To: Faculty

From: Oren Bracha

Re: Drawing Board Luncheon on "The Folklore of Informationalism: The Case of Search Engine Speech"

Dear Participants of the drawing board luncheon. Being in an embryonic stage the project is a true DBL material. I appreciate you taking the time to think about it and I am looking forward to hearing your comments and suggestions. Attached is an abstract, a tentative introduction of the paper, a stylized outline of the current argument, and a list of questions/issues for further consideration. While any comment will be appreciated, the topics in the list are ones with which I particularly feel I could use your wise counsel. Many thanks.

The Folklore of Informationalism: The Case of Search Engine Speech

Oren Bracha

Abstract

The claim that search engine results constitute speech protectable under the First Amendment has become recently one of the most important aspects of the debate over search engine regulation. Search engine speech forms a nexus where several important themes of current trends in First Amendment jurisprudence meet, including: the question of the status of machine generated expression; a recent tendency toward constraining governmental economic regulatory power through aggressive and broad interpretation of freedom of speech; and the question of the scope of limitations on the coverage of the First Amendment. Arguments on behalf of First Amendment protection for search engine results focus on different protected speech interests. To the extent that free speech scrutiny focuses on the speech of indexed content providers or on the speech interest of users it is both justified and necessary. By contrast, the more ambitious search engine speech argument based on describing implied observations on relevance embodied in search results as protectable opinions is doctrinally uncertain and normatively baseless. The doctrinal foundation of this argument is not as certain as assumed by its proponents. Despite some support in recent Supreme Court decisions this position is not yet firmly grounded in doctrine and its potentially far reaching implications have not been considered. As a normative matter, recognizing as protectable speech implied opinions on relevance embodied in search results stands on a more unequivocally dubious foundation. A proper examination of the social practices of search engine speech of this kind reveals that none of the established normative theories of freedom of speech provides clear support for including such expression within the scope of the First Amendment. This normative conclusion can be accommodated and First Amendment protection to such expression can be denied using existing doctrinal tools.

I. Introduction

Last night Google spoke to me. I asked about the best French restaurants in my neighborhood and it expressed its opinions on the subject. We spent half the night arguing. If you find the preceding lines strange then you have not been following the debate over search engine speech. The problem of search engine speech is at the forefront of the broader debate over

machine speech.[1] Is the expressive content generated by computerized machines—the maps that appear on the screen of a GPS navigational aide, your social network's recommendations of new friends or the list of synonyms proposed by my word processor—speech protected under the First Amendment? This question is, in turn, a subset of a larger set of vexing challenges created by the impending technological reality of pervasive, semi-autonomous, automated agents.[2] We have electronic artificial agents who contract in our name, partially (soon to be fully) automated drones who kill for us, and computer platforms who speak to us. Can these semi-autonomous agents be contained by the existing categories of the relevant laws or should those categories and laws change in order to adequately accommodate them? Can we easily trace the lines linking the actions of these automated machines to the people who created and programed them, thereby simply connecting the actions to the array of legal rights and duties of such human agents? Not since the last time a radically new social phenomenon in the form of "corporate persons" challenged existing legal categories was the law faced with such demanding conceptual and normative tasks.[3] This article does not deal generally with this broader challenge, but, rather, tackles in detail one limited (but challenging enough) facet of it, that of search engine speech.

The origins of the search engine speech debate are much more prosaic than the deep philosophical and conceptual questions alluded to above. General purpose Internet search engines constitute big business. The economic, social and cultural importance of these vital information gatekeepers together with the dominance of one firm (i.e. Google) from the moment this field began to mature have provoked demands for scrutiny and legal restrictions on the activities of search engines. Complaints of search engine manipulation, bias or abuse and proposals for remedying them take many forms but they all share a common element: a claim for restricting in some way the search engine's absolute discretion over the way it ranks and presents search results to users. The First Amendment has emerged as a doomsday weapon in the struggle to repel this push for restriction on search engines' absolute discretion. The First Amendment is one of the most formidable barriers for governmental regulation in contemporary constitutional law. From the perspective of those seeking to avoid regulation, if only search engine results could be plausibly presented as protectable speech absolute discretion over them would be considerably shielded from any legal constraint. And this is exactly what has happened in the last decade. Arguments that search engine results are speech protected under the First Amendment were first tested with great success in the early court cases involving attempts to limit Google's complete discretion over its search practices through a variety of common law and statutory doctrines.[4] Since then the argument had been perfected and it emerged as Google's first line of defense on all of the fronts in which the search engine regulation battle was joined.

---

[1] See Tim Wu, *Free Speech for Computers?*, N.Y. TIMES, June 19, 2012, at A29.
[2] See generally Samir Chopra and Laurence F. White, A Legal Theory for Autonomous Artificial Agents (2011).
[3] See Corporate personality references.
[4] See Langdon v. Google, Inc., 474 F. Supp. 2d 622 (D. Del. 2007); Kinderstart.com LLC v. Google, Inc., No. C 06-2057 JF (RS), 2006 U.S. Dist. LEXIS 82481 (N.D. Cal. July 13, 2006); Search King, Inc. v. Google Tech., Inc., No. CIV-02-1457-M, 2003 U.S. Dist. LEXIS 27193 (W.D. Okla. May 27, 2003).

The use of freedom of speech to shield the business of search engines is part of a broader trend that has been dubbed "First Amendment Lochnerism": a turn by big business to the First Amendment in order to frustrate any attempt of governmental regulation.[5] This turn to the First Amendment, perhaps similar to the role played by the Fourteenth Amendment during the Lochner era at the dawn of the twentieth century, is understandable. In post-New-Deal constitutional jurisprudence the First Amendment is one of the most significant enclaves of court willingness to aggressively scrutinize and considerably limit governmental regulatory action.[6] A more recent development is the rise of the information economy in which much business activity is concentrated around informational resources or streams—exactly the kind of subject matter that could be potentially characterized as "speech." Together these two features make the First Amendment a very rich vein to be mined by business actors seeking refuge from regulation. Needless to say, positive explanations do not necessarily make a normative justification.

The analysis here brackets the questions of the policy desirability or practical feasibility of search engine regulation of any kind. It focuses on what started as a sideshow to that debate and is gradually turning into the main event: the question of search engine speech. The argument of many proponents of search engine speech protection is straightforward. Under existing case law, this argument goes, the definition of speech covered by the First Amendment is very captious. In essence, it includes any communication of a substantive message from a speaker to a listener who can recognize the message.[7] This broad definition of covered speech is limited only by a narrow and strict list of well recognized exceptions such as obscenity or sedition.[8] Furthermore, as demonstrated by a series of recent decisions, the Supreme Court is adamantly opposed to expansion of this limited list of categories of uncovered speech or to the introduction of any distinction on the basis of the character of the speech that attempts to limit First Amendment protection of covered speech not included in those categories.[9] The views of proponents of search engine free speech differ on what exactly the protected speech produced by search engine results is. They all agree, however, that the application of this legal formula to the subject matter at hand is simple. Search engine results (or their relevant aspect), produced by an algorithm construed as an instrument in the hands of those who defined its parameters—the equivalent of a painter's brush—constitute a substantial message communicated from a speaker to listeners. Such speech does not fall within any of the traditional categories of excluded speech. No other distinction, such as the existence or absence of a clear articulable view point or the subject matter of the message, is relevant. Therefore search engine results are protected under the First Amendment. End of debate.

---

[5] See Kenneth D. Katkin, Symposium Introduction, First Amendment Lochnerism? Emerging Constitutional Limitations on Government Regulation of Non-Speech Economic Activity, 33 N. Ky. L. Rev. 365 (2006).
[6] Caroline Products
[7] Stuart Benjamin, Algorithmic Speech (forthcoming).
[8] United States v. Stevens.
[9] Brown v. Entertainment Merchants Ass'n, 131 S. Ct. 2729 (2011); United States v. Alvarez, 132 S. Ct. 2537 (2012).

Except that it is not. The problem of search engine speech is far from settled either as a matter of existing doctrine or as a normative question. As a pure doctrinal matter the question of First Amendment coverage casts doubt on the inevitability of recognizing search engine speech as protectable. As many commentators have observed, there is a large amount of expressive activity that falls within the case law's formal definition of speech whose legal regulation does not trigger First Amendment scrutiny. We ordinarily do not assume that the regulation of insider trading information or the content of product warning labels is a restriction of speech subject to First Amendment scrutiny. Commentators refer to such speech as uncovered by the First Amendment.[10] The formal, recognized categories of excluded speech are just the tip of the iceberg. There is a vast amount of expression within the formal definition of speech whose regulation generates no colorable constitutional complaint, giving rise to an apparent silent consensus that such speech is not covered by the First Amendment. Inclusion within the formal definition of speech appears to be, at most, a necessary but not a sufficient condition for setting in motion First Amendment scrutiny. Arguably some sweeping language in recent Supreme Court decisions casts doubt on this conventional wisdom. But to date the proposition that First Amendment coverage is limited otherwise than by the definition of speech has not been explicitly rejected. The consequences of such a sweeping rejection could be monumental. Vast areas of speech previously tacitly assumed to be outside the reach of the First Amendment will be brought within its confines. Swaths of regulations would be subjected to exacting constitutional scrutiny. True First Amendment Lochnerism, in the sense of a far-reaching constitutional attack on the ability of government to effectively regulate economic and social activity, may result. To the extent that a trend to eliminate the limiting mechanism of First Amendment coverage exists it is still reversible. Given its potential effects, such a step should not be taken lightly or without consideration of its normative implications. In this sense the issue of search engine speech is one concrete manifestation of the broader normative question about First Amendment coverage and its fate in evolving Supreme Court jurisprudence.

Should search engine speech be covered by the First Amendment? Normative theories of freedom of speech are somewhat of an embarrassment. Commentators point out that no normative theory can coherently account for First Amendment jurisprudence in its entirety and courts appear almost gleeful to ignore such theories.[11] Nevertheless, the only way to answer open normative questions such as the coverage of search engine speech is through, well, a normative analysis. One, however, does not have to commit to one specific normative framework to analyze the question. Building on the work of Robert Post, I discuss the question of search engine speech through the concept of social practices relevant for the First Amendment.[12] This approach focuses not just on the abstract nature of the regulated activity as expression, but rather

[10] See See FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 89–92 (1982); Robert Post, Recuperating First Amendment Doctrine, 47 STAN. L. REV. 1249, 1250 (1995) [hereinafter Post, Recuperating]; Fredrick Schauer, The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience, 117 HARV. L. REV. 1765, 1769 (2004).

[11]

[12] Post, Recuperating.

on the specific character of the relevant social interaction within which the expression is produced and received. Just as words do not carry meaning in the abstract but only within a set of specific social practices the normative significance of expressive activities only arises within the concrete context of the social practices within which they are embedded. Only after understanding the concrete social context of an expressive activity and locating its normatively significant aspects one can assess whether, on the basis of whatever normative framework applied, it merits the strong protection extended by the First Amendment. I argue that, understood within the specific social context in which it is embedded—meaning the social practices of speakers and listeners—search engine speech is hard to justify on the basis of *any* of the traditional theories of freedom of speech. To date nobody has offered a plausible account of how the social practices of search engine speech are relevant to any set of values possibly underlying the First Amendment. This is not surprising because search engine speech practices are not reasonably relevant to any such values. In other words, search engine speech is exactly the kind of expression that should not be covered by the First Amendment. This is a more careful and nuanced conclusion than a sweeping exclusion of machine speech from First Amendment coverage. It leaves the door open for convincing accounts of how other social practices involving machine generated expression are relevant for values underlying the freedom of speech.

The blind insistence on extending First Amendment protection to the new phenomenon of search engine speech and machine speech more generally while refusing to examine either the social practices within which this speech is embedded or the relevance of the values underlying the freedom of speech cannot be justified. This insistence is the information age equivalent of what Thurman Arnold called *The Folklore of Capitalism*: the uncritical transfer of concepts and beliefs taken from one social-economic context to a thoroughly different one.[13] Arnold's main target was the "folklorist" assumption that an economy dominated by business corporations constituting tremendous concentrations of power and wealth is the same as Adam Smith's free market composed of individual actors—an assumption embodied in the legitimacy-conferring myth of the corporate person.[14] The claim on behalf of search engine speech is part of a folklore of informationalism. It is the uncritical assumption that simply because it meets a technical, broad definition of expression communication generated by machines is the same as other social practices involving speech and that it normatively merits the same constitutional protection. The result is the legitimacy-conferring myth of the speaking search engine. Perhaps unsurprisingly another commonality of the folklore of capitalism and the folklore of informationalism is that both were cultivated and wielded as a shield against governmental regulation of big business. To avoid the pitfalls of the folklore of informationalism the phenomenon of search engine speech must be understood in its social context and then normatively evaluated. I argue that such proper scrutiny produces conclusions unfavorable for search engine results as speech protectable by the First Amendment.

[13] Thurman Arnold, The Folklore of Capitalism.
[14] Id., at.

Part II briefly describes the origins of the search engine speech debate and explains that various arguments for the application of the First Amendment in this area employ very different assumptions about the relevant protected speech interest. Some of those assumptions are very plausible. There is no doubt that some social practices implicated by search engine results, such as the speech of users or indexed entities, involve important speech interests that must be vigilantly protected. The target of my critique is one dominant variant of the search engine speech argument based on the premise that implied opinions about relevance embedded in the algorithmic ranking of search results constitute the protected speech interest and the proper focus of First Amendment analysis. Part III focuses on this variant of the argument and analyzes it from a doctrinal perspective. After explaining the doctrinal argument for search engine speech, it contends that First Amendment jurisprudence is not yet at the point where it unequivocally compels recognition of such speech as covered. It further explains that to the extent that Supreme Court jurisprudence is moving in this direction such a development may significantly undermine the long standing balance within First Amendment jurisprudence between protecting important speech interests and avoiding disruption of government's ability to regulate in vast economic and social areas. The looming specter of undermining this balance, I argue, is especially relevant in the information society and economy where an increasing amount of activities may be characterized as expression in a broad, technical sense. Such a radical and consequential change of the status quo requires a normative discussion and assessment. Part IV turns to a normative assessment of search engine speech. It argues that once one properly focuses on the contextual features of search engine speech as a concrete social practice no persuasive normative justification for First Amendment coverage emerges under any of the common normative theories of freedom of speech. In part this conclusion follows from the precarious and heavily mediated connection between the expression and the human agents who through an agency construct are seen as the speakers. More importantly, the nature of the interaction between speaker, listener and speech typical of the practices of search results places search engine speech beyond the scope of interest of the various normative theories. Part V discusses the question of how this normative conclusion should be operationalized within actual legal rules that always involve second best choices about over protection and under protection of normatively relevant speech. I argue that the exclusion of search engine speech from the coverage of the First Amendment can be achieved through existing doctrinal tools capable of minimizing any concerns about over exclusion of other normatively significant speech. Part VI briefly concludes.

Outline of Argument

1. Taxonomy of arguments for First Amendment protection to search engine results on the basis of the protected speech interest.

a. The protected speech interest is that of indexed content providers. (e.g. a regulation that prohibits indexing in search results socialist websites restricts the websites' speech by undercutting their exposure).
b. The protected speech interest is that of users who use search engines to facilitate their access to desired content by others. (e.g. a regulation that prohibits the indexing of socialists websites violates the speech-related interest of users who seek exposure to such content).
c. The protected speech interest is that of the search engine (i.e. the human or corporate person/s who control the search algorithm) as an editor of content. Regulating results constitutes a form of compelled speech (or compelled lack of speech) vis-à-vis the content of the indexed website with whom the editor is associated. (e.g. requiring the high ranking of certain websites in response to searches for "socialism" results in compelling the search engine to express support of or identification with the content of those website).
d. The protected speech interest is that of the search engine (i.e. the human or corporate person/s who control the search algorithm) as a speaker of opinions. The opinions are observations about relevance implied in the ranking of search results. (e.g. a regulation that limits the search engine's ability to boost the rank of its commercial allies violates the search engine's right to express its opinions that the websites of its allies are the most relevant to the user's search query).

2. The First Amendment analysis and the likelihood of the regulation surviving scrutiny changes according to the relevant speech interest on which it is focused (e.g. determining whether the regulation is content-based).
3. The focus of the article is arguments of variant 1(d).
    a. Claims of variants 1(a)-(b) are justified and important to the extent that relevant regulation presents itself.
    b. Claims of variant 1(c) may be justified, but given the context of search engines and depending on the specifics of the regulation, First Amendment jurisprudence allows relatively large breathing space for constitutionally permissible regulation.
    c. Under variant 1(d) almost any conceivable limitation of search engines' discretion over their results will be content-based and is very unlikely to survive scrutiny. Variant 1(d) also represents the weakest normative case for protection.
4. The structure of argument 1(d) for First Amendment protection to search results.
    a. The first Amendment protects any expression, defined as a message communicated from a speaker to a listener who can potentially understand it.
    b. The only exception to (a) is a limited set of categories of excluded expression (e.g. obscenity, sedition) which the Supreme Court adamantly refuses to expand.
    c. Implied observations on relevance in search results satisfy the definition of expression.

i. The speaker is the entity who programed the parameters of the computer algorithm which produces the speech in each case.
ii. Each ranked search results list contains an implied observation on the relative relevance of each listed item to user's query.
iii. The observation about relevance is a substantial message.
iv. Which is understandable by users.

d. Implied observations of relevance in search results do not fall within one of the excluded categories.
e. Ergo implied observations of relevance are protected by the First Amendment.

5. Objection: satisfying the definition of speech is not a *sufficient condition* for applying the First Amendment.
    a. Commentators develop the concept of First Amendment coverage, meaning subject matter that satisfies the dentition of expression (in 4(a)), does not fall within the categories of exceptions and yet is not covered by the First Amendment.
    b. Recent Supreme Court decisions have not explicitly rejected the concept of coverage.
    c. Rejection of the concept of coverage will have potentially far-reaching effects on the ability of government to regulate in the information society in areas traditionally not affected by the First Amendment.
    d. Rejecting coverage requires a normative assessment of these effects, which is unlikely to be favorable.
6. The question of coverage of a specific subject matter is a normative one.
    a. But there is a strong disagreement on the normative theory underlying freedom of speech.
    b. (following Robert Post) The normative question of coverage must be answered in light of the specific social practices in which the relevant expression is embedded. Speech practices have normative significance only in specific social context.
7. The specific social practices of search engine speech (per 1(d)) do not create a plausible justification for coverage under any of the common normative theories.
    a. Character of the speaker: while being responsible for the speech by purposefully designing the algorithm that produces it, the human speakers are very *removed* from the speech, in the sense that the specific content of the speech is determined, to a large extent, by user and contextual data not produced by the speaker. (Directly relevant for autonomy and indirectly relevant for democratic dialogue rationales).
    b. Character of the speech interaction : users/listeners are unlikely to interact with the speech in a dialogical way, i.e. interpreting it as a purposeful message from a speaker that potentially could/should be agreed/disagreed with, critiqued, reacted

to through speech, verified/refuted, etc. (Relevant for autonomy, democratic dialogue, and truth-seeking rationales).

8. The normative conclusion that search engine speech should not be covered by the First Amendment can be reasonably implement in a second-best doctrinal world where any rule will entail some over-protection or under-protection of speech.
    a. Speech/act distinction. Courts occasionally deny First Amendment scrutiny when the regulation targets the perofrmative/functional aspect of a speech practice rather than its propositional one.
    b. Relevant regulations are likely to care about and target the function/effect of search results not their propositional content. The regulation is not about preventing Google from expressing its opinion that X is relevant for user A's query α; it is about preventing Google from channeling users from X to Y content providers in certain ways under certain circumstances.
    c. While imperfect, the speech/act doctrinal hook avoids or minimizes the specter of unlimited discretion to exclude speech from the coverage of the First Amendment on the basis of evaluating the value of its content.

Questions/Issues for Consideration

1. Examples of problematic/absurd results in a universe where the First Amendment covers any expression that fits the broad definition of speech subject only to the short list of traditional excluded categories.
2. Assuming there is something to the intuition that search engine results are not speech which is normatively relevant to the values underlying the freedom of speech, what is the exact reason for this intuition?
3. Assuming that there is something to the intuition that search engine results are not normatively relevant speech, in part, because of the character of the connection between the speaker and the speech, what exactly in this connection warrants this conclusion?
4. Does the speech/act doctrinal solution work as a way for reasonably implementing the normative conclusion in regard to search engine results?
5. Are there doctrinal alternatives for implementing this normative conclusion that can work better and/or better minimize concerns such as excluding speech normatively worthy of protection?