

## The Proper Standard for Constitutional Protection of Internet Search Practices

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The First Amendment grants speech in the United States an extraordinary degree of protection. It is, without question, the most speech-protective organic law in the world, and both American law and American society have benefitted immeasurably from the freedom of expression that its protections have fostered. Yet, even the First Amendment's protections for speech are seldom absolute.

Google, which operates a hybrid Internet search and advertising business that is under antitrust investigation by the Federal Trade Commission, has asserted that its sphere of operation falls into an area of absolute First Amendment protection. Specifically, it argues that its search and advertising results are subjective "editorial judgment" that is absolutely immune from antitrust scrutiny.<sup>2</sup> This absolutist view, however, has no support in First Amendment law. It has been clear for decades that an actor cannot make anticompetitive actions impervious to antitrust regulation merely by attempting to clothe those actions in the garb of "speech," "opinion," or "judgment." Google's alleged search manipulation or other anticompetitive behavior, if proved, can form the basis of liability because such behavior can reasonably be considered deceptive and constitutes commercial speech. Indeed, antitrust liability for such behavior, if it is proved, would support rather than undermine First Amendment values.

Columbia Law Professor Tim Wu recently argued that computer-generated results often should not be considered speech at all,<sup>3</sup> in which case antitrust regulation could be applied to search algorithms without controversy. But even assuming that search

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<sup>2</sup> See Eugene Volokh & Donald M. Falk, Google, *First Amendment Protection for Search Engine Results* 6–7 (Apr. 20, 2012); Cade Metz, *Google Drops Nuke on "Objective" Search Engine Utopia*, THE REGISTER (Dec. 16, 2010), [http://www.theregister.co.uk/2010/12/16/google\\_algorithms\\_are\\_google\\_opinions/page2.html](http://www.theregister.co.uk/2010/12/16/google_algorithms_are_google_opinions/page2.html).

<sup>3</sup> See Tim Wu, Op-Ed, *Free Speech for Computers?*, N.Y. TIMES, June 20, 2012, at A20, available at <http://www.nytimes.com/2012/06/20/opinion/free-speech-for-computers.html>.

results constitute speech and are due some level of protection, as is the case with online and interactive content generally,<sup>4</sup> a finding that content constitutes “speech” is not a trump card that “blocks” government oversight.<sup>5</sup> That determination is the beginning of the First Amendment inquiry, not its end.

The Supreme Court consistently has stated that First Amendment speech protections are “not absolute.” *Virginia v. Black*, 538 U.S. 343, 358 (2003). Instead, certain laws “restrict public speech directly, deliberately, and of necessity.” *Bartnicki v. Vopper*, 532 U.S. 514, 537 (2001) (Breyer, J., concurring). Some expression is categorically unprotected, while even constitutionally protected speech may be regulated in a variety of contexts. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 387 (1992) (“Even the prohibition against content discrimination . . . is not absolute.”). Any contrary approach would lead to endemic difficulties in the administration of law, given that “[i]t is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one’s friends at a shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the First Amendment.”<sup>6</sup>

Bodies of law regulating speech are numerous and varied, and include, for example:

- Privacy and data security laws;
- Torts including defamation and related claims, assault, privacy claims, and intentional or negligent infliction of emotional distress;
- Hostile work environment and related claims arising under anti-discrimination laws;
- Intellectual property and related misappropriation of information laws;
- Campaign finance laws;
- Regulation of obscenity and sexual speech;
- Consumer protection laws;
- FCC regulation of broadcasters, common carriers, cable carriers, and other communications industry participants;

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<sup>4</sup> *See Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2738 (2011); *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 445-59 (2d Cir. 2001).

<sup>5</sup> *See* Volokh & Falk at 27.

<sup>6</sup> *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989); *see United States v. O’Brien*, 391 U.S. 367, 376 (1968) (“We cannot accept the view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea”).

- Criminal speech entailing conspiracy, fraud, harassment, intimidation, stalking, or blackmail;
- Wiretapping and national security information classification laws;
- Accessibility and closed captioning rules for online industry participants pursuant to the Twenty-First Century Communications and Video Accessibility Act of 2010.<sup>7</sup>

Of course, advocates may argue for law reform and urge higher levels of constitutional protection than existing precedent provides. However, a pending inquiry demands application of the standards of existing law. Here, existing law supports the legality of certain restrictions so long as the applicable First Amendment standard is satisfied. Internet search results are not an exception, and thus do not receive unqualified protection merely because they may be a form of speech.

The first step in determining whether speech is subject to protection and, if so, ascertaining the proper level of protection, is to consider the nature and characteristics of the speech under consideration. Here, Google asserts absolute antitrust immunity for its hybrid search and advertising practices that have been alleged to harm competition in the marketplace for Internet search and advertising. Because Google argues for absolute immunity—essentially, that it cannot be held accountable under antitrust law regardless of whether it intended to monopolize markets and use its monopoly power to undermine competition—the allegations of Google’s critics must be taken as true for purposes of this analysis. Whether the Federal Trade Commission will find these allegations persuasive, seek to establish them in a court of law, and succeed are, of course, premature questions—the Commission’s investigation of these allegations has not resulted in any public disclosures. But given that Google’s argument is based on a claim of absolute immunity, the

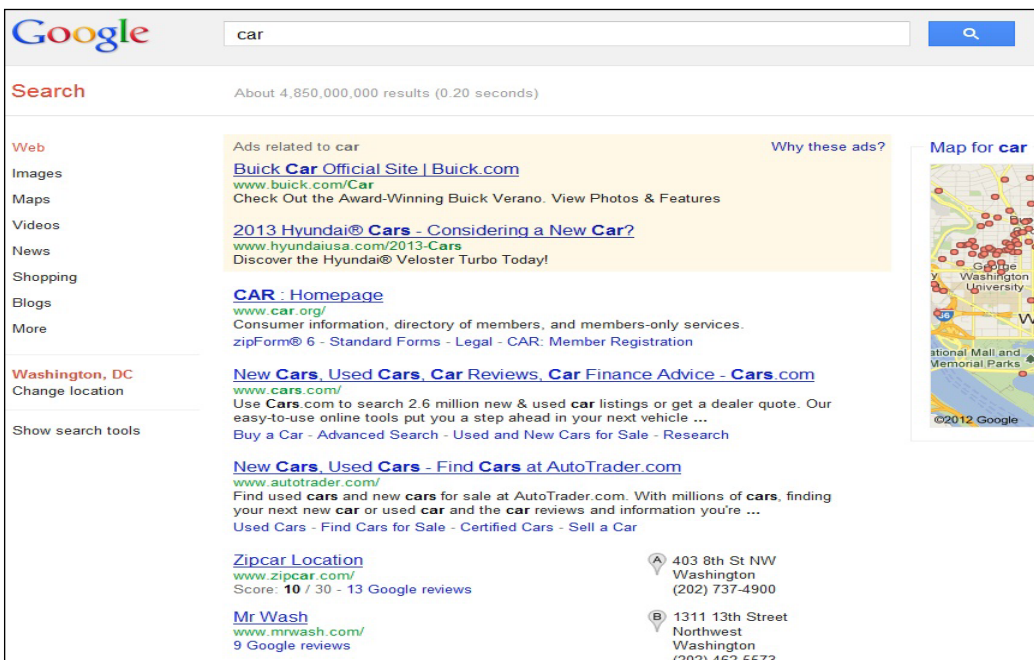
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<sup>7</sup> Contrary to its absolutist position on content that it presents, Google recently argued that the FCC should *broaden* the scope of its new Internet closed captioning rules to require all online video distributors to pass through closed captions for video clips in addition to the existing requirement to pass through captioning for full-length programs. See Reply to Comments and Oppositions of Google Inc., *Closed Captioning of Internet Protocol-Delivered Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, MB Dkt. No. 11-154 (June 18, 2012), available at <http://apps.fcc.gov/ecfs/document/view?id=7021923534>.

appropriate analysis must assume the truth of the allegations to determine the appropriate legal standards to apply to the facts.

***The Allegations Against Google.*** Due to the complexity of the Web and its literally trillions of pages, search has become an indispensable gateway to the Internet. Google controls some 70 percent of the market for Internet search in the United States, and near 90 percent of the market for search advertising. Its market share in other countries approaches 100 percent. Absence of a product or service from the first few entries of a search result ensures its obscurity. Google thus is in a position to exercise extraordinary control over the structure and future of the Internet.

In response to user search queries, Google presents several kinds of results. The “sponsored” results are provided in a shaded box and labeled as “ads.” The remaining “non-sponsored” results are presented outside of the shaded box. These non-sponsored results may include both “algorithmic” results, meaning results based on Google’s PageRank system, and “integrated” results highlighting additional information derived from Google services.<sup>8</sup> For instance, in the example below of a search for the word “car” by a user in the Washington D.C. area, the Buick and Hyundai links at the top are sponsored; the cars.org, cars.com, and autotrader.com links are



<sup>8</sup> Google, *Results Page Full Overview*, GOOGLE | INSIDE SEARCH, <http://support.google.com/websearch/bin/answer.py?hl=en&answer=35891> (last visited June 7, 2012).

algorithmic; and the remaining links are “integrated” results based on a search of Google Maps in the Washington area for the term “cars.”

Google consistently states that its “simple” goal in providing non-sponsored search results is “to give people the most relevant answers to their queries.”<sup>9</sup> It explains how its algorithmic search results work as follows: “Each blue underlined line is a search result that the Google search engine found for your search terms. The first item is the most relevant match we found, the second is the next most relevant, and so on down the list.”<sup>10</sup> Further, Google represents that search algorithms evaluate “200 unique signals,” thus representing (or at least implying) that those signals are interpreted in the same way for each site.<sup>11</sup> It even characterizes its search results as “democra[ti]c,” explaining that “Google search works because it relies on the millions of individuals posting links on websites to help determine which other sites offer content of value.”<sup>12</sup>

Google’s critics assert that its non-sponsored search results deviate from this purportedly “simple” mission by often providing an artificially prominent ranking and placement for Google services while artificially demoting or even de-listing entirely competitors’ sites. Vertical search engines such as Nextag and Foundem, which focus on specific types of content rather than general Web search, assert that Google has manipulated its rankings and system of search advertising to make them essentially invisible on the Web and destroy their businesses.<sup>13</sup> Google has an incentive to hide vertical search engines

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<sup>9</sup> Google, *Finding More High-Quality Sites in Search*, THE OFFICIAL GOOGLE BLOG (Feb. 24, 2011, 9:50 PM), <http://googleblog.blogspot.com/2011/02/finding-more-high-quality-sites-in.html>.

<sup>10</sup> *Results Page Overview*, *supra*.

<sup>11</sup> Google, *About Search*, Google: Facts About Google and Competition, <http://www.google.com/competition/howgooglesearchworks.html> (last visited June 11, 2012); Google, *Ten Things We Know To Be True*, Google | Company, <http://www.google.com/about/company/philosophy/> (last visited June 11, 2012).

<sup>12</sup> *Ten Things We Know To Be True*, *supra*.

<sup>13</sup> See Jeffrey Katz, Op-Ed, *Google’s Monopoly and Internet Freedom*, WALL ST. J., June 8, 2012, at A15, available at [http://online.wsj.com/article/SB10001424052702303830204577448792246251470.html?mod=google\\_news\\_wsj](http://online.wsj.com/article/SB10001424052702303830204577448792246251470.html?mod=google_news_wsj); *Foundem’s Google Story: Stifling Innovation and Eroding Consumer Choice*, SEARCH NEUTRALITY.ORG (Aug. 18, 2009), <http://www.searchneutrality.org/foundem-google-story>. Nextag and Foundem

to prevent their tailored and innovative features from attracting users away from Google's own search services. Regardless of whether this manipulation occurs through the operation of an algorithm or by "human" intervention is irrelevant to Google's critics; they assert that the obvious motive behind such self-serving manipulation is to serve Google's economic interests rather to provide "the most relevant answers" to users. Moreover, users who expect Google to deliver on its promise to provide the most useful results are deceived. "Integrated" results, such as the Google Maps results above, are nothing more than unmarked advertisements for other Google webpages and services. Moreover, Google's critics assert that its self-serving manipulation of its algorithmic search results — its core service — is entirely hidden from consumers and contrary to Google's explicit characterization of its own service to its users.<sup>14</sup>

With these allegations forming the basis for analysis, we now turn to a discussion of the appropriate model for First Amendment analysis of Internet search and advertising.

**1. Regulation of Deceptive and Anticompetitive Search Practices Is Consistent with the First Amendment.**

Assuming that Google has engaged in the behavior alleged by its critics, it seems clear that regulation of Google's deceptive search practices would be entirely consistent with the First Amendment. These allegations assert that Google is consistently engaging in misleading and deceptive speech in representing to consumers that it is returning the most "relevant" search results when, in fact, Google is misrepresenting that its own services are the most relevant or purposely hiding search results leading to Google's competitors who

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are vertical search engines focusing on price comparison in the U.S. and U.K. respectively.

<sup>14</sup> This would not be the first instance in which Google has been alleged to have leveraged its monopoly position in a manner that raises competition concerns. For its Google Books feature, the company scanned and indexed millions of books that remained under copyright without permission from the rights-holders. *See Authors Guild v. Google Inc.*, 770 F. Supp. 2d 666, 670 (S.D.N.Y. 2011). Google's attempted settlement of the litigation that has resulted "would [have] give[n] Google a de facto monopoly over unclaimed [orphan] works." *Id.* at 682. The U.S. Department of Justice and others objected to the settlement due to the threat to competition that it presented, and Judge Chin rejected the settlement in part on antitrust grounds, writing that "Google's ability to deny competitors the ability to search orphan books would further entrench Google's market power in the online search market." *Id.* at 683.

may operate relevant services. This alleged deception is designed to eliminate competitive threats and strengthen the walls around Google's monopoly while allowing the company to retain before the public its mask of producing consistent algorithmic search results.

Federal Trade Commission Chairman Jon Leibowitz described this distinction clearly in an *All Things Digital* interview on June 1, 2012. "If you engage in deceptive acts or practices, if you advertise deceptively, there is no First Amendment right to do that," Chairman Leibowitz told the Wall Street Journal's Walt Mossberg. "If your behavior is that you exercised First Amendment rights . . . as Microsoft was, I think, found to have done by the D.C. Circuit in the 1990s or the early aughts, in furtherance of an antitrust violation or an unfair method of competition, then you are not protected there."<sup>15</sup> Indeed, the application of these standards to the search marketplace is hardly novel, given that the FTC issued guidance on standards for paid-placement and paid-inclusion search programs under its Section 5 authority a decade ago.<sup>16</sup>

Chairman Leibowitz's views are firmly rooted in constitutional law. Misleading or false commercial speech falls entirely outside of the protection of the First Amendment.<sup>17</sup> See *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980). Moreover, the Supreme Court has stated that "regulatory commissions may prohibit businessmen from making statements which, though literally true, are potentially deceptive." *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 68 (1976) (plurality opinion). Consistent with this statement, the FTC has undertaken numerous enforcement actions against online service providers that have acted deceptively by engaging in privacy practices that deviate from their written privacy policies.<sup>18</sup>

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<sup>15</sup> See *D10 Video: Jon Leibowitz Session Highlights*, All Things D, [http://allthingsd.com/video/?video\\_id=A61A8E74-0B1C-4961-8141-1E2FFCDBD919E](http://allthingsd.com/video/?video_id=A61A8E74-0B1C-4961-8141-1E2FFCDBD919E) (June 1, 2012).

<sup>16</sup> See Letter from Heather Hipsley, Acting Associate Director, Division of Advertising Practices, Bureau of Consumer Protection, Federal Trade Commission, to Gary Ruskin, June 27, 2002.

<sup>17</sup> The next section explains why Google's alleged manipulation of its non-sponsored search results constitutes commercial speech.

<sup>18</sup> See, e.g., Federal Trade Commission, *FTC Charges Deceptive Privacy Practices in Google's Rollout of Its Buzz Social Network*, March 30, 2011, <http://www.ftc.gov/opa/2011/03/google.shtm>.



Moreover, courts repeatedly have held that antitrust liability may be predicated on false or misleading speech. *See Am. Soc’y of Mech. Eng’rs v. Hydrolevel Corp.*, 456 U.S. 556 (1982) (finding that deliberate misinterpretation of industry code for the purpose of deterring purchase of a competitor’s product violated the Sherman Act); *MCI Commc’ns Corp. v. AT&T*, 708 F.2d 1081, 1129 (1983) (stating that knowingly misleading or false product preannouncement by monopolist can constitute violation of Sherman Act); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 287-88 (2d Cir. 1979). Because Google’s anticompetitive biasing of its search results misleads the public, it may be actionable consistent with the First Amendment.

Regulation of deceptive speech in the search context is not an unusual or special case. From 1984 to 2004, the Civil Aeronautics Board and later the Department of Transportation prohibited “display bias” among Computer Reservation Systems (CRS), the method by which airlines communicated flight and fares information to travel agents and flyers.<sup>19</sup> “Display bias” was the practice of listing the flights of affiliated airlines above those of non-affiliates, even where the non-affiliates’ flights better matched the entered search parameters.<sup>20</sup> The Department of Transportation justified the prohibition, in the face of First Amendment attack, on the ground that display bias constituted misleading commercial speech susceptible to regulation because display bias “gives [affiliated] vendor flights an unwarranted display position, thereby causing travel agents to book flights that are not necessarily the best suited for their customers.”<sup>21</sup>

Google raises two defenses to the argument that its alleged search manipulation may be regulated because it is deceptive. Neither defense is persuasive:

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<sup>19</sup> *See* Civil Aeronautics Bd., *Airline Computer Reservation Systems: Display of Information*, 49 Fed. Reg. 32,540 (Aug. 15, 1984) (establishing regulations); Dep’t of Transportation, *CRS Regulations*, 57 Fed. Reg. 43,780 (Sept. 22, 1992) (extending display bias rules); Dep’t of Transportation, *CRS Final Rule*, 69 Fed. Reg. 976 (Jan. 7, 2004), available at <http://ostpxweb.dot.gov/aviation/Data/crsfinalrule.pdf> (setting sunset period for CRS display bias rule).

<sup>20</sup> *See* Cindy R. Alexander & Yoon-Ho Alex Lee, *The Economics of Regulatory Reform: Termination of Airline Computer Reservation System Rules*, 21 Yale J. on Reg. 369, 377-79 (2004).

<sup>21</sup> *CRS Regulations*, 57 Fed. Reg. at 43,792. *See also CRS Final Rule*, 69 Fed. Reg. at 1003-05 (reaffirming First Amendment analysis).



**a. Search Rankings Are Not Immune from Being  
Actionably False or Deceptive Because They Are  
“Opinion.”**

Under the First Amendment, statements of “opinion” are not immune from being held to be actionably false or deceptive. Rather, a statement characterized as an opinion may be actionable if it “is sufficiently factual to be susceptible of being proved true or false.” *See Milkovich v. Lorain J. Co.*, 497 U.S. 1, 21 (1990). *See also Hustler Magazine v. Falwell*, 485 U.S. 46, 50 (1988) (to be actionable, the key question is whether a statement could “reasonably have been interpreted as stating actual facts”); *Moldea v. N.Y. Times Co.*, 22 F.3d 310, 313 (D.C. Cir. 1994) (“Statements of opinion can be actionable if they imply a provably false fact, or rely upon stated facts that are provably false.”); *Genesee Cnty. Emps’ Ret. Sys. v. Thornburg Mortg. Sec. Trust 2006-3*, 825 F. Supp. 2d 1082, 1232-38 (D.N.M. 2011) (concluding that even though credit readings constitute statements of opinion, they are not protected by the First Amendment because the credit ratings are alleged to be false and misleading).

Of course, selecting factors for inclusion in a search ranking algorithm entails making subjective judgments. But consumers, relying on Google’s representations, reasonably expect Google to use the same algorithmic variables to rank all websites. Instead, its critics assert, Google may employ either an algorithm designed to deceive, or it may employ undisclosed self-serving tweaks when pursuing its own ends, resulting in outcomes promoting Google’s own vertical sites or punishing those of competitors. This “king making” is inconsistent with the promises of returning the most relevant results that Google has used to build its dominance and therefore constitutes verifiably falsely implied facts.

The few federal district court cases addressing Google’s search practices do not dictate a different result. In *Search King, Inc. v. Google Technology, Inc.*, 2003 WL 21464568 (W.D. Okla. May 27, 2003), the only case to address directly Google’s defense that its search results constitute opinion, the court approved of Google’s defense due to the unavoidable subjectivity of relevance determinations.<sup>22</sup> *See*

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<sup>22</sup> *Search King* relied on *Jefferson County School District No. R-1 v. Moody’s Investor’s Services, Inc.*, 175 F.3d 848 (10th Cir. 1999). *See* 2003 WL 21464568 at \*3-4. However, *Jefferson County* and cases like it are not on point because they turn on the mere subjectivity of the underlying ranking. *See Jefferson County*, 175 F.3d at 855 (concluding that bond service made no assertion of fact where it gave certain bonds a “negative outlook,” taking into account a myriad of factors, many of them subjective); *Browne v. Avvo, Inc.*,

*Search King*, 2003 WL 2146568, at \*3–4. However, the court failed to discuss the variance in how Google applied its criteria to index sites. *See id.* The verifiably false implications created by Google are not in the ranking methodology itself, but Google’s allegedly misleading statements suggesting that it applies its methodology consistently and for the benefit of users when in fact it deceptively punishes competitors without disclosure. In fact, the *Search King* court notes in an analogous context that “[b]ecause patented processes must be capable of replication, it stands to reason that the intentional deviation from such a process would result in a provably false result to the extent the result would have been different in the absence of manipulation.” *Id.* at \*3. Similarly, if Google has deviated from its self-described search process by intentionally demoting and otherwise disadvantaging competitors in natural search rankings and search advertisement placements, such action similarly would result in a provably false fact.

Other recent district court cases simply are not on point. The courts in *Kinderstart.com, LLC v. Google, Inc.*, 2007 WL 831806, at \*13-15 (N.D. Cal. Mar. 16, 2007) and *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 630-31 (D. Del. 2007) simply declined to treat Google as a government actor that had violated the *plaintiff’s* First Amendment rights.<sup>23</sup> The *Langdon* court did address the First Amendment rights of Google when the court determined that the specific remedies sought by the *pro se* plaintiff would constitute impermissible compelled speech, but the court did not address the First Amendment in the context of liability. *See Langdon*, 474 F. Supp. 2d at 630-31. The *Kinderstart.com* court explicitly declined to address Google’s First Amendment defense. *See Kinderstart.com*, 2007 WL 831806, at \*21. It did address the factual verifiability of Google’s representations concerning search in the context of evaluating whether the plaintiff had met its pleading burden in alleging the filing of misleading

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525 F. Supp. 2d 1249, 1251-53 (W.D. Wash. 2007) (concluding that multi-factor attorney ranking system did not by itself assert a fact).

<sup>23</sup> Similarly, it is not surprising or relevant that courts have refused to interpret the First Amendment as requiring newspapers to comply with a general nondiscrimination standard for advertising. *See Associates & Aldrich Co. v. Times Mirror Co.*, 440 F.2d 133 (9th Cir. 1971); *Newspaper Printing Corp. v. Galbreath*, 580 S.W.2d 777 (Tenn. 1979). The plaintiffs in those cases did not raise antitrust claims and instead argued that as a general matter newspapers with monopoly or near-monopoly status in a particular city were quasi-public actors subject to similar constitutional duties to the government. It is undisputed that the First Amendment imposes limits on the government, not private actors.

statements with the SEC or false advertising. In its analysis, the court concluded that Google's representations about manual manipulation of search results could be understood by a reasonable person as consistent "with the limited, manual removal of what Google considers bad links" and as consistent with "Google's stated refusal to alter search results for compensation." *Id.* at \*8. Google's critics allege that such generous conclusions are not apt, and as a result the disjoint between Google's claimed methods and its actual practice is more clear.

**b. Search Results May Be Actionably Deceptive  
Notwithstanding Google's "Right as a Speaker to  
Select What Information It Presents and How It  
Presents It."**

Second, Google contends that its statements about its search service should not be scrutinized for consistency with its actual search practices because "Google has never given up its right as a speaker to select what information it presents and how it presents it."<sup>24</sup> The cases on which Google purports rely, unsurprisingly, fail to demonstrate that Google is absolutely immunized by the First Amendment even if it operates its search service contrary to its own assertions.

Google first purports to rely on *Blatty v. New York Times*, 728 P.2d 1177 (Cal. 1987), in which the California Supreme Court upheld the dismissal of intentional interference with prospective economic advantage and other injurious falsehood claims based upon the newspaper's omission of the plaintiff's book from a bestseller list, despite assertions by the *New York Times* regarding the quality of the lists and their methodology. However, the court dismissed the claims based upon the plaintiff's failure to demonstrate that the omission established a falsehood "of and concerning" him, a necessary element in defamation and related claims. *See id.* at 547-51. The "of and concerning" standard does not and should not apply to antitrust proceedings. While defamation and related claims remedy harm to reputation, and therefore establishing that a statement concerns a particular person is an important predicate to liability, the "principal purpose" of antitrust actions, including private antitrust actions, is "to deter anticompetitive practices." *Hydrolevel*, 456 U.S. at 572. Moreover, it is clear that Google's targeted demotion and omission of competitors would be "of and concerning" the competitors because such

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<sup>24</sup> Volokh & Falk at 17.

intervention requires deviation from Google's usual algorithmic search results.

Google also cites *ZL Technologies, Inc. v. Gartner, Inc.*, 709 F. Supp. 2d 789 (N.D. Cal. 2010), in which the court dismissed defamation claims based on a trade report's characterization of the plaintiff as a "niche" company and its software product as the "same" as a purportedly inferior competing product. The court determined that the report's statements were non-actionable opinions that neither expressed nor implied statements of fact, notwithstanding the publication's purported use of "objective" criteria and a "rigorous mathematical model." *Id.* at 796-801. However, there was no allegation that the defendant in *ZL Technologies* deviated from its self-established criteria without disclosure. In contrast, Google establishes the expectation that it applies the same algorithmic criteria in every case "to give people the most relevant answers to their queries," when it may, in fact, deviate from those criteria without disclosure in certain cases to punish competitors and prop up its own services. Such commercial deception is actionable under the antitrust laws consistent with the First Amendment.

In sum, if it is proved that Google has manipulated its search results in contradiction to its assurances to users in order to further its monopoly on search, the First Amendment will not "block" application of antitrust law.

## **2. Google's Search Practices May Be Actionable Because They Are Commercial Speech Subject To Reduced First Amendment Protection.**

Even if Google's search results are not found to be deceptive and outside the scope of the First Amendment, commercial speech is subject to decreased First Amendment protection compared to other forms of speech. *See, e.g., Central Hudson*, 447 U.S. at 564. Because statements made by a search engine in responding to a customer's search query constitute "commercial speech," the manipulation of search results to favor Google or its partners and/or disadvantage competitors is subject to a reduced First Amendment standard that permits an antitrust action to proceed.

Although the Supreme Court has not defined "commercial speech" with precision, the term generally encompasses "expression related solely to the economic interests of the speaker and its audience." *Id.* at 561. *See also United States v. Philip Morris USA, Inc.*, 566 F.3d 1095, 1143 (D.C. Cir. 2009) (collecting cases) ("In addition to information related to proposing a particular transaction,

such as price, [commercial speech] can include material representations about the efficacy, safety, and quality of the advertiser's product, and other information asserted for the purpose of persuading the public to purchase the product.”). In *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66-67 (1983), the Supreme Court suggested three factors for helping determine whether speech is commercial: (i) whether the communication is an advertisement, (ii) whether the communication refers to a specific product or service, and (iii) whether the speaker has an economic motivation for the speech. If all three factors are present, there is “strong support” for the conclusion that the speech is commercial. *Id.* at 67. Even where the first two *Bolger* factors are not determinative, courts may determine whether speech is commercial by focusing on the third factor — the motive for the speech. *See Procter & Gamble Co. v. Amway*, 242 F.3d 539, 552-53 (5th Cir. 2001).

Google’s search results are plainly commercial speech. Google’s primary business service to customers is generating search results in response to queries — those responses (and the lucrative advertisements that are triggered by those queries) are quintessential commercial speech. Sponsored search results are unquestionably advertisements, and the presentation of non-sponsored results is also intended to generate advertising revenue. The practice of manipulating non-sponsored search results to favor Google to the detriment of competitors also constitutes a form of commercial speech because it is intended to promote Google’s own search services over those of nascent competitors.

As stated above, if deemed commercial speech, Google’s search practices may be regulated consistent with the First Amendment if they are false, deceptive, or misleading. *See Central Hudson*, 447 U.S. at 563; *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 771-72 (1976); *Pittsburgh Press Co. v. Human Rel. Comm’n*, 413 U.S. 376 (1973) (upholding city ordinance prohibiting newspapers from publishing sexually discriminatory classified job advertisements). Moreover, even commercial speech that is *not* misleading may be regulated if (i) the state must have a “substantial interest” that will be achieved by restriction of the speech, (ii) the restriction directly advances the state interest involved, and (iii) the restriction is proportional to the asserted interest. *See Central Hudson*, 447 U.S. at 562-63. Antitrust regulation of Google’s anticompetitive search practices would meet this intermediate scrutiny standard.

Preventing Google from using its dominant search position to squelch nascent competitors is unquestionably a substantial government interest. Google itself admits that the government has a substantial interest in “the economic, political, and social interests of access to the widest array of Internet-based information sources and content . . . .”<sup>25</sup> As President Obama explained, “[t]he Internet, as vital infrastructure, has become central to the daily economic life of almost every American by creating unprecedented opportunities for small businesses and individual entrepreneurs.”<sup>26</sup> And as FCC Chairman Julius Genachowski has stated, “[n]o central authority, public or private, should have the power to pick winners and losers on the Internet; that’s the role of the commercial market and the marketplace of ideas.”<sup>27</sup> Moreover, the Supreme Court has previously found that states have a substantial interest in issues as varied as discouraging casino gambling and preventing ambulance-chasing by lawyers. See *Posadas de Puerto Rico Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328, 341 (1986); *Ohralik v. Ohio State Bar Ass’n.*, 436 U.S. 447, 460-62 (1978). Preserving opportunities for competition on the Internet against Google’s alleged attempts at suppression is (at minimum) no less vital.

Seeking to obscure the commercial nature of its speech, Google analogizes itself to a newspaper editorial board and argues that antitrust liability would intrude on its editorial discretion in formulating its search results.<sup>28</sup> However, in the newspaper industry, it is traditional for there to be a “wall” between editorial and advertising staff.<sup>29</sup> In contrast, at Google, the advertising (both for

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<sup>25</sup> Reply Comments of Google Inc., *In the Matter of Preserving the Open Internet*, GN Dkt. 09-191, WC Dkt. No. 07-52, at 30 (Apr. 26, 2010), available at <http://apps.fcc.gov/ecfs/document/view?id=7020438889>.

<sup>26</sup> President Barack Obama, *Memorandum on Unleashing the Wireless Broadband Revolution*, June 28, 2010, <http://www.gpo.gov/fdsys/pkg/DCPD-201000556/pdf/DCPD-201000556.pdf>.

<sup>27</sup> Julius Genachowski, Federal Communications Commission Chairman, *New Rules for an Open Internet*, OFFICIAL FCC BLOG (Dec. 21, 2010), <http://www.fcc.gov/blog/new-rules-open-internet>.

<sup>28</sup> While Google argues that it should be treated like newspapers, which it holds out as models of unfettered free speech, even newspapers are subject to a variety of speech-related restrictions, including competition-related restrictions such as the FCC’s newspaper-broadcast cross-ownership rules.

<sup>29</sup> See, e.g., *The New York Times Company Policy on Ethics in Journalism* ¶¶ 80-81, rev. October 2005, <http://www.nytc.com/company-properties-times-coe.html#A7> (“The relationship between the company and advertisers rests

itself and for others) drives the search results. Courts are therefore fully justified in setting aside Google's inapt analogy of itself as a non-commercial editorial speaker. Just as First Amendment doctrine distinguishes between commercial and non-commercial speech, courts evaluating antitrust claims will more readily set aside First Amendment defenses predicated on commercially motivated speech. In *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990), the Court held that a boycott by a group of trial lawyers protesting allegedly low legal fees available for representing indigent defendants violated Section 5 of the FTC Act. The lawyers claimed that their ultimate goal was to better serve the indigent defendants and argued that they should receive the same First Amendment protection as civil rights protestors who boycotted racially discriminatory merchants. However, the Court saw through the claim, holding that unlike civil rights protestors, "the undenied objective of the[ lawyers'] boycott was an economic advantage for those who agreed to participate," and therefore First Amendment protection that civil rights protestors receive did not apply to the lawyers. *Id.* at 426. A court would equally be justified in scrutinizing Google's motives and methods and setting its claim of First Amendment protection aside.

**3. Government Regulation of Google's Anticompetitive Search Practices Would Be Permissible Under the First Amendment as a "Content Neutral" Restriction**

Laws that regulate speech but are "content neutral" are subject to reduced First Amendment scrutiny compared to laws that are "content-based." Because the antitrust laws are content neutral, generally applicable statutes that, at most, only incidentally burden speech, they are subject to reduced First Amendment scrutiny. The Supreme Court has stated that "[g]overnment regulation of expressive activity is content neutral so long as it is justified without reference to the content of the regulated speech." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (citation and internal quotation marks

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on the understanding that news and advertising are separate . . . . Journalists should maintain their independence by avoiding discussions of advertising needs, goals and problems except where those are directly related to the business of the newsroom. The news and advertising departments may properly confer on [layout] though not on [specific content . . . .]"); Associated Press Media Editors, *Statement of Ethical Principles*, rev. 1994, <http://www.apme.com/?page=EthicsStatement> ("The newspaper should report the news without regard for its own interests, mindful of the need to disclose potential conflicts. It should not give favored news treatment to advertisers or special-interest groups.").



omitted). The antitrust laws are intended to promote competition rather than to regulate a particular type of speech; when the antitrust laws do regulate speech, they do so based on speech's anticompetitive effect rather than its expressive content. Therefore, the antitrust laws are content neutral. Moreover, there is precedent for treating competition-promoting laws that regulate speech as content neutral. In *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 653-57 (1994) (*Turner I*) and *Turner Broad. Sys. v. FCC*, 520 U.S. 180 (1997) (*Turner II*), the Supreme Court held that the "must-carry" provisions of the Cable Television Consumer Protection and Competition Act of 1992 requiring cable television providers to dedicate some of their channels to local broadcast television stations were content neutral and rejected the cable operators' argument that the provisions were an impermissible incursion onto the companies' "editorial control" of the programming they carry.

Laws that are content neutral are subject to "intermediate scrutiny," under which the court asks whether the government regulation is "narrowly tailored to serve a significant governmental interest." *Ward*, 491 U.S. at 796 (citation and internal quotation marks omitted). "To satisfy this standard, a regulation need not be the least speech-restrictive means of advancing the Government's interests." *Turner*, 512 U.S. at 662. "Rather, the requirement of narrow tailoring is satisfied so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Ward*, 491 U.S. at 799 (citation and internal quotation marks omitted). A government antitrust action against Google based on its manipulation of its search results would survive this standard. As noted above, preventing Google from abusing its dominant position in search to harm competitors is clearly a significant government interest. And antitrust liability would be narrowly tailored because it would arise only out of Google's abuse of its monopoly position and would be necessary to deter Google's harmful misconduct effectively.

#### **4. The First Amendment Does Not Immunize Behavior That Violates The Antitrust Laws.**

Search is a relatively young technology, but the issue of whether antitrust law can be applied to expressive technologies has long been settled. In *Associated Press v. United States*, 326 U.S. 1 (1945), the Supreme Court held that the First Amendment did not bar application of antitrust law to the actions of expressive industries, even as applied to core newsgathering activities. As the Court noted in *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949), a case in which it

rejected the defendants' argument that a state anti-trade-restraint statute violated the First Amendment,

[I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed . . . . Such an expansive interpretation of the constitutional guaranties of speech and press would make it practically impossible ever to enforce laws against agreements in restraint of trade as well as many other agreements and conspiracies deemed injurious to society.

Following this principle, successful antitrust actions have been predicated on speech. For instance, in *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951), the Supreme Court held that a newspaper violated the Sherman Act by refusing to sell advertising to businesses that also placed ads with a competing radio station. In so doing, the Court flatly rejected the notion that the publisher had an absolute right to choose the advertisements it would print:

We do not dispute that general right. But the word "right" is one of the most deceptive of pitfalls; it is so easy to slip from a qualified meaning in the premise to an unqualified one in the conclusion. Most rights are qualified. The right claimed by the publisher is neither absolute nor exempt from regulation. Its exercise as a purposeful means of monopolizing interstate commerce is prohibited by the Sherman Act.<sup>30</sup>

Speech with "performative" elements — speech that performs an action as well as expresses an idea — can also form a basis for antitrust action consistent with the First Amendment. See, e.g. *Nat'l Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679 (1978) (ethical code banning competitive bidding by members); *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969) (agreement prohibiting newspapers from engaging in joint operations). See also *Hydrolevel*, 456 U.S. at 556 (finding that interpretive letter of unclear performative effect that deliberate misinterpreted industry code is actionable). Such liability can extend even when the performative aspect has ended, and therefore only "reputational" harm persists. See *Wilk v. AMA*, 895 F.2d 352, 370-71 (7th Cir. 1988) (stating that already-abandoned ethical canon prohibiting dealing with chiropractors had lingering

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<sup>30</sup> *Id.* at 155 (quoting *Am. Bank & Trust Co. v. Fed. Reserve Bank*, 256 U.S. 350, 358 (1921) (Holmes, J.)) (internal quotation marks omitted).

“effects on professional association and reputation” justifying ongoing injunctive relief and rejecting First Amendment defense).

In sum, there is ample precedent that in a speech-driven industry, profit-motivated misleading and exclusionary speech can justify liability. As the Justice Department stated in its amicus brief in *Mass. Sch. of Law at Andover, Inc. v. Am. Bar Ass’n*, 107 F.3d 1026 (3d Cir. 1997), parties may undertake action “that has the purpose and effect of maintaining or enhancing their market power, effectuated purely by means of speech—in this case, for example, by promulgating and publishing a purported ‘standard’ or ‘statement of opinion’ that is designed to exclude rivals. There is no basis in the First Amendment for a rule exempting all such schemes from the Sherman Act.”<sup>31</sup> Neither is there any basis for a claim that the First Amendment provides immunity to an antitrust action against Google for its search practices.

**5. The *Noerr-Pennington* Doctrine Simply Does Not Apply to Allegations of Search Manipulation.**

The *Noerr-Pennington* line of cases does not offer Google any defense. It is black letter law that those cases offer protection only for speech that constitutes “an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly.” *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 136 (1961). See also *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965). This protection is rooted solely in the petition clause of the First Amendment, which protects efforts to petition the government for a change in law. Google’s decisions underlying its search results cannot rationally be claimed to be efforts to petition the government. The mere fact that a First Amendment defense based on *some* clause of the First Amendment exists to *some* antitrust claims simply does not have any bearing on whether Google has a First Amendment defense here.

**6. Application of Antitrust Law in the Search Marketplace Would Be Consistent With First Amendment Values**

Google’s claimed defenses fundamentally misapprehend the values that animate the First Amendment. While Google casts its opponents as a threat to speech rights, it is Google itself that may be the true threat. Its alleged leveraging of its monopolist position

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<sup>31</sup> Brief for U.S. Department of Justice as Amicus Curiae, *Mass. Sch. of Law at Andover, Inc. v. Am. Bar Ass’n*, 107 F.3d 1026 (3d Cir. 1997) (No. 96-1792), at 14, available at <http://www.justice.gov/atr/cases/f0900/0964.htm>.

distorts and harms the online market in speech. In this circumstance, use of antitrust authority promotes rather than undermines the market for speech. As the Supreme Court stated in *Associated Press*,

The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. . . . The First Amendment affords not the slightest support for the contention that a combination to restrain trade in news and views has any constitutional immunity.

326 U.S. at 20. See also *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 800 n.18 (stating that the “application of the antitrust laws to newspapers is not only consistent with, but is actually supportive of the values underlying, the First Amendment”). Consistent with this view, the FCC has maintained a variety of prophylactic rules designed to promote competition among media and telecommunications entities, including its broadcast ownership caps, broadcaster-newspaper cross-ownership rules, telecommunications CPNI rules, and more recently its net neutrality rules.

The speech that the First Amendment is designed to protect would not be chilled by an antitrust action against Google. First, the speech that Google seeks to protect is of marginal value, at best, because it seeks only to punish competitors and promote Google’s own services. Although the First Amendment protects a wide range of discourse, see *United States v. Stevens*, 130 S. Ct. 1577, 1591 (2010), courts can differentiate the aim of speech in determining appropriate levels of protection, as in the context of commercial speech, obscenity, defamation, fighting words, and elsewhere. Google’s anticompetitive speech is a far cry from the political and social expression embodied in the exclusion of a GLBT group from a parade, which the Supreme Court held immune from state antidiscrimination law in *Hurley v. Irish-Am.Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995). Unlike the parade organizers who excluded the GLBT group because the banner under which they intended to march would have altered the message conveyed by the parade, Google allegedly excludes its rivals because of the competitive threat they present and allegedly favors its own services because of the profit they provide.

Additionally, an antitrust action against Google would be highly targeted. Antitrust does not operate as an unconstitutional prior restraint, see *Lovell v. City of Griffin*, 303 U.S. 444 (1938), nor would

liability enact a blanket civil or criminal rule punishing a specific type of speech, *cf. Citizens United v. FEC*, 130 S. Ct. 876 (2010), nor would it impose a blanket right of reply without regard to wrongdoing, *see Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974). Instead, only a single speaker would face liability based not only on its speech but on its market power, and such liability could be established only after a lengthy, backward-looking, and targeted proceeding. *Cf. Ball Mem'l Hosp. Inc. v. Mut. Hosp. Ins., Inc.*, 784 F.2d 1325, 1333 (7th Cir.1986) (observing that “[a]ntitrust cases are notoriously extended”). No other entity would meet such specific and exacting criteria, and accordingly no other speaker would be deterred by a finding of liability against Google.

The effect of accepting Google’s arguments would be to remove entirely the online space from antitrust scrutiny because all actions undertaken online necessarily take the form of speech. Such a result is inconsistent both with the history of competition regulation of media entities and with the growing importance of the online media space. As Professor Tim Wu has noted, “[a]s a nation we must hesitate before allowing the higher principles of the Bill of Rights to become little more than lowly tools of commercial advantage.”<sup>32</sup> To ensure the continued vitality of competition on the Internet, Google cannot be allowed to shield its anticompetitive activity from liability merely because it is accomplished through speech.

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As the Department of Justice has stated, “[t]he First Amendment does not provide blanket protection to restraints of trade effectuated through speech.”<sup>33</sup> Instead, the First Amendment and antitrust inquiry have coexisted over the course of decades in which expressive technologies have evolved dramatically. In each case, antitrust decision makers have been able to determine when means of expression are being used to undermine competition and harm the public. The commencement of an inquiry into whether a dominant search engine is manipulating its search results to favor advantage itself or damage its competitors is entirely consistent with the First Amendment, which cannot be played as a trump card to insulate wrongdoing from scrutiny.

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<sup>32</sup> Wu, *supra* note 3.

<sup>33</sup> Brief for U.S. Department of Justice, *supra* note 31, at 8.