

GOOGLE
FIRST AMENDMENT PROTECTION FOR SEARCH ENGINE
SEARCH RESULTS

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INTRODUCTION

Once, the leading sources to which people turned for useful information were newspapers, guidebooks, and encyclopedias. Today, these sources also include search engine results, which people use (along with other sources) to learn about news, local institutions, products, services, and many other matters. Then and now, the First Amendment has protected all these forms of speech from government attempts to regulate what they present or how they present it. And this First Amendment protection has applied even when the regulations were motivated by a concern about what some people see as “fairness.”

Google, Microsoft’s Bing, Yahoo! Search, and other search engines are speakers. First, they sometimes convey information that the search engine company has itself prepared or compiled (such as information about places appearing in Google Places). Second, they direct users to material created by others, by referencing the titles of Web pages that the search engines judge to be most responsive to the query, coupled with short excerpts from each page. Such reporting about others’ speech is itself constitutionally protected speech.

Third, and most valuably, search engines select and sort the results in a way that is aimed at giving users what the search engine companies see as the most helpful and useful information. (That is how each search engine company tries to keep users coming back to it rather than to its competitors.) This selection and sorting is a mix of science and art: It uses sophisticated computerized algorithms, but those algorithms themselves inherently incorporate the search engine company engineers’ judgments about what material users are most likely to find responsive to their queries.

In this respect, each search engine’s editorial judgment is much like many other familiar editorial judgments:

- newspapers’ daily judgments about which wire service stories to run, and whether they are to go “above the fold”;
- newspapers’ periodic judgments about which op-ed columnists, lifestyle columnists, business columnists, or consumer product columnists are worth carrying regularly, and where their columns are to be placed;
- guidebooks’ judgments about which local attractions, museums, stores, and restaurants to mention, and how prominently to mention them;
- the judgment of sites such as DrudgeReport.com about which stories to link to, and in what order to list them.

All these speakers must decide: Out of the thousands of possible items that could be included, which to include, and how to arrange those that are included? Such editorial judgments may differ in certain ways: For example, a newspaper also includes the materials that its editors have selected and arranged, while the speech of DrudgeReport.com or a search engine consists almost entirely of the selected and arranged links to others' material. But the judgments are all, at their core, editorial judgments about what users are likely to find interesting and valuable. And all these exercises of editorial judgment are fully protected by the First Amendment.

That is so even when a newspaper simply makes the judgment to cover some particular subject matter: For instance, when many newspapers published TV listings, they were free to choose to do so without regard to whether this choice undermined the market for *TV Guide*. Likewise, search engines are free to include and highlight their own listings of (for example) local review pages even though Yelp might prefer that the search engines instead rank Yelp's information higher. And this First Amendment protection is even more clearly present when a speaker, such as Google, makes not just the one include-or-not editorial judgment, but rather many judgments about how to design the algorithms that produce and rank search results that—in Google's opinion—are likely to be most useful to users.

Of course, search engines produce and deliver their speech through a different technology than that traditionally used for newspapers and books. The information has become much easier for readers to access, much more customized to the user's interests, and much easier for readers to act on. The speech is thus now even more valuable to customers than it was before. But the freedom to distribute, select, and arrange such speech remains the same.

We will discuss this in detail below, both as to the First Amendment generally (Part III) and as to the intersection of First Amendment law and antitrust law (Part IV). We focus in this submission on Google search results for which no payment has been made to Google, because they have been the subject of recent debates; we do not discuss, for instance, the ads that Google often displays at the top or on the right-hand side of the search results page.

I. ACCUSATIONS AND FACTS

The accusations by certain competitors against Google and the facts bearing on those accusations have been covered in Google's previous filings, and will not be repeated here. Briefly, the heart of the accusations is that Google somehow prioritizes its own thematic search results over results originating from specialized competitors. Whether this is so is a contested question, which turns, among other things, on disputes about what would constitute "neutral" judgments and what would be a departure from those judgments. Yet even if it is assumed that Google engages or plans to en-

gage in such prioritizing, that prioritizing would constitute the legitimate exercise of Google's First Amendment right to decide how to present information in its speech to its users.

II. THE FIRST AMENDMENT FULLY PROTECTS SEARCH ENGINE RESULTS

Two federal court decisions have held that search results, including the choices of what to include in those results, are fully protected by the First Amendment. *Search King, Inc. v. Google Technology, Inc.* concluded that Google's rankings of pages were "subjective result[s]" that constituted "constitutionally protected opinions" "entitled to full constitutional protection."¹ Likewise, *Langdon v. Google, Inc.*, refused to order Google and Microsoft to prominently list plaintiff's site in their search results, reasoning: "The First Amendment guarantees an individual the right to free speech, 'a term necessarily comprising the decision of both what to say and what not to say.' . . . [T]he injunctive relief sought by Plaintiff contravenes Defendants' First Amendment rights."² Just as newspapers cannot be forced to print either editorial content or advertising, the court held, so search engines cannot be forced to include links that they wish to exclude.³

And Supreme Court precedents compel the conclusion reached by these two courts, for seven related reasons. First, Internet speech is fully constitutionally protected. Second, choices about how to select and arrange the material in one's speech product are likewise fully protected. Third, this full protection remains when the choices are implemented with the help of computerized algorithms. Fourth, facts and opinions embodied in search results are fully protected whether they are on nonpolitical subjects or political ones. Fifth, interactive media are fully protected. Sixth, the aggregation of links to material authored by others is fully protected. Seventh, none of this constitutional protection is lost on the theory that search engine output is somehow "functional" and thus not sufficiently expressive. And, eighth, Google has never waived its rights to choose how to select and arrange its material.

¹ No. CIV-02-1457-M, 2003 WL 21464568, at *4 (W.D. Okla. May 27, 2003) (internal citations and quotation marks omitted).

² 474 F. Supp. 2d 622, 629–30 (D. Del. 2007) (citing *Riley v. National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796–97 (1988); *Miami Herald Pub'g Co. v. Tornillo*, 418 U.S. 241, 256 (1974); and other cases).

³ *Id.* at 630.

A. *The First Amendment Fully Protects Internet Speech*

To begin with, the First Amendment protects communications delivered over the Internet as much as it protects traditional print communications.⁴ The Supreme Court's First Amendment precedents "provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium [the Internet]."⁵

B. *The First Amendment Fully Protects Editorial Choices About What to Include or Exclude in One's Speech Product*

Just as the First Amendment fully protects Internet speech, it also fully protects Internet speakers' editorial judgments about selection and arrangement of content. As the Supreme Court held in *Miami Herald Publishing Co. v. Tornillo*,⁶ the freedom to speak necessarily includes the right to choose what to include in one's speech and what to exclude. And the Court later reinforced that principle: "'Since all speech inherently involves choices of what to say and what to leave unsaid,' one important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say.'"⁷

A speaker is thus entitled to choose to present only the speech that "in [its] eyes comports with what merits" inclusion.⁸ And this right to choose what to include and what to exclude logically covers the right of the speaker to choose what to include on its front page, or in any particular place on that page. The government may not tell the Huffington Post or the Drudge Report how to rank the news stories or opinion articles to which they link. Likewise, it may not do so for other speakers, such as search engines.

And this is true even when the government argues that a speaker's choices are unfair to others. "A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated."⁹ The "point" of the rule that speakers may choose what to include and what to exclude "is simply the point of all speech protection, which is to shield just those choices of content that in someone's eyes are misguided, or even hurtful."¹⁰

⁴ *Reno v. ACLU*, 521 U.S. 844 (1997).

⁵ *Id.* at 870.

⁶ 418 U.S. 241, 258 (1974).

⁷ *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 573 (1995) (plurality opinion) (emphasis in original) (quoting *Pacific Gas & Electric Co. v. Public Utilities Comm'n of Cal.*, 475 U.S. 1, 16 (1986)).

⁸ *Id.* at 574.

⁹ *Miami Herald*, 418 U.S. at 256.

¹⁰ *Hurley*, 515 U.S. at 574.

The Court has also made clear that this right to choose what to include and what to exclude in one's speech is not "restricted to the press, being enjoyed by business corporations generally and by ordinary people engaged in unsophisticated expression as well as by professional publishers."¹¹ "The concerns that caused [the Court] to invalidate the compelled access rule in [*Miami Herald*] apply to appellant [a utility company sending material to its customers] as well as to the institutional press."¹² And this in turn is just a special case of the broader principle that First Amendment rights extend equally to the institutional press and to other speakers.¹³ Google, Microsoft's Bing, Yahoo! Search, and other search engine companies are rightly seen as media enterprises, much as the New York Times Company or CNN are media enterprises. And in any event, the First Amendment fully protects speech by all speakers, whether they are media enterprises or not.

C. *That Search Engine Results Are Created with the Help of Computerized Algorithms Does Not Rob Them of First Amendment Protection*

Search engine selection decisions are indeed the result not just of individual editorial choices, but also of the computerized algorithms that search engine employees have created to implement these choices. That is necessary given the sheer volume of information that search engines must process, and given the variety of queries that users can input. Such automation is necessary for users to get free, convenient, quick, and comprehensive access to speech—both the speech of the search engines expressing their decisions about how to rank and organize content, and the speech of the sites referenced by the search engines' speech.

Such automation does not reduce the First Amendment protection afforded to search engine results, for three related reasons. First, the computer algorithms that produce search engine output are written by humans. Humans are the ones who decide how the algorithm should predict the likely usefulness of a Web page to the user. These human editorial judgments

¹¹ *Hurley*, 515 U.S. at 574; *id.* at 575–76 (applying *Miami Herald* to protect the rights of a parade organizer).

¹² *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal.*, 475 U.S. 1, 11 (1986) (plurality opinion); *id.* at 21–26 (Marshall, J., concurring in the judgment) (not noting any disagreement with the majority on this matter).

¹³ *See, e.g.*, *Citizens United v. FEC*, 130 S. Ct. 876, 905 (2010) ("We have consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers.") (quotation marks and internal citations omitted); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 782 n.18 (1978) (rejecting the "suggestion that communication by corporate members of the institutional press is entitled to greater constitutional protection than the same communication by [non-institutional-press businesses]"); *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938) (stating that the freedom of the press "embraces pamphlets and leaflets" as well as "newspapers and periodicals," and indeed "comprehends every sort of publication which affords a vehicle of information and opinion").

are responsible for producing the speech displayed by a search engine. For instance, Google's ground-breaking use of the volume of links from other sites as a criterion for ranking search results was itself the result of Google engineers' editorial judgment that inbound links provided a sound and quantifiable measure of a site's value. Search engine results are thus the speech of the corporation, much as the speech created or selected by corporate newspaper employees is the speech of the newspaper corporation.

Second, the First Amendment value of speech also stems from the value of the speech to listeners or readers.¹⁴ As we mentioned, the automation process only increases the value of the speech to readers beyond what purely manual decision-making can provide. Finally, the objections to Google's placement of its thematic search results arise precisely because Google employees are said to have made a conscious choice to include those results in a particular place.

D. *The First Amendment Fully Protects Facts and Opinions on Nonpolitical Subjects*

Much of the speech distributed by search engines responds to searches on political, religious, or scientific topics. And if the government asserts the power to constrain Google's ordering of search results, that power would logically extend to search results for political queries (e.g., "the best book about Mitt Romney" or "is global warming happening") as much as for other queries. The First Amendment clearly forbids such use of government authority.¹⁵

But even query results that relate to less elevated matters remain fully constitutionally protected, because the First Amendment protects even speech that is not closely linked to political or religious debates. As the Court pointed out just two years ago,

*Most of what we say to one another lacks "religious, political, scientific, educational, journalistic, historical, or artistic value" (let alone serious value), but it is still sheltered from government regulation. Even "[w]holly neutral futilities . . . come under the protection of free speech as fully as do Keats' poems or Donne's sermons."*¹⁶

And the First Amendment also protects the collection and communication of facts as much as it protects opinions, including facts that are not

¹⁴ See, e.g., *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748 (1976); *Lamont v. Postmaster General*, 381 U.S. 301, 307–08 (1965) (Brennan, J., concurring).

¹⁵ See, e.g., *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96 (1972) (holding that the government acting as regulator may not prefer some ideas over others).

¹⁶ *United States v. Stevens*, 130 S. Ct. 1577, 1591 (2010) (emphasis and ellipsis in original) (quoting *Cohen v. California*, 403 U.S. 15, 25 (1971) (internal quotation marks omitted)).

ideologically laden—such as names of crime victims in three-sentence crime reports, names of accused juvenile offenders, lists of bestselling books, lists of tenants who had been evicted by local landlords, information in a mushroom encyclopedia, recipes in a cookbook, and computer program source code.¹⁷ As the Supreme Court has held, “information is speech,”¹⁸ and “[the] general rule, that the speaker has the right to tailor the speech [by choosing what to say and what to leave unsaid], applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid.”¹⁹ Any theory that search results lack full First Amendment protection because they are “mere facts” thus lacks support.

Of course, search engine results are in reality not simply facts: They are collections of facts that are organized and sorted using the judgment embodied in the engines’ algorithms, and those judgments and algorithms represent the search engine companies’ opinions about what should be presented to users.²⁰ But even to the extent that search engine results could be treated as primarily consisting of facts rather than opinions, they remain fully constitutionally protected.

E. *The First Amendment Fully Protects Interactive Media*

Search engine output is in many ways more interactive than traditional print—users get different results depending on the particular queries they enter, as well as on the user’s location, the user’s search history, and other factors. But the First Amendment protects interactive media as well as non-interactive ones, and new media as well as the centuries-old ones.²¹ Indeed, the fact that interactive search engine outputs are more personalized than a

¹⁷ See, respectively, *Florida Star v. B.J.F.*, 491 U.S. 524 (1989); *Oklahoma Publ’g Co. v. District Court*, 430 U.S. 308 (1977); *Blatty v. New York Times Co.*, 728 P.2d 1177 (Cal. 1986); *U.D. Registry, Inc. v. State*, 40 Cal. Rptr. 2d 228, 230 (Ct. App. 1995); *Winter v. G.P. Putnam’s Sons*, 938 F.2d 1033, 1037 (9th Cir. 1991); *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 447 (2d Cir. 2001) (dictum); *Junger v. Daley*, 209 F.3d 481, 485 (6th Cir. 2000).

¹⁸ *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2667 (2011). In *Sorrell* there was an argument that the speech was subject to the somewhat lower protection offered commercial advertising, because the speech itself was used as part of an advertising transaction. This is not so for Google’s speech discussed here, and it was not so in the other cases mentioned in this paragraph. But *Sorrell*’s broader point remains applicable: Whether or not speech is commercial advertising, the protection given to factual speech is the same as that given to ideas.

¹⁹ *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 573 (1995).

²⁰ See, e.g., *Search King, Inc. v. Google Tech., Inc.*, No. CIV-02-1457-M, 2003 WL 21464568, at *4 (W.D. Okla. May 27, 2003) (concluding that Google’s rankings of pages were “constitutionally protected opinions”).

²¹ See *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2738 (2011) (holding that even violent video games are constitutionally protected, despite their interactivity).

traditional book or newspaper simply makes them especially valuable to readers.

F. *The First Amendment Fully Protects Aggregation of Materials Authored by Others*

Search engines are also fully constitutionally protected in showing short excerpts from selected other sites, rather than creating content themselves. The First Amendment protects the decisions to include or exclude others' content, based on the speakers' exercise of their judgment, as much as it protects the authoring of the content in the first place. As the Supreme Court made clear in deciding that a parade organizer is protected by the First Amendment—even though the parade simply consists of others' floats—

First Amendment protection [does not] require a speaker to generate, as an original matter, each item featured in the communication. . . . [T]he presentation of an edited compilation of speech generated by other persons is a staple of most newspapers' opinion pages, which, of course, fall squarely within the core of First Amendment security, *Miami Herald Pub. Co. v. Tornillo*, as does even the simple selection of a paid noncommercial advertisement for inclusion in a daily paper, see *New York Times v. Sullivan*.²²

And that was so even when the parade was highly unselective, allowing nearly all applicants to march.²³ Search engines are vastly more selective, with the first page of the output containing only a tiny fraction—though, in the search engine companies' views, the most useful fraction—of all the potentially relevant Web pages. Search engines' selectivity is much more comparable to the selectivity of newspaper op-ed pages, which choose to feature only a small fraction of potential columns. Thus, even though the search engine does not generate the content that is linked to by its results, the judgments and opinions about how to rank and present those results are fully protected by the First Amendment.

So what is true for parades and newspaper op-ed pages is at least as true for search engine output. When search engines select and arrange others' materials, and add the all-important ordering that causes some materials to be displayed first and others last, they are engaging in fully protected First Amendment expression—“[t]he presentation of an edited compilation of speech generated by other persons.”²⁴

²² *Hurley*, 515 U.S. at 570.

²³ *Id.* at 569–70.

²⁴ *Id.* at 570.

G. *The Rules Governing Speech That Is Acted on Mechanically Are Inapplicable Here*

Some contents of a Web page may be acted on mechanically, with no user judgment, and may therefore be more subject to regulation in some circumstances. Thus, for instance, if a Web page contains a virus, courts and legislatures may be able to impose liability on the producer of the page.²⁵ The same would be true if the page knowingly displays a link that, when clicked on, triggers such a virus. Analogous examples with paper publications are rare, but one can imagine some: If some of the chemicals used in a fashion magazine's "scratch and sniff" perfume insert prove poisonous to some readers, that might lead to liability.

This conclusion might also support the results in the aeronautical charts cases, in which people were allowed to recover damages against manufacturers who provided factually erroneous aeronautical charts.²⁶ As we noted above, even purely factual information—such as that given in an Encyclopedia of Mushrooms—is constitutionally protected. But as a federal appellate court explained in distinguishing aeronautical charts from the mushroom encyclopedia, "[a]eronautical charts are highly technical tools" akin to compasses, which are "like a physical 'product'" rather than like speech.²⁷

People use aeronautical charts not by considering whether to follow the charts' advice, contemplating using a different chart, or deciding which of the charts' many recommendations should be accepted. Chart users just apply the information given in the charts. Charts are authoritative, especially in an environment where quick decisions are necessary and lives are at stake.

But search engines' speech about goods and services, which people read and evaluate at leisure and often with skepticism, is not "a physical 'product'" akin to a compass. Rather, like the mushroom encyclopedia, the information output by a search engine "is pure . . . expression,"²⁸ and restrictions on the format and distribution of such information implicate the First Amendment²⁹

²⁵ We do not say that such liability is currently the law, or that it would be a good legal rule to have; we only say that such liability likely would not violate the First Amendment.

²⁶ See, e.g., *Brocklesby v. United States*, 767 F.2d 1288, 1294–95 (9th Cir. 1985).

²⁷ *Winter v. G.P. Putnam's Sons*, 938 F.2d 1033, 1036 (9th Cir. 1991).

²⁸ *Id.*

²⁹ *Id.* at 1037.

H. *Google Has Never Surrendered the Right—Which All Speakers Possess—To Choose What Information It Presents and How It Presents It*

Finally, some of Google’s critics assert that any speech by Google that prefers Google’s thematic search results is misleading. Customers, the argument goes, have allegedly come to expect that Google will choose search results based solely on supposedly “neutral” computer algorithms, with no preference for Google’s thematic search results. But the critics cannot point to any such guarantees to customers, because Google makes no such guarantees. Google has never given up its right as a speaker to select what information it presents and how it presents it.

And the First Amendment does not let the government hold a speaker liable on the theory that the speaker’s alleged biases deny readers the balanced presentation that they supposedly expect. That the *New York Times* has spoken of publishing “all the news that’s fit to print” cannot justify holding the newspaper liable for slighting some stories that the government or a third party may feel are even more important than what the *Times* chose to print.

The precedents bear this out. That the *Times* bestseller list is said to be “based on computer-processed sales figures from about 2,000 bookstores in every region of the United States” cannot justify a lawsuit objecting to the *Times*’ supposedly misleading exclusion of one book, on the theory that the *Times* represented the list as an “objective, unbiased and accurate compilation of actual sales.”³⁰ And an information technology advisor’s describing its “analysis [as] being ‘fact-based and knowledge-centric,’ ‘built on objectivity,’ and founded on a methodology it says ensures the ‘ultimate objectivity’” cannot justify a lawsuit objecting to a particular ranking as being supposedly contrary to the publisher’s assurance of objectivity and therefore misleading.³¹ Even such express assertions of an objective foundation, the *ZL Technologies* court held, “are insufficient to transform the tenor of the rankings . . . from opinion to fact,”³² and thus to diminish the speaker’s right to exercise its judgment in crafting such rankings. This is so even when the rankings are allegedly biased by the speaker’s economic incentives.³³

It is clearer still that the government may not demand that a search engine live up to some hypothetical and undefined expectations of abstract objectivity. Reasonable users understand that determining which of the billions of Internet pages are the most useful responses to any particular query necessarily involves a great deal of subjective judgment, and that

³⁰ *Blatty v. New York Times Co.*, 42 Cal. 3d 1033, 1046 n.2 (1986).

³¹ *ZL Techs., Inc. v. Gartner, Inc.*, 709 F. Supp. 2d 789, 797–98 (N.D. Cal. 2010).

³² *Id.* at 798.

³³ *Id.* at 801 n.4.

search engine companies might well conclude that material produced by themselves will be especially useful and thus merits being prominently displayed. And reasonable users would not expect that Google would lock itself into a set of ranking and display criteria used at any particular time—indeed, given the rapid innovation that has characterized the Internet generally and search engines specifically, change in algorithm design should and would be expected.

If users do find Google's results to be unreliably skewed, Google will be punished by the marketplace, as frustrated users shift to other easily available search engines.³⁴ Users' appreciation of the usefulness of Google's search results is what brought so many users to Google in the first place. If users start doubting the usefulness of Google's results, the users will switch to another search engine. But the First Amendment denies government the power to police the "fairness" of search engine speech, just like the First Amendment denies government the power to police the fairness of newspaper speech.³⁵

³⁴ Google's rivals are naturally promoting what they say is the superior quality of their search technology, both as to its selection decisions and as to the arrangement of results on the page—that is to say, their own supposedly superior editorial judgment—in order to persuade users to switch. See, e.g., Tim Addington, *Bing Will Take Market Share from Google*, B & T (Australia), Nov. 15, 2011, <http://www.bandt.com.au/news/latest-news/bing-will-take-market-share-from-google-> (quoting "Stefan Weiz, senior director of Bing search," as saying, "I think we are going to take share away in certain areas because we are going to have a better experience and they are going to maintain share in certain areas because they have a good experience"); Dr. Jan Pedersen, Chief Scientist for Core Search at Bing, *Bing Search Quality Insights: Whole Page Relevance*, Mar. 5, 2012, http://www.bing.com/community/site_blogs/b/search/archive/2012/03/05/bing-search-quality-insights-whole-page-relevance.aspx (promoting the result selection and arrangement technology of Microsoft's Bing as supposedly being better for users); UKTeam, *Bing Announces Significant Improvements to Instant Answer and News Searches*, Apr. 26, 2011, http://www.bing.com/community/site_blogs/b/uk/archive/2011/04/26/bing-announces-significant-improvements-to-instant-answer-and-news-searches.aspx (discussing changes in Microsoft's Bing search, and closing with "[t]he search improvements are a result of customer feedback and research, and closely follow news that Bing has gained a greater market share in the UK. With more and more room to grow we look forward to further developments in the future and will continue to keep you all updated. We hope you enjoy the new features!"); Dave Copeland, *Is Microsoft Driving at Google with Bing Maps Improvements & Patent?*, Jan. 5, 2012, READWRITEWEB, http://www.readwriteweb.com/archives/is_microsoft_driving_at_google_with_bing_maps_impr.php ("Microsoft announced enhancements to its Bing Maps, including a change to the algorithm that allows the service to process directions requests twice as fast and help drivers avoid traffic. Those changes, along with a newly-awarded patent for a feature that allows Bing Maps to route pedestrians away from unsafe neighborhoods, suggest Microsoft is driving to surpass Google Maps, which has dominated the space since surpassing MapQuest in site traffic and queries in 2008.").

³⁵ For a particularly effective—and amusing—illustration of the analogy between calls for regulating search and what would be clearly unconstitutional calls for regulating news, see Danny Sullivan, *The New York Times Algorithm & Why It Needs Government Regulation*, SEARCH ENGINE LAND (July 15, 2010, 2:07AM), <http://searchengineland.com/regulating-the-new-york-times-46521>.

III. THE FIRST AMENDMENT PROTECTS SEARCH ENGINE RESULTS AGAINST ANTITRUST LAW

Businesses that engage in speech, like other businesses, are covered by antitrust law when it comes to restrictions on their non-speech business practices, such as the licensing of content.³⁶ But antitrust law itself, like other laws, is limited by the First Amendment, and may not be used to control what speakers say or how they say it.

A clear example of this comes in the *Noerr/Pennington* line of cases. Antitrust law generally prohibits organizations from unreasonably restraining competition. But when organizations try to restrain trade by speaking to legislators and to the public, and urging the listeners to enact anticompetitive regulations, such speech is immunized from liability. A contrary conclusion, the Court has held, would “invade” the protection offered by the First Amendment.³⁷ Indeed, the Supreme Court took the view that it should interpret the antitrust laws to avoid any interpretation that would even “raise important constitutional questions.”³⁸

Likewise, antitrust law cannot be used to require a speaker to include certain material in its speech product. *Associated Press v. United States*, the 1945 Supreme Court case that held that the press may generally be covered by antitrust law, stressed that the lower court’s decree “does not compel AP or its members to permit publication of anything which their ‘reason’ tells them should not be published.”³⁹ And the Court has since made clear, in *Miami Herald Publishing Co. v. Tornillo*,⁴⁰ that the First Amendment bars orders that a newspaper “print that which it would not otherwise print,” even when those orders apply antitrust law:

[B]eginning with *Associated Press, supra*, the Court has expressed sensitivity as to whether a restriction or requirement constituted the compulsion exerted by government on a newspaper to print that which it would not otherwise print. The clear implication has been that any such a compulsion to publish that which “‘reason’ tells them should not be published” is unconstitutional.

To be sure, it is constitutionally permissible to stop a newspaper from “forcing advertisers to boycott a competing” media outlet, when the newspaper refuses advertisements from advertisers who deal with the competi-

³⁶ *Associated Press v. United States*, 326 U.S. 1 (1945).

³⁷ *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *see also* *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

³⁸ *Noerr*, 365 U.S. at 138; *see also* *FTC v. Super. Ct. Trial Lawyers Ass’n*, 493 U.S. 411, 424 (1990) (describing the *Noerr* Court’s interpretation of the Sherman Act “in the light of the First Amendment[.]”).

³⁹ 326 U.S. at 20 n.18.

⁴⁰ 418 U.S. 241, 256 (1974).

tor.⁴¹ But the newspaper in *Lorain Journal Co.* was not excluding advertisements because of their content, in the exercise of some editorial judgment that its own editorial content was better than the proposed advertisements. Rather, it was excluding advertisements solely because the advertisers—whatever the content of their ads—were also advertising on a competing radio station. The *Lorain Journal Co.* rule thus does not authorize restrictions on a speaker's editorial judgment about what content is more valuable to its readers.⁴²

Search engines' decisions about where to display certain search results do not involve any such illegal agreements, or attempts to force advertisers to boycott the search engines' competitors. Instead, search engines' selection and arrangement decisions reflect editorial judgments about what to say and how to say it, which are protected by the First Amendment. As the Tenth Circuit made clear in *Jefferson County Sch. Dist. No. R-1 v. Moody's Investor Servs.*, cases such as *Lorain Journal*, *Superior Court Trial Lawyers Ass'n*, and *National Society of Professional Engineers* "do not suggest that merely engaging in protected speech may constitute an antitrust violation."⁴³ "[T]he First Amendment does not allow antitrust claims to be predicated solely on protected speech."⁴⁴ Likewise, the Ninth Circuit has concluded that even a newspaper that was plausibly alleged to have a "substantial monopoly" could not be ordered to run a movie advertisement that it wanted to exclude, because "[a]ppellant has not convinced us that the courts or any other governmental agency should dictate the contents of a newspaper."⁴⁵ And the Tennessee Supreme Court similarly stated that, "[n]ewspaper publishers may refuse to publish whatever advertisements they do not desire to publish and this is true even though the newspaper in question may enjoy a virtual monopoly in the area of its publication."⁴⁶

This principle that even generally applicable economic regulations may not be used to require a speaker to include certain material in its speech product is not confined to antitrust law; it is equally visible, for example, in the labor law cases. Labor law, like antitrust law, is aimed at

⁴¹ *Lorain Journal Co. v. United States*, 342 U.S. 143, 152, 155 (1951).

⁴² See *FTC v. Super. Ct. Trial Lawyers Ass'n*, 493 U.S. 411, 426 (1990) (stressing that a boycott violated antitrust law not because of the defendants' speech or lobbying, but because of the "concerted refusal" to engage in commercial transactions); *National Society of Professional Engineers v. United States*, 435 U.S. 679, 692, 697 (1978) (stressing that an injunction against a professional association's adoption of a ban on competitive bidding was constitutional because the ban was implemented in reaction to a Sherman Act violation that consisted of an "agreement among competitors to refuse to discuss prices with potential customers until after negotiations have resulted in the initial selection of an engineer").

⁴³ *Jefferson Cnty. Sch. Dist. No. R-1 v. Moody's Investor Servs.*, 175 F.3d 848, 860 (10th Cir. 1999).

⁴⁴ *Id.*

⁴⁵ *Assocs. & Aldrich Co. v. Times Mirror Co.*, 440 F.2d 133, 135 (9th Cir. 1971).

⁴⁶ *Newspaper Printing Corp. v. Galbreath*, 580 S.W.2d 777, 779 (Tenn. 1979).

protecting against misuse of economic power. And labor law, like antitrust law, may usually be lawfully applied to most business decisions by newspapers and other speakers. Yet the Court has stressed “the full freedom and liberty of” a speaker “to publish the news as it desires it published or enforce policies of its own choosing with respect to the editing and rewriting of news for publication.”⁴⁷

Likewise, federal appellate courts have reaffirmed that “the First Amendment erects a barrier against government interference with a newspaper’s exercise of editorial control over its content.”⁴⁸ The NLRB, for instance, is not allowed to force newspapers to yield editorial control to union members,⁴⁹ keep publishing an employee’s column,⁵⁰ or keep an employee as part of the publisher’s editorial writing staff.⁵¹ “The Supreme Court has implied consistently that newspapers have absolute discretion to determine the contents of their newspapers.”⁵² “Implementation of a remedy that requires governmental coercion gives rise to a confrontation with the First Amendment.”⁵³ The First Amendment bars the government from controlling what speakers say and how they say it, even when the government’s motivation is to correct a perceived unfair use of economic power.

And, as discussed above, these principles apply equally to all speakers, whether they create newspapers or other speech. Indeed, the *Miami Herald v. Tornillo* principle has been applied even to parades, including ones that have far more viewers than other parades are likely to have. Even when “the size and success of [a] parade makes it an enviable vehicle for the dissemination of [a speaker’s] views,” that sort of influence on the parade’s part cannot justify ordering the parade to include floats that the organizers want to exclude.⁵⁴

Moreover, the one case in which the Court did uphold a law that required speakers to include certain kinds of speech, *Turner Broadcasting System, Inc. v. FCC*,⁵⁵ relied on the fact that the speakers in that case—who were cable system operators—were physically able to “prevent . . . subscribers from obtaining access to programming [the operator] chooses to exclude.”⁵⁶ The Court stressed that its decision to uphold the

⁴⁷ *Associated Press v. NLRB*, 301 U.S. 103, 133 (1937).

⁴⁸ *McDermott v. Ampersand Pub., LLC*, 593 F.3d 950, 959 (9th Cir. 2010).

⁴⁹ *Id.*

⁵⁰ *Passaic Daily News v. NLRB*, 736 F.2d 1543, 1558 (D.C. Cir. 1984).

⁵¹ *Wichita Eagle & Beacon Pub. Co., Inc. v. NLRB*, 480 F.2d 52, 56 (10th Cir. 1973) (holding that the NLRB’s ruling blocking the transfer of an employee from the editorial writing department “infringe[s] upon the newspaper’s freedom to determine the content of its editorial voice in an atmosphere of free discussion and exchange of ideas”).

⁵² *Passaic Daily News*, 736 F.2d at 1557.

⁵³ *Id.* at 1558.

⁵⁴ *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 577–78 (1995).

⁵⁵ *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994).

⁵⁶ *Id.* at 656.

must-carry law did not stem simply from a judgment that a cable company had market power. The Court made clear that its analysis would not apply to newspapers, “no matter how secure [their] local monopoly,” because such a newspaper “does not possess the power to obstruct readers’ access to other competing publications.”⁵⁷ Instead of focusing on market share, the Court focused on the physical power of the cable operator to block speakers: “A cable operator, unlike speakers in other media, can . . . silence the voice of competing speakers with a mere flick of the switch.”⁵⁸

Search engine operators, no matter what their alleged market shares may be, lack any such physical power because of how the Internet works. In 1994, each home usually had access only to one cable provider. But each home has access, with just a click of the mouse, to Google, Microsoft’s Bing, Yahoo! Search, and other general-purpose search engines, as well as to almost limitless other means of finding content on the Internet, including specialized search engines, social networks, and mobile apps.

As the later *Hurley* case explained, *Turner* also rests on the fact that cable system operators were seen at the time as merely “a conduit” for others’ speech that viewers did not perceive as edited or compiled into a coherent item by the cable operator.⁵⁹ But the *Turner* approach does not apply where the speaker is compiling and editing a speech product of its own—such as a single page that contains text selected and presented in a way that “in the [speaker’s] eyes comports with what merits” inclusion.⁶⁰

As *Hurley* held, the *Turner* “conduit” metaphor is “not apt” where the inclusion of some item of speech “would likely be perceived as having resulted from the [speaker’s] customary determination . . . that [the] message [of any component of the speech] was worthy of presentation.”⁶¹ That is precisely the perception that users are likely to have when viewing search engine results: Users assume that each link was judged by the search engine as “worthy of presentation,” because the very point of using a search engine is to narrow down the billions of Web pages into those that the engine views as worth presenting.

In such a situation, whether it involves a parade, a newspaper, or a page of results displayed by a search engine, the First Amendment fully protects the speaker’s “autonomy to control [its] own speech.”⁶² For search engine output, as for the contents of a parade or of a newspaper, “[t]he choice of material . . . and the decisions made as to limitations on the size

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Hurley*, 515 U.S. at 575; *Turner*, 512 U.S. at 629 (“[T]he cable system functions, in essence, as a conduit for the speech of others, transmitting it on a continuous and unedited basis to subscribers.”).

⁶⁰ *Hurley*, 515 U.S. at 574.

⁶¹ *Id.* at 575.

⁶² *Id.*

and content . . . —whether fair or unfair—constitute the exercise of editorial control and judgment” upon which the State can not intrude.⁶³

CONCLUSION

Google, Microsoft’s Bing, and Yahoo! Search exercise editorial judgment about what constitutes useful information and convey that information—which is to say, they speak—to their users. In this respect, they are analogous to newspapers and book publishers that convey a wide range of information from news stories and selected columns by outside contributors to stock listings, movie listings, bestseller lists, and restaurant guides. And all of these speakers are shielded by the First Amendment, which blocks the government from dictating what is presented by the speakers or the manner in which it is presented.

⁶³ *Id.* (quoting *Tornillo*, and explaining why *Turner* is inapplicable).