

Asterisk Revisited: Debating a Right of Reply on Search Results

I. INTRODUCTION

WHAT DO WE WORRY ABOUT WHEN WE WORRY ABOUT GOOGLE? Will the company combine the worst aspects of Microsoft, ChoicePoint, WalMart, Experian, and News Corporation?¹ Or will its “Don’t Be Evil” slogan and unique ownership structure assure some accountability to the public?²

Some of the most creative minds in cyberlaw, science fiction, and cultural studies have addressed those questions.³ Some have envisioned Google-driven dystopias.⁴ In Cory Doctorow’s story *Scroogled*, the Department of Homeland Security out-sources so much surveillance to Google that the company becomes a new J. Edgar

* Associate Professor of Law, Seton Hall Law School. I wish to thank James Grimmelman for his comments on a draft of this Essay. I certainly have not been able to respond to all of his comments, but thank him for the kind of open-minded conversation that right-of-reply at its best facilitates.

1. Google has a uniquely dominant place in the universe of search engines and for that reason will be the primary focus of this Essay. It is aiming to combine social networking, software, database, media, and retail capabilities in an unprecedented way. At the time of this writing (November 2007), its market capitalization made it the fifth largest company in the United States, and few companies are unafraid of its potential to restructure their markets. Steve Lohr, *The Risks to Google’s Rise*, N.Y. TIMES, Oct. 13, 2007, at C1. (“In September, Google’s share of Web searches in the United States was 67 percent, up from 54 percent a year earlier, reports Compete.com, a Web analytics firm. The Yahoo share was 19 percent, compared with 29 percent a year earlier. And Microsoft had 9 percent, up slightly from a year ago.”); see also Complaint at ¶ 30, *In re Google, Inc. and DoubleClick, Inc.*, Federal Trade Commission (Apr. 20, 2007) (listing the range of services Google provides), available at http://www.epic.org/privacy/ftc/google/epic_complaint.pdf; Steve Lohr, *Just Googling It Is Striking Fear into Companies*, N.Y. TIMES, Nov. 6, 2005, § 1, at 1 (focusing on WalMart’s worries).

2. Google Investor Relations, Google Code of Conduct, <http://investor.google.com/conduct.html> (last visited Sept. 27, 2007).

3. See *Who’s afraid of Google?*, ECONOMIST, Aug. 30, 2007, at 9 (outlining the fears different economic and political groups have over Google’s growth and increasing collection of private information).

4. Cory Doctorow, *Scroogled*, RADAR, Sept. 12, 2007, http://www.radaronline.com/from-the-magazine/2007/09/google_fiction_evil_dangerous_surveillance_control_1.php; see also WALTER KIRN, *THE UNBINDING* (2007). Though some may dismiss such sources as middlebrow or speculative, legal theorist James Boyle counters with the observation that, “Sadly for academics, the best social theorists of the information age are still science fiction writers and, in particular cyberpunks—the originators of the phrase ‘cyberspace’ and the premier fantasists of the Net. If one wants to understand the information age, this is a good place to start.” James Boyle, *A Politics of Intellectual Property: Environmentalism for the Net?*, 47 DUKE L.J. 87, 88 (1997). The Stanford Center for Internet and Society and the journal of Law & Contemporary Problems feted the tenth anniversary of this essay with a conference and journal edition featuring leading intellectual property scholars and commons theorists. See *Cultural Environmentalism @ 10*, LAW & CONTEMP. PROBS., Spring 2007, at 1; see also James Boyle, *Cultural Environmentalism and Beyond*, LAW & CONTEMP. PROBS., Spring 2007, at 5.

Hoover, wielding extraordinary power over its ostensible political masters.⁵ Walter Kirn imagines an omniscient data source that becomes a trusted oracle of advice for the masses.⁶ The creators of the short film EPIC 2014 imagine a Google capable of bringing the print media to heel in less than a decade, as consumers demand an “Evolving Personalized Information Construct” (EPIC) that rapidly displaces the news as we know it.⁷

My work on the negative externalities generated by dominant search engines⁸ has focused on a more mundane, but immediate problem: the possibility that high-ranking results about a certain searched term are harmful from either a societal perspective,⁹ or from the perspective of an entity with a stake in the search term.¹⁰ For example, if all the results about a (hypothetical) person named Xavier Hollidayly are negative opinions or mistaken accusations, should he get any chance to reply to them on the search page on which they appear—or at least to indicate with an asterisk a link that leads to a page that will do so? Or if the owner of the (again fictitious) trademark Flanakapan Popsicles finds that all the results in response to that term lead to competitors’ websites, should she be able to indicate on that page that she owns the mark FLANAKAPAN?¹¹

In a 2006 article, I proposed that individuals like Hollidayly or mark owners like Flanakapan¹² should, in some circumstances, have the right to place an asterisk linking to a reply on the first page of objectionable search results generated by their

5. Doctorow, *supra* note 4.

6. KIRN, *supra* note 4, at 4.

7. EPIC 2014 (Robin Sloan & Matt Thompson 2004), available at <http://robinloan.com/epic/>. See generally Matt Thompson, *EPIC 2014: The Future is Now*, POYNTERONLINE, July 21, 2005, http://www.poynter.org/content/content_view.asp?id=85631.

8. We provisionally can consider a dominant search engine one with over 30 percent market share. Google clearly satisfies this criteria in the United States and much of Europe, but would not satisfy this criteria in South Korea, where Naver dominates. See Choe Sang-Hun, *South Koreans Connect through Search Engine*, N.Y. TIMES, July 5, 2007, at C9.

9. Oren Bracha & Frank Pasquale, *Federal Search Commission? Access, Fairness and Accountability in the Law of Search*, 93 CORNELL L. REV. (forthcoming 2007) (manuscript at 24–30, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1002453). For a good typology of the types of bias that search engines may introduce, see Jennifer A. Chandler, *A Right To Reach an Audience: An Approach to Intermediary Bias on the Internet*, 35 HOFSTRA L. REV. 1095, 1109 (2007) (“[F]orms of bias introduced by search engines[] includ[e] (1) the removal of websites from the search engine index, (2) the reduction of website ranking, (3) the refusal to accept keyword-triggered advertisements from certain websites, and (4) the practice of providing preferences in indexing or ranking for paying websites.”).

10. Frank Pasquale, *Rankings, Reductionism, and Responsibility*, 54 CLEV. ST. L. REV. 115, 135–36 (2006).

11. I generated both of these unlikely names by googling them and assuring that there were no results for them. One can easily imagine a day when a court accepts as evidence of a mark’s fancifulness its creator’s assurance that it was “unGoogleable”—i.e., no other evidence of the mark appears on the web. See, e.g., Ann Harrison, *‘UnGoogleables’ Hide from Search*, WIRED, Oct. 3, 2005, <http://www.wired.com/politics/security/news/2005/10/68998> (describing the phenomena of being unGoogleable). Even the decision to use google as a verb is a way of undermining Google, Inc.’s power, given its effort to prevent “Google” from becoming generic. Deven R. Desai & Sandra L. Rierson, *Confronting the Genericism Conundrum*, 28 CARDOZO L. REV. 1789 (2007); Ben Moshinsky, *Google Ready to Fight Genericization*, MANAGING INTELL. PROP., Dec. 2005, at 14.

12. See *supra* note 11 and accompanying text.

name or mark.¹³ Critics have claimed that the proposal would either be unworkable or a troubling instance of “forced speech”¹⁴ or “censored search.”¹⁵ In this Essay, I respond to their criticisms and try to refine the proposal.¹⁶ Our conversation should prove illuminating on issues of search engine accountability, although our differences ultimately may not be amenable to reason.¹⁷

II. CENSORED SEARCH?

James Grimmelmann has written one of the most comprehensive commentaries on search engine law.¹⁸ In a recent essay addressing the AutoAdmit controversy, Grimmelmann addresses a variety of proposals designed to ameliorate search engines’ role in increasing the salience of damaging and inaccurate information online.¹⁹ He begins with my asterisk proposal:

First, and least intrusively, Frank Pasquale has proposed a kind of right of reply at the level of search results. If a high-ranking result in a search on Bob’s name is [a] calumny, Pasquale would give Bob the right to make the search engine place an asterisk on its results page. The asterisk would hyperlink to a Web page where Bob sets the story straight.²⁰

Grimmelmann finds the proposal deficient for several reasons, each of which is worth responding to in some detail.

Grimmelmann first contends that the asterisk requirement would “hinder users’ ability to choose among diverse search engines,” because it “might inhibit the development of better, more helpful responses—such as personalized search based on the recommendations of one’s friends, or semantic analyses that can automatically put Web pages in a broader context.”²¹ Grimmelmann’s perceptive earlier article,

13. Pasquale, *supra* note 10, at 135–36.

14. For a compelling argument against this being considered unconstitutionally compelled speech, see Jennifer Chandler’s discussion of *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 27 (2006). Chandler, *supra* note 9, at 1129; see *infra* note 60 and accompanying text.

15. See, e.g., James Grimmelmann, *Don’t Censor Search*, 117 YALE L.J. POCKET PART 48, 51 (2007); Technology & Marketing Law Blog, http://blog.ericgoldman.org/archives/2007/08/pasquale_bracha.htm (Aug. 8, 2007, 10:11 EST).

16. See *infra* Parts II, III.

17. See, e.g., David G. Post, *What Larry Doesn’t Get: Code, Law, and Liberty in Cyberspace*, 52 STAN. L. REV. 1439, 1442–48 (2000) (suggesting that libertarians will have a difficult time finding common ground with Lawrence Lessig’s regulatory proposals due to a fundamental divergence in values). Many current debates in cyberlaw are not amenable to empirical research and instead hinge on rival visions of the ideal development of online space. Moreover, even finding agreement on objective facts may be difficult—there is an inextricable intertwining of description and judgment (or, as lawyers often experience, fact and law) in the characterization of rights and responsibilities online.

18. See James Grimmelmann, *The Structure of Search Engine Law*, 93 IOWA L. REV. (forthcoming 2007).

19. Grimmelmann, *supra* note 15, at 49.

20. *Id.*

21. *Id.* at 50.

Regulation by Software, commends respect for his opinions about the interrelationship between regulation and the development of search technology.²² However, is there real danger here that a regulatory first step toward accountability would impede technological development? Might the relationship actually be the reverse—that a limited right-of-reply mandate actually could lead to more investment in resources that would head off future mandates? For example, the Uniform Dispute Resolution Policy (UDRP) was developed in response to the possibility that certain domain name disputes could lead to unduly extensive civil litigation.²³ Informal forums can catalyze self-regulation by creating incentives for search engines to defuse the concerns that could lead to more heavy-handed responses.²⁴ A blanket immunity for search engines would remove the key incentive they now have for better behavior.²⁵ They would no longer “bargain in the shadow of” more comprehensive responses.²⁶

Admittedly, there is long-standing literature critiquing “command and control” style regulation that forced businesses to meet certain ends by adapting certain technology.²⁷ However, results-oriented regulation in the environmental context has been credited with creating incentives for corporations to develop better methods of controlling pollution.²⁸ For example, acid rain declined markedly when companies were forced to start paying for pollution permits for sulphur dioxide.²⁹

22. See James Grimmelmann, Note, *Regulation by Software*, 114 YALE L.J. 1719 (2005).

23. Orion Armon, *Is This as Good as It Gets? An Appraisal of ICANN's Uniform Domain Name Dispute Resolution Policy (UDRP) Three Years after Implementation*, 22 REV. LITIG. 99, 104–09 (2003).

24. For a parallel take on network neutrality regulation, see Edward W. Felten, *Nuts and Bolts of Network Neutrality* (Center for Info. Tech. Policy, Princeton University, July 6, 2006), available at <http://itpolicy.princeton.edu/pub/neutrality.pdf> (“The present situation, with the network neutrality issue on the table in Washington but no rules yet adopted, is in many ways ideal. ISPs, knowing that discriminating now would make regulation seem more necessary, are on their best behavior; and with no rules yet adopted we don't have to face the difficult issues of line-drawing and enforcement. Enacting strong regulation now would risk side-effects, and passing toothless regulation now would remove the threat of regulation. If it is possible to maintain the threat of regulation while leaving the issue unresolved, time will teach us more about what regulation, if any, is needed.”). The kinds of blanket First Amendment immunities discussed later in this piece could upset this equilibrium.

25. See Craig W. Walker, *Application of the DMCA Safe Harbor Provisions to Search Engines*, 9 VA. J.L. & TECH. 1, 22 (2004).

26. See generally Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 997 (1979).

27. E.g., THINKING ECOLOGICALLY: THE NEXT GENERATION OF ENVIRONMENTAL POLICY 4 (Marian R. Chertow & Daniel C. Esty eds., 1997); see also Allen Blackman & Winston Harrington, *The Use of Economic Incentives in Developing Countries: Lessons from International Experience with Industrial Air Pollution*, 9 J. ENV'T & DEV. 5, 11–13 (2000).

28. Sam Napolitano et al., *The U.S. Acid Rain Program: Key Insights from the Design, Operation, and Assessment of a Cap-and-Trade Program*, ELEC. J., Aug./Sept. 2007, at 57, available at http://www.epa.gov/AIRMARKET/resource/docs/US%20Acid%20Rain%20Program_Elec%20Journal%20Aug%202007.pdf.

29. *Id.* at 47–49.

The key here is to develop responsive, flexible regulation,³⁰ rather than rigid mandates that would actually crowd out or impede innovation.³¹

In the context of trademark- or privacy-undermining search results, what would such a regulation look like? The asterisk proposal might be configured as a back-stop that would only be implemented after a complainant exhausted administrative processes that permitted a search engine (or trusted third party) to investigate the matter.³² Consider the self-regulation success story of eBay. This “perfect store” has developed sophisticated methods of reputation management in order to manage disputes among its users.³³ Though no precise regulation forced eBay to better manage disputes, the company wisely decided to defuse the threat of being dragged into multiple litigations by developing internal methods of resolving disputes.³⁴

Of course, online marketplaces are immunized by statutory safe harbors in many cases, so we may have to look beyond cyberspace to find internal administrative procedures more clearly influenced by threats of regulatory or legal intervention.³⁵ In the healthcare context, private insurance companies make millions of decisions each year that are inflected by a threat of eventual litigation if their responses to customer concerns prove unsatisfactory.³⁶ By and large, judges are unwilling to intervene if they can be convinced that the private company tried its best to act in a fair and reasonable matter internally.³⁷ But it is difficult to imagine those types of internal processes being developed in the absence of any threat of judicial or administrative action.

Would the eventual imposition of an asterisk inevitably amount to an undue burden on a search engine? If there is one thing that cyberlaw scholarship has taught in the past few years, it is the importance of diversifying settings for dispute

30. IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION* 3–7 (1992); Napolitano et al., *supra* note 28, at 57–58.

31. Blackman & Harrington, *supra* note 27, at 12–13.

32. See *supra* note 13 and accompanying text.

33. ADAM COHEN, *THE PERFECT STORE: INSIDE eBay* 27 (2002); Lenden Webb, *Brainstorming Meets Online Dispute Resolution*, 15 AM. REV. INT’L ARB. 337, 339 (2004); Lenden Webb, *International BBB Ratings a la eBay: A Proposal for an Improved Online Better Business Bureau to Facilitate International Business Transactions*, 35 CAL. W. INT’L L.J. 127, 128 (2004); Mary M. Calkins, Comment, *My Reputation Always Had More Fun Than Me: The Failure of eBay’s Feedback Model to Effectively Prevent Online Auction Fraud*, 7 RICH. J.L. & TECH. 33, 36 (2001).

34. Calkins, *supra* note 33, at 36. Admittedly, section 230 of the Communications Decency Act provides an immunity from intermediary liability for sites like eBay. See Michael L. Rustad & Thomas H. Koenig, *Rebooting Cybertort Law*, 80 WASH. L. REV. 335 (2005) (criticizing the expansive reach of this safe harbor).

35. eBay has qualified for Digital Millennium Copyright Act safe harbors immunizing it from liability for the activities of sellers. See, e.g., *Hendrickson v. eBay Inc.*, 165 F. Supp. 2d 1082, 1093–96 (C.D. Cal. 2001).

36. See, e.g., Deborah A. Stone, *Beyond Moral Hazard: Insurance as Moral Opportunity*, 6 CONN. INS. L.J. 11 (1999) (describing a case study where medical insurance companies began covering a bone-marrow procedure specifically because of the growing fear of litigation over non-coverage).

37. *Strachan v. Union Oil Co.*, 768 F.2d 703, 704 (5th Cir. 1985) (citing *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 653 (1965)) (noting that courts may not intervene in employment cases until an employee has exhausted their rights under the company’s internal grievance procedures).

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resolution.³⁸ Both Michael Carroll and Mark Lemley & Anthony Reese have developed proposals for such fora in the contexts of fair use determinations and online file sharing (respectively).³⁹ Lemley also has proposed a uniform “safe harbor” for online intermediaries that would feature fast and efficient resolution of disputes.⁴⁰ But we need not turn to legal academics’ proposals: the UDRP has handled thousands of disputes over domain names since its inception, helping to divert a flood of trademark cases away from courts and into more efficient (if less due process-oriented) arbitral settings.⁴¹

Admittedly, some of the disagreement between Grimmelmann and I may come down to different models of the innovation process. Perhaps Grimmelmann believes that money spent trying to comply with a government-imposed asterisk requirement would be better spent on such innovations as “personalized search” or “semantic analyses that can automatically put web pages in a broader context.”⁴² Unfortunately, the current search market does not provide much incentive for pushing research in that direction until search engines themselves start to feel the adverse consequences of results that are now primarily affecting isolated examples or entities.

For example, imagine a job applicant involved in a nasty breakup finds that a web page from DontDateHimGirl.com is the top result attached to his name.⁴³ Potential employers who google him to find out what has been written about him on the web are going to see that site at the top of the list.⁴⁴ Now imagine one search engine decides to respond to complaints from applicants like him (by granting an asterisk linking his reply and clarification), while another one refuses to respond. The applicant may well decide to use the responsive search engine out of loyalty, but it is by no means clear that others who want to investigate the applicant will do so. In fact, given the current media environment, it would not be surprising if the most salacious, dirt-digging engine managed to attain the highest market share. As Grimmelmann himself noted in his *Structure of Search Engine Law*, a search engine

38. E.g., Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement without Restricting Innovation*, 56 STAN. L. REV. 1345, 1351–52 (2004).

39. See generally Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087 (2007); Mark A. Lemley & R. Anthony Reese, *A Quick and Inexpensive System for Resolving Peer-to-Peer Copyright Disputes*, 23 CARDOZO ARTS & ENT. L.J. 1 (2005).

40. Mark A. Lemley, *Rationalizing Internet Safe Harbors 2* (Stanford Pub. Law Working Paper, No. 979836, 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=979836.

41. INTERNET CORP. FOR ASSIGNED NAMES AND NUMBERS, STATISTICAL SUMMARY OF PROCEEDINGS UNDER UNIFORM DOMAIN NAME DISPUTE RESOLUTION POLICY (May 10, 2004), <http://www.icann.org/udrp/proceedings-stat.htm>.

42. Grimmelmann, *supra* note 15, at 50.

43. See Grimmelmann, *supra* note 18, at 32 n.164.

44. Although similar conduct is common in everyday hiring practices in the United States, see, e.g., Robert Sprague, *Googling Job Applicants: Incorporating Personal Information into Hiring Decisions*, 23 LAB. LAW. 19 (2007), Finnish law actually bars employers from conducting internet searches on employees without their consent. Act on the Protection of Privacy in Working Life, 759/2004 (2004) (Fin.).

is an agent for many principals.⁴⁵ If the profits made from prying principals are greater than those garnered from the loyalty of protected principals, where is the incentive for the search engines to be concerned with desires of the former group?

The same dynamics can occur in the context of trademark law—leading many brand owners to fear that Google will amount to a new WalMart.⁴⁶ If the organic search results in response to a trademark feature all the trademark owner's competitors, the mark owner may well try to pay Google for a high ranking in its paid results. But there is no guarantee that it will be able to purchase salient advertising, and even if it does, the potential for consumer confusion is high.⁴⁷

Finally, the right of reply might be required only of search engines once they have attained a certain level of market share and profitability.⁴⁸ To the extent the requirements are an added burden only on leaders in the search field, they may leave these leaders with less resources to buy up their competitors. A consolidation process has already been lamented in the alternative search engine world, where a leading ranker of small search engines observes that Google is rapidly buying up potential competitors.⁴⁹ The largest search engines have an impact on indexed entities much larger than smaller, alternative ones.⁵⁰ Therefore, they should be the first type of search engine burdened with any right of reply that may be developed.

45. Grimmelmann, *supra* note 18, at 4.

46. E.g., David Lazarus, *Fast Lane to Online Dominance*, S.F. CHRON., May 11, 2007, at D1; Frederick C. Moss, *A 2006 Law Grad's Speech to the Graduating Class of 2050*, 15 WIDENER L.J. 243, 245 (2006) (implying that Google and Wal-Mart will be the dominant financial institutions in the world by 2050). *But see* Will History Repeat Itself with Google Playing the Part of Lotus?, <http://techdirt.com/articles/20070924/000427.shtml> (Nov. 9, 2007, 4:21 EST).

47. DEBORAH FALLOWS, PEW INTERNET & AM. LIFE PROJECT, SEARCH ENGINE USERS ii (2005), available at http://www.pewinternet.org/pdfs/PIP_Searchengine_users.pdf (stating that 62 percent of internet searchers are unaware of the difference between paid and unpaid results); Greg Lastowka, *Google's Law*, 73 BROOK. L. REV. (forthcoming 2008).

48. See generally Warren S. Grimes, *Antitrust and the Systemic Bias against Small Business: Kodak, Strategic Conduct, and Leverage Theory*, 52 CASE W. RES. L. REV. 231, 233 (2001) ("Modern markets and antitrust policy combine to create a systemic bias against small business. The bias is created by the convergence of three factors: (1) the presence of large power firms in most markets; (2) the exercise of countervailing power in commercial transactions between power firms; and (3) the power firms' strategic exercise of power against non-power players, raising their costs or forcing them to accept unfavorable, discriminatory terms.").

49. The Dream Team of Search Part III, <http://altsearchengines.com/2007/09/07/the-dream-team-of-search-part-iii> (Sept. 7, 2007, 10:33 EST). The author claims:

[Alternative search engines must] [c]ollaborate or [p]erish. If the [alternative search engines] don't begin their collaboration now, the Google cycle will just continue unchecked.

[The Google cycle:

1. Look at the Top 100 Alternative Search Engines. Pick your favorite one.
2. Imitate their approach, hire their talent, or just buy them outright.
3. (I need to) Replace the now-missing Alt with a lesser quality one.
4. Repeat steps 1–3.

Note that as step 3 recurs, the alternative search engine rankings system becomes less valuable, leading less consumers to seek alternatives to dominant search engines.

50. See Katie Hafner, *We're Google. So Sue Us.* N.Y. TIMES, Oct. 23, 2006, at C1 (discussing the devastating effect a massive search engine like Google can have on a company); Press Release, Nielsen Online, Nielsen Online Announces September U.S. Search Share Rankings (Oct. 19, 2007), available at <http://www.netratings.com>.

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Even when limited to dominant search engines, the exact contours of a right of reply require a good deal of clarification and specification. Grimmelmann raises two challenges to the “personal name” right:

*Pasquale’s annotation proposal creates an opportunity for abuse—in this case, to muscle one’s way onto search results pages. Would George W. Bush be able to asterisk every progressive blog? The search equivalent to the commercial spam industry is a place of mind-boggling tenacity and creativity. There are people who would consider changing their name to “Cheap Mortgage” or “Discount Viagra” if it would get them on the first page of search results for a popular enough phrase.*⁵¹

As for the Bush challenge, perhaps another limitation on the name right would track the “public/private” figure distinction in defamation law, reserving protection for the latter.⁵² The name change issue could lead the United States to follow the example of other nations that have regulated naming.⁵³ For example, “In Germany, the government still bans invented names and names that don’t clearly designate a child’s sex. Sweden and Denmark forbid names that officials think might subject a child to ridicule. Swedish authorities have rejected such names as Veranda, Ikea and Metallica.”⁵⁴ Such rules may well be adopted in an attenuated form in the United States to prevent the opportunism that Grimmelmann fears.

III. SEARCH AND SPEECH: FROM CONSUMER PROTECTION TO FAIRNESS DOCTRINE

Admittedly, the greatest threat to regulation of search comes not from the considered policy arguments of scholars like Grimmelmann, but from the First Amendment concerns his essay’s title adumbrates.⁵⁵ Is a regulatory effort to shape search results a form of censorship—or at least the type of “forced speech” that the U.S. Supreme Court has recently rejected in cases like *Hurley v. Irish-American GLB of*

com/pr/pr_071019.pdf (chart showing that over 70 percent of total online searches are done on one of the two major search engines (Google or Yahoo)).

51. Grimmelmann, *supra* note 15, at 51.

52. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (adopting a rule that “prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not”); see also *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974) (further defining “public figure”).

53. See generally Thomas Fuller, *In Thai Cultural Battle, Name-Calling is Encouraged*, N.Y. TIMES, Aug. 29, 2007, at A4 (examining the trend in Thailand for children to be given nicknames such as “Mafia” or “Seven” and the Ministry of Culture’s published booklet of proposed nicknames); *Ugandans Grab ‘Pig-for-Name’ Deal*, ALJAZEERA.NET, Dec. 11, 2006, <http://english.aljazeera.net/NR/exeres/2B251C10-2561-4D5F-97BF-99F3EEB7D732.htm> (discussing Ugandan government officials outrage at a Danish artist’s offering of a pig to anyone who took on his last name).

54. Alexandra Alter, *The Baby-Name Business*, WALL ST. J., June 22, 2007, at W1.

55. See generally Grimmelmann, *supra* note 15.

*Boston*⁵⁶ and *Boy Scouts of America v. Dale*?⁵⁷ Perhaps, but the Court has also “corrected course” in its 9-0 decision in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*,⁵⁸ which allows the government to condition certain benefits on government beneficiaries’ compliance with governmental standards.⁵⁹ Jennifer Chandler describes how the FAIR precedent could cabin any search engine’s claims that the First Amendment prohibits government regulation of its results:

*A prohibition against blocking access to websites or refusing to include them in a search engine index would prima facie be an interference with the selection intermediary’s selection freedom. However, . . . [FAIR] suggest[s] that such a rule would not raise the concerns typically associated with compelled speech. This is because such a rule is content neutral, it would not curtail the selection intermediary’s ability to speak, the selection intermediary would not be understood to endorse the website (or it could post disclaimers) and the selection intermediary would not be forced to modify its own speech to respond or to avoid triggering the rule.*⁶⁰

Perhaps the bevy of immunities Congress has granted to search engines via the Digital Millennium Copyright Act⁶¹ and Communications Decency Act⁶² should be conditioned on something like the asterisk proposal⁶³—or at least their adoption of some self-regulating internal processes designed to give those hurt by search results a fair hearing.⁶⁴

56. 515 U.S. 557, 559 (1995) (holding that requiring “private citizens who organize a parade to include among marchers a group imparting a message that the organizers do not wish to convey” is a violation of First Amendment free speech rights).

57. 530 U.S. 640, 644 (2000) (reversing a New Jersey Supreme Court ruling that required the Boy Scouts to admit a gay assistant scoutmaster because it violated the Boy Scouts’ right of expressive association).

58. 547 U.S. 47 (2006).

59. *Id.* at 69–70.

60. Chandler, *supra* note 9, at 1129.

61. Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 17 U.S.C.). See generally Rustad & Koenig, *supra* note 34, at 335.

62. Pub. L. No. 104-104, 110 Stat. 133 (1996) (codified as amended in scattered sections of 47 U.S.C.). See generally Rustad & Koenig, *supra* note 34.

63. This proposal would apply what Orin Kerr proposes for indexed sites to the search engines that bring them to attention:

Orin Kerr has suggested pressuring Web sites to make harassment less searchable. His proposal would revoke a Web site’s section 230 immunity with respect to anything it allows search engines to index. (There are several common protocols used by Web sites to request that search engines not index particular pages. The legal effect of these protocols is unclear, but the major search engines all respect these opt-out requests.) A site operator would have to choose between taking full responsibility for content on her site or keeping it out of search engines.

Grimmelmann, *supra* note 15, at 49; see also Posting of Orin Kerr to The Volokh Conspiracy, <http://volokh.com/posts/1176705254.shtml> (Apr. 16, 2007, 17:11 EST).

64. See generally *Goss v. Lopez*, 419 U.S. 565, 579 (1975) (noting that students who have suffered a loss or interference with a protected property interest “must be given *some* kind of notice and *some* kind of hearing”); Henry J. Friendly, “*Some Kind of Hearing*,” 123 U. PA. L. REV. 1267 (1975).

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In *Federal Search Commission?*, Oren Bracha and I respond to early court cases holding that search results cannot be the subject of litigation because such accountability would chill speech.⁶⁵ Like Grimmelmann, some other commentators have suggested that regulation may amount to censorship.⁶⁶ In its most extreme form, the argument is that search engines provide information just like a newspaper does, and deserve roughly the same amount of First Amendment solicitude.⁶⁷ More qualified critiques push the idea that search engines are like broadcasters or commercial speakers, and that regulation therefore must respect the frameworks laid out in *Turner*⁶⁸ and *Central Hudson*⁶⁹ in order to pass muster.⁷⁰

Any of these conclusions about the degree of protection due to search leave some room for regulation to structure the future of search. In the sections below, I consider how broadcasters are required to clearly separate paid from editorial content.⁷¹ I next consider how the continued constitutionality of the “fairness doctrine” for broadcasters could be applied to the search industry.⁷² I conclude with some reflections on why Google should be hesitant to argue for sweeping First Amendment circumvention of regulation of search.⁷³ Such an approach could undermine the constitutional foundations of the very regulatory regime it intends to use to prevent carriers from fatally undermining its business model.⁷⁴

65. Bracha & Pasquale, *supra* note 9, at 40–52.

66. E.g., Jack M. Balkin, *Law and Liberty in Virtual Worlds*, 49 N.Y.L. SCH. L. REV. 63, 68 (2004).

67. See *id.* at 68–69.

68. *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189–90 (1997) (finding that any government regulation of broadcasters would be subject to intermediate scrutiny and that only regulation that is content-neutral and does not substantially burden “more speech than necessary” will be held constitutional).

69. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 563–64 (1980) (holding that commercial speech is protected under the First Amendment, but to a lesser degree than other constitutional speech, but government regulation of commercial speech (other than misleading or illegal speech) is circumscribed by a lesser standard of scrutiny). Andrew Sinclair applies *Central Hudson* to search engines in his proposal for the clearer separation of paid and editorial content. Andrew Sinclair, Note, *Regulation of Paid Listings in Internet Search Engines: A Proposal for FTC Action*, 10 B.U. J. SCI. & TECH. L. 353 (2004).

70. See, e.g., Steve Mitra, Note, *The Death of Media Regulation in the Age of the Internet*, 4 N.Y.U. J. LEGIS. & PUB. POL’Y 415, 437 (2000) (“Specifically, the regulations at stake in the *Red Lion* and *Turner I* and *II* decisions could be used to ensure diversification of ownership and a diversity of voices on the Internet. Under the fairness doctrine, regulatory agencies could force Web directories and Internet search engines to list Web sites using objective criteria, thereby ensuring that users are directed to content sites based not on commercial relationships between sites and search engines, but on their utility to the user. A combination of the fairness doctrine and must-carry regulations could be used to compel embedding links (since linking is clearly a form of access on the Internet) to content sites with opposing or different points of view if controversial or political subjects are addressed at news content sites or if public figures are attacked. One can also imagine regulations compelling commercial sites to fund an independent news outlet, an Internet equivalent of today’s Public Broadcasting System, in the public interest. However, because the *Red Lion* and the *Turner I* and *II* decisions interpreting the Constitution leave little room for the FCC or Congress to act either by promulgating content- or access-based regulations, none of these regulatory initiatives are likely to succeed.” (citation omitted)).

71. See *infra* Parts III.A–B. See generally Ellen P. Goodman, *Stealth Marketing and Editorial Integrity*, 85 TEX. L. REV. 83 (2006) (examining the harm of undisclosed sponsorship in media).

72. See *infra* Part III.A.

73. See *infra* Part III.B.

74. See Christopher S. Yoo, *Architectural Censorship and the FCC*, 78 S. CAL. L. REV. 669, 731 (2005).

A. *First Amendment Analogies*

Dominant Search Engine's (DSE) may challenge annotation requirements on First Amendment grounds. Google has been fighting a number of lawsuits challenging its placement of websites in search results. It claims to have a First Amendment right to exclude sites from its database and to rank web entities as it pleases.⁷⁵ Yet it is ultimately pursuing contradictory self-characterizations. For the purposes of copyright and defamation suits, the company claims "We're not a media company—we're just a conduit. Don't come to us if we highly rank a site you find objectionable—we're just the infrastructure. Go to the source."⁷⁶ But when called to account for misleading rankings, it claims to be just another content provider, and hides behind the shield of *Miami Herald Publishing Co. v. Tornillo* (which declared a statutory "right of reply" mandate in newspapers unconstitutional).⁷⁷

For example, in *Langdon v. Google*,⁷⁸ the complainant claimed that Google had a duty to carry his advertisements, which charged U.S. bureaucrats with corruption and China with committing atrocities.⁷⁹ The district court dismissed the claim⁸⁰ along the lines that cyberlaw scholar Eric Goldman predicted it would: Google's advertising decisions were tantamount to those made by a newspaper, and therefore regulation of them would be as suspect as the "right of reply" at issue (and rejected) in *Miami Herald v. Tornillo*.⁸¹ However, the *Miami Herald* was merely one of hundreds of U.S. newspapers at the time of that decision.⁸² Google is far more dominant in the world of search,⁸³ and its importance is only growing at the time

75. See Dahlia Lithwick, *Google-Opoly: The Game No One but Google Can Play*, SLATE, Jan. 29, 2003, <http://slate.com/toolbar.aspx?action=print&id=2077875>.

76. See Richard Siklos, *Struggle over Dominance and Definition*, N.Y. TIMES, Nov. 12, 2006, § 3, at 35; see also Pasquale, *supra* note 10, at 120–21 (describing Google's refusal to de-list or otherwise respond to complaints about search results).

77. 418 U.S. 241, 256–58 (D. Del. 1974).

78. 474 F. Supp. 2d 622 (2007).

79. *Id.* at 626. See generally Chris Langdon, *Communist China Has Murdered Millions: Boycott China*, <http://www.chinainsevil.com> (last visited Sept. 13, 2007). Congressional concern over search engines' complicity in the Chinese government's campaign against dissent was expressed in 2006 with the proposal of the Global Online Freedom Act. See Posting of Frank Pasquale to Concurring Opinions, http://www.concurringopinions.com/archives/2007/11/shaming_search.html (Nov. 6, 2007, 16:57 EST).

80. *Langdon*, 474 F. Supp. 2d at 634–35.

81. Technology and Marketing Law Blog, http://blog.ericgoldman.org/archives/2006/06/must_carry_laws.htm (June 8, 2006, 12:46 EST) ("Recall that from *Miami Herald v. Tornillo*, a statutory must-carry rule applied to newspapers violated the constitutional freedom of the press. Given the very specific justifications for tighter regulation of broadcasting, and that those bases have been held inapplicable to the Internet (see, e.g., *Reno v. ACLU*), I think (for these purposes) that search engines are more appropriately analogized to newspapers instead of broadcasters. Accordingly, I can't see how any judge could constitutionally order 'must carry' relief here.").

82. JOURNALISM.ORG, *THE STATE OF THE NEWS MEDIA 2004: AN ANNUAL REPORT ON AMERICAN JOURNALISM* (2004), available at http://www.stateofthenewsmedia.org/narrative_newspapers_intro.asp?cat=1&media=2 (noting that in 2002 there were 1,457 U.S. daily newspapers).

83. See Posting of Greg Jarboe to Search Engine Watch, <http://searchenginewatch.com/showPage.html?page=3625072> (Feb. 22, 2007, 8:48 EST) (noting that worldwide, Google has "3 times the audience of nearest rival, Yahoo Search"); see also Chandler, *supra* note 9, at 1116 (citing *The un-Google*, ECONOMIST, June

of this writing.⁸⁴ Given the weakness of Langdon's case generally, the *Langdon* court may well have been using a constitutional sledgehammer to knock out a vexatious fly.⁸⁵ Cases like *Langdon* do not merely end frivolous business tort claims, but also set dangerous precedents that could serve as roadblocks to substantive regulation of search.

Search engines' self-characterization as merely the "pipes" or "infrastructure" arranging information casts doubt on the possibility that they should be protected to the extent that traditional content providers are protected.⁸⁶ The relevant precedent for *Langdon* is *Turner Broadcasting Systems, Inc. v. FCC*,⁸⁷ not *Tornillo*. In *Turner*, Justice Kennedy upheld must-carry provisions for a cable network as constitutional, reasoning that they further "important governmental interests" and do not "burden substantially more speech than necessary to further those interests."⁸⁸ In *Langdon*, the real reason to dismiss the case was the lack of any such must-carry requirement in North Carolina or federal law—not the unconstitutionality of any hypothetical requirement.

In *Turner*, carrying three mandatory channels was deemed a small burden to the cable companies, and the burden was outweighed by the furthering of government interests in "(1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming."⁸⁹ We can anticipate parallel benefits from some basic ground rules

17, 2006, at 65) ("There are four major players who produce their own independent indices, and together they accounted for about ninety-seven percent of the United States search market share in the spring of 2006, with Google and Yahoo! representing seventy-eight percent of the market."); Press Release, *supra* note 50 (showing that Google searches make up 54 percent of all searches in September of 2007); Search Engine Relationship Chart (Bruce Clay, Inc., Moorpark, CA), available at www.bruceclay.com/searchenginechart.pdf.

84. See Kevin J. Delaney, *Google Displays Core Strength—As Product Line Expands, Search Business Drives Surges in Profit, Revenue*, WALL ST. J., Apr. 20, 2007, at A3; see also Anick Jesdanun, *Study: Google Gets Bulk of World Search*, YAHOO! NEWS, Oct. 9, 2007, http://biz.yahoo.com/ap/071009/worldwide_search.html?v=4.

85. The key point here is only that the First Amendment should not be allowed to short circuit debate on regulation. One easily can imagine courts using *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256–58 (1974) (finding a law that required newspapers to print candidates' reply to editorials is unpressible), to strike down a statute that, say, makes newspapers reveal to some government body (even a private one) information about how they decide what is news. But it would be very troubling if that sort of immunity precluded any efforts to go "behind the curtain" at the search engine to determine if, say, manipulation of results or other untoward behavior occurred. The newspaper and the search engine serve very different functions.

86. See Siklos, *supra* note 76. David Eun, Google's vice president for content partnerships, stated that in his opinion Google does not create content, but rather just channels it to users. *Id.*

87. 520 U.S. 180 (1997).

88. *Id.* at 189.

89. *Id.* As David Wolitz argues, the same language also supports net neutrality regulations. Posting of comment by David Wolitz to Concurring Opinions Blog, http://www.concurringopinions.com/archives/2007/08/larrys_lochner.html (Aug. 30, 2007, 01:50 EST) ("Per Turner, net neutrality would trigger only intermediate First Amendment scrutiny—not strict scrutiny—because it would be a content-neutral regulation. That is, the purpose of net neutrality regulation would be to foster "widespread dissemination of information from a multiplicity of sources"—not to suppress or prefer any particular speech. Thus, net neutrality would not trigger the highest form of scrutiny, but rather the intermediate scrutiny discussed in *United States v. O'Brien*.").

of transparency (and perhaps must-carry rules) in the search engine context. Such regulation probably will become a more pressing issue as U.S. politicians, disgruntled with censorship of results in countries like China, consider requiring Google to disclose how (and which) sites are blocked on Google.cn (when such results are transmitted to the U.S.).⁹⁰ Even if regulators go beyond transparency obligations and embrace must-carry rules or the “fairness doctrine” adumbrated in the asterisk proposals discussed above, it is not clear how burdensome such a requirement would be. Such requirements did not appear to hurt phonebooks, one recent example of an all-purpose index that some public utility commissions forced to carry all regional phone numbers.⁹¹

Moreover, Google’s “sponsored results” are a form of “commercial speech,” and that categorization may color legal treatment of its organic results as well.⁹² Clearly Google’s “sponsored results” on the right side of each page of search results is the type of advertising that is paradigmatic of commercial speech.⁹³ The Supreme Court has clearly stated that “false and misleading” advertising has virtually no protection under the First Amendment.⁹⁴ That alone should be enough to permit the Federal Trade Commission (FTC) to regulate those results should it decide to enforce the suggestions it put out in the “Hipsley Letter” of 2002.⁹⁵

The Hipsley Letter (and sophisticated efforts to specify its potential enforcement)⁹⁶ not only suggest guidelines for search engine advertising, but also implicate

90. Clive Thompson, *Google’s China Problem (and China’s Google Problem)*, N.Y. TIMES, May 7, 2006, § 6, at 10.

91. See *Feist Publ’ns v. Rural Tel. Serv. Co.*, 499 U.S. 340, 342 (1991) (citing a Kansas state regulation that requires all operating telephone companies to issue an inclusive telephone directory every year). I am not saying that the plaintiff in *Langdon* was right, or that Google had to sell him advertising space in prime locations. All that I am arguing is that the First Amendment does not prevent some future legislature from requiring search engines to disclose if the search engine has deliberately deleted a website from their index. If search engines truly want to be characterized as newspapers or media companies, they might have to pay a price by facing the same infringement liability such sites would face if they served up copyrighted or defamatory content.

92. See generally *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557 (1980) (discussing constitutional limitations on commercial speech); Tom Bennisson, *Can Commercial Corporations Engage in Non-Commercial Speech?*, 39 CONN. L. REV. 379 (2006) (arguing that commercial corporations’ fiduciary responsibilities to shareholders render all their communication an adjunct of commercial transactions).

93. The Supreme Court defines commercial speech as “expression related solely to the economic interests of the speaker and its audience.” *Cent. Hudson*, 447 U.S. at 561. This definition is easily applicable to the returned advertisements in a Google search.

94. *Id.* at 593.

95. Letter from Heather Hipsley, Acting Assoc. Dir., Div. of Adver. Practices at the FTC, to Gary Ruskin, Executive Dir. at Commercial Alert (June 27, 2002), available at <http://www.keytlaw.com/FTC/Rules/paid-placement.htm> (deciding not to take regulatory action against search engines for failing to clearly mark advertisements as “ads,” but recommending that to avoid any further action search engines: 1) make all paid ads clearly distinguishable from non-paid ads, 2) ensure that all paid inclusions are “clearly and conspicuously explained and disclosed,” and 3) make “no affirmative statement . . . that might mislead consumers as to the basis on which a search result is generated”).

96. See generally Sinclair, *supra* note 69. Following on the FTC’s suggestion to search engines in 2002, Congress could a) require search engines to separate “paid” from “editorial” content, and b) establish some

Google's organic results. The Hipsley letter focuses on the separation between paid and editorial content⁹⁷—search engines must clearly disclose which results are being paid for and which results arise out of a disinterested search process.⁹⁸ Presently, search engines have represented that they abide by the FTC's suggestion, and have not challenged the Hipsley Letter, but matters could change quickly if enforcement actions begin.⁹⁹ According to one of its court filings, "Google takes extraordinary measures to protect its trade secrets and confidential commercial information."¹⁰⁰ Like FICO scores¹⁰¹ and much proprietary voting machine software,¹⁰² the algorithm of Google's search results is a zealously guarded trade secret.¹⁰³ Enforcement of the paid content disclosure rules could lead to investigations into these algorithms—and provoke a vigorous First Amendment defense already suggested in a Google submission to an FTC "Town Hall."¹⁰⁴

No one should be surprised if Google attempts to leverage the First Amendment immunities garnered in private law disputes in order to block or cripple regulation of the editorial/paid content divide. Google's Senior Policy Counsel Alan Davidson has already suggested the basic contours of the argument: "Simply put, advertising

mechanism for actually verifying the separation is occurring. Some commentators have already proposed specific suggestions for such a reform. See, e.g., *id.* at 368–71.

97. Letter from Heather Hipsley, *supra* note 95.

98. *Id.* Compare Goodman, *supra* note 71, at 96–100, 119–33 (making this basic distinction), with Eric Goldman, *Stealth Risks of Regulating Stealth Marketing: A Comment on Ellen Goodman's Stealth Marketing and Editorial Integrity*, 85 TEX. L. REV. 11 (2006) (criticizing Goodman's distinction).

99. JORGEN J. WOUTERS, CONSUMER REPORTS WEBWATCH, STILL IN SEARCH OF DISCLOSURE: RE-EVALUATING HOW SEARCH ENGINES EXPLAIN THE PRESENCE OF ADVERTISING IN SEARCH RESULTS 4–5 (2005), available at <http://www.consumerwebwatch.org/pdfs/search-engine-disclosure.pdf> (noting that "most search engines also appear more interested in following the letter—rather than the spirit—of the FTC's guidelines," and that "many search engines seem to be doing as little as possible to comply with FTC recommendations and as much as possible to camouflage the presence of advertising within their search results"). If the results of this study remain true, enforcement actions by the FTC could lead to an immediate change in search engines' current disclosure techniques.

100. Google's Opposition to the Government's Motion to Compel at 11, *Gonzales v. Google*, 234 F.R.D. 674 (N.D. Cal. Mar. 17, 2006) (Case No. 5:06-mc-80006-JW).

101. Currently, mortgage lenders are attempting to protect FICO scores from "piggybacking"—a scheme where groups will let you borrow part of another person's credit score by becoming an authorized borrower on the person's card. See Julie Creswell, *Fake Pay Stubs Online, and Other Mortgage Fraud*, N.Y. TIMES, June 16, 2007, at A1; *Credit Piggybacking—What Will They Think of Next?*, MORTGAGENEWSAILY.COM, June, 14, 2007, http://www.mortgagenewsdaily.com/6142007_CreditPiggybacking.asp. See generally EDWARD TENNER, *WHY THINGS BITE BACK* (1997) (offering case studies of how technological breakthroughs often create bigger problems than the one they were supposed to solve in the first place).

102. See Michael A. Carrier, *Vote Counting, Technology, and Unintended Consequences*, 79 ST. JOHN'S L. REV. 645 (2005) (discussing the disturbing characteristics of electronic voting); David S. Levine, *Secrecy and Unaccountability: Trade Secrets in Our Public Infrastructure*, 59 FLA. L. REV. 135 (2007) (examining trade secrecy's intrusion into voting machines, the internet, and telecommunications).

103. Stacy Collett, *Cracking Google's 'Secret Sauce' Algorithm*, COMPUTERWORLD, Mar. 14, 2007, <http://www.computerworld.com/action/article.do?command=viewArticleBasic&articleId=9012943>. See generally Levine, *supra* note 102 (discussing trade secrets and arguing for greater disclosure for trade secrets involving the public infrastructure).

104. Letter from Alan Davidson, Senior Policy Counsel, Google Inc., to the Federal Trade Commission's Town Hall (Sept. 14, 2007), available at http://blog.wired.com/27bstroke6/files/google_town_hall_lecture.pdf.

is information, and relevant advertising is information that is useful to consumers. . . . It is also the case that online advertising promotes freer, more robust, and more diverse speech.”¹⁰⁵ Of course, the same could be said of offline advertising, and the regime regulating false and misleading advertising there has withstood First Amendment challenges.¹⁰⁶ However, in decisions like *44 Liquormart, Inc. v. Rhode Island*¹⁰⁷ and *Thompson v. Western States Medical Center*,¹⁰⁸ the Supreme Court has become increasingly solicitous of commercial speech. Rebecca Tushnet, author of cutting edge articles in the field,¹⁰⁹ predicts that false advertising law may be on a collision course with the First Amendment.¹¹⁰ A lawsuit over regulation of search results may be an ideal vehicle for the issue to finally be settled.

Yet perhaps the First Amendment can be held in abeyance to the extent that search engines are characterized as providing data, instead of expressing a viewpoint. Google is a premier example of automated judgment, constantly engineering new ways to order information in response to search queries.¹¹¹ While resisting any efforts to “peek under the hood” of its search processes,¹¹² Google also has been claiming that whatever results they come up with should be protected under the First Amendment.¹¹³ It should be noted from the outset that Google’s results are automated. This makes Google a very different entity than a human powered search engine such as Mahalo.¹¹⁴ When compared to something like Mahalo, or

105. Posting of Ryan Singel to Wired Blog Network, <http://blog.wired.com/27bstroke6/2007/09/google-trying-t.html> (Sept. 18, 2007, 5:11:55 EST); see also Letter from Alan Davidson, *supra* note 104.

106. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 593 (1980).

107. 517 U.S. 484, 501, 510–14 (1996) (stating that “[t]he mere fact that messages propose commercial transactions does not in and of itself dictate the constitutional analysis that should apply to decisions to suppress them” as less stringent review applies to regulations’ attempt to protect consumers from misleading ads, but that a state does not have “broad discretion to suppress truthful, nonmisleading information for paternalistic purposes”).

108. 535 U.S. 357, 370–73, 377 (2002) (finding unconstitutional a section of the Food and Drug Administration’s Modernization Act of 1997 that prohibited advertising of compound drugs that do not seek FDA approval because the regulation of commercial speech was more extensive than necessary, but noting that “not all regulation of [commercial speech] is unconstitutional”).

109. See Rebecca Tushnet, *Trademark Law as Commercial Speech Regulation*, 58 S.C. L. REV. 737 (2007); see also Rebecca Tushnet, *Truth and Advertising: The Lanham Act and Commercial Speech Doctrine*, in *TRADEMARK LAW AND THEORY: A HANDBOOK OF CONTEMPORARY RESEARCH* (Graeme B. Dinwoodie & Mark D. Janis eds., forthcoming 2008), available at <http://www.tushnet.com/law/truthandads.pdf> [hereinafter TUSHNET, *Truth in Advertising*].

110. TUSHNET, *Truth and Advertising*, *supra* note 109, at 2–3 (stating that “[t]he lines between confusing and informative and between true and false are difficult to draw, in ways that in other contexts—particularly libel doctrine—have led courts to impose increasing burdens on those entities, whether private or governmental, who would penalize defendants for speech that is deemed harmful because it is deemed false”).

111. See George Johnson, *An Oracle Part Man, Part Machine*, N.Y. TIMES, Sept. 23, 2007, § 4, at 1.

112. See Google’s Opposition, *supra* note 100, at 11 (stating that Google takes “extraordinary measures to protect its trade secrets and confidential commercial information”).

113. See Bracha & Pasquale, *supra* note 9, at 40–42.

114. See Mahalo FAQ, What is Mahalo, http://mahalo.com/Mahalo_FAQ (last visited Oct. 16, 2007); see also Randall Stross, *The Human Touch that May Loosen Google’s Grip*, N.Y. TIMES, June 24, 2007, BU3. Mahalo, meaning “thank you” in Hawaiian, is a new search engine that pre-prepares results, and currently has about 5,000 terms prepared on topics like health, travel, entertainment, and more. Stross, *supra*. Mahalo differs from

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alternative search engines or directories driven by human editors, Google is much closer to a data provider than, say, a newspaper. The latter actually expresses a point of view on what the news is; the former merely aggregates information.¹¹⁵ This difference has consequences for the legal treatment of search results.

Data providers like consumer reporting companies can be held more accountable for what they say than a newspaper. If I have a dispute with a newspaper over whether they have portrayed me accurately, and they refuse to acknowledge my complaint, I probably am going to have to sue for defamation in order to settle things.¹¹⁶ But according to an FTC website,

*[i]f an investigation doesn't resolve your dispute with the consumer reporting company, you can ask that a statement of the dispute be included in your file and in future reports. You also can ask the consumer reporting company to provide your statement to anyone who received a copy of your report in the recent past.*¹¹⁷

Moreover, "only authorized individuals such as potential lenders, employers, insurance underwriters or landlords may access your report, and only if they intend to do business with you."¹¹⁸ Finally, in case of disputes, "you're entitled to add a written statement (100 words or less) explaining your view of the mistake."¹¹⁹

Google or other search engines "[b]y using its own editors as the final arbiters of what goes in, Mahalo cuts off access in its listings to Web sites that confuse a search engine's algorithm with advertorials that commingle advertisements with noncommercial information." *Id.*

115. Google itself offers a chance to reply on certain news articles. Brad Stone, *Names in the News Get a Way to Respond*, N.Y. TIMES, Aug. 13, 2007, at C3; Google News, http://news.google.com/news?q=source%3Agoogle_news&scoring=&btp=1 (last visited Nov. 8, 2007) (listing the news articles that have received a reply). The comments page appears to tell readers (1) who is making the comment; (2) who they are affiliated with; (3) their comment; (4) a hyperlink to their organization (usually a bio page of some sorts); and (5) a link to the original article that is being commented on.

116. See generally *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) (discussing libel claims brought by public officials against newspapers).

117. FED. TRADE COMM'N, *FACTS FOR CONSUMERS: BUILDING A BETTER CREDIT REPORT* (2006), available at <http://www.ftc.gov/bcp/edu/pubs/consumer/credit/cre03.shtm>.

118. My Money Management, *How to Maintain a Good Credit Rating*, <http://www.mymoneymanagement.net/TIPSADVICERESOURCES/UnderstandingCredit/HowtoMaintainYourCreditScore/tabid/193/Default.aspx> (last visited Oct. 16, 2007).

119. *Id.* The FTC also states:

If an investigation doesn't resolve your dispute with the consumer reporting company, you can ask that a statement of the dispute be included in your file and in future reports. You also can ask the consumer reporting company to provide your statement to anyone who received a copy of your report in the recent past. You can expect to pay a fee for this service.

See FEDERAL TRADE COMMISSION FOR THE CONSUMER, *CREDIT REPAIR: SELF-HELP MAY BE BEST* (2005), available at <http://www.ftc.gov/bcp/online/pubs/credit/repair.pdf>; see also Fair Credit Reporting Act of 1970 § 611, 15 U.S.C. § 1681i(b) (2000) ("If the reinvestigation does not resolve the dispute, the consumer may file a brief statement setting forth the nature of the dispute. The consumer reporting agency may limit such statements to not more than one hundred words if it provides the consumer with assistance in writing a clear summary of the dispute.").

If the consumer reporting agency stands by its accusation, it must conduct a “reasonable reinvestigation” regarding the allegedly inaccurate information.¹²⁰ Then, the agency provides notice of the dispute to whatever person supplied the allegedly bad information.¹²¹ The agency can cancel the reinvestigation if it reasonably determines that the dispute is frivolous or irrelevant.¹²² Under subsection 5, unverifiable or inaccurate information must be stricken from the report.¹²³

Why might we want to extend these types of protections to those who appear on search results (and increase scrutiny of other “black box” data aggregators like ratings agencies and credit bureaus)? There is something deeply troubling about unaccountable power—about a system that can spit out some life-changing result without giving any explanation for it.¹²⁴ Suspicion about FICO scores has led some states to prohibit their use in insurance rating,¹²⁵ just as Finland has prevented

120. Fair Credit Reporting Act of 1970 § 611, 15 U.S.C. § 1681i(a)(1)(A) (“[I]f the completeness or accuracy of any item of information contained in a consumer’s file at a consumer reporting agency is disputed by the consumer and the consumer notifies the agency directly, or indirectly through a reseller, of such dispute, the agency shall, free of charge, conduct a reasonable reinvestigation to determine whether the disputed information is inaccurate and record the current status of the disputed information, or delete the item from the file in accordance with paragraph (5), before the end of the 30-day period beginning on the date on which the agency receives the notice of the dispute from the consumer or reseller.”).

121. *Id.* § 1681i(a)(2)(A) (“[T]he agency shall provide notification of the dispute to any person who provided any item of information in dispute, at the address and in the manner established with the person. The notice shall include all relevant information regarding the dispute that the agency has received from the consumer or reseller.”).

122. *Id.* § 1681i(a)(3)(A) (“[T]he agency shall provide notification of the dispute to any person who provided any item of information in dispute, at the address and in the manner established with the person. The notice shall include all relevant information regarding the dispute that the agency has received from the consumer or reseller.”).

123. *Id.* § 1681i(a)(5)(A) (“If, after any reinvestigation under paragraph (1) of any information disputed by a consumer, an item of the information is found to be inaccurate or incomplete or cannot be verified, the consumer reporting agency shall— (i) promptly delete that item of information from the file of the consumer, or modify that item of information, as appropriate, based on the results of the reinvestigation; and (ii) promptly notify the furnisher of that information that the information has been modified or deleted from the file of the consumer.”).

124. The film *Brazil* provides a dark commentary on the type of dystopian bureaucratic systems that can fundamentally change individuals’ lives on the basis of random errors in computational equipment. *BRAZIL* (Universal Pictures 1985). I, along with other commentators, question whether algorithms or other artificial intelligence should be granted constitutional rights. Lawrence B. Solum, *Legal Personhood for Artificial Intelligences*, 70 N.C. L. REV. 1231 (1992) (collecting objections to granting constitutional rights to artificial intelligences); Posting of Frank Pasquale to Concurring Opinions, http://www.concurringopinions.com/archives/2007/10/king_algorithm.html (Oct. 4, 2007, 08:52 EST). *But see* IAN AYRES, *SUPER CRUNCHERS* (2007) (lauding data-driven analysts who take large sets of figures and come up with counterintuitive conclusions). *See generally* George Johnson, *An Oracle Part Man, Part Machine*, N.Y. TIMES, Sept. 23, 2007, § 4, at 1 (surveying data-driven decisionmaking technologies).

125. Liz Pulliam Weston, *Demand Your FICO Score Now!*, <http://articles.moneycentral.msn.com/Banking/YourCreditRating/DemandYourFICOScoreNow.aspx> (last visited Oct. 16, 2007) (noting that a few states, like California and Massachusetts, prohibit FICO scores from being used in insurance ratings). Many other states have proposed such legislation. Press Release, MASSPIRG, Proposed Auto Rules Need Stronger Consumer Protections (Aug. 29, 2003) (“Credit scores and information gathered from consumers’ credit reports have only been temporarily prohibited for rating purposes and have not been restricted at all for use in denying coverage altogether. Earlier this month 10 consumer groups urged the Commissioner and the Governor to ban the use of all socioeconomic rating and underwriting factors such as credit scores, which have nothing to do with an

employers from using Google results in evaluating potential applicants.¹²⁶ Full First Amendment protection should be reserved for accountable, attributable speech—not the opaque data processing systems that are increasingly powerful arbiters of taste, authority, and creditworthiness.

Of course, given the legal landscape here, Google may well see the First Amendment as a legal sword perfect for cutting a Gordian knot of regulatory challenges. Even if it fails to achieve the status of a newspaper or media outlet, protection under *Turner* still will lead to some scrutiny of government action.¹²⁷ The growing First Amendment backlash against false advertising regulation (coupled with trade secrecy protections against vigorous enforcement) could cripple even the FTC's authority to force a distinction between paid and unpaid content. Yet search engines may want to be careful what they wish for in First Amendment developments.

B. *The First Amendment: A Double-Edged Sword*

As Google grows, regulators are starting to take notice.¹²⁸ Many have written about the privacy-eroding implications of massive database coordination, but the legal discussion is only beginning about the results of Google searches.¹²⁹ Consider the fate of countless businesses which depend on internet-based customers for their livelihood.¹³⁰ John Battelle chronicled one small business's Google crisis:

*[R]ight before the critical holiday shopping season
the phones stopped ringing [at large-shoe seller, 2bigfeet.com]*

individual's ability to drive and which correlate with a consumer's income level and race.”), available at <http://www.masspirg.org/news-releases/auto-insurance/auto-insurance-news/proposed-auto-rules-need-stronger-consumer-protections>; Press Release, ConsumersUnion.org, Consumers Union Urges Lawmakers to Ban Use of Credit Histories in Setting Homeowners Insurance Rates (June 20, 2003) (discussing a California bill that would “prohibit[s] insurers from using a consumer's credit history to rate, underwrite, cancel or refuse to renew a homeowners policy. . . . [and] also prohibits insurers from requiring a particular payment plan for homeowners insurance based on an individual's credit history”), available at <http://www.consumersunion.org/pub/2003/06/000196print.html>.

126. Act on the Protection of Privacy in Working Life, 759/2004 (2004) (Fin.).

127. See *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 662 (1994) (holding that intermediate scrutiny is the standard used in evaluating constitutionality of cable television regulation under the First Amendment).

128. Comparisons are being made between Google and Microsoft, which has faced antitrust probes both in the United States and Europe. In the United States, regulators are currently probing Google's proposed purchase of the internet advertising company, DoubleClick, and Europe is expected to follow suit. Elise Ackerman, *Google Grows Into a Target*, SAN JOSE MERCURY NEWS, Sept. 3, 2007, at F1 (noting growing concerns over privacy and Google's secretive software); Thomas Crampton, *Google Said to Violate Copyright Laws*, N.Y. TIMES, Feb. 14, 2007, at C3 (noting new legal troubles for Google in Europe); *Web-ocrats Down Under*, WALL ST. J., July 19, 2007, at A14 (noting legal problems for Google in Australia).

129. For example, a Google search on “Search Engine Regulation” brings up 1,800 results, “Regulation of Search Engine Results” brings up only 3, and “Regulation of Google Search Results” has 0 returns. (Oct. 24, 2007).

130. See, e.g., John Markoff, *Google Aims for the Classified Ads Business*, N.Y. TIMES, Nov. 16, 2005, at C6.

[It] was no longer the first result for “big feet” on Google. In fact, it wasn’t even in the first hundred results. As [business owner Neil] Moncrief put it, it was as if the Georgia Department of Transportation had taken all the road signs away in the dead of night, and his customers could no longer figure out how to drive to his store. . . .

Google had tweaked its search result algorithms, something the company does quite frequently. But this time Google’s modifications, which were intended to foil search engine spammers [people who dishonestly modify their web sites to rank higher in search engine results], had somehow sideswiped Moncrief’s site as well. What Google giveth, Moncrief learned the hard way, Google can also take away.¹³¹

When a company can exercise make-or-break power over internet-based businesses, does it need to be held accountable to some standards? Google says that it does not—that it has a First Amendment right to rank web entities as it pleases.¹³² But consider what Google itself thinks of the companies that own the “pipes” that transmit its services. In its advocacy for net neutrality, it repeatedly has argued that these digital conduits do not deserve the right to “fast-track” certain content, or to charge certain websites more than others.¹³³ Google is eager to characterize the internet’s “pipes” as infrastructural, but not its own service—even if it has higher market share than the broadband providers it has asked the FCC to regulate.¹³⁴

Google has advocated for FCC policy that would put several restrictions on carriers like telephone and cable companies.¹³⁵ For those who control the all-important “last mile” of cable into households and businesses, they propose a ban on the following:

- *Levying surcharges on content providers that are not their retail customers;*
- *Prioritizing data packet delivery based on the ownership or affiliation (the who) of the content, or the source or destination (the what) of the content; or*
- *Building a new “fast lane” online that consigns Internet content and applications to a relatively slow, bandwidth-starved portion of the broadband connection.¹³⁶*

131. JOHN BATTELLE, *THE SEARCH: HOW GOOGLE AND ITS RIVALS REWROTE THE RULES OF BUSINESS AND TRANSFORMED OUR CULTURE* 156 (2005).

132. See Lithwick, *supra* note 75.

133. See Miriam Hill, *With Billions at Stake, Corporate Giants Square Off on Law to Ensure “Net Neutrality,”* PHILA. INQUIRER, June 19, 2006, at A01.

134. See Steve Hewlett, *Media: Media FAQ*, GUARDIAN, July 3, 2006, at 3.

135. See, e.g., Martin H. Bosworth, *Google Challenges Verizon over Lobbying of FCC*, CONSUMERAFFAIRS.COM, Oct. 5, 2007, http://www.consumeraffairs.com/news04/2007/10/google_verizon.html (noting Google’s persistence in calling for the FCC to support their open access requirements).

136. Posting of Richard Whitt, Washington Telecom and Media Counsel at Google, Inc., to Google Public Policy Blog, <http://googlepublicpolicy.blogspot.com/2007/06/what-do-we-mean-by-net-neutrality.html> (June 16, 2007, 17:52 EST).

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Why are these goals so important for Google (and the other search engine application providers that have joined the Open Internet Coalition)? Robert X. Cringely succinctly presents the following nightmare scenario for the company:

What if Verizon, and AT&T, and Comcast, and half a dozen other huge broadband ISPs suddenly cut deals with some search company other than Google and your ISP-supplied browser and homepage no longer give such prominence to Google? The G-folk have rabid competitors who would very much like to take over that top spot. Would we even notice? How different are the search results these days from one engine to another? Not very different.¹³⁷

The situation he describes is threatening enough for Google to spur it to lobby for “net neutrality” rules designed (in part) to prevent upstream providers of “conduits” from squeezing application providers like search engines for more money—or shutting them down altogether.¹³⁸

Despite this threat, Google appears to be embracing expansive interpretations of the First Amendment now in ways that will undermine fights for net neutrality in the future.¹³⁹ Just as Google claims that it has a First Amendment right to order web pages as it pleases, broadband carriers may claim that they have a First Amendment right to avoid government regulation.¹⁴⁰ Is their “message” that much different than Google’s?

Several scholars have laid theoretical foundations for a First Amendment challenge to net neutrality regulations. Christopher S. Yoo has complained of “architectural censorship” of carriers by the FCC,¹⁴¹ and Larry Tribe has argued that regulation of telecommunications should be susceptible to much greater First Amendment scrutiny.¹⁴² According to one report, Tribe has weighed in to cut off

137. Robert X. Cringely, *Is Google on Crack?: Eric Schmidt Bets the Ranch on Wireless Spectrum*, I, CRINGELY, July 27, 2007, http://www.pbs.org/cringely/pulpit/2007/pulpit_20070727_002573.html. *But see* Jon Brodtkin, *Search Engine Roulette*, NETWORKWORLD, June 15, 2007, <http://www.networkworld.com/news/2007/061507-search-engine-results.html?page=1> (“In a study of 19,332 queries, Google, Yahoo, Windows Live and Ask delivered the same top result only 3.6% of the time. The four engines never delivered the same top three results, even when the order of the results was ignored. Fewer than 1% of first-page results were shared by all four sites.”). Given search’s status as a credence good, it is by no means clear that diversity of results is actually understood by consumers or leads to durable allegiance to one search engine.

138. See Posting of Richard Whitt, *supra* note 136; *see also* Tom Abate, *Speed Bumps on the Information Highway*, S.F. CHRON., June 18, 2006, at A1.

139. See Lithwick, *supra* note 75 (describing Google’s argument that the First Amendment protects Google’s right to order and rank their results as they please, and even have no duty to list a specific result on their search engine).

140. See Michael Posner, *Media Giants a Big Step in Wrong Direction*, GLOBE AND MAIL (Canada), Mar. 20, 2002, at B15.

141. See generally Yoo, *supra* note 74 (contending that structural regulations can have adverse impacts on speech and First Amendment rights, amounting to architectural censorship by the FCC).

142. See Laurence H. Tribe, *Why the Federal Communications Commission Should Not Adopt a Broad View of the “Primary Video” Carriage Obligation: A Reply to the Broadcast Organizations* 3–5, 7–18 (Nov. 24, 2003) (unpublished regulatory filing with the FCC, available at <http://www.ncta.com/DocumentBinary.aspx?id=215>).

the debate on net neutrality, suggesting that virtually any regulation of the big carriers' treatment of content would violate the First Amendment:

*Professor Tribe was asked . . . whether he thought broadband providers should be allowed to censor music lyrics critical of the President of the United States. Tribe rephrased the question: Can [broadband providers] be forced to act as common carriers? [and. . .] cited Hurley . . . 515 U.S. 557 (1995) - as the decision that "would probably apply here." In that case, the organizers of a parade did not want to include among the marchers a group espousing a view with which the organizers did not agree. The Supreme Court ruled that the parade was not merely a conduit for the speech of participants.*¹⁴³

As Neil Richards has noted,¹⁴⁴ (and as Oren Bracha and I argue in our piece on search engine regulation¹⁴⁵), the First Amendment is the 800-pound gorilla in the room of equitable information policy. Many First Amendment absolutists would like to see it eviscerate the public's rights to privacy and cultural self-determination.¹⁴⁶ Here is the philosophical foundation of Tribe's position, excerpted from his article "The Constitution in Cyberspace":

143. Posting of Hance Haney to The Technology Liberation Front, <http://www.techliberation.com/archives/042715.php> (Aug. 24, 2007, 14:03 EST). In *Hurley v. Irish-American Gay, Lesbian and Bisexual Groups of Boston*, 515 U.S. 557 (1995), the Court tried to distinguish the parade organizers whose free speech was at issue from the cable operators who lost their First Amendment challenge to must-carry rules in *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994). *Hurley*, 515 U.S. at 576. While cable operators had a "monopolistic opportunity to shut out some speakers," the gay and lesbian marchers in *Hurley* could organize their own parade. *Id.* at 577. Tribe appears to believe that the decline of spectrum scarcity makes it just as easy for those dissatisfied with their internet service to find another provider, just like the gay and lesbian marchers could find or organize another parade. *Id.*; see Laurence H. Tribe, *Address before the Progress and Freedom Foundation: Freedom of Speech and Press in the 21st Century: New Technology Meets Old Constitutionalism* (Aug. 21, 2007), in PROGRESS ON POINT 14.19, Sept. 2007, at 5. But given that 99.6 percent of households have two or less choices for service, that appears to be quite an optimistic assumption (even if it appears to be shared by some parts of the DOJ). See, e.g., *Reconsidering our Communications Laws, Before S. Comm. on Judiciary*, 109th Cong. 2 (2006) (Prepared Statement of Vinton G. Cerf, Vice President and Chief Internet Evangelist, Google Inc.), available at http://judiciary.senate.gov/testimony.cfm?id=1937&wit_id=5416. Moreover, the possibility that Comcast has a "message" that "must-carry" rules interfere with is much less convincing than the argument of the Irish-Catholic organizers of the St. Patrick's Day parade in Boston had a message (of exclusion) that gay and lesbian marchers would undermine. See *Hurley*, 515 U.S. at 559.

144. Neil M. Richards, *Reconciling Data Privacy and the First Amendment*, 52 UCLA L. REV. 1149, 1150-51 (2005) (noting, but opposing, a "widely held belief that because the First Amendment protects at its core the dissemination of truthful information, any right of 'data privacy' is in direct conflict with the First Amendment because any attempt to regulate . . . would inevitably require . . . unconstitutional restrictions on speech").

145. Bracha & Pasquale, *supra* note 9, at 40-52. Oren Bracha and I, similar to Neil Richards, note that "[c]ourts seem eager to treat search results as constitutionally protected speech and summarily find any attempt to regulate . . . results . . . [in either] censorship of an opinion or compelled speech." *Id.* at 41. This proposition and eagerness of courts, however, we argue, is on "somewhat shaky ground." *Id.* at 41-52.

146. See, e.g., Tribe, *supra* note 143; see also Lithwick, *supra* note 75 (describing Google's First Amendment legal argument).

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[Given that] networks . . . acquire quasi-governmental powers as they . . . mediat[e] their members' conflicting interests . . . [a] tempting conclusion is that . . . judges must treat these networks not as associations that have rights of their own against the government but as virtual "governments" in themselves—as entities against which individual rights must be defended in the Constitution's name. . . .

. . . [B]ut . . . [i]t's a fallacy to suppose that, just because a computer bulletin board or network or gateway is something like a shopping mall, government has as much constitutional duty—or even authority—to guarantee open public access to such a network. . . . [N]othing about any new technology suddenly erases the Constitution's enduring value of restraining government above all else, and of protecting all private groups, large and small, from government.¹⁴⁷

Tribe never mentions the extraordinary amount of money that carriers shower on Congress,¹⁴⁸ or the way in which the FCC's present way of doing business tends to marginalize non-carrier stakeholders.¹⁴⁹ Yet in a recent speech in Aspen,¹⁵⁰ Tribe continued to stress how much major carriers need protection from the state they do so much to influence.¹⁵¹

Of course, where Tribe sees a telecosm¹⁵² of media diversity, many experts on telecommunications law only see duopoly.¹⁵³ There are several reasons to oppose Tribe's position, and even Yoo has conceded that his similar (but better developed and targeted) approach would likely be unpersuasive to courts.¹⁵⁴ The evolution of

147. Laurence H. Tribe, Prepared Keynote Remarks at the First Conference on Computers, Freedom & Privacy: The Constitution in Cyberspace (Mar. 1991), available at <http://www.sjgames.com/SS/tribe.html> (emphasis added).

148. See OPENSECRETS.ORG, TELECOM SERVICES & EQUIPMENT: MONEY TO CONGRESS (2006 election cycle), <http://opensecrets.org/industries/summary.asp?Ind=B09&cycle=2006> (stating that in the 2006 election cycle alone, the telecom service and equipment industry gave congress members a total of \$4,667,413 in campaign donations).

149. See generally John Dunbar, *FCC's Methods Leaves Public in the Dark*, WASHINGTONPOST.COM, Sept. 9, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/09/04/AR2007090401103.html> (noting that the FCC often does not conduct its business in an open fashion).

150. Posting of Adam Thierer to The Progress & Freedom Foundation Blog, http://blog.pff.org/archives/2007/08/laurence_tribe.html (Aug. 23, 2007, 00:13 EST) ("Prof. Tribe began by noting that the Supreme Court had perpetrated a 'profound fallacy' in the *Red Lion* and *Pacifica* cases in holding that spectrum scarcity or a medium's 'pervasiveness' in society could be used as a rationale for censorship of broadcasters or any other media operator. And he argued that although 'today's FCC continues to sing the *Pacifica* tune,' if the Supreme Court reconsidered *Red Lion* or *Pacifica* today, 'the odds are overwhelming that the Court [would overturn them]' because the Court would recognize that those rationales were probably never valid but are certainly not valid in an age of media abundance and cross-platform convergence.").

151. See Tribe, *supra* note 143.

152. See generally GEORGE F. GILDER, TELECOSM: HOW INFINITE BANDWIDTH WILL REVOLUTIONIZE OUR WORLD (2000).

153. See Michael Bazeley, *Telecom Choices for Consumers: Probably Just Two*, SAN JOSE MERCURY NEWS, Feb. 2, 2005, at 1A.

154. Yoo, *supra* note 74, at 727–31.

Tribe's position since the early 1980's is quite striking; consider this quote from *Speech as Power*:

[M]ore and more of the most important forums and means of communication are coming under the control of fewer and fewer private owners.

*These changes in access to and control over the forms of public communication have eaten away at the average citizen's rights of expression and, thus, . . . it is not exaggerating to say that that order could be seriously threatened by a continued failure of the Court to take account of background institutions of power and the costs of participation in public dialogue.*¹⁵⁵

This diagnosis is all the more appropriate today, as media consolidation accelerates.¹⁵⁶ As Neil Richards,¹⁵⁷ Lee Greenwood¹⁵⁸ and Julie Cohen¹⁵⁹ have suggested, positions like Tribe's and Yoo's would do for information policy what *Lochner* did for economic regulation.¹⁶⁰

I will not go into great detail here to dispute Tribe's First Amendment absolutism;¹⁶¹ suffice it to say that *Federal Search Commission's* arguments regarding the

155. LAURENCE H. TRIBE, *CONSTITUTIONAL CHOICES* 198 (1985) (emphasis added).

156. See Eric Klinenberg, *The National Entertainment State (Forum)*, *NATION*, July 3, 2006, at 22 (noting that since 1996, an "unprecedented" number of media mergers have occurred, making it increasingly hard to determine which conglomerate owns what).

157. See Richards, *supra* note 144, at 1153–54 ("The First Amendment critics' assumption [of privacy law] not only ignores the reality that few data privacy rules actually involve speech, but also significantly overstates the breadth of the protection afforded by the . . . First Amendment . . . I suggest that much of this "speech" is either outside the scope of the freedom of speech protected by the First Amendment, or constitutes a hitherto unnoticed category of speech warranting rational basis review. . . . From the privacy law perspective . . . the parallels are striking between the strong form of the First Amendment critique and the discredited 'liberty of contract' doctrine of the *Lochner* period. . . . [This] critique paves the way for the obliteration of the distinction between economic and civil rights at the core of post-*Lochner* American constitutionalism . . . [and] threaten[s] to unravel the basic premise upon which post-New Deal constitutionalism is based.").

158. See Daniel J.H. Greenwood, *First Amendment Imperialism*, 1999 *UTAH L. REV.* 659, 666. ("The First Amendment, in the name of preserving the underpinnings of political self-government, is replacing politics with law. *Lochner*, then, has returned. Once again, our Court is trying to solve the problems of our joint economic life by interpreting the principles of liberal abstention. But the rules of living together are too complicated for that . . .").

159. Julie E. Cohen, *Lochner in Cyberspace: The New Economic Orthodoxy of "Rights Management,"* 97 *MICH. L. REV.* 462, 464 (1998).

160. This would be a sad result indeed for Tribe, a thinker who so compellingly recognized "speech as power" in his book *Constitutional Choices*. Tribe, *supra* note 155, at 188.

161. David Wolitz elucidates the doctrinal shortcomings of Tribe's position:

[N]et neutrality would trigger only intermediate First Amendment scrutiny—not strict scrutiny—because it would be a content-neutral regulation. . . .

Net neutrality can easily pass intermediate scrutiny because (1) it promotes the important governmental interest in ensuring "uninhibited, robust, and wide-open" competition in the Internet content and applications markets and (2) its only burden on speech—potentially diminishing the editorial discretion of broadband providers—is precisely the means essential to securing the interest invoked.

In sum, under current precedent, net neutrality would be entirely consistent with the First Amendment, even if we grant that it does "force" some speech on broadband providers.

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limits of search engines' free speech rights are likely to apply *a fortiori* to the present dominant carriers.¹⁶² However, the potential expansion of First Amendment protections should worry a company like Google. By characterizing all it does as speech, it may well pave the road for carriers to do the same. If they do so, the net neutrality legislation Google so vigorously supports may itself be deemed unconstitutional.

IV. CONCLUSION

In a recent interview, Siva Vaidhanathan nicely encapsulated some of the most pressing concerns raised by search engines:

*[A]s Google grows in importance in our lives, we should demand some accountability. . . . [C]ompetition is failing to generate that accountability. . . . Google has managed to leverage its advantage in Web search to become a player, an instant factor, in so many different parts of our lives and so many parts of the economy. . . . [I]t's about time we began to question Google's motives and tactics.*¹⁶³

The questioning can begin in earnest once we recognize how quickly old services are converging.¹⁶⁴ WalMart worries that Google will be a fierce competitor.¹⁶⁵ A service like Yahoo! Yellow Pages is rapidly replacing phone books¹⁶⁶—anyone who needs to find a particular business can just type in a zip code and a name and usually get some results. Google News, once merely an aggregator, is itself becoming more and more like a digital newspaper, even offering a “right of reply” feature on some stories.¹⁶⁷ Google's subsidiary, YouTube, hosts thousands of “channels,” each maintained by amateur “broadcasters” whose offerings range from pirated content to original programming.¹⁶⁸ None of these web services fit easily into old media categories of newspaper, magazine, broadcaster, “data service,” or carrier.

Posting of David Wolitz to Concurring Opinions, http://www.concurringopinions.com/archives/2007/08/larrys_lochner.html (Aug. 30, 2007, 1:50 EST).

162. Bracha & Pasquale, *supra* note 9, at 40–57.

163. Brian McNeill, *UVA Professor Takes on 'Googlization,'* DAILY PROGRESS, Sept. 30, 2007, available at http://www.dailyprogress.com/servlet/Satellite?pagename=CDP%2FMGArticle%2FCDP_BasicArticle&c=MGArticle&cid=1173352941956&path=!news; see also Posting of Danny Sullivan to Search Engine Land, <http://searchengineland.com/071106-102435.php> (Nov. 6, 2007, 10:24 EST).

164. See, e.g., EPIC 2014, *supra* note 7.

165. Lohr, *supra* note 1.

166. See, e.g., Meg Richards, *Net Search Sector Still Risky*, DETROIT NEWS, Aug. 22, 2004, at 6C.

167. See Stone, *supra* note 115.

168. See generally YouTube, About YouTube, <http://youtube.com/t/about> (last visited Oct. 24, 2007).

When one influential company can combine so many functions,¹⁶⁹ old First Amendment analogies quickly fall apart.¹⁷⁰ If the debate on a “right of reply” on search engines demonstrates one thing, it is the need to think beyond the old categories and to develop a new way of balancing dominant search engines’ rights and responsibilities. I have argued that search engines’ rights to use the intellectual property of others should be expanded given the services they provide.¹⁷¹ However, their own IP rights or First Amendment protections may have to yield to compelling societal interests in more accountable and accurate search engine results.¹⁷²

Transcending the old First Amendment categories is going to be a difficult intellectual exercise; as polymath Doug Hofstadter recently argued, analogy may be at the core of all cognition.¹⁷³ Lawyers who argue on the basis of precedent are constantly trying to show how a particular situation is like (or unlike) a situation authoritatively addressed by law in the past (*pace* Schauer).¹⁷⁴ But in the search space, categories like “newspaper,” “information service,” “broadcaster,” and “data provider” are just not broad enough to cover the range of social functions of search. The “structure of search law” may have to be something quite different from past regulatory schemes.¹⁷⁵ The practical shortcomings of a “fairness doctrine” in broadcasting (or its constitutional infirmity in the case of newspapers) should be no reason to dismiss certain limited rights of reply to search results.

169. Lohr, *supra* note 1 (explaining that that Google is usurping the function of many businesses by offering superior services); Stone, *supra* note 115 (reporting that Google News is beginning to take over the function of print media by offering a right of reply feature on some stories).

170. See *Who's Afraid of Google*, *supra* note 3 (analogizing the need for regulating search engines to the regulation of the banking industry); see also Kirn, *supra* note 4; Matt Weiland, *Web of Spies*, N.Y. TIMES, Feb. 11, 2007, § 7, at 14 (book review). See generally Douglas R. Hofstadter, *Analogy as the Core of Cognition*, in THE ANALOGICAL MIND 499–538 (Dedre Gentner et al. eds., 2001), available at <http://prelectur.stanford.edu/lecturers/hofstadter/analogy.html>; Frederick Schauer, *Why Precedent in Law (and Elsewhere) is Not Totally (or Even Substantially) about Analogy* (KSG Faculty Research Working Paper Series, RWP07-036, 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1007001.

171. See Frank Pasquale, *Copyright in an Era of Information Overload: Toward the Privileging of Categorizers*, 60 VAND. L. REV. 135 (2007).

172. See *supra* Parts II, III.

173. See Hofstadter, *supra* note 170, at 499.

174. See generally Schauer, *supra* note 170.

175. Grimmelmann, *supra* note 18. Grimmelmann advises legal scholars and regulators that a multiplicity of legal doctrines balance the rights of technology developers, users, and third parties. *Id.* at 50–51. Any search engine laws will need to satisfy as “many competing policy demands at once as possible.” *Id.*