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Allocating Responsibility for the Damage from Deceptive PR-Materials Disseminated by the Media: A Thought Experiment

Atribuir la responsabilitat dels danys que causen els materials enganyosos de relacions públiques difosos pels mitjans de comunicació: un experiment inventat

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Media practitioners often rely on PR specialists as a source of information. Journalists use press releases, newsletters, press briefings, etc. as a foundation for editorial content. But what happens if the media passes along PR-materials to audiences that are not absolutely true, or even intentionally false, and the public is deceived by these false messages? Who bears the responsibility for harmful consequences? Who should be held accountable: a deceptive PR practitioner, the journalist who relies too heavily on this type of source, or the public? The paper utilises the methods of legal philosophy to approach these questions and to theoretically examine how responsibility is (or could be) allocated between the actors in the communication process. Using the methodology of a thought experiment —a hypothetical case in which a pharmaceutical

Els professionals dels mitjans confien sovint en especialistes de relacions públiques com a font d'informació. Els periodistes utilitzen comunicats de premsa, butlletins informatius, reunions de premsa, etc. com a base per als continguts editorials. Però què passa si els mitjans de comunicació passen materials PR a l'audiència que no són absolutament certs, o fins i tot intencionadament falsos, i s'enganya el públic amb aquests missatges falsos? Qui es fa càrrec de les males conseqüències que això comporta? Qui n'ha de ser responsable: un professional de les relacions públiques enganyós, el periodista que recorre en excés a aquest tipus de fonts o bé l'audiència? Aquest article fa ús dels mètodes de la filosofia legal per abordar les qüestions de comunicació i examinar, teòricament, si la responsabilitat es troba (o podria trobar-se)

company makes a false claim about its products and disseminates it via a press release— the authors come to the conclusion that the balance between freedom of speech and property rights requires an individual case-by-case approach, and that deceptive messages themselves are not a crime. To hold a company responsible in each case, there must be a specific victim who demands restitution and justice, and turns to the courts or judges to adjudicate the dispute.

Key words: *deceptive PR, media responsibility, words and deeds, advocacy model to PR, theory of contract.*

entre els implicats en el procés de comunicació. Utilitzant com a mètode un experiment no real —un cas hipotètic en què una empresa farmacèutica fa una reclamació falsa sobre els seus productes i la divulga a través d'un comunicat de premsa—, els autors arriben a la conclusió que l'equilibri entre la llibertat d'expressió i els drets de propietat requereix un enfocament individual cas per cas, i que els missatges enganyosos no són un delicte en si mateixos. Per mantenir una empresa responsable en cada cas, ha d'haver-hi una víctima específica que reclami indemnització i justícia, i que s'adreci als tribunals o als jutges per tal de resoldre el conflicte.

Paraules clau: *PR enganyosa, responsabilitat mediàtica, paraules i fets, model de defensa davant del PR, teoria del contracte.*

This article addresses the question of evaluating false statements used in business publicity as a result of public relations activity. Media-practitioners (journalists and editors) to a certain extent rely on PR-practitioners as a source of information. They use press-releases, newsletters, press-briefings, etc. as a foundation of the editorial content. This is the very nature of interdependence between PR and media: journalists need and often use information provided by communication practitioners, and, equally, practitioners and the companies that they work for often need the media as a conduit to generate coverage on the company and to reach important stakeholders such as the financial community, customers, prospective employees, government and the general public. According to some reports, as much as 80 per cent of news reports about companies is prompted and delivered by communication practitioners (Merten, 2004).

Most theories in public relations ethics focus on responsibilities of PR-practitioners towards clients, media and public. They emphasise the importance of balancing the interests through providing truthful and accurate information (See public relations professional codes that require truth, accuracy, honesty: IABC #1, IPRA ## 10, 11; PRSA ## 3, 4, 5). Within this framework both media and media audiences are treated as passive recipients of information. Both groups are seen as gullible and

vulnerable entities, incapable of critical evaluation of the information provided to them by PR practitioners. According to this view PR practitioners are responsible for making sure that the information that they disseminate is true. It is a PR responsibility not to deceive journalists so that they in turn do not deceive the public.

However, not all PR theories recognise the importance or truthfulness in communication. The extent to which PR practitioners should be truthful and completely honest vary. For instance, advocacy model of PR looks at responsibility of PR specialists as a set of obligations primarily towards employers or clients. And indeed, this theory at least partly reflects the practice in real life, where PR-practitioners sometimes deceive public for various reasons and in various ways —either by telling lies, concealing truth or manipulating facts. "In public relations ... there is no clarity on the issue of lying... Lying is paradoxical; as communication professionals, our codes strictly advocate not lying, and most of us would feel professional and personal qualms about doing so... Yet, lying is undeniably a human practice" (Engrlehardt and Evans, 1994).

Given that some of disseminated PR-materials may be not be absolutely true to the facts, or even intentionally false, and the media may use these materials for further distribution, the audiences of the media may be deceived. In some hypothetical cases, the publics may even be harmed by these false messages. As Barney and Black (1994: 238) correctly point out, "most consumers have felt deceived or manipulated by information distributed by self-serving communicators".

We will define fraudulent PR statements used in communication as any claim that is deceptive or untruthful and thus gives the audience an incorrect understanding of the product they are interested in purchasing or using (for the sake of simplicity this paper will deal with marketing PR, although most of the insights can be extrapolated to other spheres of public relations). For this case we can make a reference to the concept of fraudulent advertising —Webster's New World Law Dictionary (2010) defined it as "the act of knowingly advertising a product or service that does not exist or does not function as represented"—. Merriam-Webster's Dictionary of Law (2011) gives a more detailed definition: "The crime or tort of publishing, broadcasting, or otherwise publicly distributing an advertisement that contains an untrue, misleading, or deceptive representation or statement which was made knowingly or recklessly and with the intent to promote the sale of property, goods, or services to the public". Generally fraud has come to be defined by courts to require an intentional misrepresentation that was properly relied upon by the plaintiff and caused the plaintiff damages.

A first, general ethical question about deceptive PR messages is whether they are fraudulent: "A natural reaction to assure a higher level of reliability is to advocate some methods of disciplining manipulative persuaders, as a way of reassuring themselves that messengers and the messages can be trusted" (Barney and Black, 1994: 238). But as McCaffrey (2016) noted, "a more specific and practical question is whether these activities should be punishable by law. The narrower question matters because not all cases of fraud are cases of theft: some are simply immoral deceptions. It is not for the law to enforce all types of morality, and of course, morality is not synonymous with legality. Prosecution should therefore be limited to cases where the use of force is appropriate".

The matter of legal regulation of the industry is not limited exclusively to the discussion about law enforcement. Another alternative is the current discussion within the field suggesting government licensing "as a way of of elevating professional credibility and prestige, seems to be a misguided and superficial response to external criticism and threats of control (Barney and Black, 1994: 238).

With the increasing interest in the topics related to the issues of truth in the media, when accuracy and validity of information disseminated through media is of growing interest to the academic community (Howard *et al*., 2017; Marwick, 2017; Caplan, 2017), it is important to analyse the role or PR in the communication process. Current academic literature focuses primarily on the responsibilities of the media (Wardle, 2017; Boyd, 2017), and some researchers emphasise the ethical aspects of corporate actions (Uberti, 2016). However the analysis of the whole process of communication which would involve the three type of actors —the entity (ex., a corporation), the PR practitioner representing the entity, the media outlet and, finally, the public— is missing. And yet the question of allocating responsibility for disseminating false information is important not only for the developing professional consciousness, but also for evaluating legislative initiatives which have been proposed worldwide to address the issue of "fake news" (Yi, 2017; Beech, 2018).

In determining whether the law enforcement is the answer, we believe it is important to identify who is responsible for wrongdoing (should it occur) and thus becomes subject to punishment. If fraudulent media relations practices cause damages to third parties, then who bears responsibility for these consequences? Who should be held guilty: a deceptive PR-practitioner, an over-relying journalist or public? The paper utilises some elements of legal philosophy to theoretically examine how responsibility is (or could be) distributed between the actors of communication process.

When the company is acting as communicator and a clearly identified source of communication (such as in the case of direct advertising), the responsibility for the content of the message is solely on the company. We can generally presume that fraudulent advertising is an act of implicit theft under the theory of contract (fraud as a type of theft).[1] Suppose a seller makes a statement about his product as possessing certain features X, but in fact his product does not quite possess those features (which is a typical example of puffery). If a client believes the promise and purchases the product, she thereby expresses her consent to transfer a property title in her money on the condition of exchanging it for a property title in the product with particular (advertised) characteristics. If the seller accepts the money knowing that the product does not have these characteristics, then he acquires the property title in client's money without client's voluntary consent, which is theft. The client was willing to voluntarily pay for

1 For more on that see Pavel Slutskiy (2016), "Fraudulent Advertising: A Mere Speech Act or a Type of Theft?" *Libertarian Papers*, 8 (1), pp. 109-127.

the product, because advertising set him to believe that the product will meet her requirements (Evers, 1977; Rothbard, 1982; Kinsella, 2003).

The question examined in this paper can be described roughly as follows: what happens with this direct responsibility if the message is not paid for but distributed by the media for free? Would media function as an intermediate actor that breaks the chain of causal connection between the company that disseminated the message and the public was damaged by the message?

The idea is that the intermediate actor (the media) has free intervening will that "break" the chain of causal connection. What is even more important, due to the very nature of the media they have the privilege of acting as an objective third party, whose opinions and messages are supposed to be independent and therefore more credible. Thus, it can be assumed that the responsibility is somehow transferred to the media and relieved from the company.

In order to answer the main question of this article we begin by giving some background and basic theoretical framework for analysis. In the next section we formulate the question of causation and responsibility in the cases of intervening will of intermediate actors in the communication process. Section four examines the responsibility of PR practitioners and the use of media as means to achieve fraudulent ends. In section five the notion of control is added to the equation to analyse the extent to which PR-practitioners have control over the editorial content. Section six looks at the responsibilities of media practitioners. We conclude in section seven.

BACKGROUND AND FRAMEWORK OF ANALYSIS

For a start we can accept the assumption stated above: fraudulent advertising is logically equivalent to theft. This view clearly presupposes a right not to be deceived in order to establish a contract right (Mack, 1977). Let us consider the following thought experiment: if Homeopathy Inc. advertises medication but delivers placebo sugar pills, they have actually stolen the money price of "medications" (see, for ex., Block, 2008: 59; Rothbard, 1982: 79-80, and Kinsella, 2004: 34).[2]

2 This example has been chosen to illustrate recent controversy on homeopathy. To quote FTC, Homeopathy, which dates back to the 1700s, is based on the theory that disease symptoms can be treated by minute doses of substances that produce similar symptoms when provided in larger doses to healthy people. Many homeopathic products are diluted to such an extent that they no longer contain detectable levels of the initial substance. According to the policy statement, homeopathic theories are not accepted by most modern medical experts. For the vast majority of OTC homeopathic drugs, the policy statement notes, "the case for efficacy is based solely on traditional homeopathic theories and there are no valid studies using current scientific methods showing the product's efficacy". As such, the marketing claims for these products are likely misleading, in violation of the FTC Act" (FTC Issues Enforcement Policy Statement Regarding Marketing Claims for Over-the-Counter Homeopathic Drugs, 2016).

Such advertising of sugar balls as being medication would be considered an intentional lie —as distinct from uttering a mistaken opinion or believing what in fact is a lie and passing it on as the truth one believes it is— (van Dun 2004; 37). In our example we will acknowledge the overabundance of evidence against homeopathy, and the fact that it has been widely recognised that patients who choose to use homeopathy rather than evidence-based medicine risk missing timely diagnosis and effective treatment of serious conditions. Therefore Homeopathy Inc. can not use in their defence that they sincerely believed that their product can treat any diseases —such claims are not withstanding, and for a company that manufactures pharmaceutical products such ignorance about scientifically proven facts can only be attributed to criminal negligence anyway. However, we can also imagine some hypothetical examples when the seller or advertiser honestly believes in the statements that he is making about his products. Whether in this case the lie is intentional or not is another difficult question. It is hard to differentiate between honest mistakes and intentional lies. Besides, it is not the intentions that matter, but actions. As Rothbard wrote (1982: 121), "surely legality or illegality should depend not on the motivation of the actor, but on the objective nature of the act… aside from the obvious difficulties in legally determining an individual's subjective motivations for any action".

But it is not merely not telling the truth that makes it crime. James Child argues that "not all lying in the sale of a product is fraud" (Child, 1994: 737). Only because the lie is intended to achieve an illegal goal of obtaining the money from a non-consenting customer, it should be unlawful. This logic seems to be consistent with the common law definition of fraud as the intentional misrepresentation of material facts presented to and relied upon by another party to his detriment.

Property rights imply that the owner of a scarce resource has the right to exchange the property title for a title to another scarce resource. An intention to do so must be communicated, and the other side must communicate a consent to the exchange (in the absence of mutual agreement such exchange would be forced upon one of the sides). Without this mutual agreement to exchange property titles any contracts would be impossible. Voluntary consent is what makes contracts non-aggressive in their nature, since consent is a fundamental condition of justice in human interactions. The manifested or communicated consent of the owners is what determines whether a contract is legitimate or it is implicit trespass or theft —"consent plays a far larger role in contract theory than is often admitted" (Barnett, 1992: 783)—. And because of this, communication is a necessary requirement for determining whether consent was granted (Kinsella, 2004: 61-63).

Such understanding of the role of communication in distinguishing legitimate contractual exchanges from trespass or theft explain why promises can not be seen as "mere exercises in the freedom of speech". Consent for a property title transfer is given on particular conditions. These conditions are explicitly manifested through communication.

If Homeopathy Inc. has a stall on a market and the seller is shouting that he is selling pills against flu for $20, and Karen transfers the property title to her $20 in exchange for a property title to that package of pills, the condition of

the exchange is that she actually gets medication for her money, and not sugar balls with a mere placebo effect.[3] Homeopathy Inc. gets Karen's consent to take the title to her money only if the condition is satisfied. If Homeopathy Inc. sells placebo instead of medication then the condition for transferring the title to the money to him are not satisfied. He does not have the right to $20, he is taking the money with our Karen's consent which is theft, and she can accuse Homeopathy Inc. of trespass.

So clearly to be qualified as fraud there must something more than just a false statement. There must be a victim who did not give a genuine consent for the deceiver to take his property: "There must be a victim of the fraud, and the victimisation must be of a type in which there is an ostensible title transfer but which fails because of lack of true consent" (Kinsella, 2006).

THE CHAIN OF CAUSES AND EFFECTS IN MEDIA RELATIONS: INTERVENING FREE WILL AND MEDIATION

The above example in which Homeopathy Inc. deliberately frauds Karen is simple and straightforward. After all, their chosen means of carrying out theft against Karen was direct fraudulent communication —a misleading message verbally communicated with an intent to achieve an illegal goal of obtaining the money from a non-consenting customer—.

Now imagine that Homeopathy Inc. is making a *mediated* statement by advertising in a newspaper —it does not change anything— the company, not the newspaper, is recognised as the origin of the message; Homeopathy Inc.'s complete control over the message and its content is guaranteed by the fact that they paid for the advertisement, thus they bear all the responsibility for the damage they may cause. Most people would agree that Homeopathy Inc. is responsible for the harm inflicted upon Karen, even if the fraudulent message was transmitted via media which they employed to attain the result.

Let us further develop this hypothetical example and imagine that instead of placing an advertisement Homeopathy Inc. sends out a press release to Pharma Newspaper, saying that they are selling new effective medication against flu. Pharma Newspaper is preparing a story about new advancements in pharmaceutical industry and includes Homeopathy Inc.'s product in the article. Karen reads the story, goes to a pharmacy, pays $20 for Homeopathy Inc.'s medications, but obviously gets sugar balls. She takes them instead of proper medication and suffers from severe complications. In this case another actor(s) —Pharma Newspaper— intervenes in the chain of causation, thus "breaking" this chain.

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3 Of course, advertising of such pills would not be considered deceptive or fraudulent if it effectively communicates that: 1) there is no scientific evidence that the product works; and 2) the product's claims are based only on theories of homeopathy from the 1700s that are not accepted by most modern medical experts.

> The law has long recognized that one accused of a crime or tort is not responsible if the damage was really caused by an "intervening act" that breaks the chain of causal connection" between the actions of the accused and the damage that occurred. The idea is that the intervening act is the true cause of the harm caused (Kinsella, 2004: 103).

So we can theoretically conclude that Pharma Newspaper is responsible for the outcome, since their action (disseminating the false statement) was undertaken under free will, thus breaking the chain of causation. It is Pharma Newspaper who gave Karen the wrong information without checking it, while Homeopathy Inc. only committed a speech act, advocating their business. PR literature demonstrates there are arguments to be made in favour of the persuasive–advocacy function in public relations. This contention is supported in Barney and Black (1994), Bivins (1987), Bernays (1923), Cutlip (1994), Gordon (1997), German (1995), Hamilton (1989), Nelson (1994), McBride (1989), Miller (1989), and Sproule (1991) to name a few.

This model suggests that public relations professionals, as professional advocates, may be said to accept roughly the same obligations to their clients as lawyers. The analogy is not an original one. Public relations pioneers Edward Bernays and Ivy Lee both claimed that public relations practitioners are expected to serve ad lawyers in the court of public opinion (Bernays, 1923; Hiebert, 1996).

> Lawyers are adversaries/advocates in the formalized courts of law (a reasonably honorable calling that is often generates substantial criticism), and public relations councilors argue their cases as advocates/adversaries in the informal court of public opinion (a calling created and expanded in recent years by exploding media development whose moral boundaries its practitioners are still in process of identifying) (Barney and Black, 1994: 240).

If an intervening will breaks the causation, Homeopathy Inc. is not guilty since their action of sending a press release is separated from Karen's purchasing decision by at least two acts of intervening will. Homeopathy Inc. did not communicate the message to Karen —Pharma Newspaper did—. But it is also not Pharma Newspaper who decided to make the purchase —Karen chose to trust the statement that Pharma Newspaper printed and made this purchase herself—. Her damage can be attributed to her own wilful action. This conclusion is slightly absurd, but not completely. Another notion which is impossible to ignore is the fact that Karen's own actions also play a role —after all, she chose to trust the editorial content and decided to purchase the pills—. Her damage can be attributed to her own wilful action. We would not hesitate to say that Homeopathy Inc. lied in his press-release and caused defrauding, even though there is a significant time lag between his actions and the ensuing result. But Pharma Newspaper's and Karen's volitional actions were part of the chain of events.

First, the decision to trust a media is entirely voluntary, making it difficult for Karen to claim that Pharma Newspaper's opinions are thrust upon her. Perhaps Karen should have known that whatever the paper's opinion about Homeopathy Inc.'s products may be, the media can not control the quality of Homeopathy

Inc.'s products and therefore can not be responsible for it. Trusting whatever the media writes may be foolish and plain dangerous. If she follows Pharma Newspaper's advice or suggestion, buys the products and is harmed by the consequences of her decisions, her own responsibility for her actions is undeniable:

> Such situations call on other entities to provide their own advocates to counter balance the message. It would also appear to call on consumers to engage in some efforts on their own behalf in gathering and evaluating broadly based information, and even to becoming active and adversaries countering unopposed views. An advocacy culture assumes both caveat emptor and caveat vendor —let the buyer as well as the seller beware— (Barney and Black, 1994: 241).

This view is also perfectly consistent with the idea that "initiating" an act of communication is not a crime, but an exercise in free speech and brand advocacy, based on the relations between the business and the media: "A social role of the professional persuader as advocate is to "use" the media and other channels, to take advantage of a conduit function of mass communication to transmit messages that will reach the audience in as intact form as possible… use of selective truth may be morally justifiable as appropriate to role in this climate" (Barney and Black, 1994: 243).

The media is using its unique position of an objective third party endorser which is responsible for the content it provides to its audiences. If the message is not clearly marked as advertising, that means it is the opinion of the media, and the media bears full responsibility for whatever they disseminate. Thus, it can be argued, that since the newspaper journalists and editors had control over the message, this case is very different from advertising, where Homeopathy Inc. had control over (and therefore responsibility) for the content of the message. In the case of advertising the newspaper was used as a means to achieve fraudulent ends, but in the case of press-release the decision was made by the newspaper staff, and thus Homeopathy Inc. may not be considered responsible for the outcome.

INTERMEDIARY A MEANS: USING MEDIA TO ACHIEVE FRAUDULENT ENDS

On the other hand, it is hard to accuse Pharma Newspaper of defrauding Karen, primarily because it is Homeopathy Inc. who got Karen's money, not Pharma Newspaper. In their defence Homeopathy Inc. could also claim that the message that the paper disseminated did not represent an offer for a conditional exchange of property titles. The message that the buyer is acting on comes from the newspaper, is signed by the newspaper and thus Homeopathy Inc. can not be considered bounded by and contractual obligations towards potential buyers. Indeed, if companies were legally obliged to fulfil any promising statements that media would make completely arbitrary, businesses would not be able to function. So, it seems like Homeopathy Inc., not Pharma Newspaper, committed a fraud and

actually acquired a title in Karen's property without her genuine consent by violating the implied conditions of the exchange.

To support this point it would make more sense to analyse the situations in terms of means-ends framework. We can conclude that Homeopathy Inc. did have a prohibited end in mind (fraud), and employed means to attain this end. In the first example of advertising Homeopathy Inc. had control over their means, but in the example of the press-release the means (media) had free will. Does it change the situation? It seems like the only difference in the second example is that Homeopathy Inc.'s chances to succeed might have been lower.

The first question that we may ask in order to challenge this logic is why editors and journalists can not be means of a fraudulent business communicator to the same extent as he can use advertising as his means? The fact that the newspaper is not getting paid for spreading the false statement does not mean that the newspaper is not being used as a means for Homeopathy Inc.'s actions. To determine if Homeopathy Inc. is responsible, we ask whether they used Pharma Newspaper as their means to defraud Karen. To be responsible, they would have to intend prohibited result; and they would have used means that resulted in it (Kinsella, 2004: 107).

Whether Homeopathy Inc. made their fraudulent statement directly, via some paid media or via earned media may not have any impact on the analysis of the situation. What might matter is the fact that the company intentionally employed means to attain profited ends. In this case, the journalist and the paper were the Homeopathy Inc.'s means of defrauding Karen.

So, Homeopathy Inc. still might be responsible for the loss of Karen's money —they are not released of their responsibility because Pharma Newspaper is the source from which Karen got the information. But is Pharma Newspaper responsible as well? The question is not an easy one, and merely formulating the issue in this manner does not make the correct answer easy to find. As Kinsella points out,

> Such questions must take into account relevant facts and the context, and depend on the sense of justice of the judge or jury. Looking at actions from the praxeological point of view, however, helps us look in the right place and ask the right questions (…) But it is simply arbitrary to restrict cause to cases where the intermediate actor is (…) paid cash (Kinsella, 2004: 107-108).

We would normally consider that in order to qualify as trespass the result had to follow as a direct, and immediate consequence of the action, with no "intervening cause" breaking the connection between the action and the result. In the case of Homeopathy Inc., we are asking whether the company chose and employed means to achieve the result that intentionally inflicted harm upon Karen.

From a moral perspective some may argue that "withholding a simple fact manipulates people by limiting the information available to them as they make choices. This is an assault on one's personal autonomy, or freedom of self-determination… protecting and enhancing the freedom of human persons has to be at the head of ethical principles and at the core of ethical behavior" (Schick,

1994: 7). However, in this article we are going to focus on the distribution and allocation of legal, not moral responsibility. Not all cases of deception and lying are cases of theft: some are simply immoral actions. It is not for the law to enforce all types of morality, and of course, morality is not synonymous with legality (McCaffrey, 2016). Prosecution should therefore be limited to cases where the use of force is appropriate.

> In a free society whose welfare has been based on relatively high degree of free enterprise and competition, PR-practitioner's primary function is to advance a client's interest in the face of such competition by distributing selectively favorable information, placing on others the obligation of generating countering messages if those messages are to be generated... Such a role justifies "selective truth" distribution, relieving the public relations counselor of obligations to tell an "objective truth", and allows for ethical persuasion (Barney and Black, 1994: 247).

THE ISSUE OF CONTENT CONTROL: WISHFUL THINKING IN EMPLOYING THE MEANS OF CONTENT DISSEMINATION

One of the ways to understand the nature of the issue is to go deeper in analysing the relationship between the PR-actor and the media. Adolph Reinach (1983) provides a framework for the analysis of causation. Using Reinach's causal analysis, one does not necessarily absolve someone of responsibility simply because another actor is used to help "cause" the unlawful end.

We can look at the example case as a continuum. Homeopathy Inc. sends a message to newspaper for further dissemination. On the one end of this continuum Homeopathy Inc. is able to control exactly where and when and what is going to be published by Pharma Newspaper, because Homeopathy Inc. pays for it (advertising). On the other end of this continuum Homeopathy Inc. only hopes that the message would be accepted by Pharma Newspaper for further dissemination. In both cases we can argue that Homeopathy Inc. is the "cause" of Karen's loss of money, since she would not have bought those pills (sugar balls, apparently), if Homeopathy Inc. had not sent that message.

If we understand Reinach's analysis correctly, he would conclude that Homeopathy Inc. is guilty only in the case of advertising, but not in the case of sending out the press release. The difference for Reinach would be intent: in the case of sending the press release, Homeopathy Inc. only hoped it would be accepted, but it was just wishful thinking —they had no control over the editorial process, and no objective knowledge of whether their plans of defrauding customers through earned media would succeed—.

Along these lines one could argue that Homeopathy Inc.'s actions are not really fraud, because they did not intend to defraud Karen and did not employ any means that guaranteed that they would attain that goal. Homeopathy Inc.'s actions are not calculated to guarantee the result of causing harm to Karen —the company does not expect nor has any reason to be sure that that the paper would accept their press release and that Karen would act upon the informa-

tion—. As Reinach puts it, "there is no intention if the outcome is only hoped for" (Reinach, 1983: 14). With the same result Homeopathy Inc. could have been praying for this to happen.

The catch here, of course, is the existing media relations practices in Homeopathy Inc.'s and Pharma Newspaper's society or community. What are the existing default presumptions? Are they such that Homeopathy Inc. has more than a wish, but a certain knowledge, a justified expectation that by sending a press release they have decent chances of having it printed without any fact checking by the editors? If yes, then perhaps we can conclude that Homeopathy Inc. had the intent necessary to be held responsible for Karen's loss of money. In this case Homeopathy Inc.'s actions become more than just sending a press release to a newspaper. With the knowledge that the paper tends to publish whatever it gets as press releases, Homeopathy Inc.'s actions rise to the levels of intentional defrauding. This is due to the fact that if Homeopathy Inc. knows quite for sure that sending a press release will result in its publication, then Homeopathy Inc. has an intent to attain the goal, and their actions include employing reasonable means to attain this goal. It is probably fraud because Homeopathy Inc. intentionally used another actor (Pharma Newspaper) according to his nature (too trusting) in order to cause some property rights violation (illegally acquiring property title in Karen's money and consequentially causing her some harm).

So, we may conclude that in cases when Homeopathy Inc. utilises Pharma Newspaper as a means to achieve their fraudulent ends, Homeopathy Inc. can be at least partly considered responsible for the outcome. But what about failed attempts to disseminate false information via media? What happens in other circumstances, when Pharma Newspaper is not known for disseminating unchecked un unverified information?

Imagine that Homeopathy Inc. sends out a press-release which includes some false statements and which, if repeated in Pharma Newspaper's editorial column, may influence Karen's purchasing decision. However, Pharma Newspaper never prints this press-release. Should Homeopathy Inc. be held liable? On the one hand, there is intention and there is (failed) causality. Homeopathy Inc. performs a series of actions that the company believes to be objectively suited to bringing about the desired prohibited result. However, they fail. Homeopathy Inc.'s actions in this case count as mere hopes and wishes, or are they a part of a fraudulent activity? It is only because of some other event that the result did not occur as desired (Hoppe, 2004: 93-94).

Should Homeopathy Inc. be punished for the failed attempt? This seems counter intuitive, and also does not meet the general requirements for an action to be classified as fraudulent. One of the conditions is that there must be objective damages to the victim —the victim must have been detrimentally impacted by the intentional misrepresentation. This is one of the five stringent conditions of fraud that must be properly demonstrated: false material fact, knowledge, intent, reliance, and injury. The point is clear: bad intentions are necessary, but they are not sufficient for criminality. In addition, the perpetrator must actually harm the "victim." Thus, just a simple fact of disseminating a fraudulent state-

ment via media is definitely not a trespass, unless someone acted following this message and suffered some objective damage.

Anything less than that turns both marketers and consumers into victims of subjective law, that is, of "rule by men" rather than of "rule by law." Anything less than a stringent, objective law to protect the freedom of speech turns advertising into a pawn [...] Anything less than the stringent conditions of common law fraud establishes the principle that censorship is legal (Kirkpatrick, 2007: 78).

Besides, even if we consider Homeopathy Inc. liable, what would be the proportional punishment for them? Most contemporary liberal theories of punishment focus on making the victim whole again. But as we already established, in this case there was no victim of fraud, thus the crime has never occurred. Since the criminal has done no harm, the just and proportional restitution would be zero (or, perhaps, zero times two, which, of course, remains zero (Mortellaro, 2009).

RESPONSIBILITY OF THE MEDIA AND FACT-CHECKING

Nevertheless, deceptive PR-practices theoretically can lead to theft: one could argue that if fraudulent messages intentionally influence editorial judgement, and this leads people to spending money on false goods, legal fraud has occurred. Consumers are deceived by media claiming to offer unbiased opinions, when in reality those media simply repeated marketing points suggested by PR practitioners. In turn, some viewers may have bought poor-quality products. If this is what happened, the deception does amount to theft.

If it is so, then perhaps part of the guilt could be on the Pharma Newspaper. They were used as means to disseminate deceptive messages, but also they were aware of the content what they were distributing. Journalists ethical code require them to check facts and make sure that they are responsible with their sources. Their primary obligation is to give their audience objective information and to make sure that there are unbiased in the way they treat the information.

Consider the following example in which in which fraudulent advertiser employs an innocent third party as one of his means: Homeopathy Inc. prints their deceptive message in a booklet and mails this booklet to Karen via a mailman. The mailman does not know that the envelope he is delivering contains a fraudulent message. Karen receives the envelope, sees the message that advertises pills, purchases them and gets defrauded. Who should be held responsible: —Homeopathy Inc. or the mailman?— The obvious answer seems to be Homeopathy Inc. and although the mailman is causally connected to the fraudulent activity, he did not know what he was delivering and he did not have the intent to defraud Karen. He was only a means for Homeopathy Inc., and it was Homeopathy Inc.'s action that lead to illegitimate ends, not the mailman's. The mailman simply delivered a letter. Homeopathy Inc., on the other hand, deliberately used the means —the message in the letter and the unaware mailman— to inflict harm upon Karen.

But the newspaper journalists and editors are very different from this innocent mailman in the example above. They do know the content of each message

they choose to accept and their responsibilities actually include message selection. They are indeed responsible for whatever they choose to disseminate, and therefore can not be completely excluded from bearing responsibility.

And although Pharma Newspaper is not a part of the crime itself (they did not extract money from Karen without her consent), it would be a stretch to suggest that Pharma Newspaper is not at all guilty. Rather, the media should be included in the list of those who played necessary roles in the fraudulent action, yet do not directly engage in fraud itself. So, the media in this case are aiding and abetting the fraudulent seller. We will assume that the media that cover news of the pharmaceutical industry may not be possibly unaware of the homeopathy controversy and thus they chose to disseminate the message either out of neglect, or ignorance or unprofessionalism. In either case they were aware of the content of the message. They were aware of what they were doing and of the responsibilities that they have to their readers. And also their participation was necessary for "the plan" of Homeopathy Inc. And of course they had an option to reject that press release.

Mortellaro (2009) would suggest that these two elements — being aware of the actions and being necessary for the actions taken— are the key criteria for allocating the responsibility. Indeed, in the case of the mailman who delivers a letter with a booklet, the first criterion takes the responsibility from the mailman and places it on the Homeopathy Inc. In the case of the press release the second criterion implicates those who were not involved in the taking the money from the but still involved in the fraud.

But the fact that Pharma Newspaper is also responsible in no way lifts the blame from Homeopathy Inc. They also did more than just exercised their freedom of free speech, so are still responsible at least for aiding the crime by neglect. There is nothing wrong in actually accepting the fact that there can be some shared liability for a crime, shared jointly by multiple parties. But just as one person or one party can harm several other people, so multiple actors can each be fully and jointly liable for the damage. There is simply no reason to believe there is a finite "pie" of "harm" that has to be distributed piecemeal to multiple criminals who collaborate to harm someone (Kinsella, 2004: 104).

However, the devil is in the details again. There are more questions to ask before we hold Pharma Newspaper responsible: did they know that Homeopathy Inc.'s claims were false or did they merely neglected their duty to check the statements made in the press release? Is there any connection or affiliation between Homeopathy Inc. and Pharma Newspaper? If they are branches of the same corporation, the circumstances are obviously different —both Homeopathy Inc. and Pharma Newspaper could be considered guilty of conspiracy. But again, not necessarily— a lot would depend on whether their relationship is overt or not. If it is widely known that Homeopathy Inc.'s business is affiliated with Pharma Newspaper, calling their action a conspiracy would be again a stretch.

If Pharma Newspaper can not be held responsible for defrauding Karen by selling her sugar balls instead of medicine (and the newspaper did not sell anything after all), then perhaps Pharma Newspaper is guilty of something else:

> The main problem with blaming the media is figuring out whether disseminating deceptive messages involves theft. If media sell false products to their viewers, they are guilty of theft and must pay restitution. The trouble, however, lies in defining what their product is, and thus what would constitute a fraudulent sale. It's usually unclear exactly what services media provide and what kind of value their viewers expect to receive, and this makes unpacking potential deception more difficult (McCaffrey, 2016; Rothbard, 2001).

Still, one could ague that Karen purchased the newspaper expecting to find true information in it, but in fact there were false statements. Then the paper can be accused in acquiring property title in Karen's money without her consent.

A proper analysis of this situation should include the questions of whether the paper has some explicit obligations towards the reader to publish only the information verified by the editorial stuff; whether there is a long-lasting tradition of relying on the paper's opinion. However, if there is no such obligation, and the paper makes it clear that the editorial opinions are their own —in this case Pharma Newspaper's has no contractual obligations towards Karen to tell her the truth—. Karen should trust her own judgement and not to rely blindly on suggestions of the media.

Suppose, however, that Pharma Newspaper enjoys this reputation of being independent and objective in its coverage. If the paper *promises* to tell the truth or boasts that it always checks the facts to adhere to the highest standards of journalism, then perhaps it did enter some contractual obligations. In this case Pharma Newspaper is indeed guilty of disseminating false statements about Homeopathy Inc.'s business. But it is not responsible for the damages Karen suffered from Homeopathy Inc.'s mischievous actions. Newspaper's responsibility probably extends only to the point of not fulfilling their promise —to tell the truth—. That means that in order to make the victim (Karen) whole again, he owes her the amount of money equivalent to the price she paid for the newspaper (perhaps twice the price to compensate for the damages).

CONCLUSION

This paper attempted to examine the question of locating responsibility for damages caused by the dissemination of fraudulent PR messages by the media. The analysis seems to demonstrate that it is hardly possible to come up with a definite answer "from the armchair". In questions of communication, when freedom of contract and property rights come into conflict with the freedom of speech, details and concrete circumstances are vital for understanding the matter. And the number of details that require examination may be almost infinite, and abstract reasoning will never reach the level of complexity of real world scenarios in richness of relevant facts.

However, the guiding principle perhaps is the existence of expectations predetermined by practice and implied rules, formulated in precedents. What is expected from PR-practitioners given the implied rules? What are the implied

responsibilities of the media? What the obligations they formally or informally accepted towards each other and the public? Basically, allocating responsibility requires examining existing common practices that constitute media relations at a given time and place.

One thing seems to be clear —deceptive messages themselves are not a crime—. In each case there must be a concrete victim who claims for the restitution of justice and turns to courts or judges for adjudicating the dispute. These judges or juries will need to resolve the case, by turning to both abstract principles on the one hand, and some precedents and general expectations on the other. To understand where the border is drawn these judges or juries will need to refer to their sense of justice and reason in understanding the nuances of the situation in question.

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