Are Search Results Speech?

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Whether and in what respect search results are speech protected by the First Amendment has dramatic implications for how, if at all, they can be regulated. At one extreme, Google argues that search results are editorial opinions (or, more recently, "scientific opinions") entitled to near-absolute protection from legal scrutiny, and several courts have agreed. At the other, Oren Bracha and Frank Pasquale argue that the First Amendment "simply does not extend to cover" most of Google's search results. In between are the allegations by Foundem and other disgruntled websites and competitors, which argue that certain specific ranking decisions are objectively wrong, and thus actionable. Courts' choice of how to characterize search results will likely determine the fate of the antitrust storm gathering over Google, as well as a host of private lawsuits sounding in defamation, interference with contract, and other business torts.

In prior work, I analyzed the copyrightability of ratings and rankings using a tripartite scheme: as facts, as opinions, and as self-fulfililng prophecies. In this paper, I will train those categories on search results, showing how they capture the divergent theories of search. Foundem and other critics describe search results as statements of fact, and hence protected only to the extent that they are true; Google describes its results as opinions, and hence fully protected; Bracha and Pasquale describe them as a form of conduct akin to the self-fulfilling prophecy and hence entirely unprotected. I plan to go beyond these totalizing characterizations and show that any given search result contains elements from *all three* categories. The paper will describe in detail which aspects of rankings are immune from judicial and legislative scrutiny, and which are not—and thus explain which of the current and coming anti-Google suits should be barred, and which should not.