

ARE SEARCH RESULTS SPEECH?

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INTRODUCTION

Google is in trouble. The company faces simultaneous antitrust investigations by the Federal Trade Commission and the Texas Attorney General.¹ Its competitors around the world are urging on the regulators, making the case against it in the press and online, and filing lawsuits of their own. Their central allegation—that Google systematically manipulates its search results to promote its own commercial interests—goes to the heart of its two-hundred-billion-dollar business model. If they are right, then Google has been using its power to determine the order in which search results appear to distort the information seen by hundreds of millions of Internet users. And if Google’s critics prevail in court, they will put significant limits on how the company can carry out the core function of a search engine: finding and ordering its results.

Google, however, has what it believes to be a complete and perfect shield against these attacks: the First Amendment. In defending against private lawsuits, the company has successfully invoked its free speech rights to block courts from even reaching the merits of the claims against it. In a Google-sponsored white paper, Eugene Volokh and Donald Falk argue that search engines “exercise editorial judgment about what constitutes useful information and convey that information—which is to say, they speak—to their users.”² They conclude, “[T]he First Amendment denies government the power to police the ‘fairness’ of search engine speech.”³ If Google engages in constitutionally protected “speech” when it chooses the order in which it displays search results, then many of the claims it faces are doomed from the outset.

But there are some very difficult facts for any theory of search results as speech. First, and most fundamentally, people use search engines as means to an end: finding the speech of websites and other information providers. Traditionally, the search engine’s own contribution to this process consists of identifying those providers and telling users how to find them. If this is speech, it is speech of an extraordinarily inarticulate form: the online equivalent of pointing and grunting.

These other providers have an obvious free speech interest, but Google has emphatically distanced itself from that speech, saying publicly, “We assure you that the views expressed by the

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¹ It is also the subject of an antitrust investigation by the European Commission and numerous private complaints within the European Union and elsewhere around the world. This Article will focus primarily on United States law, so it will bracket these other actions against Google. It will use worldwide examples to illustrate the factual issues, and it is hoped that the analysis of how Google works will be useful beyond the United States, as well.

² EUGENE VOLOKH & DONALD M. FALK, FIRST AMENDMENT PROTECTION FOR SEARCH ENGINE SEARCH RESULTS 28 (Apr. 20, 2012).

³ *Id.* at 20.

sites in your results are not in any way endorsed by Google.”⁴ Indeed, when the company was sued for directing users to allegedly defamatory webpages, it told the court, “[Search] results are not ‘new’ statements authored by Google or statements with meaning that is different or independent of the content of the underlying web page.”⁵

Moreover, Google generates its search results automatically, using computer algorithms and enormous data centers filled with computer servers. True, these computers are programmed by people, but at best their speech is algorithmically mediated. Google itself has tried to downplay the role of human choice in how it ranks search results. The basic algorithm it uses to assess the importance of webpages is patented, and the company has emphasized the inhuman objectivity of its algorithmic rankings, saying, “Our search results are generated completely objectively and are independent of the beliefs and preferences of those who work at Google.”⁶

Making matters even worse for Google, the company is an advertising-driven commercial juggernaut that has expanded into numerous other lines of business, from maps and restaurant reviews to books and product comparisons. Search results at Google.com now prominently link to numerous other Google properties: Google Maps, YouTube, Google Flight Search, and many more. The commercial self-interest is obvious—so obvious that the company’s founders warned against a version of it, arguing that “advertising funded search engines will be inherently biased towards the advertisers and away from the needs of the consumers.”⁷ But that was before Google became an advertising-supported search engine with a robotic finger in every conceivable pie.

Unsurprisingly, some commentators have concluded that search engines simply do not speak when they return results, or speak in ways the law can easily regulate. Oren Bracha and Frank Pasquale claim that search results are “functional arrangements of information” that “are hard to justify as a type of covered speech in terms of any of the common normative accounts of freedom of speech.”⁸ Tim Wu argues that “nonhuman or automated choices” like Google’s “should not be granted the full protection of the First Amendment, and often should not be considered ‘speech’ at all.”⁹ Kurt Wimmer concludes that Google makes constitutionally unprotected “misleading statements suggesting that applies its methodology consistently and for the benefit of users when in fact it deceptively punishes competitors without disclosure.”¹⁰

This Article presents the first comprehensive treatment of search engine speech: what it consists of, and how the First Amendment applies to it. The key to understanding search results, and to resolving many of the paradoxes of treating them as speech, lies in a distinction made over three decades ago by W. Page Keeton between two kinds of opinions: *evaluative* opinions are normative expressions of tastes and values while *deductive* opinions are descriptive claims about the world. Evaluative opinions are obviously speech, and they are unconditionally protected by

⁴ *An Explanation of Our Search Results*, GOOGLE (last visited July 16, 2012), <http://www.google.com/explanation.html>.

⁵ Combined Respondent’s Brief as to the Merits and Cross-Appellant’s Opening Brief as to Fees 15, *Maughan v. Google Tech., Inc.*, No. B183969, 2006 WL 1286841 (Cal. App. Feb. 27, 2006).

⁶ *An Explanation of Our Search Results*, GOOGLE (Mar. 21, 2007), *available at* <http://web.archive.org/web/20070321092528/http://www.google.com/explanation.html> (last visited July 27, 2012).

⁷ Sergey Brin & Lawrence Page, *The Anatomy of a Large-Scale Hypertextual Web Search Engine*, <http://infolab.stanford.edu/~backrub/google.html>.

⁸ Oren Bracha & Frank Pasquale, *Federal Search Commission: Access, Fairness, and Accountability in the Law of Speech*, 93 CORNELL L. REV. 1149 (2008).

⁹ Tim Wu, *Free Speech for Computers?*, N.Y. TIMES, June 19, 2012, at A29.

¹⁰ Kurt Wimmer, *The Proper Standard for Constitutional Protection of Internet Search Practices* (2012).

the First Amendment. Deductive opinions are also speech, but their protection is not absolute. Because they make claims about the world, they can sometimes be wrong. The First Amendment affords substantial breathing room to be wrong, but not to lie, at least not in ways that cause serious harm.

A search result expresses a deductive opinion about whether the user will find the linked information relevant, not an evaluative opinion about the search engine's own endorsement of the information. Google's search results are objective in that they steer clear of evaluative opinions; they are subjective in that relevance is necessarily a deeply imperfect science. Reasonable minds can, and very frequently do, differ in their assessments of what information is relevant to a user. And so search results enjoy the substantial—but not total—protection the First Amendment affords to deductive opinions.

In particular, the distinction between evaluative and deductive opinions neatly answers nearly all of the difficult questions about search results. For one thing, it shows that a rank-ordering of information sources can qualify as protected speech. It is hard to express a moral judgment by pointing and grunting, but “the thing you are looking for is here” is a perfectly comprehensible deductive opinion conveyed through digital pantomime. For another, the distinction shows that automation is a red herring with no bearing on the speech status of search results. A programmer's choice of a search algorithm expresses a deductive opinion about the most useful (to users) way to rank websites. That opinion is reflected in the actual rankings generated by the algorithm: they are deductive opinions, too.

Search engines' arms-length relationship with the speech of the information sources they direct users to also becomes comprehensible from this point of view. Recognizing that search results are speech about relevance shows whether they do or do not adopt websites' speech is the wrong question to ask. Information providers and search-engine users have important free-speech interests that search engines can facilitate. They do so not but adopting providers' speech as their own but by making their own speech about relevance, which helps users and providers find each other.

A close examination of caselaw on other kinds of highly-succinct deductive opinions shows that it is possible to state a cause of action for deceptive search ranking practices. A search ranking itself can almost never be false; relevance is too variable and too hard to assess for a court ever to say that a 30th-place ranking rather than a 3rd-place ranking is objectively “wrong.” But this is not the end of the story. One could say much the same about giving a collateralized debt obligation an AA rating rather than a BBB rating—and yet the courts have been able to conclude that credit ratings are actionable when they involve knowing deviations from the rating agency's own standards. The falsity inheres not in the rating itself, but in the implied statement that the rating agency actually believes it. So too with search results—at least in theory.

In practice, the evidentiary burden required to plead a claim for deceptive search ranking that passes First Amendment muster is high indeed. Google critics often assume that there are a clear, discrete set of specific manual deviations from its otherwise generally-applicable algorithmic results. But the baseline is illusory; it's algorithms all the way down. Their strongest case involves searches in which Google presents its own content prominently. But these decisions can frequently be defended on the basis that the company honestly and reasonably believes that integrating its other search offerings will enhance relevance. Its critics may disagree, but mere disagreement falls far short of their First Amendment burden. Even to the extent that these self-

interested search results are misleading commercial speech, clearer disclosure of the Google affiliation is likely to solve any problem of misleadingness. Google's critics may well prevail on some of their claims against it, but are almost certainly not entitled to the sweeping relief they seek.

The Article will proceed as follows. Part I will give background on how Google works and the principal challenges to its ranking practices. The remainder of the Article will then discuss in detail the First Amendment characterization of search results. Part II will start by explaining how search engines embed descriptive opinions in their ranking decisions and how the First Amendment protects such opinions regardless of the process used to generate them. Part III will clarify search engines' relationship to the speech of information providers, showing that they can indeed disclaim adoption of providers' speech without rendering themselves mute for First Amendment purposes. Part IV will address the doctrinal subtleties of the argument that search results can constitute harmful false speech, showing that they can, but only under quite narrow circumstances. Part V will consider the complications introduced by Google's commercial self-interest, explaining that the concerns here are quite real but can be addressed with remedies that do not place significant restrictions on its ranking practices. And finally, a Conclusion will consider implications of the present analysis for other online controversies, including network neutrality and First Amendment protection for other information arrangers like Facebook and Twitter.

The Article's scope is necessarily limited. Google is now a sprawling online empire, engaged in a remarkable series of multi-front legal battles. It faces serious privacy challenges, a slew of antitrust allegations covering a wide range of its business practices, and more patent lawsuits than the author has been able to keep track of. The Article focuses only on speech-related issues that affect the core business of a search engine—choosing which search results to display and in which order. The focus is justified on pragmatic grounds: it so happens that this core business is extraordinarily lucrative for Google. It is also justified on theoretical grounds: the speech issues raised by search ranking are illuminating about some difficult pieces of First Amendment doctrine, and should be broadly applicable.