Searching for the First Amendment: An Inquisitive Free Speech Approach to Search Engine Rankings

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Introduction

Search engines allow Internet users to sort through the thicket of information on the Internet by returning a list of websites pertinent to a user's search. Several legal questions arise from web searching: How should we classify search engine results? What protective status should the law give to these results? Are search results the free speech opinion of the search providers that programmed the searching algorithms?[1] Or are search results simply machine output so far removed from human expression that they are not speech at all?[2]

Commentators have suggested several approaches to address these questions. Some commentators argue for full First Amendment free speech protection for search engine results.[3] In fact, search providers have successfully used First Amendment defenses in several lawsuits, with trial courts holding the First Amendment does give search providers some protection in the way they rank search results.[4] Other commentators believe that claims of First Amendment protection for search engine results "stand on shaky ground."[5]

The law should not treat all search engine speech the same way; it is not a monolith. Recently, allegations arose that some search prov-

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1 Eugene Volokh & Donald M. Falk, *First Amendment Protection for Search Engine Search Results*, (UCLA School of Law Research Paper No. 12-22, 2012), *available at* http://ssrn.com/abstract=2055364, at *3-4.

2 *See* Tim Wu, Op-Ed., *Free Speech for Computers?*, N.Y. Times, June 19, 2012, at A29.

3 Volokh & Falk, *supra* note 1, at *3-5.

4 Kinderstart.com, LLC v. Google, Inc., No. 5:06-CV-02507, 2007 WL 831806, at *14-15 (N.D. Cal. Mar. 16, 2007); Langdon v. Google, Inc., 474 F. Supp. 2d 622, 630 (D. Del. 2007); Search King, Inc. v. Google Tech., Inc., No. 5:02-CV-01457, 2003 WL 21464568, at *4 (W.D. Okla. May 27, 2003).

5 Oren Bracha & Frank Pasquale, *Federal Search Commission? Access, Fairness, and Accountability in the Law of Search*, 93 Cornell L. Rev. 1149, 1189 (2008).

iders elevate the ranking of search results for their own products, a process known as artificial placement.[6] The Federal Trade Commission (FTC) has investigated the search provider Google based on these allegations.[7] Google publicly declared it would prevail from the FTC investigation because of the First Amendment rights its search engine results enjoy.[8] Yet, the ability for search providers to tailor search results in a way that bolsters its own products suggests that some search results may be more like commercial advertisements than unqualified free speech opinions.[9]

This Comment provides a dynamic approach for applying the First Amendment to search engine result ranking, characterized by a fact-intensive analysis of the search results in question. Particularly, this Comment argues that search results that are sorted relatively neutrally should be granted full First Amendment free speech protection. However, search results shown to purposefully advance an internal commercial interest of the search provider should be classified as commercial speech and, therefore, subject to less First Amendment protection.

Part I of this Comment will provide background to the pertinent First Amendment theories that arise in examination of search engine speech, including "commercial speech" doctrine. Part I will also discuss lawsuits where search providers have used the First Amendment as a defense and will summarize the major legal arguments advanced by search results commentators. Part II will discuss the concept of artificial placement and why none of the approaches adopted by courts or suggested by commentators are dynamic enough to account for artificial placement. Part II will then introduce an approach to analyzing search results speech that is flexible enough to protect free speech for content-neutral search results, but qualifies content-biased search results as commercial speech.

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[6] *See* Amir Efrati & Jeffrey Trachtenberg, *With Frommer's, Google Taps Gurus*, WALL ST. J., Aug. 14, 2012, at A1.

[7] Edward Wyatt & Miguel Helft, *F.T.C. Is Said Near a Move on Google*, N.Y. TIMES, June 23, 2011, at B1.

[8] Brent Kendall, *Google Preps for Possible FTC Fight*, WALL ST. J., (May 10, 2012), http://online.wsj.com/article/SB10001424052702304543904577396483337361246.html.

[9] *See infra* Part II.

This Comment does not seek to provide a policy recommendation for regulating search results speech.[10] Instead, this Comment intends to answer the boundary question of whether the Government could ever regulate Internet search results without First Amendment conflict. Also, this Comment considers only generic search results, not paid advertisements that appear in demarcated sections at the top of some search results pages.[11] Finally, much of this Comment will focus on Google, but the First Amendment approach recommended by this Comment applies to all search providers. Google is highlighted because of its litigation history in this area. Also, Google is the focus of much of the scholarship written on search engine speech.

I. BACKGROUND

Before suggesting a First Amendment approach for search engine speech, it is necessary to provide an overview of the existing law in this area. Section A will discuss the First Amendment legal doctrines implicated by search engine speech. Section B will review the litigated cases where the First Amendment and search results speech have collided. Section C will conclude the overview by examining the proposals for search results speech made by the academic legal community.

A. *Applicable First Amendment Background*

The First Amendment guarantees "Congress shall make no law . . . prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press."[12] The degree of protection secured from this amendment is not clear from the text alone, which "provides only a hint of the ultimate contours of legal protection."[13] The past century has seen the courts place a substantial layer of gloss on the simple text of the First Amendment.[14] This section will examine three of the

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[10] For policy recommendations, *see generally* Bracha & Pasquale, *supra* note 5; Frank Pasquale, *Rankings, Reductionism, and Responsibility*, 54 CLEV. ST. L. REV. 115 (2006) [hereinafter Pasquale, *Rankings*].

[11] *See generally* Alex W. Cannon, Comment, *Regulating Adwords: Consumer Protection in a Market Where the Commodity is Speech*, 39 SETON HALL L. REV. 291 (2009) (discussing how the First Amendment applies to sponsored web links).

[12] U.S. CONST. amend. I.

[13] DANIEL A. FARBER, THE FIRST AMENDMENT 1 (3d ed. 2010).

[14] *See id.* at 11.

developed First Amendment doctrines that impact search results speech.

1. Editorial Discretion Doctrine

One of the philosophical underpinnings of free speech is the promotion of a "marketplace of ideas."[15] This ideal allows citizens to voice any opinion without government censorship, creating a robust forum for the collected thoughts of society.[16] Maintaining this open forum requires not barring opinions even when many find them offensive, such as flag-burning[17] and cross-burning.[18] The rationale for such a permissive marketplace is that the truth can only be found if society hears all opinions.[19] As Justice Wendell Oliver Holmes once remarked "[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . . ."[20]

The marketplace of ideas construct is premised on the idea that the opinions in the marketplace are available for all to enjoy.[21] Some criticize this premise as implausible because they believe that distribution of opinion in modern society comes largely from the editorial discretion of the media.[22] The question then arises: Should the media be compelled to present a broad range of opinions to serve the marketplace of ideas?[23] Also, if the press were required to present many different opinions in the interest of free speech, would this mandate at the same time restrict their freedom of speech?

These were the issues the Supreme Court addressed in *Miami Herald Publishing Company v. Tornillo*.[24] Florida, in hopes of promoting an open marketplace of ideas, adopted a law requiring newspapers to provide political candidates with the right to reply to critical

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15 GEOFFREY R. STONE ET AL., THE FIRST AMENDMENT 9-10 (4th ed. 2012).

16 *Id.*

17 Texas v. Johnson, 491 U.S. 397, 420 (1989) (upholding the constitutionality of burning the United States flag as protected by the First Amendment).

18 R.A.V. v. City of St. Paul, 505 U.S. 377, 395-96 (1992) (upholding the constitutionality of cross burning as protected by the First Amendment).

19 STONE ET AL., *supra* note 15, at 9-10.

20 Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

21 Jerome A. Barron, *Access to the Press - A New First Amendment Right*, 80 HARV. L. REV. 1641, 1641 (1967).

22 *Id.*

23 *Id.* at 1660.

24 418 U.S. 241, 243 (1974).

editorials written about them.[25] The Supreme Court declared the statute facially unconstitutional.[26] The Court reasoned that although facilitating an open forum for ideas was a desirable goal, it could not come at the expense of coercing newspapers to publish what they would rather not publish.[27] The editorial discretion of a newspaper—deciding what stories to cover and what to say about them—is therefore a free speech opinion.[28]

The "editorial discretion" doctrine is not only confined to newspaper editors. In *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, the Supreme Court broadened its holding in *Tornillo* to include all public speakers exercising judgment in expressive communication.[29] In *Hurley*, a private Irish heritage organization denied a request from an LGBT group of Irish descent to march in the organization's St. Patrick's Day parade.[30] In holding for the parade organizers, the Court expressed that "[O]ne important manifestation of the principle of free speech is that one who chooses to speak may also decide what not to say."[31] The Court believed that inclusion of a float in the organizer's parade could reasonably give rise to the inference the parade organizer supported the views of those with floats in the parade.[32] Therefore, the organizer's decision of who would march, much like the editor's decision of what to publish, expressed a value judgment that the First Amendment protected.[33]

2. Commercial Speech Doctrine

Critics of the marketplace of ideas justification for freedom of speech[34] tend to believe that the framers of the U.S. Constitution had a much narrower purpose for the First Amendment.[35] They suggest the original intent behind freedom of speech was to ensure citizens were able to participate in and criticize their Government without fear

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25 FLA. STAT. ANN. § 104.38 (West 1973).
26 *Tornillo*, 418 U.S. at 258.
27 *Id.* at 256.
28 *Id.* at 258.
29 515 U.S. 557, 581 (1995).
30 *Id.* at 561.
31 *Id.* at 573 (internal citation omitted).
32 *Id.* at 573-76.
33 *Id.*
34 STONE ET AL., *supra* note 15, at 13.
35 *See* JEROME A. BARRON & C. THOMAS DIENES, FIRST AMENDMENT LAW IN A NUTSHELL 10 (4th ed. 2008).

of legal consequences.[36] These commentators believe speech should be unrestricted so long as it furthers this end.[37] However, in their view, speech that does not fulfill this purpose should not always be given full, unqualified First Amendment protection.[38]

Although controversial,[39] the commercial speech doctrine has incorporated this premise into First Amendment jurisprudence. Commercial speech has been defined through case law as "speech doing no more than proposing a commercial transaction."[40] The Supreme Court declared in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.* for the first time[41] that commercial speech does indeed come under the protection of the First Amendment.[42] The Court reasoned that a profit motive alone cannot disqualify speech from protection and that commercial information is highly demanded by the public.[43] Therefore, the First Amendment applies to commercial expression, including advertising.[44]

However, *Virginia Board* does not give limitless First Amendment protection to commercial speech. The First Amendment protects commercial speakers to the extent they inform consumers about commercial products.[45] The economic justification is that commercial speakers are in the best position to know about their products and inform the public.[46] Nevertheless, implicit in this justification is that the First Amendment does not fully protect commercial speakers who do not inform the public about their products.[47] Indeed, the Court

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36 *Id.*; *see generally* CASS SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1993) (discussing how Madisonian Republicanism relates to freedom of speech).

37 BARRON & DIENES, *supra* note 35; *see generally* SUNSTEIN, *supra* note 36.

38 BARRON & DIENES, *supra* note 35; *see generally* SUNSTEIN, *supra* note 36 (discussing author's belief that the government may regulate many types of speech without violating the First Amendment).

39 *See generally* Richard J. Vangelisti, *Cass Sunstein's "New Deal" for Free Speech: Is it an "Un-American" Theory of Speech?*, 85 KY. L.J. 97 (1997).

40 FARBER, *supra* note 13, at 152.

41 *See* Breard v. Alexandria, 341 U.S. 622, 642-45 (1951) (holding that door-to-door salesmen were not entitled to First Amendment protection); *see also* Valentine v. Chrestensen, 316 U.S. 52, 54-55 (1942) (holding that distributing advertisements on public streets is not protected by First Amendment).

42 425 U.S. 748, 762-63 (1976).

43 *Id.*

44 *Id.* at 770.

45 FARBER, *supra* note 13, at 156-57.

46 *Id.*

47 *Id.*

cautioned that "Some forms of commercial speech regulation are surely permissible."[48]

Subsequent case law has shown that the First Amendment does provide a lower level of protection to commercial speech. In *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, the Supreme Court developed a test for the regulation of commercial speech.[49] The "*Central Hudson* test"[50] allows the Government to regulate commercial speech when "the regulation directly advances the governmental interest asserted, and . . . is not more extensive than is necessary to serve that interest."[51] The Court clarified the *Central Hudson* test in a later case by holding that the test does not require that the government use the absolute least restrictive method of regulation.[52] Nevertheless, the Court has often found commercial speech regulations too broad and, therefore, unconstitutional.[53]

The commercial speech doctrine has implications for search engine speech. Under certain circumstances, Internet search results can be seen as the search provider proposing a transaction with the user.[54] In these instances, analysis under the *Central Hudson* test is necessary to determine the implications of such a categorization.[55]

3. Conduit and Embedded Speech Distinctions

On the Internet, it is often unclear what is speech and who is speaking. Indeed, commentators have posed such questions of Internet search results. One commentator remarked that "[A]s a general rule, nonhuman or automated choices should not be granted the full protection of the First Amendment, and often should not be considered 'speech' at all."[56]

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48 Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976).

49 Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980).

50 *See* BARRON & DIENES, *supra* note 35, at 179 (coining the term "*Central Hudson* test"); *see also* FARBER, *supra* note 13, at 154.

51 *Cent. Hudson*, 447 U.S. at 566.

52 Bd. of Trs. v. Fox, 492 U.S. 469, 480 (1989).

53 *See* Thompson v. Western States Med. Ctr., 535 U.S. 357, 377 (2002) (holding ban on drug advertisement broader than necessary); *see also* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 563-66 (2001) (holding ban on smoking advertisements in certain locations is too broad).

54 *See infra* Part II.B.

55 *See infra* Part II.C.

56 Wu, *supra* note 2 (internal quotation marks in original).

Generally, the law considers speech to encompass all expressive output and the speaker is the one responsible for that output.[57] In *Turner Broadcasting System, Inc. v. FCC*, a cable operator argued that a federal law requiring cable operators to carry local broadcast television stations violated its free speech rights.[58] The cable operator argued that its decision of which channels to carry was expressive and, therefore, subject to First Amendment protection.[59]

Although agreeing that a cable operator is a speaker, the Court held that operators are "a conduit for the speech of others."[60] This holding differs from the holding in *Tornillo*, where the Court expressly rejected the idea that newspapers were conduits.[61] The Court reasoned that as conduits, the First Amendment gives less protection to cable operators' decisions concerning which channels to carry.[62] The Court did not think it was likely that the public would interpret a cable operator carrying a channel as the operator's endorsement of that channel.[63]

The conduit view of speech is not the only legal approach that relies on the hybrid speech concept. The legal notion of embedded speech gives multiple, simultaneous speech categorizations to what appears to be a single piece of speech. For example, in *Bolger v. Youngs Drug Products Corp.*, a contraceptives manufacturer mailed promotional pamphlets to the general public that included information about venereal diseases and family planning.[64] The Court found the portions of the pamphlets that discussed public health were informational and the manufacturer could directly comment on these issues without limitation.[65] However, the Court concluded the pamphlets, taken as a whole, were advertisements that were subject to regulation as commercial speech.[66] Even though portions of the

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57 BARRON & DIENES, *supra* note 35, at 250-51.

58 512 U.S. 622, 634 (1994).

59 *Id.*

60 *Id.* at 629.

61 Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974) ("A newspaper is more than a passive receptacle or conduit for news, comment, and advertising.").

62 *Turner*, 512 U.S. at 655-56.

63 *Id.*

64 463 U.S. 60, 62 (1983).

65 *Id.* at 68.

66 *Id.* at 67-68.

pamphlets contained unqualified, informational speech, the pamphlets themselves still qualified as commercial speech.[67]

One of the great challenges in applying the First Amendment to search results ranking is defining the type of speech at issue. Some commentators suggest that the conduit-speaker description used for the cable operators in *Turner* is appropriate.[68] However, a hybrid approach more similar to the one used by the Court in *Bolger* may also apply.[69]

B. *Search Engine First Amendment Cases*

There are three lawsuits that directly confront the First Amendment's application to Internet search results,[70] two of which were decided squarely on the basis of the First Amendment.[71] These cases give insight into preliminary judicial thought about search engine result speech. However, all these cases were decided in federal district courts.[72] Not reaching a federal circuit court of appeals or the Supreme Court leaves these cases with limited persuasive force because they have no precedential value outside of their respective districts. Accordingly, their importance should not be overemphasized.

The initial case to address the First Amendment in relation to search engine speech was *Search King, Inc. v. Google Technology, Inc.* in 2003 in the Western District of Oklahoma.[73] Search King, a web-advertising contractor, brought a tortious interference lawsuit against Google premised on the theory that Google altered the PageRank[74] of Search King's website.[75] Search King alleged that its website went from being ranked very highly in Google search results to not being

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67 *Id.*

68 Bracha & Pasquale, *supra* note 5, at 1191-94.

69 *See infra* Part II.C.

70 Kinderstart.com, LLC v. Google, Inc., No. 5:06-CV-02507, 2007 WL 831806 (N.D. Cal. Mar. 16, 2007); Langdon v. Google, Inc., 474 F. Supp. 2d 622 (D. Del. 2007); Search King, Inc. v. Google Tech., Inc., No. 5:02-CV-01457, 2003 WL 21464568 (W.D. Okla. May 27, 2003).

71 *Langdon*, 474 F. Supp. 2d 622; *Search King*, 2003 WL 21464568.

72 *Kinderstart.com*, 2007 WL 831806; *Langdon*, 474 F. Supp. 2d 622; *Search King*, 2003 WL 21464568.

73 2003 WL 21464568.

74 PageRank is Google's proprietary algorithm for ranking its search engine results. *See* AMY N. LANGVILLE & CARL D. MEYER, GOOGLE'S PAGERANK AND BEYOND: THE SCIENCE OF SEARCH ENGINE RANKINGS 25-28 (2006).

75 *Search King*, 2003 WL 21464568, at *1-2.

included in the search results at all.[76] Google advanced an affirmative defense, arguing that the search rankings generated by its algorithm were opinions fully protected by the First Amendment.[77]

The court compared search results rankings to bond ratings proffered by credit agencies.[78] Other courts have held that these ratings have First Amendment protection because they provide an opinion about a state of the world.[79] Therefore, by analogy, the court declared "Google's PageRanks are entitled to full constitutional protection."[80] The court took its reasoning further and declared that PageRanks are "*per se* lawful."[81]

Four years later, a similar result was reached by a different court in *Langdon v. Google, Inc*.[82] Like *Search King*, a web site operator accused Google and other search providers of deceptive business practices for failing to include his web site in search results.[83] The court believed that providing the web site operator with the relief he requested would force Google to speak.[84] Citing *Tornillo*, the court held that forcing an individual to speak violates his First Amendment right not to speak.[85] Therefore, the court held the First Amendment protected Google and other search providers from suit.[86]

C. *Normative Approaches Suggested in Legal Scholarship*

Several legal commentators have addressed the issue of First Amendment protection for Internet search engine results. Their work has built upon existing First Amendment doctrine[87] and search results case law[88] to provide an appropriate normative legal approach. The focus of this work has been on constructing a bright-line, categorical

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[76] *Id.* at *1.

[77] *Id.* at *2.

[78] *Id.* at *2-3.

[79] Jefferson Cnty Sch. Dist. No. R-1 v. Moody's Investor's Servs., Inc., 175 F.3d 848, 852 (10th Cir. 1999).

[80] *Search King*, 2003 WL 21464568, at *4 (quoting Jefferson Cnty. Sch. Dist. No. R-1 v. Moody's Investor's Servs., Inc., 175 F.3d 848, 852 (1999) (internal quotation marks omitted)).

[81] *Id.* at *3 (emphasis in original).

[82] Langdon v. Google, Inc., 474 F. Supp. 2d 622 (D. Del. 2007).

[83] *Id.* at 626-27.

[84] *Id.* at 629-30.

[85] *Id.* at 630 (citing Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 256 (1974)).

[86] *Id.*

[87] *See supra* Part II.A.

[88] *See supra* Part II.B.

rule that applies to all search engine speech. Some commentators believe search engine speech is always entitled to full First Amendment free speech protection.[89] Conversely, other commentators believe the law should never furnish full First Amendment protection to search engine results, either because search engines do not speak at all[90] or because their speech is of low value.[91]

Eugene Volokh argues that the First Amendment requires giving search engine results full, unfettered free speech protection.[92] Volokh's conception is best understood as a distillation process, where search engines act as proxies for those who program them.[93] The distillation process begins with the companies that provide search engines to the public.[94] Those companies hold opinions about how to provide users with useful websites in response to their search queries.[95] For example, Google believes a website's value to search users comes from the number of other websites that have hyperlinks to that website.[96]

At the first level of distillation, the search engine companies relay their opinion of website usefulness to their team of computer programmers.[97] Next, through another level of distillation, the programmers abstract the opinions of the company by creating Internet searching algorithms.[98] These algorithms use computer automation to sort search results based on the usefulness opinion held by the search engine company.[99] For Google, the PageRank algorithm is able to analyze a search query entered by a user, find websites that discuss the query, and then sort those websites based on how many times they are linked to by other websites.[100]

Volokh argues the distillation process directly corresponds with the free speech protection of editorial discretion.[101] Volokh contends

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89 *See generally* Volokh & Falk, *supra* note 1.

90 Wu, *supra* note 2.

91 Bracha & Pasquale, *supra* note 5, at 1193-94.

92 *See generally* Volokh & Falk, *supra* note 1.

93 *See id.* at *11.

94 *See id.*

95 *See id.*

96 *See id*; *see also* LANGVILLE & MEYER, *supra* note 74.

97 *See* Volokh & Falk, *supra* note 1, at *10-11.

98 *See id.*

99 *See id.* at *11.

100 *See* LANGVILLE & MEYER, *supra* note 74.

101 Volokh & Falk, *supra* note 1, at *8.

that the "judgments about selection and arrangement of content" made by search providers are just like the decisions about what to print made by the newspaper in *Tornillo*.[102] Employing the holding from *Hurley*—that the editorial discretion doctrine does not require one to be a publisher in the formal sense—bolsters Volokh's argument.[103] Therefore, the application of the First Amendment editorial discretion does not hinge on categorizing search engine providers as members of the media.[104] Google, like the parade organizer in *Hurley*, cannot be forced to speak in a certain way.[105]

Volokh disagrees that search engine results are mere conduits, like the cable programming in *Turner*.[106] Instead, Volokh argues that search users believe search results sorting is based on the search provider's value judgment about the worth of the speech.[107] This conception makes search results more like the parade organizer's choices in *Hurley* than a conduit to other's speech.[108] According to Volokh "[T]he *Turner* approach does not apply where the speaker is compiling and editing a speech product of its own . . . ."[109]

Other commentators have come to the opposite conclusion and believe *Turner* is the proper case for analyzing search engine speech. For example, Frank Pasquale questions the *Search King* holding, saying "The court may call rankings opinions, but the world does not treat them as such; rather, the more dominant a search engine is, the more its ranking is treated as (and becomes) a fact about the relevance, quality, and prominence of the ranked."[110] Pasquale also believes users treat search results as a public good and do not perform a detailed inspection of how results are ranked.[111] Using a marketplace of ideas rationale, Pasquale contends the First Amendment inquiry for search results should focus on a website's ability to speak and be heard, not the search engine's ability to rank.[112]

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102 *Id.* (citing Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974)).

103 *Id.* at *15 (citing Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557, 570 (1995)).

104 *Id.* at *9-10.

105 *Id.* at *15.

106 *Id.* at *25-27.

107 Volokh & Falk, *supra* note 1, at *26-27.

108 *Id.* at *26.

109 *Id.*

110 Pasquale, *Rankings, supra* note 10, at 125.

111 *Id.* at 128.

112 *Id.* at 139.

As a result, Pasquale argues *Tornillo* is inapplicable to search engine cases and *Turner* is the controlling precedent.[113] By this view, search engines are conduits to others' speech and the Government could constitutionally require search engines to return certain websites in their search results.[114] Pasquale and Bracha, do not believe this approach violates *Hurley* because users are not likely to associate the rankings with the search engine.[115] If anything, the rankings are only "implied observations," not value judgments.[116] Pasquale concludes no First Amendment rationale can support the extension of free speech protection to these implied opinions.[117]

II. ANALYSIS

The preliminary approaches to search engine speech are underdeveloped and do not fit comfortably within First Amendment doctrine. Section A will introduce the concept of artificial placement, a search provider practice that is becoming more prevalent and introduces new challenges to free speech as applied to search engines. Section B will describe the insufficiencies of the approaches applied by courts and suggested by commentators. Also, Section B will identify the insights made in these approaches that are useful in developing a more comprehensive approach. Section C will build upon these insights to suggest an inquisitive, fact-based approach in applying the First Amendment to search engine results. This approach addresses a more complex, and more realistic view of search engine results than previous approaches.

A. *Artificial Placement of Search Results*

The process known as artificial placement complicates First Amendment application to search results ranking.[118] Artificial placement is premised on the ability of search providers to control the

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113 Frank Pasquale, *Asterisk Revisited: Debating A Right of Reply on Search Results*, 3 J. BUS. & TECH. L. 61, 72-73 (2008) [hereinafter Pasquale, *Asterisk*].

114 *Id.*

115 Bracha & Pasquale, *supra* note 5, at 1197.

116 *Id.* (internal quotation marks omitted).

117 *Id.* at 1195-96, 1199-1201.

118 Andrew Sinclair, *Regulation of Paid Listings in Internet Search Engines: A Proposal for FTC Action*, 10 B.U. J. SCI. & TECH. L. 353, 370 (2004) (introducing term "artificial placement").

order in which search results are displayed to a user.[119] Search providers can, in theory, modify their search algorithms to rank certain websites higher than they would normally appear in the search results.[120] For example, a search provider could modify its algorithm to always rank a certain website first when a user searches "car," even if that website would not otherwise be highly ranked by the algorithm. Artificial placement describes when search providers make such modifications to their search algorithms to promote their own products and websites.[121]

Google's competitors argue Google engages in artificial placement and allege this practice is anticompetitive.[122] Google offers many products beyond its search engine that it could promote by using artificial placement.[123] Also, as Google acquires companies like Frommer's, a consumer travel guide producer, to broaden its product offering.[124] Google's competitors argue Google already artificially places some of its products[125] and are concerned Google will escalate this practice with its acquisition of other companies.[126] A European Commission investigation found there was merit to these complaints.[127]

Regardless of whether Google is already artificially placing search results, the fact remains that search providers have the ability to artificially place search results. Artificial placement is different than when search engines sell advertisements based on search terms.[128] In those situations, the sponsored search results appear in a separate identifiable area and not within the general search results

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119 *Id.*

120 *Id.*

121 *Id.*

122 Juliette Garside, *TripAdvisor Files Competition Complaint Against Google*, THE GUARDIAN (Apr. 3, 2012), http://www.guardian.co.uk/technology/2012/apr/03/tripadvisor-files-complaint-against-google.

123 *See* About Google- Products, GOOGLE, http://www.google.com/intl/en/about/products/ (follow "About Google" hyperlink; then follow "Products" hyperlink).

124 *See generally* Efrati & Trachtenberg, *supra* note 6.

125 Garside, *supra* note 122 (quoting executive of Google competitor alleging that Google artificially places its Google Places product).

126 Efrati & Trachtenberg, *supra* note 6.

127 Paul Geitner, *Google Moves Toward Settlement of European Antitrust Investigation*, N.Y. TIMES, July 24, 2012, at B3.

128 *See generally* Cannon, *supra* note 11 (discussing how the First Amendment applies to sponsored web links).

ranking.[129] Therefore, First Amendment treatment for search results ranking requires consideration of the distinct issue of artificial placement. However, because artificially placed search results appear directly next to normal search results, it is difficult to use a single First Amendment approach for a search that returns both types of results.

B. *Legal Insufficiency of Suggested Approaches*

The approaches of the courts and legal commentators to First Amendment protection for search engine results all have desirable features. Yet, none are sufficient to stand alone as a comprehensive doctrine that addresses issues like artificial placement. Full First Amendment protection for search engine results is overbroad and does not incorporate the contours of commercial speech into its reasoning. Unqualified limitations on First Amendment protections of search engine results also fails to comport with several First Amendment principles, including protection for speech that expresses an editorial opinion.

Volokh's abstraction of search engines as proxies for their programmers is useful and appropriate.[130] The approach is also legally justifiable, drawing on First Amendment precedent that links computer automation to its programmer.[131] However, his analysis is incomplete. Specifically, any further extension of Volokh's abstraction approach does not fully support First Amendment protection for search results.

Volokh's argument that search engines are the proxies of their programmers seems to undercut his conclusion of unfettered First Amendment protection for search engine results.[132] In arguing that search engines are effectively proxies, Volokh concludes it is the opinion of the programmer that is protected by extending First Amendment protection to search engine results.[133] The First Amendment rights of those programmers, like all speakers, are subject to limitations and qualifications, such as the commercial speech and conduit

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129 *See generally id.* (discussing how the First Amendment applies to sponsored web links).

130 Volokh & Falk, *supra* note 1, at *11.

131 *See id.* at *14 (citing Brown v. Entm't Merchants Ass'n, 131 S. Ct. 2729 (2011) (holding that interactive media, such as video games, are protected speech)).

132 *Id.* at *11.

133 *Id.* at *8.

doctrines.[134] Therefore, by Volokh's proxy logic, a rule of blanket free speech coverage for search engine results is over-inclusive if the inquiry ends simply by categorizing speech as coming from a search engine.

For example, consider a user who types the query "vegetables" into a search engine prompt and receives back from the search engine an ordered listing of websites. According to the proxy abstraction, this query is the same as the user asking a representative of the search engine company "What Internet pages, in order of importance, would be the most helpful to inform me about vegetables?" The ordered search results represent the search engine company responding to the user by saying, "This is my opinion of the pages you should view." It is this opinion of the search engine provider that should be the focus of the First Amendment inquiry, not the mere fact that a search engine was the means to provide the answer. In other words, Volokh's abstraction model should not shield the true speaker—the search provider—from scrutiny.

Pasquale's search results conception is also incomplete because it does not target the true speaker. Pasquale envisions the mathematical algorithm itself as the opinion.[135] According to Pasquale, "Full First Amendment protection should be reserved for accountable, attributable speech—not the opaque data processing systems . . . ."[136] But this analysis misconstrues the machine running the search algorithm as the speaker.

The speaker exists only at the first level of abstraction, before being distilled by automation.[137] To return to the previous example, a user who searched for the word "vegetable" is not being spoken to by a machine, but instead has a machine automate the opinion of the human programmer speaking higher up in the chain.[138] At the top of this chain are the search engine company's decision makers, who decide what is a useful method for ranking websites.[139]

Pasquale's notion that search results are only implicit opinions, minimally expressive and mostly functional, seems plausible.[140] At

134 *See supra* Part I.A.2-3.
135 Pasquale, *Asterisk*, *supra* note 113, at 78.
136 *Id.*
137 *See* Volokh & Falk, *supra* note 1, at *11.
138 *See id.*
139 *See id.*
140 Bracha & Pasquale, *supra* note 5, at 1197.

first blush, there appears to be a parallel with search results and the conduit theory of *Turner*, with search engines merely acting as an intermediary between a user and the speech the user is interested in accessing.[141] However, a deeper analysis reveals this parallel cannot stand. It would not be helpful if search engines merely returned all websites containing terms matching the user's query, with no correlation to the level of usefulness each result will be to the user. The function that search engines serve is to provide a helpful sorting for the user.[142] Otherwise, the user would be required to sort through potentially millions of websites to determine which were useful for his needs.

Pasquale's conduit conception really begins to falter when analyzing the situation of artificial placement.[143] Pasquale's adoption of the conduit theory, instead of the editorial discretion theory, comes from the notion that "[S]earch engines lack any association between the supposedly compelled speaker . . . ."[144] However, when search providers prioritize their own results, they are more closely associated with the speaker. Therefore, Pasquale's conduit parallel argument only makes sense fully if the government regulations at issue in *Turner* targeted channels owned by the cable operators. But these facts were not present in *Turner* and the Court found the cable operators were conduits to *others'* speech, not conduits to their *own* speech.[145]

Pasquale's assertion that Internet search results are largely functional and not expressive is also strained when considering artificially placed results.[146] Artificial placement itself evidences that a search provider has an opinion about the artificially placed search results that is more than just functional. Instead of allowing the algorithm to naturally rank these search results, the search provider elevates them. Pasquale's reasoning works against classifying even these artificial and subjectively placed search results as opinions. Yet, these artificially placed results are seemingly the most likely targets for speech restrictions.

Similarly, the approach adopted by the court in *Search King* is not extensible in instances where search results are artificially placed.

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141 Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 629 (1994).

142 *See* Volokh & Falk, *supra* note 1, at *5.

143 *See supra* Part II.A.

144 Bracha & Pasquale, *supra* note 5, at 1197.

145 *Turner*, 512 U.S. at 629.

146 Bracha & Pasquale, *supra* note 5, at 1197.

The *Search King* court found it important that "[W]eb sites that are ranked have no power to determine where they are ranked, or indeed whether they are included on Google's search engine at all."[147] The opposite is true when search providers artificially place results. Search providers do have the power to define the search ranking and they execute that power when they place their own pages higher in search results.[148]

Therefore, the *Search King* decision is based on a premise that does not necessarily take into account how search engines operate. The *Search King* court may have reached the right conclusion based on the facts before it,[149] but its flawed premise may lead to incorrect results when search results are artificially placed in rankings.

Also, *Search King* is not factually helpful when examining artificially placed results. Google was sued in *Search King* for not including a website in its search results, or in other words, for not speaking.[150] *Hurley* protects this right,[151] but a different analysis should occur when a speaker breaks his silence and does speak. Google has the right to artificially place search results, but such placement may constitute commercial speech.[152] Using only the reasoning in *Search King*, which states that a speaker has the right not to speak, will not lead to this commercial speech classification.

Volokh's editorial discretion analysis also does not properly address artificial placement. Volokh considers all search engine providers to effectively be editors, at least in the nonliteral understanding of that term used in *Hurley*.[153] This generalization is not necessarily true. Search providers that artificially place their websites high in search rankings seem more similar to sellers of goods than to editors reporting on stories they know little about.

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147 Search King, Inc. v. Google Tech., Inc., No. 5:02-CV-01457, 2003 WL 21464568, at *1 (W.D. Okla. May 27, 2003).

148 *See* Efrati & Trachtenberg, *supra* note 6.

149 Pasquale, *Rankings, supra* note 10, at 117 ("Nevertheless, one need not reject the court's conclusion that a business tort occurred here in order to agree that *some* accountability for search engine results is increasingly necessary as they become the primary portal for net users." (emphasis in original)).

150 *Search King*, 2003 WL 21464568, at *1.

151 Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557, 573 (1995) ("[O]ne important manifestation of the principle of free speech is that one who chooses to speak may also decide what not to say." (internal citation omitted)).

152 *See infra* Part II.B.

153 Volokh & Falk, *supra* note 1, at *8-10.

It is also hard to imagine that newspaper editors would always enjoy the fully protected free speech Volokh's approach suggests. For example, a newspaper editor using his editorial judgment may decide to print within the newspaper an advertisement for monthly subscriptions. A court would likely analyze this speech decision under the commercial speech doctrine because it proposes a commercial transaction.[154] Likewise, commentators propose that some of the speech made by search providers is commercial speech.[155] One example of such speech is the paid advertisements that often appear above search results.[156] Approaches that categorize this speech as commercial speech suggest that, at least in some situations, search providers are commercial speakers.

C. *Applying an Inquisitive Approach to Search Engine Speech*

Like all speakers, search engines speak in different ways. The First Amendment does not protect a business owner who misleads consumers about his products.[157] However, the First Amendment does allow the same business owner to speak his political views without any fear of the government silencing him.[158] If the law is to treat search engines as speakers, the approach used to analyze such speech must be sophisticated enough to differentiate amongst the various types of speech search engines promulgate. It is not sufficient to simply use a broad, *per se* speech classification that covers all search results rankings. If the broad classification is overly restrictive, such an approach would invariably sacrifice the democratic value of the marketplace of ideas.[159] Similarly, a broad classification that is overly permissive would not comport with commercial speech doctrine.[160]

The approach that should be used to classify search engine result speech must always focus on the intentions of the actual speaker: the

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154 *See infra* Part I.A.2.

155 Cannon, *supra* note 11, at 317-18.

156 *Id.*

157 *See* 15 U.S.C. § 1125(a) (2012) (providing as part of the federal Lanham Act a civil action against those who advertise with false or misleading claims).

158 *See, e.g.*, Eugene Volokh, *No Building Permits for Opponent of Same-Sex Marriage*, VOLOKH CONSPIRACY (July 25, 2012, 1:24 PM), http://www.volokh.com/2012/07/25/no-building-permits-for-opponent-of-same-sex-marriage/ (arguing ban refusal to award business permits based on owner's political speech is a per se violation of First Amendment).

159 *See infra* Part I.A.1.

160 *See infra* Part I.A.2.

search provider. This approach requires a factual inquiry into the nature of the speech. When search providers rank search results without artificially placing their own websites, they do so with the intent of expressing their opinion about the value of the websites returned in the search. This intent entitles the speech to full First Amendment protection per the editorial discretion doctrine of *Tornillo* and *Hurley*. When search providers artificially place their own websites high in search rankings, deviating from the normal searching algorithm, they purposefully advance a commercial interest. Therefore, these rankings should be treated as commercial speech.

Commercial speech doctrine exists for speech that proposes a commercial transaction.[161] Artificial placement of a search engine's own product or the product of its subsidiary is exactly that type of proposition. When a user enters a search query into a search engine, she indicates to the search provider her interest in that query. With artificial placement, the search provider responds by suggesting the user purchase its product or use its service. It does so by placing its product high in the search results, directly presenting it to the user instead of risking that its product ranks behind hundreds or thousands of the other search results.

This elevated ranking represents the commercial speech proposal to transact. The search engine effectively communicates that it hopes the user consumes the artificially placed product. As artificially placed search results have no characteristics that distinguish them from normal search results, users may not realize search providers are proposing a transaction with them. However, a user's lack of awareness of the proposal should not defeat a commercial speech classification. The focus of the inquiry should not be on the understanding of the user, but on the intent of the speaker. This analysis follows logically because the speaker controls the speech and, therefore, the speaker is in the best position to tailor his speech accordingly.[162]

To be precise, this approach suggests categorizing as commercial speech the inflated *ranking* of the search provider's website, not necessarily the website itself. The high ranking, intended so a user will

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[161] FARBER, *supra* note 13, at 152.

[162] *Cf.* E. Air Lines, Inc. v. Gulf Oil Corp., 415 F. Supp. 429, 441-42 (S.D. Fla. 1975) (explaining that contract law allocates risks that aren't express to the party best able to foresee and bear the risk); Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 462 (1944) (Traynor, J., concurring) (explaining that tort law burdens and duties are placed upon the party in the best situation to exercise control).

see the website, meets the commercial speech definition of a proposal to transact.[163] The website itself is a separate piece of speech that may or may not be commercial speech.

Functionally, the distinction between the ranking and the website is important because it dictates how the *Central Hudson* test for commercial speech regulation operates in this realm.[164] A government regulation aimed at the substance of the website that satisfies the *Central Hudson* test would not be sufficient to regulate the ranking of the website. A separate iteration of the *Central Hudson* test would be required to justify such a regulation. For example, to regulate a website itself, the government must show it has a substantial interest directly advanced by regulating the content of the website.[165] To regulate the artificially placed ranking of that website, the government would need only demonstrate it has a substantial interest directly advanced by regulating artificial rankings.[166]

The seeming tension created by this approach is that in a search where one or several results are artificially placed, the vast majority of the remaining results are ranked using the search engine's natural algorithm. Is the composite ranking of all the search results commercial speech or editorial discretion free speech? The embedded speech teaching of *Bolger* eases this tension. *Bolger* approved an unrestricted free speech classification for factual speech embedded in a larger piece of commercial speech.[167] For search results, the application is similar to that of *Bolger*, but the result is inverted. The overall ranking produced by a search query will be considered as editorial discretion free speech. However, the individual elevated ranking of the artificially placed result is commercial speech contained within the free speech composite ranking.

The difficultly in applying this approach in practice is the factual inquiry it entails. Any party attempting to classify search rankings as commercial speech will need to prove as a preliminary matter that a search engine is artificially placing results. To prove artificial placement, experts will likely need to explain to a court the mechanics of complicated computer algorithms. Even for these experts, it may be

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163 Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 562-63 (1980).

164 *See supra* Part I.A.2.

165 *Cent. Hudson*, 447 U.S. at 564.

166 *Id.*

167 Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 68 (1983).

difficult to interpret the algorithms and determine if they do indeed artificially place websites for certain queries.[168] Although this difficulty may be consistent with the complicated inquires involved in many lawsuits involving a technical subject matter,[169] it likely exceeds the inquiry that usually occurs in First Amendment cases.[170] Normally, a speaker's intent is plain from his speech.

A complicated factual inquiry should not be a bar to implementing an inquisitive approach to search results speech. Procedural devices designed to make such inquiries less burdensome on courts already exist, and many areas of law utilize these inquiries.[171] The Federal Rules of Civil Procedure allow courts to appoint a special master to assist in fact finding upon the parties' consent.[172] Special masters who are experts in a technical area, such as computer programming, can be especially useful in resolving factual disputes requiring a skillset within that technical area to make sound determinations.[173] Judges accept the factual determinations of the special master unless there is clear error.[174] The Federal Rules of Evidence provide another procedural mechanism to aid with factual inquiries by permitting a judge to call his own expert witness.[175] Judges often use this evidentiary rule to clarify complicated technical facts.[176]

Even if this approach requires a heightened factual inquiry, the additional effort is worthwhile. The approach strikes the right balance between guaranteeing First Amendment protection and implementing

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168 *See* Steven Levy, *Inside the Box*, WIRED, Mar. 2010, at 96 (explaining the software engineering complexities in Google's search algorithm).

169 HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 156-57 (1973) (explaining belief of author, a federal judge, that technical factual inquiries go "quite beyond the ability of the usual judge to understand without the expenditure of an inordinate amount of educational effort by counsel and of attempted self-education by the judge").

170 Sarah F. Suma, Comment, *Uncertainty and Loss in the Free Speech Rights of Public Employees Under* Garcetti v. Ceballos, 83 CHI.-KENT L. REV. 369, 392 (2008) (describing the factual inquiry in some First Amendment cases as "imprecise").

171 *See* Arti K. Rai, *Specialized Trial Courts: Concentrating Expertise on Fact*, 17 BERKELEY TECH. L.J. 877, 892 (2002) (describing use of special masters and expert witnesses in patent litigation).

172 FED. R. CIV. P. 53.

173 Shira Scheindlin, *We Need Help: The Increasing Use of Special Masters in Federal Court*, 58 DEPAUL L. REV. 479, 482-83 (2009) (explaining belief of author, a federal judge, that use of special masters as technical experts is particularly helpful in cases involving computers).

174 Margaret G. Farrell, *Coping with Scientific Evidence: The Use of Special Masters*, 43 EMORY L.J. 927, 947 (1994).

175 FED. R. EVID. 706.

176 Rai, *supra* note 171, at 893 (citing study tracking usage of FED. R. EVID. 706).

practical First Amendment policy. It gives search providers full leverage to use their discretion and to freely express their opinion when judging the worth of a website to a user's search. Conversely, it prevents search providers from hiding behind the layers of abstraction between them and search rankings to avoid classification as a commercial speaker. Search providers should not have the benefit of free speech without also having the accountability that comes with being a commercial speaker. However, a search provider's occasional commercial speech should not rob that provider of its constitutional guarantee to free speech in other contexts.

CONCLUSION

A search engine speaks to Internet users by the manner in which it ranks search results. Like all speech, the First Amendment is always implicated with search engine speech. A *per se* categorization that applies to all search engine speech is not likely to reflect the complexities of search engine rankings. Instead, legal analysis of search engine speech must be dynamic enough to consider the nuances in search ranking and tailor the approach accordingly. When a search engine is providing a mere opinion, its result should be treated as a fully protected free speech opinion. However, in instances where the search engine's implicit motive is selling a product or service, the search engine should be subject to the speech limitations created by the commercial speech doctrine.