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Perspectives on the regulation of search engine algorithms and social networks: The necessity of protecting the freedom of information

Matteo Monti

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ABSTRACT

The paper studies how the paradigm of the freedom of information has changed by the advent of the Internet and whether new forms of regulation of the Internet media are necessary.

The paper focuses on two different issues: on one side, the importance of the algorithms and of search engines in the field of the press is analysed; on the other side, the central role played by social networks in the spread of news is examined. These phenomena are affecting the world of journalism by impacting on one of the most important element of the constitutional-democratic order: the freedom of information and the press as “watchdog of democracy”. The algorithms developed by search engines decide what type of news we “receive” when we use the search string

* Ph.D. student at Scuola Superiore Sant’Anna

for a query, and the social networks are going to become the global newsstand of news in the near future. The research question of this paper is whether and how these two phenomena should be regulated according to the Italian paradigm of the freedom of information.

In the first part of the paper, in section 2, the innovations and transformations of the world of information that are related to the advent of the Internet are highlighted. Next, in section 3, the constitutional principles of the media sector are briefly analysed, in order to develop a systemic approach to the framing of the *new media* of the Internet.

In the second part, in section 4, the characteristics of search engines and social networks are explored, and the requirement that they are classified as ‘means of distribution of news’ (i.e. as media), with the necessary regulatory consequences, is stressed. In the development of this analysis, comparisons with American doctrine and case law cannot be avoided, because of the remarkable sensitivity in the US to the reality of the Internet and its problems.

In this paper a fairly simple solution is proposed concerning the spreading of news by the new media: 1) search engines should show and clarify the algorithms they use to select the news they propose to users; in this way, readers can choose what type of editorial criteria (meaning algorithms) they use, by choosing what type of search engines they use; and 2) social networks should guarantee that fake news on their platforms will be rectified/corrected.

KEYWORDS

Freedom of information – Freedom of expression – Right to be informed – Algorithms – Search engines – Social networks – Facebook – Fake news – Regulation – New media

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I. Introduction

Law is, par excellence, a technical means of control as well as an expression of the *will of power*, but it is also ‘techno-law’, that is, a «relationship of legal power and other powers»¹. It is, therefore, necessary to be wary of the concept of technicality as a neutral principle, since it could be «one of the most powerful tools of autocracy» (Kelsen)². The phenomenon of the Internet poses a new challenge to the national law in the same way as the so-called techno-economy did in the past, since the Internet is based on the same concept of a-territoriality and tries to escape the grip of national law.

The starting point of this analysis is the idea that the state can (and must) preserve its role of controlling the content of the Internet, at least such content as is visible in its territory (accessible from its territory), and of imposing forms of regulation on internet corporations. Although the Internet is currently described as a global phenomenon, the idea that national laws cannot regulate it is actually a false myth. The myth of a-territoriality is in fact denied by the ‘moments of reaction’ in states that have decided that national law applies to online content³. In Italy, there are already many tools to control online content, and various techniques for removing illegal content⁴. Regulating the Internet according to national rules is therefore not a utopia⁵. The new digital platforms are certainly economic giants and formidable opponents for the state, but it is not impossible that the struggle with them can be won.

The analysis in this essay will form part of the macro-survey that has been clearly defined by the Italian scholar Pasquale Costanzo, which concerns the transformation that «constitutionalism is undergoing as a result of global technological progress»⁶.

In particular, this essay will study the development and problems of the new mass media of the Internet. It will focus on the innovative tools for spreading news: search engines and social networks.

The research question of this paper is one that has been repeatedly examined in the most accurate and sensitive Italian literature: is it necessary to develop forms of regulation for

¹ N. Irti, *Il diritto nell'età della tecnica*, Naples, 2007, 3 (My own translation, MM).

² As stressed by Hans Kelsen, how it is reported by N. Irti, cit., 16 (My own translation, MM).

³ The leading case of national regulation of the Internet is the French case *LICRA v. Yahoo!*. In this case, the *Tribunal de grande instance* of Paris in 2000 (*Tribunal de grande instance*, Paris, May 22, 2000 and November 22, 2000, No RG:00/0538) stated that the sale of Nazi memorabilia made through Yahoo was contrary to Article R645-1 of the French Criminal Code, and therefore ordered Yahoo to prevent access to these types of contents (See G. Berger-Walliser, *L'affaire YAHOO, comment repenser la notion de souveraineté à l'heure d'internet*, in *SSRN Electronic Journal*, September 2011). For a deep comparative analysis see: Swiss Institute of Comparative Law, *Comparative study on blocking, filtering and take-down of illegal internet content*, 2016.

⁴ See Swiss Institute of Comparative Law, *Comparative study on blocking, filtering and take-down of illegal internet content*, 2016 (Excerpt, pages 773-800).

⁵ Cf. O. Pollicino, M. Bassini, *The Law of the Internet between Globalization and Localization*, in M. Maduro, K. Tuori, *Transnational Law - Rethinking Law and Legal Thinking*, Cambridge, 2014, 346.

⁶ P. Costanzo, *Il fattore tecnologico e le sue conseguenze*, Convegno annuale AIC, Salerno, 23-24 novembre 2012 “Costituzionalismo e globalizzazione”, in *www.associazionedeicostituzionalisti.it*, 2012, 2 (My own translation, MM).

the new Internet media? The question seems to have to be answered in the affirmative; the analysis will therefore be strongly characterized by *de jure condendo* and *de lege ferenda* considerations.

The reason why regulation is necessary is quite simple: as will be seen, the role of the new media is increasing in the news ecosystem, and as a consequence these media are increasingly going to be the new *watchdogs of democracies*. Internet corporations cannot play this role without assuming the responsibilities of the press. It is certainly necessary to safeguard the pluralism and the correctness of news, because, in current liberal democracies, the press influences the voters and the political actors and has a role of accountability in political power that requires it to meet certain standards.

The *file rouge* that will accompany this brief dissertation is the need not only to ensure that the media system is as pluralistic or neutral as possible, but also to address questions relating to content, such as the *fake news* problem.

In this paper a fairly simple solution is proposed concerning the spreading of news by the new media: 1) search engines should show and clarify the algorithms they use to select the news they propose to users; in this way, readers can choose what type of editorial criteria (meaning algorithms) they use, by choosing what type of search engines they use; and 2) social networks should guarantee that fake news on their platforms will be rectified.

In the first part of the paper, in section 2, the innovations and transformations of the world of information that are related to the advent of the Internet are highlighted. Next, in section 3, the constitutional principles of the media sector are briefly analysed, in order to develop a systemic approach to the framing of the *new media* of the Internet.

In the second part, in section 4, the characteristics of search engines and social networks are explored, and the requirement that they are classified as a ‘means of distribution’ (i.e. as media), with the necessary regulatory consequences, is stressed. In the development of this analysis, comparisons with American doctrine and case law cannot be avoided, because of the remarkable sensitivity in the US to the reality of the Internet and its problems. It will, therefore, be inevitable that US theoretical constructions, which this paper seeks to frame within the Italian constitutional order with its unique distinguishing features, are discussed.

In the final remarks the arguments developed in the paper are summarized, and some paths to regulation are suggested.

II. The advent of the Internet: Changes in the media system, and the new hierarchy of sources of information

The Internet has radically changed the paradigm of freedom of information and the media system worldwide. This has involved a huge and radical change in the world of informa-

tion (i.e. news); in Italy the term ‘information’ also traditionally means both freedom of information and the media⁷.

It should also be noted that until the advent of the Internet and the epochal change it produced, the first aspect (freedom of information) was always irretrievably tied to the second (the media). Freedom of information is not (and was not) characterized – in Italy or in any other democratic state – as a positive right of access to media, but merely as a negative liberty⁸. Nowadays, thanks to the Internet, information is no longer restricted to traditional media and professional journalists, but each of us has been made into a potential journalist.⁹ Obviously, this transformation has mainly been positive, with an increase in pluralism and so-called counter-information, but there has also been a series of downsides like the spread of fake news. This latter aspect is particularly related to the absence of the control mechanisms that applied to the traditional media when they spread news. This radical transformation of information (seen as the media) has led to a profound change in democratic regimes, where the press (as the union of journalism and the media) has always been regarded as a “*watchdog of democracies*”¹⁰, “*the fourth power*” or the “*fourth estate*”¹¹. The press was (is it still?) appointed to carry out the task of holding the political powers *accountable*, which required, in particular, respect for the truth (i.e., narrating facts/events that actually happened)¹².

«Our news ecosystem has changed more dramatically in the past five years than perhaps at any time in the past five hundred»¹³.

This change has led to a general crisis in journalism: for some¹⁴, the impact has been so great as to involve a transformation in the whole concept of journalism, moving the clock

⁷ As stressed by many Italian scholars, *ex pluribus* P.Costanzo, *Informazione nel diritto Costituzionale*, in *Dig. Pubbl. VIII*, Turin, 1993, 319, 370.

⁸ «The CC clarified, however, that the language of Article 21 does not imply that everyone should have material availability of all possible means of distribution; rather, more realistically, the law ‘should ensure for everybody the legal possibility to use and access them, in the manner and within the limits posed by the specific characteristics of each medium’». F. Casarosa, E. Brogi, *The Role of Courts in Protecting the Freedom of Expression in Italy*, in E. Psychogiopoulou (eds.), *Media Policies Revisited*, London, 2014, 101, 104. The judgments cited by the Authors are: Constitutional Court, judgment no. 59/1960 and no. 105/1972.

⁹ Some Authors talk about the birth of the “Fifth Estate”: E. Dubois, W. H. Dutton, *Empowering Citizens of the Internet Age*, in M. Graham, W. H. Dutton (eds.), *Society and the Internet*, Oxford, 2014, 238. Cf. Committee on Culture, Science, Education and Media of the Parliamentary Assembly of the Council of Europe, Report doc. 14228, 09 January 2017, 3.

¹⁰ ECtHR, *Goodwin v. United Kingdom*, App. No. 17488/90, 27 March 1996.

¹¹ See *ex pluribus*: L. A. Powe JR., *The fourth estate and the constitution: freedom of the press in America*, Berkeley-Los Angeles-Oxford, 1991.

¹² «Respect for truth and for the right of the public to truth is the first duty of the journalist». IFJ Declaration of Principles on the Conduct of Journalists.

¹³ E. BELL, *Facebook is eating the world*, in *Colum. Journalism Rev.*, March 7, 2016.

¹⁴ M. C. Dorf, S. Tarrow, *Stings and Scams: “Fake News”, the First Amendment, and the New Activist Journalism*, in *Cornell Legal Studies Research Paper No. 17-02*, 2017, 8. «When we look back to the 18th century, the idea of journalists as objective reporters looks like a brief 20th century interlude in a much longer story of the inseparability of journalism, activism, and social movements». *Idem*, 22.

hands back to a time when journalism and information were nothing more than a branch of political activism; for other scholars, the role of the journalism is changing from that of a gatekeeper to that of a gatewatcher¹⁵.

Passing from the global sphere to the national one, it is important to note how the Internet ecosystem has acquired a very important role in the world of information, as noted in the XIIth Censis-Ucsi Report¹⁶. In the field of information, the traditional media are still the most important (76.5% of Italians watch news broadcasts, and 52% listen to radio bulletins), but 51.4% of Italians also use search engines to find information and 43.7% are in the habit of using Facebook as well. The percentages are different among young people, where Facebook is the top source for news (71.1%), followed by search engines (68.7%) and news broadcasts (68.5%). The role of social networks and search engines in the information world is therefore destined to grow from one generation to the next. We are the witnesses of the construction of a «new hierarchy of the sources of information», in the words of the XIIth Censis-Ucsi Report.

III. The Italian Constitution and the Constitutional Court's case law: Regulation of media, and freedom of information

The best way to consider the need to ensure pluralism and regulate the *new media* of the Internet is through analysing the fundamental principles of the freedom of information and media freedom as enshrined in the Italian constitutional system¹⁷.

Mass media or media «have to be considered in our legal system (...) as a public service or at least as a public interest service»¹⁸.

Although Article 21 of the Italian Constitution – given the historical period in which it was drafted – deals only with the regulation of the press, the principles of freedom of information have been extended to other instruments that do not have specific constitutional protection, such as radio and television.

Concerning newsprint, the most traditional tool for the dissemination of information, it seems that historically as well as currently the market has been able to guarantee both

¹⁵ A. Bruns, *Gatewatching, Gatecrashing: Futures for Tactical News Media*, in AA.VV., *Digital media and democracy: tactics in hard times*, Cambridge, 2008, 247.

¹⁶ XII^o Rapporto Censis-Ucsi, 2015. Obviously, this is not only an Italian trend, but it is also at stake, for example, in the United States of America: See Pew Research Ctr., *The Modern News Consumer 4* (2016), 3-4.

¹⁷ For a more in-depth analysis of media freedom written in Italy in English, see: F. Casarosa, E. Brogi, cit.

¹⁸ Constitutional Court, judgment no. 94/1977 (My own translation, MM). «Quite importantly, the CC has also acknowledged that the freedom of expression and media freedom enjoy an equal position as constitutional values, though the latter must be interpreted as instrumental to the former». F. Casarosa, E. Brogi, cit., 105. The Authors cited the Constitutional Court, judgment no. 48/1969.

internal and external pluralism¹⁹. Obviously, the ‘success’ of the market did not mean the absence of regulation of the mass media in either the days of the monarchy or the days of the republic. During each period there was general awareness of the need to ‘regulate’ what was then the major *watchdog of democracies* – to use an expression that is dear to the European Court of Human Rights – both from the point of view of the transparency of sources of information and sources of funding and from the point of view of safeguards²⁰. The Italian Law no. 47/1948 and the subsequent Law no. 416/1981 therefore recognized the need to regulate the press from the point of view of the responsibility of publishers and journalists and from the point of view of safeguards, and this was fundamental in guaranteeing its central role in the new Italian democracy. In the field of information, in addition to the criteria for freedom of information such as objectivity (particularly in the process of correcting mistakes and published falsehoods)²¹ and impartiality, the importance of the principle of transparency²² was also recognized, and this had already been identified in Article 21 co. 5 of the Constitution on sources of funding.

Moreover, an *ex ante* anti-trust regulation has been enacted to protect external pluralism, because it ensures the existence of an adequate number of newspapers whose ownership is not concentrated in the hands of a few agents (through the so-called SIC – Integrated Communications System); control of this system is entrusted to an independent authority, the *Authority for Communications Guarantees* (Autorità per le garanzie nelle comunicazioni – AGCom).

In the field of radio and television, the broadcasting sector, the initial technical complexities, which had resulted in a limited number of available frequencies, not only caused more problems in defining the media, but also led to the development of constitutional case law that outlined in broad terms the constitutional principles underlying the media. At first, the Constitutional Court entrusted the broadcasting media to the public media monopoly system to ensure there was pluralism and correct information²³. In the subsequent pluralistic regime with

¹⁹ As stressed by Italian scholars, *ex pluribus* A. Pace, *Mezzi di diffusione e comunicazioni di massa*, in A. Pace, M. Manetti, *Commentario della Costituzione*, Rome, 2006, 540 and P. Caretti, *Diritto dell’informazione e della comunicazione*, Bologna, 2013, p. 25.

²⁰ This was quite clear in the debate inside the Constituent Assembly. The first draft of article 21 (article 16 of the Project of Constitution) contained a provision that concerned the control on the sources of information in order to guarantee the public faith: «Regarding the special functions of the press the law provides checks on sources of news and on means of financing in order to assure the public faith» (My own translation, MM). Cf. Seduta della Prima Sottocommissione del 27 settembre 1946, in *La Costituzione della Repubblica nei lavori preparatori della Assemblea Costituente*, Edizione a cura della Camera dei Deputati, Rome, 1976, 158 e ss.

²¹ The truth correction process is linked with the human fundamental rights and with the public interest to the objectivity of news, as claimed by Constitutional Court, judgment no. 133/1974.

²² Cf. A. Pace, *Disciplina della stampa e delle imprese editoriali*, in A. Pace, M. Manetti, *Commentario della Costituzione*, cit., 493.

²³ See Constitutional Court, judgment no. 59/1960. In the Constitutional Court, judgment no. 225/1974, the Court invited the government to enact a law granting the internal pluralism in broadcasting media.

many frequencies, the Constitutional Court²⁴ claimed the need to defend pluralism against the development of dominant positions²⁵ and to guarantee the «plurality, objectivity, completeness and impartiality of information»²⁶ in the ‘mixed’ public–private system. Thus, if internal pluralism is only maintained for public radio and television, certain «content and modal obligations»²⁷ must also be imposed on private broadcasters: «right from here “the constitutional imperative” establishes that “the freedom of information”, guaranteed by Art. 21 of the Constitution, should be qualified and characterized, inter alia, by the pluralism of the sources (...) and by the objectivity and impartiality of the provided data, and finally by the completeness, correctness and continuity of the information activity (Judgment no 112 of 1993)»²⁸.

«The CC observed that the acquisition of economic and information power by private companies would allow them to “exercise, from a position of prominence, influence over collectivity, which would be incompatible with the rules of a democratic system”. The CC thus supported the establishment of a pluralistic media environment, noting that only the achievement of a sufficient level of pluralism would allow a concrete possibility for citizens to choose among a multiplicity of information sources. This could not be achieved unless citizens were able to access, both in the public and in the private sectors, programmes that guaranteed the expression of heterogeneous tendencies»²⁹.

Finally, Article 2 of Law no. 223/1990 stated the two notions of pluralism, both internal and external, and, most importantly, stated, after the pressure imposed by the Constitutional Court, that the requirement of Article 1 for a range of radio and television programming was in the ‘general interest’. The laws on the matter of television were subjected to many modifications to try to reduce the duopoly and grant external pluralism, but often they did not respect the principles that could be inferred from the case law of the Constitutional Court. The so-called Maccanico law (Law no. 249/1997) lowered the anti-trust limits, and the Communication Authority, with the support of the Constitutional Court (judgment no. 466/2002), required one of Silvio Berlusconi’s three television channels to migrate to a digital platform. The next law, Law no. 112/2004, introduced by Berlusconi’s government, did not solve the problem and, *au contraire*, it led to the well-known Europa 7 case³⁰.

²⁴ See Constitutional Court, judgment no. 202/1976.

²⁵ See Constitutional Court, judgment no. 826/1988, no. 420/1994 and no. 466/2002. This seems quite clear also in the main decision about the freedom to inform and right to be informed, Constitutional Court, judgment no. 148/1981.

²⁶ See Constitutional Court, judgment no. 153/1987 e no. 826/1988 (My own translation, MM).

²⁷ Wording by A. Pace, *Mezzi di diffusione e comunicazioni di massa*, op. cit., p. 535 (My own translation, MM).

²⁸ Constitutional Court, judgment no. 155/2002 (My own translation, MM). «[T]he information, in its passive and active features, expresses not only a subject, but rather a “precondition” or an “irrepressible requirement” for the implementation at any level, central or local, of the correct features of a democratic state». Constitutional Court, judgment no. 29/1996, (Translated by F. Casarosa, E. Brogi, cit., 103).

²⁹ F. Casarosa, E. Brogi, cit., 104. The internal quotation is a sentence translated from the Constitutional Court, judgment no. 826/1988.

³⁰ See P. Cavaliere, *The story of Italian television as Discovery Channel would tell it*, in *medialaws.eu*, 2011. O. Pollicino, *Has the never-ending Europa 7 saga finally ended? A guide to understand how the Italian audiovisual conundrum has*

Even with regard to broadcasting, the legislator has developed tools for the regulation of the mass media that guarantee the right to be informed and the correction of falsehoods³¹. After this brief examination of media regulation, it is necessary to recognize the lack of regulation of any of the new Internet media, which are also ignored in the latest SIC formulas³². On this point, a particularly significant statement by the Constitutional Court on the subject of the mass media should be recalled. The Court stated, in relation to television, that there is a need to regulate, in a more timely and complete manner, the mass media that are the most pervasive and ‘influential’ for public discourse. In relation to television broadcasting, the Court has requested ‘intrusive’ regulation, in «consideration of what are the characteristics of the mean of spreading the thought under consideration which, because of its well-known capacity for immediate and capillary penetration into the social sphere through spreading in the interior of the homes and the evocative force of the image together with the word, reveals a peculiar ability of persuasion and incidence on the formation of public opinion as well as on socio-cultural addresses of a very different nature from that attributable to the press»³³. This principle is very useful if we are to understand why regulation of the new Internet media is needed. Indeed, the Internet media have a strong influence on the world of information and public discourse.

In order to summarize the main point, the guiding constitutional principles (which can be extrapolated from legislation and the constitutional case law) can be identified in two major areas for regulation: on the one hand, the need for the protection and safeguard of pluralism, and, on the other, the recognition of the role of freedom of information as characterized by certain rules. The press – in the broad sense – plays a central role in contemporary democracies and is linked to objectivity and correctness of information³⁴. It should also be noted that in Italy the circulation of information (i.e. news), whether on paper, on radio or on television, was entrusted to the ‘Order of Journalists’, which was recognized by the Court as holding the most important position in the field of information: «experience shows that journalism, if it is fuelled by the contribution of those who do not engage in it pro-

been able to make our Nation sadly famous non only in Luxembourg, but also in Strasbourg, in *medialaws.eu*, 2012. R. Mastroianni, *Media Pluralism in Centro Europa 7 srl, or When Your Competitor Sets the Rules*, in F. Nicola, B. Davies (Eds.), *EU Law Stories: Contextual and Critical Histories of European Jurisprudence*, Cambridge, 2017.

³¹ See Art. 10 of the law no. 223/1990. The individual has the right to request the correction of reported falsehoods. If the television/television channel/newscast does not correct the falsehood, the individual has the “right to appeal” to the *Authority for Communications Guarantees*, which can impose the correction.

In this field finds application also the article 2 of the law no. 69/1963 (The Journalists’ Code of Ethics), which imposes the respect for the truth: journalists of newscasts shall scrupulously endeavor to report the truth.

³² Available at the website of the Italian *Authority for Communications Guarantees* (www.agcom.it). In this matter there are two projects of law of the Italian Parliament: one concerning the press online (Ddl 1119-B, Senato della Repubblica, XVII Legislatura.) and the other the spread of fake news (Ddl S. 2688 - Senato della Repubblica, XVII Legislatura).

³³ Constitutional Court, judgment no. 148/1981 (My own translation, MM).

³⁴ In several occasions the Court claimed that the freedom of information is ‘co-essential’ to the system of freedoms guaranteed by the Constitution and for democracy, and it is composed by an active feature (freedom to inform) and a passive one (right to be informed). *Ex pluribus* Constitutional Court, judgment no. 348/1990 and no. 1/1981.

professionally, lives above all through the daily work of professionals. Their freedom connects, in a single destiny, the freedom of periodic press, which in turn is an essential condition for that free comparison of ideas in which democracy is rooted in its vital roots³⁵. This link between information and professional journalism, identified by the Constitutional Court in judgments that 'saved' the Order of Journalists, cannot be ignored, because it has been at the centre of the information system and has undergone a crisis with the advent of the Internet.

The members of the Order, who were the real upholders of the freedom of information in the pre-digital era, were and are bound by a code of ethics³⁶ (as well as international codes)³⁷ to respect the truth and to correct falsehoods in news, and this was related to those values of objectivity and impartiality in the matter of the news that must be pursued in relation to information.

IV. The new media of the Internet: An analysis of search engines and social networks in the light of the Italian constitutional principles

Starting from the considerations of the paragraphs above, the impact of the Internet on the information system can be analysed from a dual perspective: search engine algorithms and social networks. These are the aspects of the Internet that show the most innovation from the previous paradigm of the press, since so-called individual journalism (that is, blogs, forums, etc.) and so-called digital journalism (that is, online versions of traditional media) are nothing more than a technological adaptation to the new tool of the Internet, and fit more easily within the legal framework of the media as it is traditionally understood. In particular, blogs and forums and all the other tools of individual journalism are more easily framed in the old media paradigms³⁸, both in processes for correcting falsehoods and in tools of control. Concerning digital journalism, it seems that digital newspapers are slowly

³⁵ And «[i]f the freedom of information and of criticism is unbreakable, it must be agreed that that precept, rather than the content of a simple law, describes the very function of the free journalist: It is the failure to do so, never practicing it that can compromise that decorum and that dignity on which the Order is called to watch». Constitutional Court, judgment no. 11/1968 (My own translation, MM). See also Constitutional Court, judgment no. 98/1968.

³⁶ See article 2 of the law no. 69/1963. As for Europe, consider the Journalistic Codes of Ethics (from Italian one to Azerbaijan one), which require the respect of truth as journalists' first duty (see T. Laitila, *Journalistic Codes of Ethics in Europe*, in *European Journal Of Communication*, 1995).

³⁷ See IFJ Declaration of Principles on the Conduct of Journalists, (*adopted by 1954 World Congress of the International Federation of Journalists - IFJ. Amended by the 1986 World Congress*). Cf. B. Kovach, T. Rosenstiel, *The Elements of Journalism: What Newspeople Should Know and the Public Should Expect*, New York, 2007.

³⁸ Think of the different projects of law that try to apply the old tools of regulation to the Internet phenomena, like the project concerning the digital press (Ddl 1119-B, Senato della Repubblica, XVII Legislatura.) or the project developed to contrast the misinformation online (Ddl S. 2688 - Senato della Repubblica, XVII Legislatura).

converging towards forms of regulation that are equal to newsprint³⁹. By contrast, search engines and social networks are completely different paradigms from traditional media. This does not mean that the Internet has not profoundly changed the traditional media, which are facing huge problems with its advent, but only that this does not seem to be a problem in which a non-paternalistic state should be interested. If the traditional media are going to disappear or, more realistically, become less important for the public discourse, this does not seem to be a big problem if the new media assume the same responsibilities. The interest for this analysis is to try to understand the problem for freedom of information linked to the new media, which currently seems to represent a concrete danger to the functioning of democracies. From the starting point of the Italian constitutional principles, it can be stressed that Internet corporations should be subject to regulation: as is clear from the Italian constitutional court case law, in the balance between the freedom of the press and the freedom to conduct a business, the freedom of the press prevails. In the Italian paradigm, the interest in pluralistic and correct information (i.e. the spreading of news) is much more relevant than the freedom of enterprise.

1. The impact of algorithms on the freedom of information: Google programmers as new publishers

The first issue for this paper is related to search engines and their role in the world of contemporary information. An information search can go through the paths of Google, Yahoo, Virgil, Istella or many other search engines. Search engines propose certain sites to Internet users, according to their selected *keywords* (a so-called ‘query’), on the basis of an algorithm. By inserting the chosen *keywords*, the user will see certain information sites (i.e. news websites) on the first pages of the search engine (the pages that are most commonly viewed) in comparison with other sites “confined” on the more remote pages. If, as has been pointed out in the previous paragraph, search engines are beginning to have a greater role in the information world, it would be useful to understand how they ‘select’ the information sites for Internet users and whether this *editorial* role should remain unregulated. The site indexing is done with algorithms that favour certain sites over others, based on the upstream ‘choices’ of the programmers. This phenomenon has had a tremendous impact on the freedom of information, giving support to the traditional media with a new editorial subject: search engines. «As the role of information gatekeeper starts to pass from journalists at legacy news organizations to engineers, coders, and designers, the very nature of the Fourth Estate and the news it produces is changing. While their aspirations may be sweeping, platform executives have not indicated a desire to be a Fourth Estate»⁴⁰. It is true that search engines do not directly *produce* news: they merely collect and disseminate it. However, the old dichotomy

³⁹ See what is stated by the Italian Supreme Court, Criminal division: Cass. pen., decision no. 31022/2015.

⁴⁰ E. C. Carroll, *Making News: Balancing Newsworthiness and Privacy in the Age of Algorithms*, in *Georgetown Law Faculty Publications and Other Works*, 2017, 2-3.

between producers and distributors of news does not seem to be valid if it does not lead to search engines being considered as a means of disseminating thought, since they are characterized as news aggregation tools on the basis of their own publishing criteria. If one just looks at the right to be informed (the passive aspect of freedom of information), it is not relevant that Google does not directly produce information: by cataloguing and aggregating Internet content (i.e. news), these new media sources enjoy huge power to condition the public discourse, and this power is the more pervasive because it is (apparently) invisible⁴¹. For the purposes of this explanation, it is necessary to illustrate the topic of this paragraph, that is, the ‘editorial’ role of search engines, in more detail. To do this some thoughts of US scholars and US case law, which is always quick to note – particularly because of geographical issues – the innovations of the Internet, are discussed. Many American lawyers have considered the development of algorithms by search engines to be a real and true freedom protected by the First Amendment⁴², since the algorithms are an editorial choice of what content is preferred by search engines. US case law has also been quite eager to recognize this editorial character of search engines. The *page ranking* discipline has been considered by the American courts as an expression of the free speech, primarily as *commercial speech*, and for this reason as being protected by the First Amendment⁴³; in the particular context of *commercial speech*, however, the discipline remains subject to antitrust regulation⁴⁴. The complete equivalence of search engines to real and true publishers has also been strongly reaffirmed within the more traditional freedom of expression (the political speech, in a broad sense). An explanation for this trend is found in *Zhang v. Baidu.com Inc* in which the Southern District of New York Court explicitly stated that

⁴¹ As stressed by M. Cuniberti, *Tecnologie digitali e libertà politiche*, in *Il Diritto dell’informazione e dell’informatica*, 2, 2015, 312.

⁴² S. M. Benjamin, *Algorithms and Speech*, in *University of Pennsylvania Law Review*, 161, 2013, 1445; Cf. E. Volokh, D. M. Falk, *First Amendment Protection For Search Engine Search Results*, in <http://www.volokh.com/wp-content/uploads/2012/05/SearchEngineFirstAmendment.pdf>, 2012. *Contra*: T.Wu, *Machine Speech*, in *University of Pennsylvania Law Review*, 161, 2013, 1495.

⁴³ Cf. *Search King, Inc. v. Google Tech., Inc.*, No. 02-1457, 2003 WL 21464568, at *3-4 (W.D. Okla. May 27, 2003) Cf. V. T. Nilsson, *Note, You’re Not from Around Here, Are You? Fighting Deceptive Marketing in the Twenty-First Century*, in *Ariz. L. Rev.*, 54, 2012. Another case in the field of *commercial speech* is *E-Ventures Worldwide, LLC v. Google (Inc.*, No. 2:2014cv00646 - Document 104 (M.D. Fla. 2016)), in which the Court affirmed the protection of algorithms under the First Amendment but then questioned the correct application of the Google’s terms of service: «[w]hile a claim based upon Google’s PageRanks or order of websites on Google’s search results may be barred by the First Amendment, plaintiff has not based its claims on the PageRanks or order assigned to its websites. Rather, plaintiff is alleging that as a result of its pages being removed from Google’s search results, Google falsely stated that e-ventures’ websites failed to comply with Google’s policies. Google is in fact defending on the basis that e-ventures’ websites were removed due to e-ventures’ failure to comply with Google’s policies. The Court finds that this speech is capable of being proven true or false since one can determine whether e-ventures did in fact violate Google’s policies. This makes this case distinguishable from the PageRanks situation. Therefore, this case does not involve protected pure opinion speech, and the First Amendment does not bar the claims as pled in the Second Amended Complaint», «Google’s reason for banning its websites was not based upon “editorial judgments,” but instead based upon anti-competitive motives».

⁴⁴ Cf. O. Bracha, F. Pasquale, *Federal Search Commission: Fairness, Access, and Accountability in the Law of Search*, in *Cornell L. Rev.*, 93, 2008, 1149.

choices to remove certain content from the *Baidu* search engine «are in essence editorial judgments about which political ideas to promote»⁴⁵. This case, which certainly makes more sense in the context of freedom of information⁴⁶, clearly exemplifies the recognition that there is editorial value in the choices underlying the algorithms, as it highlights the ‘political-editorial line’ that can be subordinated to an algorithm. However, if it is true that, for example, Google promotes the ‘most requested’ pages or ‘personalizes’ the algorithm, other search engines may develop different publishing criteria⁴⁷. Sometimes the editorial choice is not so clear, since, for example, it is based on the ‘characteristics’ of the individual user⁴⁸. Nevertheless, staying with Google, the use of the ‘most viewed pages’ selection policy merely favours news from the more *mainstream* media at the expense of so-called counter-information (although sometimes the contrary occurs, but much more rarely)⁴⁹: this is a fictitiously neutral and in fact a ‘political’ publishing criterion. Algorithms – even if they are the expression of decisions that are not explicitly political, as in the case of *Baidu* – are nothing more than the ‘political-editorial line’ of the search engine.

As regards the Italian system, in a recent decision of the Court of Appeal of Milan in relation to the possibility of filtering results made by a search engine, it was said that «on the other hand, that injunction could risk to damage the freedom of information and expression of the *Internet users*, since this system may not be able to distinguish between legitimate content and unlawful content so that its use could result in the blocking of communications having a legitimate content» (author’s italics)⁵⁰.

⁴⁵ «Allowing plaintiffs to sue Baidu for what are in essence editorial judgments about which political ideas to promote would run afoul of the First Amendment». *Zhang v. Baidu.Com Inc.*, 10 F.Supp.3d 433 (S.D.N.Y. 2014).

⁴⁶ The Court affirmed, in a legal framework such as the American one where according to US Supreme Court’s decisions freedom of information is not distinguished from freedom of expression (S. R. West, *Press Exceptionalism*, in *Harv. L. Rev.*, 127, 2014, 2434, p. 2439), that «[o]n that theory of the First Amendment’s protection of search-engine results, the fact that search engines often collect and communicate facts, as opposed to opinions, does not alter the analysis. As the Supreme Court has held, “the creation and dissemination of information are speech within the meaning of the First Amendment. Facts, after all, are the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs”». *Zhang v. Baidu.Com Inc.*, 10 F.Supp.3d 433 (S.D.N.Y. 2014).

⁴⁷ «Google uses various “signals” in order to personalize searches including location, previous search keywords and recently contacts in a user’s social network». E. Bozdog, *Bursting the filter bubble: Democracy, design, and ethics*, CPI Koninklijke Wöhrmann, 2015, 17. However, Google, as some other search engines, uses a lot of others content-based criteria such as the bad reputation of a website, the uselessness, the similarity, the “length of service” of a page and so on (see E. Bozdog, cit., 21-23). In addition, Google, like Bing, promotes its own pages (B. Edelman, *Bias in Search Results?: Diagnosis and Response*, in *Indian Journal of Law and Technology*, 7, 2011, 16). Finally, as reported by some Italian journalists, Google has decided to develop “political” publishing criteria (in the algorithm) to avoid the spread of fake news (Redazione, *Google, nuovo algoritmo contro le fake news*, in *ansa.it*, 26 aprile 2017) or to prevent the access to websites promoting the Holocaust denial (Redazione, *Google rivede algoritmo del motore di ricerca, sfavorirà i siti scomodi*, in *www.Repubblica.it*, 21 December 2016). Cf. *S.Loius martin v. Google*, Superior Court of the state of California, 17 June 2014.

⁴⁸ «Perhaps Google in particular (and maybe blekko, too) is different, insofar as its message is not so much “We value relevant websites” but more like “We select for you what you want.” In the latter formulation, Google arguably is not expressing its own preferences so much as it is indicating that it wants to satisfy ours». S. M. Benjamin, cit., 1474.

⁴⁹ Cf. H. Nissenbaum, L. D. Introna, *Shaping the Web: Why the Politics of Search Engines Matters*, in *The Information Society*, 16, 2000, 169.

⁵⁰ Court of appeal of Milan, civil division, decision no. 29/2015 (My own translation, MM).

Regardless of the subject under discussion, the principle contained in this *obiter dictum* seems to be a paradigm that is different from the one proposed by US legal scholars: a search engine cannot arbitrarily decide to exclude certain content and remove it, so long as the content is legal. The dominant view in the Italian case law therefore seems to be that search engines should not be considered as publishers⁵¹.

However, this ‘perception’ is similar to the view that describes a search engine as a ‘*caching provider*’, that is to say merely as a ‘neutral’ news distributor, and not as a ‘*content provider*’⁵². This perspective is also certainly due to the absence of decided cases in which search engines set their own algorithms according to *explicitly* ‘political-editorial line’, such as the *Baidu* case. Moreover, the exclusion of search engines from the SIC seems to support this reconstruction.

Some isolated judgements, on the other hand, seem to present what Aristotle would describe as the “golden mean”, supposing «a different figure of service provider not completely passive and neutral with respect to the organization of user content management»⁵³. The *bias* that underlies all these judicial considerations concerns the fact that they have been discussed in procedures to evaluate the responsibility of search engines for the dissemination of illicit content, while what is involved here is the work of search engines as the ‘legitimate’ loudspeakers of others – the context is therefore the freedom of information (the spread of information/news). Compared to this paradigm it would not seem unfounded to consider that «[d]epending on the algorithm, algorithm-based decisions may well constitute self-expression, enhance autonomy, and contain meaningful thought. The algorithm is simply a means to gather relevant information, but the creator chooses what to gather»⁵⁴.

However, in contrast to the concepts mentioned above, an example of mass media editorial behaviour by a search engine can be found in the context of the right to be forgotten: here, search engines are assigned to do a first ‘skimming’ of requests for removal or to carry out better de-indexing of content that is detrimental to the right to be forgotten. For example, Google makes assessments about whether there is a public interest in the information⁵⁵.

Given this short theoretical and conceptual framework, it is necessary to focus on the possible constitutional problems that may arise in relation to search engines.

The problem of algorithms in the area of the freedom of information focuses on the constitutional principles of the pluralism and transparency of information (and of the ‘content

⁵¹ Sometimes the search engines were considered as databases: Tribunal of Milan, civil division, ord. no. 21/25 January 2011 and ord. 24 March 2011.

⁵² See Tribunal of Milan, civil division, decision no. 11295/2014.

⁵³ Tribunal of Milan, civil division, decision no. 8748/2011 (R.T.I. v. Yahoo! Italia e Yahoo! Inc.) (My own translation, MM).

⁵⁴ S. M. Benjamin, cit., 1474.

⁵⁵ Cf. E. Lee, *Recognizing Rights in Real Time: The Role of Google in the EU Right to Be Forgotten*, in *Chicago-Kent College of Law Research Paper*, 2015, 13.

and modal obligations’).

As regards freedom of information, the ‘choice’ of the algorithm to prefer some sources of information over others cannot leave the legislator indifferent, since this technology is not neutral⁵⁶. The problem is twofold: on the one hand, it relates to informational pluralism, and, on the other, it relates to the transparency of the true publishing criteria (the algorithms).

With regard to the first of these problems, it is important to note that, as for the constitutional principles discussed above, there is a constitutional imperative to guarantee the existence of so-called external pluralism if the service is, even vaguely, of an informative type. In relation to the question of pluralism, a problem would arise if there were some search engines that acted in a sort of *de facto* monopoly: in this case the Constitutional Court’s ruling in the field of limited-band radio and television broadcasting would again come to mind⁵⁷. In this case, a more intrusive inspection of the mechanism of the algorithm and its neutrality (which would be impossible or almost impossible) would be needed. Despite the fact that many observers have underlined Google’s ‘near’ monopoly in the field of search engines⁵⁸, this, to date, does not look ‘dangerous’ enough to require public intervention; however, the supervision must be strong.

If, on the other hand, there are many different search engines, it would seem appropriate to let the market decide, as happened for the newspapers: as long as there is pluralism, it may, for example, be acceptable that certain sources of information are de-indexed for publishing policy reasons. If Google decides to remove (de-index) certain sites or not to support them through its algorithm, and makes this ‘editorial decision’ clear (but this is the second point in this analysis), users may choose to use a different search engine that does not apply this type of editorial policy. In fact, just as you may choose to read a communist newspaper or a catholic one, which not only describe different versions of the same events, but also cover different types of news, you can choose to use Google instead of Yahoo or Baidu instead of Bing. Obviously, if a monopoly regime arose in the future – despite anti-trust regulation – this should be regulated as such.

The second question, about transparency, is especially significant when there is a de-indexing of certain sites, and so a ‘negative’ alteration of the algorithm. In relation to the need for the algorithm to be transparent, it must first be emphasized that an algorithm cannot be considered to impose neutral criteria, since the factors that determine it are based on ‘political’ choices. The main problem of an algorithm today is that the underlying criteria are not clear to users, who should instead be made part, in the freedom of information

⁵⁶ In the field of European anti-trust law, cf. L.Vitzilaiou, *Keywords: Google, European Commission – Anyone feeling lucky?*, in *CPI Antitrust Journal*, 2011, <http://ssrn.com/abstract=1750019>; Cf. A. Urso, *Search algorithms and the boundaries of antitrust law and economics*, in *Mercato Concorrenza Regole*, 15, 2013.

⁵⁷ Constitutional Court, judgment no. 59/1960.

⁵⁸ See the Report: *Search engine usage*, www.statista.com, 2017.

context, of the criteria used to select the news that is offered to them. This is the main aspect for which regulation should be developed: it is necessary to impose transparency of editorial choices for search engines, in order to ensure complete awareness for Internet users and to give them the possibility of choosing a search engine that uses different criteria. The problem is clearly revealed, as has been highlighted, when platforms take steps to remove certain politically ‘oriented’⁵⁹ content, thus demonstrating their *non-neutral* character⁶⁰. However, the widely acclaimed neutral character of the algorithm does not even exist to begin with⁶¹, since the algorithm is not a neutral technique but is *fundamentally* subordinate to certain political choices. Behind the algorithm there are people (programmers) who decide which variables to use⁶²: «and, as has concerned many observers, their prejudices are the algorithm’s prejudices».⁶³ Therefore, some type of regulation seems to be needed to ensure the transparency of the algorithm according to which a search engine selects news⁶⁴.

This idea, however, is not altogether outside the American doctrine, which has highlighted how algorithms end up creating a sometimes unacceptable *bottleneck*⁶⁵.

In addition, in Italy this gap in transparency was noted by the *Italian Competition Authority* (Autorità Garante della Concorrenza e del Mercato) in a legal controversy started by

⁵⁹ Cf. H. Nissenbaum, L. D. Intronca, cit.; cf. E. Bozdog, cit., 98.

⁶⁰ «Indeed, the claim of such intermediaries to being merely neutral collectors of preferences is often undermined by the parallel claim they make, as corporations, they enjoy a free speech defence that would allow them to manipulate results in favour of (or contrary to), for example, a political campaign, or a competitor, or a cultural issue». G. Comandè, *Regulating Algorithms? Regulation? First Ethico-Legal Principles, Problems, and Opportunities of Algorithms*, in AA.VV., *Transparent Data Mining for Big and Small Data*, Berlin, 2016, 12. «In the United Kingdom in February 2016, Google’s autocorrect function was even accused of being politically biased. In 2015, there were similar allegations that Google had favoured Hillary Clinton on its autocomplete feature; Google explained that “the autocomplete algorithm is designed to avoid completing a search for a person’s name with terms that are offensive or disparaging. ... This filter operates according to the same rules no matter who the person is”». Committee on Culture, Science, Education and Media of the Parliamentary Assembly of the Council of Europe, Report doc. 14228, 09 January 2017, 9.

⁶¹ In the past communication *providers*, in a broad sense, used to be neutral tools, this cannot be said for the Internet providers. Cf. B. Harpham, *Net neutrality in the United States and the future of information policy*, in *Faculty of Information Quarterly*, 1, 2009.

⁶² «Social media and search companies are not purely neutral platforms, but in fact edit, or “curate,” the information they present». E. Bell, T. Owen, *The Platform Press: How Silicon Valley Reengineered Journalism*, in *Tow Center for Digital Journalism* 9, March 29, 2017, 15.

⁶³ E. C. Carroll, *Making News*, cit., 18. «While it is easy to think of algorithms with their lines and lines of code as cold and objective (and technology companies often portray them this way), they have human creators. Computer engineers, designers, and coders build and manage these algorithms. The people behind the algorithm decide what variables to use and how to weigh them relative to one another». (Ibidem)

⁶⁴ This necessity was affirmed also by the E.I.S.P.A.: «the European Internet Services Providers Association call on its members which provide social media, search engines and news aggregators: 8.3.1. to develop ethical quality standards regarding their own transparency and the due diligence of their media services; where commercial, political or other interests might conflict with the neutrality of these media services, the providers of such services should be transparent about such a bias». Committee on Culture, Science, Education and Media of the Parliamentary Assembly of the Council of Europe, Report doc. 14228, 09 January 2017, 4.

⁶⁵ Cf. F. Pasquale, *Dominant Search Engines: An Essential Cultural and Political Facility*, in AA.VV., *The next digital decade: essays on the future of the internet*, 2010, p. 401-402, who suggests the necessity of a “publicly funded search engine” (Idem, p. 416). The perspective suggested, i.e. the neutralization of the system, is a more difficult alternative compared to a regulation providing pluralism and transparency, as supported in this paper.

the *Italian Federation of Newspaper Publishers* (Federazione Italiana Editori Giornali) that concerned the transparency of Google News's algorithm (for page ranking) and the consequent impossibility of understanding the mechanism to calculate advertising income⁶⁶. Another issue concerns one of the most critical perspectives on algorithms: the problem of so-called *filter bubbles*⁶⁷. The problem here is that the 'personalized algorithm' personalizes search results too strongly: «personalization filters serve up a kind of invisible autopropaganda, indoctrinating us with our own ideas, amplifying our desire for things that are familiar and leaving us oblivious to the dangers lurking in the dark territory of the unknown»⁶⁸. The concept of filter bubbles is linked to a so-called *pre-selected personalization*⁶⁹, which is a personalization driven by the search engine's algorithm without the user being aware of it. Two points should be made about this topic. The first concerns the actual danger of this phenomenon: «[t]he filter bubble argument is overstated, as Internet users expose themselves to a variety of opinions and viewpoints online and through a diversity of media. Search needs to be viewed in a context of multiple media»⁷⁰, and an 'escape' from filter bubbles is possible⁷¹. Secondly, the suggested implementation of the principle of transparency could resolve this type of problem⁷²: users could choose to use search engines that

⁶⁶ A420 – FIEG - Federazione Italiana Editori Giornali /Google, Provvedimento n. 20224 (2009). The case was closed in 2010, after that Google proposed some reassurances about the development of a more transparent page ranking.

⁶⁷ Wording by E. Pariser, *The Filter Bubble: How the New Personalized Web is Changing What We Read and How We Think*, New York, 2011.

⁶⁸ E. Pariser, cit., 13. For more scholars' references see S. Flaxman, S. Goel, J. M. Rao, *Filter Bubbles, Echo Chambers, and Online News Consumption*, in *Public Opinion Quarterly*, 80, Special Issue, 2016, 298, 298 e ss.

⁶⁹ «Pre-selected personalisation concerns personalisation driven by websites, advertisers, or other actors, often without the user's deliberate choice, input, knowledge or consent». F. J. Zuiderveen Borgesius, D. Trilling, J. Moeller, B. Bodó, C. H. de Vreese, N. Helberger, *Should We Worry About Filter Bubbles?*, in *Internet Policy Review. Journal on Internet Regulation*, 5, 2016, 3.

⁷⁰ W. H. Dutton, B. C. Reisdorf, E. Dubois, G. Blank, cit., 5.

⁷¹ Cf. K. O'Hara, D. Stevens. *Echo Chambers and Online Radicalism: Assessing the Internet's Complicity in Violent Extremism*, in *Policy and Internet*, 5, 2015, 401.

⁷² See the *Report of the High Level Group on Media Freedom and Pluralism*: «The new media environment increases the importance of 'gate keepers', digital intermediaries who are the access route to the internet (for example search engines and social networks); whose personalisation of content risks creating a "filter bubble" for the reader – or internet service providers, who have the ability to arbitrarily censor citizens' connections to the internet. For these actors, only the EU has the effective capacity to regulate them, given its role in competition policy and the transnational character of these actors». See the Report recommendation: «[i]n order to give complete transparency as to how individualised a service is, services that provide heavily personalised search results or newsfeeds should provide the possibility for the user to turn off such personalisation, temporarily for an individual query, or permanently, until further notice». V. Vike-Freiberga, H. Däubler-Gmelin, B. Hammersley, L. M. P. Pessoa Maduro, *A free and pluralistic media to sustain European democracy*, in *europa.eu* (http://ec.europa.eu/information_society/media_taskforce/doc/pluralism/hlg/hlg_final_report.pdf), 2013, 27. Cf. European Commission (2013), 'Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values (Green Paper) Brussels, COM (2013) 231 final' (24 March 2013), p. 13-14. In this field, the Committee of Ministers of the Council of Europe recommended «Member States should: – ensure that any law, policy or individual request on de-indexing or filtering is enacted with full respect for relevant legal provisions, the right to freedom of expression and the right to seek, receive and impart information. (...) In addition, member States should work with search engine providers so that they: – ensure that any necessary filtering or blocking is transparent to the user». Council of Europe, Recommendation CM/Rec (2012) 3 of the Committee of Ministers to member States on the protection of human rights with regard to search engines, adopted by the Committee of Ministers on 4 April 2012.

offer a personalized algorithm, or they could choose other search engines with different ‘editorial policies’ (i.e. different algorithms)⁷³.

Another problem concerns ‘modal and content obligations’: search engines are the first tool for spreading news that, because professional journalists are not involved, is heavily influenced by the circulation of *fake news*. Fake news is created and appears on websites that, by passing themselves off as sources of information, spread the fake news, letting their operators earn thousands of Euros per day⁷⁴.

In relation to this particular issue, many search engines have already been using their own publishing criteria (algorithms) to decrease the impact of fake news on searched content⁷⁵. Governmental and social pressures have led the search engines to reveal their editorial role completely, but so far this is free of any form of empowerment. The possibility that some form of further regulation in this particular area may be necessary cannot be excluded, perhaps by requiring the removal (or rather de-indexing) of fake news sites after an order of a judicial or independent authority.

In conclusion, it can be argued that as search engines begin to be considered as true media, it is necessary to understand and regulate these mass media to ensure they are not free from all forms of liability or from the requirements to which information has always been tied. Minimum regulation should therefore be conceived for search engines in relation to the transparency of their algorithms and to the minimum content limits already identified by the Constitutional Court (especially in relation to so-called *fake news*).

2. The world of social networks: Facebook as the infrastructure through which information flows

The second problem to be analysed in this essay is the power of Facebook in the field of the distribution of information.

A series of preliminary warnings are needed. The first refers to the specific subject of this section, and concerns how Facebook works. The choice to focus only on Facebook and not on other social networks (Google+, Twitter, etc.) has been made because Mark Zuckerberg’s social network is the most popular social network in Italy (and in the world)⁷⁶.

⁷³ It needs to be highlighted how «[a]cross all nations, the majority of people (54.5%) believe that search engines should prioritize objective news and information. A further third (35%) say that search engines should present a range of viewpoints in search results. This data indicates that, by and large, people want search engines to be objective in the presentation of information and do not wish for their personal viewpoints to be prioritized». W. H. Dutton, B. C. Reisdorf, E. Dubois, G. Blank, cit., 124. Concerning the Italian system the problem seems to be less relevant, since the Italian users seem to be more subjected to different viewpoints online: see W. H. Dutton, B. C. Reisdorf, E. Dubois, G. Blank, cit., 94.

⁷⁴ As reported by the Italian journalist F. Costa: F. Costa, *Questa notizia è clamorosa (ma falsa): è la bufala bellezza*, in *Il-Sole24Ore.com*, 26 April 2015. For a summary of the phenomenon in English see A. Higgins, M. McIntire, G. J. X. Dance, *Inside a Fake News Sausage Factory: ‘This Is All About Income’*, in *nytimes.com*, 26 November 2016.

⁷⁵ As reported by Redazione, *Google, nuovo algoritmo contro le fake news*, in *ansa.it*, 26 aprile 2017.

⁷⁶ See the statistics here reported: <https://www.statista.com/statistics/272014/global-social-networks-ranked-by-number-of-users/>. See for the Italian scenario: <http://vincos.it/osservatorio-facebook/>.

The second warning is that in this section we are interested in analysing neither the issue of Facebook's *trending topics*, as this falls within the previous section, i.e. the algorithm⁷⁷, nor in the specific aspect of the Facebook algorithm that determines what appears on the *News Feed* (the main interface for each individual user).

The subject of this section is the role of social networks as 'megaphones' for information⁷⁸. This role is very clear from the data presented in the second section of this essay concerning the influence of social networks on the information market: «Facebook operates at a scale hitherto unseen. No publisher in the history of journalism has enjoyed the same kind of influence over the news consumption of the world»⁷⁹.

In this matter, the Committee on Culture, Science, Education and Media of the Parliamentary Assembly of the Council of Europe claimed that «social media such as Facebook and on-line platforms for user-generated content such as Twitter and YouTube have emerged with market prominence as new online media (...) become the primary contact point for users seeking news»⁸⁰.

In relation to their nature as providers of 'information', it has been objectively proved that social networks react in a schizophrenic way: on the one hand, they hope (economically) to become the main source of *news*⁸¹, but, on the other, they refuse to consider themselves as *media corporations*⁸². Hence, «[t]he people who built these platform companies did not set out to do so in order to take over the responsibilities of a free press. In fact, they are rather alarmed that this is the outcome of their engineering success»⁸³.

⁷⁷ See in general E. Bakshy, I. Rosenn, C. Marlow, L. Adamic, *The role of social networks in information diffusion*, in *Proceedings of the 21st international conference on WorldWideWeb*, 2012, 519. «Social information streams, i.e., status updates from social networking sites, have emerged as a popular means of information awareness. Political discussions on these platforms are becoming an increasingly relevant source of political information, often used as a source of quotes for media outlets. Traditional media are declining in their gatekeeping role to determine the agenda and select which issues and viewpoints should reach their audiences. Internet users have moved from scanning traditional mediums such as newspapers and television to using the Internet, in particular social networking sites. Social networking sites are thus acting as gatekeeper». E. Bozdag, cit., 38. Cf. D.T. Nguyen, N. P. Nguyen, M. T. THAI, *Sources of Misinformation in Online Social Networks: Who to suspect?*, in Military Communications Conference, 2012-MILCOM, 2012.

⁷⁸ «We see players like Snapchat, Facebook, Twitter, Instagram, playing extraordinarily powerful roles in the dissemination and understanding of information in the world». Kate Crawford, Journalism + Silicon Valley Conference, YOU TUBE (Nov. 13, 2015), <https://www.youtube.com/watch?v=0Qftw6VkDKQ> (at 52:30). How it is reported by E. C. Carroll, *Making News*, op. cit., p. 16. Cf. S. Goel, D. J. Watts, D. G. Goldstein, *The structure of online diffusion networks*, in *Proceedings of the 13th ACM Conference on Electronic Commerce*, 2012, 623.

⁷⁹ E. Bell, T. Owen, cit., 18.

⁸⁰ Committee on Culture, Science, Education and Media of the Parliamentary Assembly of the Council of Europe, Report doc. 14228, 09 January 2017, 5.

⁸¹ «These companies' CEOs are unabashed in expressing their ambition that their platforms will be the key place we find news in the future. Facebook's Zuckerberg hopes that his company will provide "the primary news experience people have." Similarly, Twitter's CEO Jack Dorsey recently told Vanity Fair, "I want people to wake up every day and the first thing they check is Twitter in order to see what's happening in the world." The companies' news ambitions are evident». E. C. Carroll, *Making News*, cit., 13.

⁸² «No, we are a tech company, not a media company (...) We build the tools, we do not produce any content». *Facebook CEO: 'We're a technology company. We're not a media company.'*, CNN tech. <http://money.cnn.com/video/technology/2016/08/29/facebook-ceo-were-a-technology-company-were-not-a-media-company-.cnnmoney/>.

⁸³ E. Bell, *Facebook is eating the world*, cit.

However, it should be noted that in recent months, after the clamour triggered by the influence of *fake news* in the US election, Facebook has also begun to consider itself as a *media corporation*⁸⁴.

Nowadays the problem is therefore related to this social network in its role as a ‘mouth-piece’: while it is true that Facebook does not directly produce news and information, it is now actually one of the main tools for spreading news. «Yet Facebook is, without doubt, the largest publishing company in the world. With 1.9 billion active users and 2 trillion searchable posts, the platform reaches more people than any media organization in history»⁸⁵.

It is necessary, first, to specify how information is spread on Facebook. Information on Facebook circulates either in the ‘traditional’ way, through Facebook pages dedicated to the spread of news (such as newspaper pages or the profiles of journalists), or by means of individual users sharing articles from external sites on the social network. Indeed, a single user may decide to share with his own contacts (‘friends’) an article taken from a blog, an online edition of a newspaper, or any other website. It is in this latter way that so-called counter-information circulates: thanks to Facebook, some websites that, if they depended on the above algorithms, would be basically inaccessible by users who did not know of them (finding themselves, for example, on the thirtieth page of the results), can reach a wide and heterogeneous audience. News that is spread in this way can in turn be re-shared by the ‘friends’ of the user who posted it for the first time, and can also become viral⁸⁶. This potentially allows even the smallest blog or digital newspaper to reach an audience whose size would have been unthinkable in the old world of information. The impact of this tool for so-called counter-information is very important, but the dark side is linked to the transformation of journalism into the *new media* of the Internet: in addition to counter-information, *fake news* can also be widely spread. The problem is that, while giving visibility to information organs that in the past were economically relegated to the corners of public discourse, Facebook does not assume, as it has been seen, any form of responsibilities as media: the absence of controls leads to the spread of fake news.

Passing on to Facebook’s media problem, it is first necessary to point out how, from the point of view of internal pluralism and in accordance with the paradigm of American free-

⁸⁴ «The two most discussed concerns this past year were about diversity of viewpoints we see (filter bubbles) and accuracy of information (fake news). I worry about these and we have studied them extensively, but I also worry there are even more powerful effects we must mitigate around sensationalism and polarization leading to a loss of common understanding. Social media already provides more diverse viewpoints than traditional media ever has. (...) Compared with getting our news from the same two or three TV networks or reading the same newspapers with their consistent editorial views, our networks on Facebook show us more diverse content». M. Zuckerberg, *Building Global Community*, 16 February 2017, Facebook note.

⁸⁵ E. Bell, T. Owen, cit., 59.

⁸⁶ W. Lee Howell, *Digital wildfires in a hyperconnected world*, in *Report Global Risks 2013*, 2013, 23. F. Vis, *The rapid spread of misinformation online*, in *Outlook on the Global Agenda 2014*, 2014, 28a. About the misinformation: Vv.AA., *Viral Misinformation: The Role of Homophily and Polarization*, in *Proceedings of the 24th International Conference on World Wide Web*, New York, 2015, 335. Cf. Vv.AA., *Collective attention in the age of (mis)information*, in M. Lytras, H. Mathkour, C. Yanez-Marquez, S. Siqueira, P. Jin, W. Al-Halabi (eds.), *Computers in Human Behavior*, 2015, 1198.

dom of expression, Facebook does not seem to have set up content filters to restrict certain ideologically-orientated news from circulating on social networks. There is therefore no question of internal pluralism, as it seems that Facebook can currently be considered to be a neutral instrument⁸⁷. This statement is valid as long as the analysis of the algorithm – which will not be studied here – is excluded, as it allows the visibility of the news appearing in the *News Feed* to be based on interactions with certain ‘friends’ or ‘pages’ or sponsorships. In this matter, another issue still needs to be discussed: the phenomenon of so-called *Echo Chambers*⁸⁸. When they are on social networks, individuals tend to be exposed to information and political ideas coherent with their existing beliefs, with a consequent increase in the polarization of groups in society. Echo Chambers are connected with the concept of *self-selected personalization*⁸⁹, i.e. the choice by an individual to subject him or herself solely to the opinions of people who think like him or her. This last characteristic of an Echo Chamber makes the issue less relevant from a legal point of view: group polarization also takes place offline (where individuals can choose to be party to a unique and homogenous political viewpoint), and, in addition, the online phenomenon of an Echo Chamber does not seem to be as dangerous as has been suggested⁹⁰ (and this seems to be particularly true for Italian users)⁹¹.

From the point of view of external pluralism, the non-problematic nature of the *de facto* monopoly of Facebook can be noted; this will continue while the neutral nature of the

⁸⁷ Concerning the *Trending topics*, Gizmodo revealed in May 2016 that Facebook’s Trending Topics “suppressed” conservative news. Facebook published an internal guideline for staff curating Trending Topics and responded to Congress Republicans. Finally Facebook decided to not use external websites to validate a story’s importance. See E. BELL, T. OWEN, cit., 64. «There are also claims that Facebook denies and removes advertisements designed for gay audience with no nudity or sexual content, labeling it “inappropriate”. Others claimed that Facebook labeled their posts containing links to a political activism site as spam and prevented the users disseminating this information. Facebook has also removed pages because of offensive content, but later reinstated them». E. Bozdog, cit., 23. The Committee on Culture, Science, Education and Media has stressed that «Former Facebook employees allegedly admitted in an online media outlet in May 2016 having manipulated content politically, but the Vice-President of Search at Facebook responded in a post to this online story that they had found no evidence that the anonymous allegations were true». Committee on Culture, Science, Education and Media of the Parliamentary Assembly of the Council of Europe, Report doc. 14228, 09 January 2017, 9.

⁸⁸ C. R. Sunstein, *Republic.com 2.0.*, Princeton, 2007.

⁸⁹ «Self-selected personalisation concerns situations in which people choose to encounter likeminded opinions exclusively. For example, a person who opposes immigration might want to avoid information that specifies how much a country has gained due to immigration, while paying a lot of attention to news stories about problems related to immigration. People tend to avoid information that challenges their point of view, for example by avoiding news outlets that often feature editorials that favour an opposing political camp». F. J. Zuiderveen Borgesius, D. Trilling, J. Moeller, B. Bodó, C. H. de Vreese, N. Helberger, cit., 3. Cf. idem, 7. «In its press outreach, Facebook has emphasized that “individual choice” matters more than algorithms do». E. Bozdog, cit., 5. Cf. W. H. Dutton, B. C. Reisdorf, E. Dubois, G. Blank, cit., 127 e D. Nikolov, D. F. M. Oliveira, A. Flammini, F. Menczer, *Measuring Online Social Bubbles*, in *PeerJ Computer Science*, 2015.

⁹⁰ See W. H. Dutton, B. C. Reisdorf, E. Dubois, G. Blank, op. cit., p. 5, regarding the necessity to consider the whole media system. In addition, «[o]ver three-fourths of our respondents (79%) say they sometimes, often, or very often, read something they disagree with (Table 4.27)» (Idem, 89).

⁹¹ «Respondents in Italy report the most diverse political opinions among people they communicate with online. Seven in ten (71%) say the people they communicate with have mixed beliefs, which is the highest among all countries, and only 13 percent say they have similar beliefs, which is the lowest among all countries». W.H.Dutton, B.C. Reisdorf, E. Dubois, G. Blank, cit., 170.

platform is maintained. The *de facto* monopoly of Facebook, however, leads to a need to investigate the substantive profile of this mass media network, in terms of ‘content and modal obligations’, namely obligations related to impartiality and the objectivity of information, which are indispensable in a monopoly context.

From this point of view, Facebook has been particularly concerned with problems of *fake news* being given space, especially on social networks. The argument being put forward in this essay is that there is an inherent need for some form of regulation of this ‘sounding board’, in accordance with the content and modal obligations in relation to means of distribution of news under the Italian legal system. The direct non-production of news by Facebook cannot be considered as an excuse for Facebook not to be deemed to be a ‘means of information’: it would thus be risky to rely on a paradigm conceived for the pre-digital era and to ignore the progress made by technology. If this were the case, the national law would be turning its back on the dominance of a very important part of the information world. It is obvious that the traditional paradigm needs to be remodelled, for example in relation to the regime for a publisher’s responsibility, but it is equally evident that these new forms of mass media cannot remain free of regulation. The role that Facebook will play in the future will in fact be in direct competition with the most pervasive traditional media, such as radio and television. «The latter may still filter news for the general public, but the alternative *social networking* threatens them because it selects precisely those people who escape *mainstream* information for intellectual curiosity or programmatic suspicion»⁹². The capillary spread of information through social networks seems to be even wider than the spread of information through television, given the diffusion of smartphones. Therefore, the reminder of the Constitutional Court of the need to regulate the most pervasive media should be recalled⁹³: if in the past television came into the living rooms of Italians, today the same can be said for the social networks that accompany us wherever we go with our smartphones.

The nature of the instrument means that the main problem, as has been said, is the spread of *fake news*⁹⁴, and this is correlated with a series of social phenomena such as the so-

⁹² F. Colombo, *Web 2.0 e democrazia: un rapporto problematico*, in P. Aroldi (eds.), *La piazza, la rete e il voto*, Roma, 2014, 30, 33 (My own translation, MM).

⁹³ See note no. 33.

⁹⁴ «The election results reverberated throughout Facebook, and caused a significant volte-face in its attitude towards its associations with journalism. In encouraging news businesses to make fuller use of Facebook as a distribution outlet, Facebook had in turn opened up publishing tools to everyone else too. While the rapid spread of misinformation on Facebook certainly represented a discrete problem during the election, it is also indicative of a much larger structural problem caused by the economic model and system of automation that lies at the core of Facebook». E.Bell, T.Owen, op. cit., p. 58.

called *social cascade*⁹⁵, *group polarization*⁹⁶, the role played by *prior convictions*⁹⁷, and finally what seems to be a *collective credulity* about Internet content⁹⁸.

Obviously, any regulation cannot be based on the same rules of control, as social networks do not produce the information that they disseminate, but only provide a ‘sounding board’ for third party content. However, this does not mean that social networks should not be subject to forms of empowerment in relation to fake news.

The need for regulation has also been claimed by the Parliamentary Assembly of the Council of Europe, which recognized the attempts made by social networks to counter the spread of fake news⁹⁹. The Parliamentary Assembly also recommended that governments «should co-operate with online media and internet service providers in order to set up codes of conduct which are inspired by the code of conduct countering illegal hate speech online agreed upon by the European Commission and major internet companies on 31 May 2016»¹⁰⁰.

Facebook itself is today increasing the action it takes to counter fake news: in the experimental phase in the United States, there is an active reporting system, the so-called *Fact-Checking Partnership*¹⁰¹.

The system, which highlights how governments are pushing Facebook into self-empowerment, works through individual users reporting potential fake news and later through *fact-checking* agencies working under Facebook’s control. Once the fake news has been identified by two of these agencies, Facebook reports the news as ‘disputed’ content. The mechanism is, however, ineffective in its current state of development, because it is not able to reach all Facebook users who have interacted with a fake news story on the social network before fact-checking has taken place. To be effective, the correction (rectification) could use other types of tools,

⁹⁵ Cf. C. Sunstein, *On Rumors: How Falsehoods Spread, Why We Believe Them, and What Can Be Done*, Princeton, 2014, 97-102.

⁹⁶ Cf. C. Sunstein, *On Rumors*, cit., 50 and ff.

⁹⁷ Cf. C. Sunstein, *On Rumors*, cit., 75 and ff.

⁹⁸ Cf. Vv.AA., *Collective attention in the age of (mis)information*, cit.

⁹⁹ «The Assembly welcomes the fact that large online media have established a policy whereby users can identify factual errors or factually false posts by third parties on their websites, such as on Facebook News Feed or through Google’s “webpage removal request tool”. Credibility and reliability of online media require that they remove or correct false information». Parliamentary Assembly of the Council of Europe, *Online media and journalism: challenges and accountability*, Resolution 2143 (2017), 2. (Provisional version).

¹⁰⁰ Parliamentary Assembly of the Council of Europe, *Online media and journalism: challenges and accountability*, Resolution 2143 (2017), 2. (Provisional version).

¹⁰¹ M. Isaac, *How Facebook’s Fact-Checking Partnership Will Work*, in *nytimes.com*, 15/12/2016. Cf. G. Pennycook, T. Cannon, D. G. Rand, *Prior Exposure Increases Perceived Accuracy of Fake News* (April 30, 2017), in *SSRN: https://ssrn.com/abstract=2958246*, 2017

This operation of Facebook seems coherent with what was suggested by EISPA in Europe: «the European Internet Services Providers Association call on its members which provide social media, search engines and news aggregators: 12.3.3. to voluntarily correct false content or publish a reply in accordance with the right of reply or remove such false content». Parliamentary Assembly of the Council of Europe, *Online media and journalism: challenges and accountability*, Resolution 2143 (2017), 3. (Provisional version)

such as a notification on a user's *News Feed* or *Wall*, and as a consequence a user who had interacted with fake news, by 'liking' it or sharing or commenting on it, would be aware that he or she had read fake news. Even this solution would not reach all users that had read the fake news – because it could not reach users who had not interacted with the news – but a large majority of them could be reached. This system would allow fake news to be corrected by the same use of social networks, and it would help the marketplace of ideas¹⁰² to react to fake news without the use of criminal provisions or censorship.

Regardless of the effectiveness of the solution, however, it must be pointed out that the problem created by this system severely affects the principle of the neutrality of Facebook, even *prima facie*, since the selected fact-checking agencies, as has been highlighted by some Italian journalists, are politically oriented¹⁰³. A possible application of this type of control in Italy would be partially in conflict with the constitutional principle of impartiality.

Just this further evolution of the system would impose the need for regulatory intervention: on the one hand, it would be necessary to ensure there were effective ways to assure people about content (by requiring social networks to have effective means to rectify fake news, such as by notifying the users who had interacted with it of its false nature) and on the other hand it would be equally necessary to ensure the impartiality and neutrality of the control system (e.g. through bipartisan fact-checking agencies, the Order of Journalists or independent authorities)¹⁰⁴.

Removing or correcting fake content (which ranges from mere fake news to the most serious type of defamation) should still require some form of public control: as with television¹⁰⁵, the right to demand rectification needs the fake content to be detected by an independent authority, so even for Facebook a similar solution might be possible. All other things being equal, additional forms of social network empowerment do not appear to be necessary or appropriate (except for a form of liability if a request for rectification is not met). «If Facebook is going to function as the new social arbiter of trust, replacing a role

¹⁰²«According to the champions of the free market of ideas metaphor, since by definition scarcity of resources is an analogue and not a digital limit, with the result that there is no need to protect pluralism of information on the internet, legal rules (and especially public law) should take a step back in the name of the alleged self-corrective capacity of the information market. Just as the economic market knows no test of product “validity” but allows demand to drive supply, relying on the market to distinguish between viable and shoddy products, the best way of dealing with the phenomenon of fake news in the information market is to secure the widest possible dissemination of all news, including news from contradictory and unreliable sources. The thesis is not so convincing». O. Pollicino, *Fake News, Internet and Metaphors (to be handled carefully)*, in *MediaLaws Rivista di diritto dei media*, 1, 2017, 24.

¹⁰³D. Scalea, *Perché il fact-checking di Facebook resterà politicamente orientato*, in *ilfoglio.it*, 18/12/17. It is true that *fact-checkers* must have subscribed the “Poynter’s non-partisan code of principles”, but this does not seem a good warranty in a so delicate matter.

¹⁰⁴As stressed, it is very important the «credibility of the source of the correction» (C. Sunstein, *On Rumors*, op. cit., 75 and 80).

¹⁰⁵See note no. 31. Consider that for television the intervention of the independent authority is merely hypothetical (right to appeal in case of refusal to correct fake news) because in newscasts journalists collect and distribute news, and journalists have a duty to report the truth and promptly correct any falsehood (as a consequence, they refuse to correct falsehood when the truth is disputed).

journalism has, however imperfectly, long served, then they will need to both counter the spread of misinformation and encourage the spread of journalism based in fact. They will simply need to begin making editorial decisions¹⁰⁶.

Regardless of the circulation of information on social networks, it is important to note that Facebook is now also a distributor of news from traditional media that, in addition to their digital platforms, must also develop forms of social communication in order to compete in the information market¹⁰⁷. The problem arises particularly in the US, where *Instant Articles* give rise to the following problem: «[t]he platform decides who to offer contracts to, and publishers must commit to performance terms»¹⁰⁸. Further regulation in this case should perhaps be considered.

V. Final Remarks

There is currently a complex scenario in which big corporations are playing a central role in the spread of information: «Search engines and social media, which are widely available and used among citizens (...) would have a strong influence on how they find, consume, and share information, which would lead them to form a certain political opinion that leads to a certain vote»¹⁰⁹. In this scenario it seems unavoidable that the new Internet media are defined as information media, even though they cannot be traced back to the traditional paradigms. As has been shown, this awareness is very clear in the world of journalism, but less clear in the world of law: the lawyer reasons according to his own categories and this is particularly evident in the field of new media and the Internet. The problem is that, as would be expected, with the mid-twentieth and pre-digital media categories the law cannot fully understand the new realities, and there is a risk that the digital technology distorts and irremediably pulls the public discourse: «Online information intermediaries, similar to the traditional media, can control the diffusion of information for millions of people, a fact that gives them extraordinary political and social power. They do not provide equal channels for every user and they are prone to biases»¹¹⁰. The «*Remediation*»¹¹¹ has already hap-

¹⁰⁶E. Bell, T. Owen, cit., 77.

¹⁰⁷«While publishers all need to have a presence across a broad range of platforms, how they distribute their content—and, in particular, the amount they “give away” to platforms in the form of native content—differs considerably». E. Bell, T.Owen, op. cit., 28.

¹⁰⁸E. Bell, T.Owen, cit., 33.

¹⁰⁹H. Dutton, B. C. Reisdorf, E. Dubois, G. Blank, cit., 112.

¹¹⁰E. Bozdag, cit., 21. «The recent push to develop tools for flagging misinformation and digital literacy campaigns are important initiatives and signal that platform companies are beginning to engage with problems they have long avoided (...) But these types of initiatives are limited by their detachment from the structural problems inherent in the platform ecosystem. Namely, the near dominance of Silicon Valley ideology, the pernicious effect of adtech economics, and the opacity of automation». E. Bell, T.Owen, cit., 81.

¹¹¹J. D. Bolter, R. Grusin, *Remediation: Understanding New Media*, Cambridge, 1999.

pened and will have enormous effects, as has been seen. In this context, it is particularly useful to look at the United States of America where, because large Internet corporations are located there, some phenomena that have not yet arrived in Italy are already developing (think of Facebook *Instant Articles* or the *Fact-Checking Partnership*) and a vigorous debate on *new media* is emerging. The opening of a serious debate about the regulation that should be developed and its subsequent enforcement seems to be unavoidable.

Moreover, although the political class (even for older questions) has ignored the issue for a long time, the situation today appears to be changing, at both the national and the EU level. The generational factor is, moreover, leading to a change of pace, as has been seen. The communicative force of the new Internet media recalls the observation of the Constitutional Court or, rather, the Court's reasoning in relation to the need to ensure some form of regulation for the most pervasive media: «[I]t is well known and consistent in the case law of this Court, the acknowledgment of the peculiar diffusion and pervasiveness of the television message (judgment No 225 of 1974, No 148 of 1981, No 826 of 1988), so as to justify the adoption, strictly of broadcasting station, of a rigorous discipline capable to prevent any inappropriate conditioning in the formation of the will of the voters»¹¹². If this is true for television, such a warning can also be extended to the Internet media.

This paper has suggested the regulation of the new media according to their specific nature. Concerning the search engines' algorithms, and given the existence of forms of pluralism and anti-trust laws, the main problem is to ensure the transparency of the algorithm according to which the search engines select the news. Thus, search engines should be obliged to tell users about the type of algorithm they use in searching news. As regards Facebook, all other things being equal, the actual and current problem concerns the spread of fake news, and this could be resolved through the application of the aforesaid mechanism of correcting false facts.

It seems inevitable today that forms of regulation will be built that act in relation to both pluralism and content, since the press is «the bible of democracy, the book out of which a people determines its conduct»¹¹³.

¹¹²Constitutional Court, judgement no. 155/2002 (My own translation, MM).

¹¹³W. Lippmann, *Liberty and the news*, New York, 1920, 47.