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PERSPECTIVE

## Defamation claims and fake news bullsh\*t

By Dan Terzian

A Colorado state senator has called a Colorado newspaper “fake news.” Now that newspaper, the *Grand Junction Sentinel*, is threatening to sue the senator for defamation.

The threat’s bullsh\*t.

Imagine if you were sued for calling something “bullsh\*t news.” You don’t have to imagine hard. It’s already happened: BuzzFeed published an article calling a British news agency “The King of Bullsh\*t News.”

For some, being called bullsh\*t by BuzzFeed would be a medal worn proudly. For others, it’s an invitation to file a libel lawsuit.

In the latter camp is the so-called bullsh\*t British news agency, Central European News, and it has accepted the invitation. Now BuzzFeed is on the wrong end (is there a good end?) of an \$11 million libel suit filed in the Southern District of New York.

Of course, context matters. The libel suit is premised not only on being called bullsh\*t. It’s also premised on BuzzFeed’s claiming that several of the agency’s stories were false. For instance, the news agency reported that “people in China walk cabbages, rather than pets, out of loneliness.” BuzzFeed claimed this wasn’t true. And the news agency’s complaint alleged that the story was indeed true.

Maybe BuzzFeed fabricated its claims of falsity and thus committed libel. Or maybe BuzzFeed didn’t commit it. We’ll find out more as that case unfolds. So far, BuzzFeed has filed an answer denying the allegations, and the news agency has filed a summary judgment motion supported by a couple declarations. BuzzFeed has opposed the motion on the grounds that it is both too early and meritless. Too early because the parties were in the middle of contentious discovery, with BuzzFeed moving to compel the production of additional documents. And meritless



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because the news agency failed to meet its burden of proving material falsity. The news agency provided no evidence that many of the debunked stories were actually true. The little evidence that the agency did provide for the other stories was flimsy, consisting of the agency’s declarations that it correctly reported the stories or that it got “the quotes from videos that were available online in China.” BuzzFeed went on to ask the court to enter summary judgment in its favor. The motion was set to be heard on March 2, but the hearing appears to have been indefinitely continued due to the case being reassigned to a different judge.

In any event, put aside the nuanced context of tales of Chinese citizens walking cabbages as pets. Let’s talk bullsh\*t. Calling an article bullsh\*t — without more — shouldn’t be libelous. It should be protected hyperbole and opinion. You can call a newspaper’s stories “tabloid trash,” “crap” and “garbage.” All of those “are nothing more than generic invective,” and “[t]he law provides no redress for harsh name-calling.” *Flowers v. Carville*, 310 F.3d 1118 (9th Cir. 2002).

The same should apply to the naked barb of fake news. It’s hyperbolic name-calling. Nothing more. If it’s defamatory, then so is

calling *The American Spectator* a participant in the vast right-wing conspiracy — which the Clinton administration did in the 1990s. And so too calling *The New York Times* liberal propaganda. The average reader knows these publications and recognizes the labels as hyperbolic opinions, not statements of fact.

As for the Colorado senator, he did more than call the paper fake news. He also said that the paper has “no facts, as usual ... [and] [t]hey haven’t contacted me to get any information on why the bill has been delayed.”

Maybe that’s defamatory. Perhaps the newspaper actually did contact him, and he’s lying about it. So here lies a thin reed for the newspaper to ground its defamation action.

Yet the paper so far seems unwilling to grasp this reed. Instead, its grievance lies with being called “fake news,” not with the surrounding statements. Well, that’s its position so far at least. If it actually files a lawsuit, presumably that position would evolve to ground its claim in the senator’s entire statement.

Doubtless the newspaper doesn’t like being called fake news. But bruised egos alone don’t make viable defamation claims.

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**Dan Terzian**

(@danterzian) is a commercial litigator in Duane Morris LLP’s L.A. office. He’s a member of the firm’s media law practice group.