prohibits Congress from enacting any law abridging the freedom of speech and association. (U.S. Const., amend. I.)

Existing California law provides that every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press. (Cal. Const., art. I, Sec. 2(a).)

Existing California law mandates that an operator of a commercial Web site or online service that collects personally identifiable information through the Internet about individual consumers residing in California who use or visit its commercial Web site or online service conspicuously post its privacy policy on its Web site. (Bus. & Prof. Code Sec. 225759(a).)

This bill would define "social media" as an electronic service or account, or electronic content, including, but not limited to, videos, still photographs, blogs, video blogs, podcasts, instant and text messages, e-mail, online services or accounts, or Internet Web site profiles or locations.

This bill would require any person who operates a social media Internet Web site with a physical presence in California to display prominently a link on the site to a disclosure informing users, in plain language, of all of the following:

- how, and on what basis, the social media Internet Web site determines what content to display to the user, the order in which content is displayed, and the format in which content is displayed;
- whether the social media Internet Web site enables other parties to influence, through payment or the use of automated accounts, what content is displayed to a user, the order in which content is displayed, or the format in which content is displayed, and specifically how such influence may be exerted by the other party on the content displayed;
- whether the social media Internet Web site allows the user to alter the settings that determine what content is displayed to the user, the order in which the

content is displayed, or the format in which content is displayed, and how the user can alter these settings;

- whether the social media Internet Web site utilizes factcheckers to verify the accuracy of news stories. If the social media Internet Web site utilizes factcheckers for that purpose, the disclosure shall state both of the following:
    - what policies and practices the factcheckers use to determine whether news stories are accurate;
    - what the social media Internet Web site does with content that its factcheckers determine is not accurate; and
- the social media Internet Web site's strategic plan to mitigate the spread of false information.

COMMENT

1. Stated need for the bill

According to the author:

> In the current climate of social media platforms being used as news sources consumers are constantly having information pushed towards them. It has been shown in some cases misinformation is likely to spread twice as fast as that of true information. Consumers have the right to know how this information is being presented to them. SB 1424 would have social media platforms inform users of the site's strategic plan to mitigate the spread of false information and share those plans with the Legislature.

2. Concerns expressed about the bill

In opposition to the bill, the California Newspaper Publishers Association (CNPA) writes:

> Whether or not intentioned, [SB 1424's definition of "social media internet website"] would capture most California newspapers, which, in addition to their print product, also operate websites that contain the type of electronic content to which SB 1424 would apply.

CNPA points to the U.S. Supreme Court's holding in *Miami Herald Pub. Co. v. Tornillo* (1974) 418 U.S. 241. In that case, the high court ruled that the government cannot compel a newspaper to publish content by requiring the newspaper to provide political candidates with equal space to respond to criticism from the newspaper. In striking down the statute, the *Tornillo* court held that "the statute fails to clear the First Amendment's barriers because of its intrusion into the function of editors in choosing

what material goes into a newspaper and in deciding on the size and content of the paper." (*Id.* at 258.)

With regard to the bill's requirement that social media Web sites reveal whether or not they employ fact-checkers, CNPA writes:

> As a practical matter, it would be nearly impossible to identify all of the practices used in a newsroom to verify facts. Moreover, weeding factual information from false or inaccurate material is the essence of the editorial discretion protected from government interference…
>
> CNPA is also concerned that requiring a newspaper that operates online to disclose what it does with content it determines to be inaccurate would violate the protections of California's Shield Law found in Article I, Section 2 of the California Constitution. This constitutional protection safeguards a newspaper against being forced to identify a source or disclose unpublished information.

In further opposition to the bill, the Firearms Policy Coalition writes:

> Reducing factually-suspect information may be a well-intentioned goal. But the government's proper response – if any should be undertaken at all – is to promote better, more factual speech. The government may not substitute a less-restrictive means of addressing information it believes to be factually wrong, such as it might through its own counter-speech, with these highly-burdensome proposed statutes that unquestionably violate rights protected under the California and United States constitutions, respectively.

3. Constitutional considerations

This bill in print would require social media Web sites to post a series of disclosures in a prominent location on their Web sites.

To critics of the bill, such a provision represents a clear violation of the First Amendment, since the right to free speech also includes the right not to be compelled to speak. (*Riley v. National Federation of the Blind of North Carolina, Inc.* (1988) 487 U.S. 781.)

In the context of disclosure requirements, however, First Amendment law is arguably far more nuanced than this, and, in fact, courts have upheld disclosure requirements in a number of circumstances. (*See, e.g. Nat'l Ass'n of Mfrs. v. SEC (D.D.C.* 2013) 956 F. Supp.2d 43 (upholding a requirement to disclose the use of conflict minerals by manufacturers); *Am. Meat Inst. v. U.S. Dep't of Agric.* (D.D.C. Sept. 11, 2013) No. 13-CV-

1033 (KBJ) (upholding a regulation requiring separate disclosure of the country of birth, raising, and slaughter for each animal utilized in the manufacture of various meat products).) Relatedly, California law currently requires Web sites that collect personally identifiable information to disclose their privacy policy. There is no case law indicating a challenge to that mandatory disclosure.

As these cases make clear, a disclosure required by the government does not, in itself, constitute a violation of the First Amendment. Rather, much depends on the content and context of the compelled disclosure. Unfortunately, it is not crystal clear what standard a reviewing court would use to measure the constitutionality of the disclosures this bill would require.[2] Moreover, the First Amendment status of compelled disclosures appears to be an evolving area of constitutional doctrine.

In instances in which the government has required private employers to post the government's message, using specific words and format, at least one court has applied strict scrutiny. (*National Association of Manufacturers v. NLRB* (D.C. Cir. 2013) 717 F.3d 947.) In circumstances in which the government has required businesses to disclose factual, uncontroversial information about the origins of their products, some courts have utilized a modified version of intermediate scrutiny, requiring only that the government have a legitimate interest and that the disclosures are not unduly burdensome. (*Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n* (1980) 447 U.S. 557.) In reviewing disclosure requirements relating to the advertisement of products or services, other courts have gone no further than to require a reasonable relationship between the required disclosure and protecting consumers against deception. (*Zauderer v. Office of Disciplinary Counsel of Supreme Court* (1985) 471 U.S. 626.)

Thus, if a court viewed the disclosures required by this bill as largely factual in nature and highly related to preventing the deception of consumers, then a reviewing court might well uphold them. If, on the other hand, a reviewing court viewed the disclosures as requiring social media Web site to carry the government's message or interfering with political speech, then the courts would almost certainly employ strict scrutiny, which the late scholar Gerald Gunther famously described as "strict in theory, fatal in fact."

4. Intellectual property concerns

The bill in print would require social media Web sites to inform consumers how the sites determine what content is displayed to users, in what order, and in what format. Such information is arguably essential to a social media consumer's ability to determine whether and how they may be getting "steered" to certain products or ideas, and whether they should or should not lend much credence to the content they see as a result.

[2] *See*, Dhooge, The First Amendment and Disclosure Regulations: Compelled Speech or Corporate Opportunism? 51 Am. Bus. L.J. 559, 601.

At the same time, that very process of targeting content to consumers is central to the business models of many modern Web sites and forcing internet based companies to lift the curtain on how they go about that process is arguably akin to demanding that Coke reveal the secret recipe for its cola. As the Chamber of Commerce writes in opposition to the bill:

> The way in which these web operators determine how content will be shown to its users is extremely sensitive and competitive proprietary information. In some cases, this intellectual property consists of lengthy algorithms that have been developed over decades, which can determine the success or failure of a website. As written, this bill would require exposure of this sensitive and complicated information to not only consumers and bad actors, but the competition as well.

Still, the strength of this argument may depend on how much specificity is required in the disclosure. The bill in print does not say. Asking social media websites to reveal their algorithm would almost certainly tread on intellectual property rights, but merely requiring the site to state whether payment or the use of "bots" can influence what a user sees probably would not. To return to the cola analogy, Coke does not risk disclosing its secret recipe through the requirement that it print the ingredient list on the can.

5. To what entities would the bill apply?

The bill states that it would apply to a "social media Internet Web site with a physical presence in California." It further defines social media as "an electronic service or account, or electronic content, including, but not limited to, videos, still photographs, blogs, video blogs, podcasts, instant and text messages, e-mail, online services or accounts, or Internet Web site profiles or locations."

This definition raises a number of questions about the scope of the bill.

First, the definition of "social media" provided in the bill describes nearly every Web site in existence. If the bill were enacted, would raleys.com, say, be required to disclose a strategic plan for mitigating the spread of false information or how it selects content to display? How about the Los Angeles Times' Web site? Or that of the American Civil Liberties Union? The California Democratic or Republic party Web sites? The author may intend this bill to apply more narrowly to better known "social media" sites such as Twitter, Facebook, or Instagram, but the Web contains myriad variations on these social media platforms, making a definition of "social media" particularly challenging.

Second, the bill refers to a "Web site," but embedded within the bill's definition of "social media" are "an electronic… account." Would individual account-holders be

required to disclose the basis on which they choose to upload content? Would these individuals have to disclose a strategic plan to mitigate the spread of false information?

In regard to this issue and in opposition to the bill, the California Chamber of Commerce writes: "[t]his expansive bill touches almost every corner of the internet – ensnaring companies big and small, as well as non-profits, individuals, organizations, and more. SB 1424's definition of 'social media Internet web site' is staggeringly broad."

The author is aware of these concerns and is undertaking to find a more precise definition of social media for purposes of this bill. As of the time of publishing this analysis, however, the author had not yet settled upon a proposal for specific amendments.

6. The strategic plan to mitigate the spread of false information

This bill would require social media Web sites to disclose their "strategic plan to mitigate the spread of false information." It is unclear from the bill in print whether this mandates social media Web sites to have such a plan. The bill only says that such a plan must be disclosed. Furthermore, it is not clear from the bill in print what, if anything, the strategic plan must contain.

From a constitutional point of view, it may be better if the bill does not require any specific content in the strategic plan, since any particular requirement for how a social media Web site should mitigate the spread of false information arguably veers into government-mandated censorship. Government censorship does not appear to be the author's intent. Rather, the author's goal seems to be to have social media Web sites disclose if and how they mitigate against the spread of false information, leaving the definition of "false information" and the proper steps for mitigating against its spread up to the social media Web site. That presumably includes not doing anything at all. It would then be up to social media consumers to decide whether they are satisfied by whatever it is the social media site is, or is not, doing to mitigate against the spread of whatever the social media Web site considers to be false information.

In its current form, however, the bill's requirement for social media Web sites to disclose its strategic plan for mitigating the spread of false information could be interpreted to mandate the existence of such a plan. A social media Web site – or a reviewing court – might also interpret the language in the bill in print to imply that the strategic plan must be calculated to indeed mitigate the spread of false information in some fashion. To hedge against either possible interpretation, the author may wish to amend the bill to clarify that no specific content is required for the strategic plan and that the disclosure requirement can be met by indicating that the social media Web site has no strategic plan for mitigating the spread of false information. Such clarification might help insulate the bill somewhat against constitutional and policy criticism that it is putting the government in the role of determining what is false information and

mandating censorship of it. Instead, the bill would come closer to the sorts of simple, factual, consumer product disclosures that courts have ruled need only have a reasonable relationship to protecting consumers against deception.

7. The complexity of the issues raised may warrant more study before legislation

There is broad consensus that the spread of "false information" through social media is a significant concern. As the Comments above suggest, however, there are tremendous practical and constitutional complexities to addressing the problem. The author is fully aware of these concerns and, at the same time, determined to find a solution. While it is always less satisfying than pressing forward with legislation, this may be an instance in which the size, importance, and complexity of the issue lends itself most appropriately to stepping back and consulting with stakeholders and experts at greater length, so as to be able to craft a careful and effective remedy to this important problem.

8. Proposed Amendments

In light of the concerns set forth in this analysis, the Committee may wish to consider amending the bill so as to:

- convene a working group of stakeholders and experts to study and make recommendations regarding model strategic plans and possible legislation designed to mitigate the spread of false information through social media.

The specific amendment is as follows:

Amendment 1

On page 2, strike out lines 7 through 31, inclusive, strike out page 3, and insert:

The Attorney General shall, not later than April 1, 2019, establish an advisory group consisting of at least one member of the Department of Justice, internet-based social media providers, civil liberties advocates, and First Amendment scholars, to do all of the following:

(a) Study the problem of the spread of false information through internet-based social media platforms.

(b) Draft a model strategic plan for internet-based social media platforms to use to mitigate against the spread of false information through their platforms.

(c) Draft potential legislation for mitigating the spread of false information through social media, if the advisory group deems it appropriate. The advisory group may consult with the Legislative Counsel and the California Law Revision Commission, among others, for this purpose.

(d) Not later than December 31, 2019, present the results of the study, the model strategic plan, and the proposed legislation, if

any, to the Legislature, pursuant to Section 9795 of the Government Code, and to the Assembly and Senate Committees on Judiciary.

Support: None known

Opposition: California Chamber of Commerce; California Newspaper Publishers' Association; Firearms Policy Coalition; Internet Association; 4 individuals

HISTORY

Source: Author

Related Pending Legislation: None known

Prior Legislation: AB 155 (Gomez, 2017) would have required the development and adoption of a media literacy curriculum in public schools with the goal, among other things, of training pupils to distinguish between "real news" and "fake news." AB 155 died in the Assembly Committee on Appropriations.

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