

# WHAT IS GOOGLE'S REPUTATION SCORE? A METHOD FOR MODIFIED SELF- REGULATION OF SEARCH

*Joseph M. Mercadante\**

"Tell me about your hobbies. Are you into model rocketry?" . . .

"No," Greg said, "No, I'm not." He sensed where this was going.

The man made a note, did some clicking. "You see, I ask because I see a heavy spike in ads for rocketry supplies showing up alongside your search results and Google mail."

Greg felt a spasm in his guts. "You're looking at my searches and e-mail?" He hadn't touched a keyboard in a month, but he knew what he put into that search bar was likely more revealing than what he told his shrink.

"Sir, calm down, please. No, I'm not looking at your searches," the man said in a mocking whine. "That would be unconstitutional. We see only the ads that show up when you read your mail and do your searching. I have a brochure explaining it. I'll give it to you when we're through here."<sup>1</sup>

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\* J.D. candidate, 2009, Seton Hall University School of Law; B.S., 2006, Villanova University. I would like to thank Professor Frank A. Pasquale for his countless insights.

<sup>1</sup> Cory Doctorow, *Scroogled: Google Controls Your E-mail, Your Videos, Your Searches...What if it Controlled Your Life?*, RADAR ONLINE, Sept. 12, 2007, [http://www.radaronline.com/from-the-magazine/2007/09/google\\_fiction\\_evil\\_dangerous\\_surveillance\\_control\\_1.php](http://www.radaronline.com/from-the-magazine/2007/09/google_fiction_evil_dangerous_surveillance_control_1.php).

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## I. INTRODUCTION

Though this is just a fictional account of what could happen if the information stored by Google is inappropriately used, it is certainly not incomprehensible that search engines, the portals to our modern internet universe, could misuse the massive amounts of data that they store and organize. With this possible misuse on the horizon, it is also necessary to assess the current state of the search industry and to discuss what kind of regulation, if any, should be placed upon this increasingly powerful gateway to our information. Part II of this Note will showcase and extrapolate three legal problems that search engines are currently facing or may face in the near future. The first problem is what could be labeled as “deceptive search practices.” Google and other search engines mislead the public into thinking that the search results that they generate are based on relevance alone, when that is far from the case.<sup>2</sup> The second problem with search<sup>3</sup> is the increasing pressure that search engines feel from trademark law.<sup>4</sup> The third problem with search is not yet a problem, but rather there is the

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<sup>2</sup> Bing Pan et al., *In Google We Trust: Users' Decisions on Rank, Position, and Relevance*, JOURNAL OF COMPUTER-MEDIATED COMMUNICATION, 12(3), article 3 (2007), available at <http://jcmc.indiana.edu/vol12/issue3/pan.html> (last visited Aug. 18, 2008) (An eye tracking experiment revealed that college users have substantial trust in Google's ability to rank results by their true relevance to the query.).

<sup>3</sup> The term “search” will be used throughout this Note to refer to internet search.

<sup>4</sup> See Eric Goldman, *Deregulating Relevancy in Internet Trademark Law*, 54 EMORY L.J. 507, 509 (2005).

increasing possibility that massive amounts of personal data collected by search engines could be misused.<sup>5</sup>

Part III will introduce the current proposals to “fix” search. Professor Frank Pasquale of Seton Hall School of Law has argued that internet searchers should be given a “right to respond” to unfavorable search results analogous to the Fair Credit Reporting Act,<sup>6</sup> which allows an individual the right to respond to anything that may be in his credit rating.<sup>7</sup> Professor Pasquale proposes that each search engine user should be given a right to place an asterisk next to any unfavorable search results and have that asterisk linked to a comment explaining the misinformation.<sup>8</sup> A second proposal to fix search, articulated by Professor Orin Kerr of George Washington School of Law, proposes that Congress should limit the tort protection that is given to search engines by § 230 of the Communications Decency Act (“CDA”)<sup>9</sup> and start holding search engines liable in tort for misinformation.<sup>10</sup> Another immunity that is given to search engines is the Digital Millenium Copyright Act (“DMCA”),<sup>11</sup> a statute which mainly

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<sup>5</sup> See, e.g., DANIEL J. SOLOVE, *THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET* (Yale University Press 2007) (2007); see also *Gonzales v. Google, Inc.*, 234 F.R.D. 687, 683-84 (N.D. Cal. 2006) (upholding a U.S. Department of Justice subpoena for Google to release 50,000 uniform resource locators (URLs) from Google’s database. However, Google was not forced to turn over everything that the Government subpoenaed, allowing Google to maintain users’ search queries as private information. This is significant because it marks the first time that information has been successfully subpoenaed from a search engine, even though admittedly the important information was kept private.).

<sup>6</sup> 15 U.S.C. § 1681 (2000).

<sup>7</sup> See Frank Pasquale, *Rankings, Reductionism, and Responsibility*, 54 CLE. ST. L. REV. 117, 117 (2006); See *infra* Part III(A).

<sup>8</sup> *Id.* at 135-36.

<sup>9</sup> 47 U.S.C. § 230 (2000). The CDA is the first government attempt to regulate pornography on the internet. Section 230 of the Act has been interpreted to say that operators of Internet services are not to be construed as publishers (and thus not legally liable for the words of third parties who use their services). *Id.*

<sup>10</sup> Posting of Orin Kerr to The Volokh Conspiracy, *Legal Responses to Cyber-Bullying*, <http://volokh.com/posts/1176705254.shtml> (April 16, 2007, 17:11 EST); see also Michael L. Rustad & Thomas H. Koenig, *Rebooting Cybertort Law*, 80 WASH. L. REV. 335, 341 (2005).

<sup>11</sup> Digital Millenium Copyright Act, 17 U.S.C. §§ 101 *et seq.* (2000); see also Robert Cannon, *The Cybertelecom Report: Networks and Copyright Infringement: DMCA Immunity*, COMMUNITY TECHNOLOGY REVIEW (2003), available at <http://www.comtechreview.org/spring-2003/000049.html> (last visited Aug. 18, 2008) (“In situations . . . where the network is neither the provider nor the requester

criminalizes the attempt to break electronic copyright protection and provides important immunities to internet service providers and other intermediaries, like search engines, could also be rolled back if Google does not construct a reliable self-regulation system. A third solution, still in early formation, is to form a secret oversight body similar to the Foreign Intelligence Surveillance Act Court (“FISA Court”). This type of oversight body could monitor search engines and their actions without disclosing any of their trade secrets to the public.

In sum, assuming that online search is broken, there are several solutions being proposed to “fix” search by some of the leading academics in the fields of internet law and privacy law. These range from placing a simple asterisk next to any unfavorable search results, to a secret court designed specifically to adjudicate search engine “fairness” without disclosing valuable trade secrets.

Part IV will argue for a less obtrusive method of internal regulation leading to increased transparency from Google and increased legal efficiency. The solution proposed by this Note will be an elaboration on Professor Pasquale’s asterisk theory. Instead of just allowing *one* user to place *one* asterisk next to possible misinformation, it would be more effective to allow *every* user to “rate” information as relevant, misleading, or otherwise. Much like we see in other online communities, a well-established user generated feedback system for search engine results will begin to solve the problems of misinformation, privacy, and trademark issues that are currently plaguing search engines.

Part V will discuss how this method of modified self-regulation can be implemented. The search engine market can be forced to implement this system by conditioning the powerful immunities<sup>12</sup> that search engines currently enjoy. For example, making search engines liable for copyright infringement, which they currently enjoy immunity from, would quickly destroy their business model by subjecting them to costly litigation every time a search returns a result that infringes on a valid copyright.

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of the infringing content, where the network is merely providing transmission, the DMCA provides a defense to the network for contributory copyright infringement liability.”).

<sup>12</sup> *Id.*

Therefore, without passing burdensome and complicated laws and without oversight from Congress, the search engine market would be monitored by its very own users, upon the conditioning of these immunities.

## II. WHAT IS WRONG WITH SEARCH AS WE KNOW IT?

### A. Deceptive Trade Practices

Google has proven to be the market leader in search, holding a 65.26% market share among all U.S. search engines in 2007.<sup>13</sup> However successful Google may be in dominating the global market for search, the methods by which it displays its search results can be misleading to the average user. Search engines operate by gathering information and responding to search queries that are specified by the user.<sup>14</sup> The results returned in response to these search queries are a result of a proprietary algorithm developed by the search engine, with supposedly no human interaction.<sup>15</sup> Though the search algorithms are mostly secret,<sup>16</sup> search engines have begun to reveal how they work.<sup>17</sup>

There are several inherent problems with this system. First, there have been several instances of Google actively interfering with its search results, and thus compromising the objective<sup>18</sup>

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<sup>13</sup> See Jordan McCollum, *Google Market Share Up (Again)*, CNET NEWS, May 9, 2007, <http://www.marketingpilgrim.com/2007/05/google-market-share-up-again.html> (“Google’s latest piece of the pie: 65.26% to Yahoo’s 20.73%, MSN’s 8.46% and Ask’s 3.69%.”).

<sup>14</sup> Pasquale, *supra* note 7, at 117.

<sup>15</sup> Google claims that “There is no human involvement or manipulation of results, which is why users have come to trust Google as a source of objective information untainted by paid placement,” Google, *Technology Overview*, <http://www.google.co.uk/corporate/tech.html> (last visited Aug. 18, 2008) (This language is no longer available on Google’s U.S. page, but still exists on the U.K. site. The language was deleted from the U.S. page during the editing process of this Note.).

<sup>16</sup> The actual algorithm that Google uses to obtain its search results is a closely guarded trade secret. Saul Hansell, *Inside the Black Box*, N.Y. TIMES, June 3, 2007, at 3-1, available at <http://www.nytimes.com/2007/06/03/business/your-money/03-google.html> (“[The algorithm] is a crucial part of Google’s inner sanctum . . . that the company treats like a state secret.”).

<sup>17</sup> Google Corporate Information—Technology Overview, <http://www.google.com/corporate/tech.html> (last visited Aug. 18, 2008).

<sup>18</sup> Pasquale, *supra* note 7, at 125 (noting “[g]iven that the purported ‘objectivity’

nature of the results.<sup>19</sup> The rankings of these search results are extremely important, as studies have shown that users are more influenced by the order in which the results are presented than the abstracts that accompany the links.<sup>20</sup> Rankings are also important because users are not likely to click on any search results that are not displayed on the first page of results.<sup>21</sup>

Second, a lack of oversight gives Google *carte blanche*<sup>22</sup> to manipulate these search results as it wishes, often with adverse economic consequences.<sup>23</sup> John Battelle relates the following turn of events in *Google, Inc. v. American Blinds & Wallpaper Factory, Inc.*, a California case involving Google's use of American Blinds' trademarks:<sup>24</sup>

September 17, 2004, was the day the San Jose District Court was to hear arguments in the American Blinds case [regarding a dispute over the trademarked adwords<sup>25</sup> "American Blinds"] . . . Google had filed a motion to dismiss . . . [When a] member of American Blinds' legal team . . . [attempted to] test the

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of rankings and lack of human intervention is the main reason why search engines refuse to review or remove links to [objectionable content], the legal protection of their capacity to alter results at will, and secretly, is curious at best.”)

<sup>19</sup> See *Search King, Inc. v. Google Tech., Inc.*, No. CIV-02-1457-M, 2003 WL 21464568 at \*2-3 (W.D. Okla. May 27, 2003) (finding that defendant Google purposely and maliciously decreased web site ranking of Plaintiff Search King by driving the actual Search King website to the bottom of the rankings for a query of “Search King.”).

<sup>20</sup> See Pan, *supra* note 2 (A study finding “that college student subjects are heavily influenced by the order in which the results are presented and, to a lesser extent, the actual relevance of the abstracts.”).

<sup>21</sup> Clay Shirky, *Power Laws, Weblogs, and Inequality*, NETWORKS, ECONOMICS, AND CULTURE (Feb. 8, 2003), available at [http://www.shirky.com/writings/powerlaw\\_weblog.html](http://www.shirky.com/writings/powerlaw_weblog.html) (“Diversity plus freedom of choice creates inequality, and the greater the diversity, the more extreme the inequality. In systems where many people are free to choose between many options, a small subset of the whole will get a disproportionate amount of traffic (or attention, or income), even if no members of the system actively work towards such an outcome. . . . The very act of choosing, spread widely enough and freely enough, creates a power law distribution.”).

<sup>22</sup> Translated to English as “white board” via Google Translator.

<sup>23</sup> Dropping off of the first or second results page can have enormous negative economic consequences for a website that depends on Google rankings to bring it business. See Pan, *supra* note 2.

<sup>24</sup> *Google, Inc. v. Am. Blinds & Wallpaper Factory, Inc.*, No. C 03-05340 JF, 2005 WL 832398 (N.D. Cal. Mar. 30, 2005).

<sup>25</sup> Adwords are a source of revenue for Google. Advertisers pay for a link to their site to be returned when a search query contains a specified word or phrase. See Google AdWords, <https://adwords.google.com/> (last visited Nov. 7, 2008).

system, he brought up Google and entered what had become a habitual search query: "American Blinds." . . . Every [other] time someone entered 'American Blinds' into Google's search field, competitors to American Blinds came up on the screen.

Only this morning, for some reason, they did not.

The lawyer suspected Google had changed its results, and called colleagues in other parts of the country. Sure enough, searches in other regions returned different results, including the potentially infringing advertisements. . . . The lawyer quickly documented his findings.<sup>26</sup>

Google's PR machine quickly sprang into action, claimed that "Google would certainly never do such a thing" and attributed the discrepancy to a technical glitch.<sup>27</sup>

The third problem with search engine ranking techniques is the concept of paid advertising.<sup>28</sup> Many webmasters try to "game" search algorithms in order to get their websites to rank higher on the results page.<sup>29</sup> The best game of all is to simply pay the search engine and buy an adword<sup>30</sup> to have a link to the purchaser's website returned for a particular search query. Adwords are a source of revenue for search engines and are purchased by companies who want their websites to be highly ranked for a particular search term.<sup>31</sup> The websites that pay to be listed are usually the top handful of results, and, if a user looks hard enough, a disclaimer entitled "sponsored links" or "sponsored results" will indicate which websites have paid to be placed at the top of the results page. The unsophisticated user might easily be deceived into thinking that these are the most relevant results and

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<sup>26</sup> JOHN BATTELLE, *THE SEARCH: HOW GOOGLE AND ITS RIVALS REWROTE THE RULES OF BUSINESS AND TRANSFORMED OUR CULTURE* 184-85 (2005).

<sup>27</sup> *Id.*

<sup>28</sup> Google, *Google Can Help Your Business Make More Money*, <http://services.google.com/marketing/links/US-HA-CMBNINE2> (last visited Aug. 18, 2008).

<sup>29</sup> "Gaming" search engines algorithms has evolved into the business of "search engine optimization." Search engine optimizers are companies or individuals that specialize in getting a client's web page ranked highly for certain search queries. Google, *Search Engine Optimization*, <http://www.google.com/support/webmasters/bin/answer.py?hl=en&answer=35291> (last visited Sept. 26, 2008).

<sup>30</sup> See *supra* note 25.

<sup>31</sup> For example, Nike might buy an adword for "sneakers" that ensures a link to the Nike website is returned high on the results page when a user searches for "sneakers."

not simply the websites with the most money to spend.<sup>32</sup>

*B. Search Engines and Trademark Law: Incompatible?*

In addition to search results not being based on relevance, a second problem with the current search engine regime is the potential for disputes over trademark law. Google is currently fighting many trademark lawsuits,<sup>33</sup> most of which claim that the search engine permits competitors to trade off of the mark owners' name by highly ranking the competitors' search results or diverting interested customers to competitor sites.<sup>34</sup> This is not addressed by the Federal Trademark statute, nor the Lanham Act,<sup>35</sup> and current law is woefully equipped to deal with possible trademark infringement by search engines.<sup>36</sup> The Communications Decency Act<sup>37</sup> ("CDA") has been stretched by the courts to shield search engines and internet service providers ("ISPs") from all tort liability, stating that they are not responsible for the speech of others.<sup>38</sup> The DMCA<sup>39</sup> criminalizes the dissemination of technology or services that are used to circumvent the measures that control digitally copyrighted works. The DMCA immunizes search engines as "service providers"<sup>40</sup> and

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<sup>32</sup> Interestingly, Google's founders recognized this problem while still working on the basics for their groundbreaking search engine while at Stanford. "[W]e expect that advertising funded search engines will be inherently biased towards the advertisers and away from the needs of the consumers." Sergey Brin and Lawrence Page, *The Anatomy of a Large-Scale Hypertextual Web Search Engine*, Computer Science Department of Stanford University (2000), <http://infolab.stanford.edu/~backrub/google.html> (last visited Aug. 18, 2008).

<sup>33</sup> See e.g., *Google, Inc. v. Am. Blinds & Wallpaper Factory, Inc.*, No. C 03-05340 JF, 2005 WL 832398 (N.D. Cal. Mar. 30, 2005); see also *Government Employees Insurance Company v. Google, Inc.*, 330 F.Supp.2d 700, 706 (E.D.Va. 2004) (granting Google's motion to dismiss trademark suit based on Google's sale of "GEICO" as an adword to GEICO's competitors in the car insurance business).

<sup>34</sup> *Am. Blinds*, 2005 WL 832398 at \*2.

<sup>35</sup> 15 U.S.C. § 1114 (2006).

<sup>36</sup> In fact, the CDA has been construed to give search engines immunity from any liability that could be incurred due to their search results. See *Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997).

<sup>37</sup> 47 U.S.C. § 230 (2006).

<sup>38</sup> *Id.* Under current law, site owners are immune from liability for the speech of others; see also *Langdon v. Google, Inc.*, 474 F.Supp.2d 622, 630 (D. Del. 2007).

<sup>39</sup> See *supra* note 11.

<sup>40</sup> 17 U.S.C. § 512(k)(1)(B) (2000) (defining "service providers" as applied to DMCA safe harbor provisions).



does not hold them liable for infractions committed by website owners and operators, even though the search engine is giving the website most of its exposure by directing interested searchers.

Trademark problems are also related to another problem with search results: inaccurate information. Search queries about a person can yield “long-buried information about people that is wrong, outdated, or incomplete.”<sup>41</sup> Under the current regime, or lack thereof, if a Google search for “Joseph M. Mercadante” yields a result accusing Joseph M. Mercadante of horrible crimes, there is nothing that the author can do to require Google to remove this information from public view.<sup>42</sup> This misinformation could result in reputation damage or economic losses to the subject’s business, or worse.<sup>43</sup>

The problems with trademark law and the law of search are further compounded by companies that vigorously defend their marks.<sup>44</sup> If a search user enters the term “Cherokee” for a school report on the Cherokee Indian Tribe, some results may be trying to sell that user a Jeep Cherokee. Jeep, in protecting its

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<sup>41</sup> Clark Hoyt, *When Bad News Follows You*, N.Y. TIMES, Aug. 26, 2007, at 10, available at <http://www.nytimes.com/2007/08/26/opinion/26pubed.html?ei=5090&en=b07542a59506b43d&ex=1345780800&partner=rssuserland&emc=rss&pagewanted=print>.

<sup>42</sup> Google’s official response to an individual’s request to remove information from a search page is “We’d like to assist you, but information in our search results is actually located on third-party publicly available webpages. In order to remove your information from our search results, you’ll need to contact the webmaster of this third-party site.” Google Help Center, *Why was my request to remove information from Google denied?*, <http://www.google.com/support/webmasters/bin/answer.py?hl=en&answer=94036#1> (last visited Sept. 26, 2008).

<sup>43</sup> See Hoyt, *supra* note 41.

A person arrested years ago on charges of fondling a child said the accusation was false and the charges were dropped. The *Times* reported the arrest but not the disposition of the case [and this shows up in a Google search]. A woman said her wedding announcement 20 years ago gave the incorrect university from which she graduated. She is afraid prospective employers who Google her will suspect résumé inflation. A woman quoted years ago in an article about weight loss said, tearfully, that she never was a size 16, as the article stated. The husband of a school administrator in the Midwest complained that a news brief reporting her suspension was published after officials had already publicly said she did nothing wrong.

*Id.*

<sup>44</sup> See, Google, Inc. v. Am. Blinds & Wallpaper Factory, Inc., No. C 03-05340 JF, 2005 WL 832398 (N.D. Cal. Mar. 30, 2005). (defending a very weak trademark).

trademark, could have information regarding the Cherokee Tribe excised from the search results page.<sup>45</sup> Trademark law prohibits trademark use in a manner that is likely to cause confusion as to the source of the goods or services in the average consumer. To determine whether a potentially infringing mark will confuse a consumer, courts have developed a test often referred to as the "Polaroid test."<sup>46</sup> The Polaroid Test is comprised of a series of factors that is used to help guide a court in determining whether two trademarks are confusingly similar enough to constitute trademark infringement. Courts have held that a domain name can infringe on a mark under the Polaroid framework,<sup>47</sup> but Eric Goldman notes that:

The Ninth Circuit has twice reversed *Brookfield* to eliminate [the] bypass to the [Polaroid] test. However, not every court in the Ninth Circuit has gotten the message. . . . As should be evident by now, the *Brookfield* case took an already unclear . . . doctrine and threw it into chaos.<sup>48</sup>

Put simply, courts have no idea how to sort out the trademark mess that the internet has become,<sup>49</sup> and the solution proposed in Part IV of this Note will hopefully alleviate this problem by creating a regime that clearly identifies the author of web content,

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<sup>45</sup> See Goldman, *supra* note 4, at 509 (arguing that "[e]merging trademark law doctrines have allowed trademark owners to excise socially beneficial content and to take unprecedented control over their channels of distribution. Without limits, trademark law has the capacity to counterproductively destroy the Internet's utility for everyone.").

<sup>46</sup> *Polaroid Corp. v. Polarad Elecs. Corp.*, 287 F.2d 492, 495 (2d Cir. 1961). These factors include: "the strength of his mark, the degree of similarity between the two marks, the proximity of the products, the likelihood that the prior owner will bridge the gap, actual confusion, and the reciprocal of defendant's good faith in adopting its own mark, the quality of defendant's product, and the sophistication of the buyers." *Id.*

<sup>47</sup> *Brookfield Commc'n, Inc. v. West Coast Entm't Corp.*, 174 F.3d 1036, 1062 (9th Cir. 1999) (holding that West Coast "improperly benefit[ed] from the goodwill that Brookfield developed in its mark.").

<sup>48</sup> Goldman, *supra* note 4, at 564.

<sup>49</sup> See generally Deborah F. Buckman, Annotation, *Initial Interest Confusion Doctrine Under Lanham Trademark Act*, 183 A.L.R. Fed. 553 (2003) (attempting to organize the conflicting cases); see also 800-JR Cigar, Inc. v. GoTo.com, Inc., 437 F.Supp.2d 273, 284-91 (D.N.J. 2006) (holding that selling trademarked keywords (or adwords, in Google terms) is a use in commerce but may not create the requisite likelihood of consumer confusion required for trademark infringement).

while also policing it.<sup>50</sup>

C. *The Elephant in the Room: Privacy on the Internet*

The rise of the information age has ushered in an unparalleled era that gives the average person access to enormous amounts of information that was inaccessible just two decades ago. Organizing and retrieving the vast amount of data available to any one individual is an ongoing and continuous struggle. Google has officially stated that its mission “is to organize the world’s information and make it universally accessible and useful.”<sup>51</sup> In order to organize all of the information in the world, one must first collect all of the information in the world. While this seems like a laudable goal, the potential for misuse of the enormous amount of personal information that Google is gathering is causing an uprising in the privacy community.<sup>52</sup> Google (and other search engines, though Google is the most prevalent)<sup>53</sup> is currently compiling a massive amount of data about each user, especially since the search engine has branched into a wildly popular e-mail service, Gmail, and an integrated online calendar, Google Calendar. The confluence of these services has led Google to collect and store information regarding everything a person does on Google services, including: details regarding a weekday lunch appointment, an internet search for rocket supplies, and an intimate email conversation.<sup>54</sup>

Google is also collecting other information on the internet not related to its services. Blogs (short for “web logs”) are being created by more users every day who use the internet to log their personal thoughts, reactions to political news, or to post

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<sup>50</sup> See *infra* Part I.

<sup>51</sup> Google Corporate Information: Company Overview, <http://www.google.com/corporate/> (last visited Sept. 26, 2008).

<sup>52</sup> “Increasingly, people are exposing personal information about themselves and others online. We can now readily capture information and images wherever we go, and we can then share them with the world at the click of a mouse. Somebody you’ve never met can snap your photo and post it on the Internet. Or somebody that you know very well can share your cherished secrets with the entire planet. . . . These fragments of information won’t fade away with time, and they can readily be located by any curious individual.” SOLOVE, *supra* note 5, at 2.

<sup>53</sup> See McCollum, *supra* note 13.

<sup>54</sup> See GOOGLE WATCH, *Google as Big Brother*, <http://www.google-watch.org/bigbro.html> (last visited Aug. 18, 2008).

embarrassing pictures of others.<sup>55</sup> In addition to blogs, any website can be retrieved by a search engine.<sup>56</sup> For example, the website “Don’t Date Him, Girl,”<sup>57</sup> which facilitates the sharing of information about cheating boyfriends and husbands by jilted lovers, is easily retrievable through a search engine.<sup>58</sup> There is obviously no fact-checking and anyone can post an inaccurate statement that someone is unfaithful. Such a statement would then be archived by Google’s web crawler<sup>59</sup> and ultimately retrievable by a search user. An anonymous post could cause damage to a person’s reputation, and the search engines that are granting access to this “information” are not held accountable in any way.

Google also uses software algorithms to “read” e-mails of anyone using Gmail (or anyone corresponding with a Gmail user)<sup>60</sup> in order to place more direct advertising on the Gmail

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<sup>55</sup> See Warren St. John, *Dating a Blogger, Reading All About it*, N.Y. TIMES, May 18, 2003, § 9 at 1 (“[B]logging [is] a once marginal activity of Internet enthusiasts that has become squarely mainstream . . .”).

<sup>56</sup> See Google Help Center, *Sizing Up Search Engines*, <http://www.google.com/help/indexsize.html> (last visited Aug. 18, 2008) (“Search engines’ published metrics for index size measurement vary greatly and are no longer easily comparable. Often, for instance, web crawlers retrieve duplicate entries for one page or links to documents that they haven’t crawled, and whose content thus isn’t in the index. At Google we believe the essential quality of an index isn’t the total number of documents, but its comprehensiveness —*which unique documents* are in the index. So we don’t count duplicate or uncrawled pages. According to our internal testing, our newly expanded search index is more than three times larger than that of any other search engine.”) (emphasis in original); see also Google Corporate Info, *Google Corporate Milestones*, <http://www.google.com/corporate/history.html> (last visited Aug. 18, 2008) (noting that Google had indexed over 8 billion pages in 2004).

<sup>57</sup> Don’t Date Him Girl, <http://www.dontdatehimgirl.com> (last visited Aug. 18, 2008).

<sup>58</sup> See The Bitch, *Refuse, Rebuff, Reject, Repel, Repulse*, MIAMI NEW TIMES, Sept. 22, 2005 (“You can do a background check for an employee. Why can’t you do one for a potential boyfriend?”).

<sup>59</sup> “A web crawler (also known as a web spider or web robot) . . . is a program or automated script which browses the World Wide Web in a methodical, automated manner. Other less frequently used names for web crawlers are ants, automatic indexers, bots, and worms. This process is called web crawling or spidering. Many sites, in particular search engines, use spidering as a means of providing up-to-date data. Web crawlers are mainly used to create a copy of all the visited pages for later processing by a search engine that will index the downloaded pages to provide fast searches.” WIKIPEDIA, *Web Crawler*, [http://en.wikipedia.org/wiki/Web\\_crawler](http://en.wikipedia.org/wiki/Web_crawler) (last visited Aug. 18, 2008).

<sup>60</sup> See Samir Chopra & Laurence White, *Privacy and Artificial Agents, or, Is Google*

page.<sup>61</sup> For example, if one were to write an e-mail to a friend about coffee, Google's algorithm would analyze that e-mail and display advertisements targeted to a coffee drinker.<sup>62</sup> This is perfectly fine for marketing purposes, but the concept of a foreign entity reading private e-mails (and retaining that information) is unsettling to some, especially if the information has the potential to become public.<sup>63</sup> Helen Nissenbaum argues that all information about someone needs to be placed in some kind of context.<sup>64</sup> In the social context, humans reveal very different kinds of information based on what situation we are in: be it at the workplace, at the doctor, or with friends.<sup>65</sup> Information that is retrievable through a search, however, has no "contextual integrity" and thus often can be misleading. Part IV of this Note proposes a regulatory scheme that would allow information to be placed in a social context, permitting a more accurate depiction

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*Reading My Email?*, <http://www.ijcai.org/papers07/Papers/IJCAI07-201.pdf>.

<sup>61</sup> *Id.* (noting that the technical capacities of the "reading" algorithms, while not advanced enough yet, will soon be able to perform the task of "reading" of your e-mail.)

<sup>62</sup> Google scans the text of Gmail messages in order to filter spam and detect viruses, just as all major webmail services do. Google . . . uses this scanning technology to deliver targeted text ads and other related information. This is completely automated and involves no humans.

About Gmail, [http://mail.google.com/mail/help/about\\_privacy.html](http://mail.google.com/mail/help/about_privacy.html) (last visited Aug. 18, 2008); *see also* An Open Letter to Google Regarding its Proposed Gmail Service, <http://www.privacyrights.org/ar/GmailLetter.htm> (last visited Aug. 18, 2008). It is important to note that many privacy groups point out that "a computer system, with its greater storage, memory, and associative ability than a human's, could be just as invasive as a human listening to the communications, if not more so." *Id.*

<sup>63</sup> *See* *Gonzales v. Google, Inc.*, 234 F.R.D. 687, 683-84 (N.D. Cal. 2006), *supra* note 5.; *see also* Posting of Nicole Wong, Assoc. Gen. Counsel, Response to the DoJ motion to The Official Google Blog, <http://googleblog.blogspot.com/2006/02/response-to-doj-motion.html> (Feb. 17, 2006, 15:55 EST) (Google has received subpoenas asking for disclosure of some search results, but so far the company has prevailed in keeping most of them secret); *see also* Anne Broache, *Judge: Google Must Give Feds Limited Access to Records*, CNET NEWS, Mar. 20, 2006, [http://www.news.cnet.com/Judge-Google-must-give-feds-limited-access-to-records/2100-1028\\_3-6051257](http://www.news.cnet.com/Judge-Google-must-give-feds-limited-access-to-records/2100-1028_3-6051257) (noting that the district judge granted the DoJ access to Google's random URL sample but did not meet their burden for obtaining a user's personal search queries.).

<sup>64</sup> *See* Helen Nissenbaum, *Privacy as Contextual Integrity*, 79 WASH. L. REV. 119, 128 (2004) (noting that "the degree of sensitivity of information [is] the key factor in determining whether a privacy violation has occurred or not.").

<sup>65</sup> *Id.* at 137.

of the person being searched.

The information that is managed by search engines is extremely personal, and the fact that disclosure of a user's personal search queries could be entertained by a federal district judge as in *Gonzales v. Google* could lead to an extremely slippery slope.<sup>66</sup> The government could use the data mining that has been pioneered by the private search industry to conduct invasive background checks on just about anyone that has ever touched a computer.<sup>67</sup> The regulation and oversight of this vast amount of data proposed in Part IV of this Note is necessary not only for the protection of those accused of crimes, but also for the protection of the average Google user.<sup>68</sup>

### III. CURRENT (PROPOSED) SOLUTIONS TO SEARCH

#### A. Professor Pasquale: The Asterisk

Professor Frank Pasquale advocates for a user's "right to respond" to objectionable search results as one solution to the false information and trademark dilemmas proposed by search.<sup>69</sup> a user could place an asterisk next to objectionable search results and be given an opportunity to explain them. There are two situations that could lead to a placement of a "Pasquale asterisk":<sup>70</sup> (1) where information about an individual is false or misleading;<sup>71</sup>

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<sup>66</sup> See Wong, *supra* note 63 (noting that Google has to fight in order to keep its data secret).

<sup>67</sup> See, e.g., Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 DUKE L.J. 967 (2003); see also Daniel J. Solove & Chris Jay Hoofnagle, *A Model Regime of Privacy Protection*, 2006 U. ILL. L. REV. 357 (2006); see also SOLOVE, *supra* note 5.

<sup>68</sup> See Doctorow, *supra* note 1.

<sup>69</sup> See Pasquale, *supra* note 7, at 135 ("Just as major credit bureaus must respond to consumers' allegations that a piece of information on their credit report is false or misleading, complaints about false or misleading search results on major search engines should lead to more than polite advice about self-help or a price list for adwords"); see also Frank Pasquale, *Asterisk Revisited: Debating a Right to Reply on Search Results*, J. BUS. & TECH. (Forthcoming 2009).

<sup>70</sup> It is important to note that the "Pasquale Asterisk" is different from the asterisk placed after the author's name in legal publications. See Charles A. Sullivan, *The Under-theorized Asterisk Footnote*, 93 GEO. L.J. 1093, 1094 (2005) (analyzing and tracking the evolution of the asterisk footnote placed at the beginning of legal publications and law reviews.).

<sup>71</sup> See The Bitch, *supra* note 58; see also Hoyt, *supra* note 41 (examples of false or

and (2) where a search for a trademark returns a result for a competitor to the trademark holder.<sup>72</sup>

Though the ability to add an asterisk to a search result would be of minimal cost and inconvenience to the search engines, legislation requiring them to do so would likely be fought<sup>73</sup> because it would in no way help the search engines, even if it did only cause minimal inconvenience. Though the Pasquale Asterisk is a good start towards achieving a more open model for search, courts have held that search results are protected free speech under the First Amendment,<sup>74</sup> and thus any challenge to asterisk legislation would likely succeed on free speech grounds because search results represent the “opinion” of the search engine as to the relevance of the search. The solution is legislation that creates a mutually beneficial search environment, helpful to both the search user in ensuring accuracy of results as well as the search engines in decreasing trademark litigation (the proposed solution will be discussed in Part IV, *infra*).

Others such as Tennessee State Rep. Rob Briley have called for a notice-and-takedown procedure (though without the asterisk) for website operators.<sup>75</sup> Under the proposed legislation, if a website receives notice that its site is harmful, it would be required to be removed within two days or the website operator

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misleading information following people through internet venues.)

<sup>72</sup> This situation would mean that the trademark holder would be allowed to place a Pasquale Asterisk next to the infringing content, not its own.

<sup>73</sup> Search engines would likely fight any sort of shift in the current business model, which ensures a small group of search companies maintaining a monopoly. See Pasquale, *supra* note 7.

<sup>74</sup> Search King, Inc. v. Google Tech., Inc., No. CIV-02-1457-M, 2003 WL 21464568 at \*2-3 (W.D. Okla. May 27, 2003). (holding that various unfair competition allegations invalid on the grounds that search results were protected under the First Amendment); see also Dahlia Lithwick, *Google-opoloy, The Game Only Google Can Play*, SLATE, Jan. 29, 2003, <http://www.slate.com/id/2D77875> (last visited Aug. 18, 2008) (discussing the case and its implications for search policy).

<sup>75</sup> See *An Assault on Web Writers?*, Billhobbs.com, (Feb. 1, 2007), available at [http://billhobbs.com/2007/02/an\\_assault\\_on\\_web\\_writers.html](http://billhobbs.com/2007/02/an_assault_on_web_writers.html). “Tennessee State Rep. Rob Briley has filed legislation that could, if it becomes law, require bloggers and other website publishers and writers to remove within two days from their website any statement that someone alleges is defamatory - and if they fail to remove the statement within two days that failure will “create a presumption of malice intent.” The contested statement does not actually have to be defamatory for the web writer to be required to remove it or face that legal presumption of guilt.” (emphasis in original.) *Id.*

could face tort liability without a showing of malice intent.<sup>76</sup> Briley's bill is an extreme measure that goes too far due to the fact that it essentially requires censorship of the internet.<sup>77</sup> However, Briley's bill is illustrative of the fact that legislative bodies that are beginning to recognize the problems associated with misinformation on the internet.

*B. Professor Kerr: Conditional Immunity*

Orin Kerr proposes that the immunity granted to search engines by § 230 of the Communications Decency Act ("CDA") be rolled back in order to hold search engines liable in tort for the content of their search results.<sup>78</sup> In response, Google argues that the results page is comprised of the speech of others, and for this, Google should not be held liable.<sup>79</sup> However, regarding other issues like manipulation of search results, Google claims that the results page is its own protected speech.<sup>80</sup> Here lies the basic logical inconsistency in Google's arguments. Google cannot have its cake and eat it too: the results page is either the speech of Google or it is not. If the results page is Google's protected speech, then Google should assume liability for inaccuracies in that speech, including non-automated manipulation of the results.

The crux of Kerr's argument is that website operators could choose to "opt out" of being indexed (that is, available for searching) by the search engines.<sup>81</sup> He notes that:

[A] site owner can allow anonymous comments, announce that anything goes, and then sit back and watch as the trolls engage in all sorts of foul play. Search engine robots then pick up the foul play, resulting in harm weeks or months later when a third party googles that person or event. A lot of people may be harmed, but the law can't stop it: the provider is immune and

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<sup>76</sup> *Id.*

<sup>77</sup> *Id.* ("Briley's legislation appears to be an attempt to give public officials and others a legal club to threaten bloggers and online critics in order to silence them or cause them to tone down their criticism.")

<sup>78</sup> See Kerr, *supra* note 10.

<sup>79</sup> See Google Help Center, *supra* note 42.

<sup>80</sup> Search King, Inc. v. Google Tech., Inc., No. CIV-02-1457-M, 2003 WL 21464568 at \*2-3 (W.D. Okla. May 27, 2003).

<sup>81</sup> See Kerr, *supra* note 10.



the commenters are anonymous.<sup>82</sup>

Kerr's solution would allow site owners, not the search engines, to block search engine robots<sup>83</sup> in exchange for CDA immunity. The legislation could be conditioned on this blocking so that if a website wants to be searchable on Google, it must take responsibility for the content that it provides.<sup>84</sup>

### C A Secret Search Engine Court?

The third proposed solution is the most intensive, requiring direct government oversight of searches. In a slightly different context than search, Dan Burk and Julie Cohen have proposed that a governmental agency should have rights to review private entities' Digital Rights Management ("DRM") systems and unlock them if necessary.<sup>85</sup> DRM is an umbrella term that applies to any system that is capable of controlling the use of a copyrighted digital work, such as a CD containing music or a DVD containing a movie.<sup>86</sup> Professors Oren Bracha and Frank Pasquale note that David Levine's recent work on trade secrets in infrastructure builds on Burk and Cohen's work by giving many compelling reasons for permitting the government to review the operations of processes deemed trade secrets by their owners.<sup>87</sup> This "search oversight body" would need to be not only complex and accountable, but also secret.<sup>88</sup> Thus, the oversight body needed to regulate the search industry would end up being similar to the FISA court.

The FISA court is a U.S. federal court authorized under the

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<sup>82</sup> *Id.*

<sup>83</sup> See Web Crawlers, *supra* note 59.

<sup>84</sup> See Kerr, *supra* note 10.

<sup>85</sup> See Dan L. Burk & Julie E. Cohen, *Fair Use Infrastructure for Rights Management Systems*, 15 HARV. J.L. & TECH. 41, 59 (2001) (Proposing that some public entity hold, in escrow, a "key" to the DRM on copyrighted works so it could decide whether to permit a user to "break" the DRM and thereby gain access to the work); see also Oren Bracha & Frank Pasquale, *Federal Search Commission? Access, Fairness, and Accountability in the Law of Search*, 93 CORNELL L. REV. 1149, 1202 (2008).

<sup>86</sup> Burk & Cohen, *supra* note 85 at 48-49.

<sup>87</sup> Bracha & Pasquale, *supra* note 85, at 1202 (citing David Levine, *Secrecy and Unaccountability: Trade Secrets in Our Public Infrastructure*, 59 FL. L. REV. 135 (2007)).

<sup>88</sup> This is because the algorithms and methods of search are proprietary. See Google Keeps Tweaking its Search Engine, *supra* note 16.

Foreign Intelligence Surveillance Act of 1978 (“FISA”).<sup>89</sup> It oversees requests for surveillance warrants against suspected foreign intelligence agents inside the United States by federal police agencies. This court could quickly and, more importantly, secretly examine whether or not a search engine manipulated its results, as well as whether the information provided is accurate.<sup>90</sup> The secrecy is the most important element because it would derail the notion that transparency will lead to disclosure of search engine trade secrets. Even Bracha and Pasquale admit that monitoring search with the same fervor as national security is excessive,<sup>91</sup> and the complication of this procedure makes it almost impossible to come to fruition.

*D. The Easy Way Out—Nothing is Wrong with Search*

James Grimmelmann critiques all calls for regulation of search in the Yale Law Journal Pocket Part by noting that:

These ideas [to fix search, such as the asterisk] are attractive because search engines are so powerful. But they all depend on a flawed conception of what search does. Search engines aren’t megaphones, any more than Web sites are. Good search tools help users find the information they want, not the information that others want them to find. Search can help individuals move from being passive consumers of information to active seekers for it. This shift is important for human autonomy, since the ability to locate the information we need is central to our ability to make decisions for ourselves. It is also economically important; search enables more efficient exchange of information goods, and thereby catalyzes a virtuous cycle of creativity. The obvious lesson here is that search is too important to muck up, so we should be cautious when doing things that might muck up search.<sup>92</sup>

Professor Grimmelmann argues that the internet has allowed people to express their views more broadly and anonymously than before. Grimmelman thought this was the correct approach as

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<sup>89</sup> 50 U.S.C. § 1803 (2000).

<sup>90</sup> See Bracha & Pasquale, *supra* note 85 at 1202.

<sup>91</sup> *Id.* at 1204.

<sup>92</sup> James Grimmelmann, *Don’t Censor Search*, 117 YALE L.J. POCKET PART 48 (2007), available at <http://thepocketpart.org/2007/09/08/grimmelmann.html> (last visited Aug. 18, 2008).

compared to the use of website operators or search engines to correct wrongful internet users.”<sup>93</sup> The fundamental flaw in Grimmelmann’s logic is that search is already “mucked up.”<sup>94</sup> Search engines are far from passive purveyors of content: they are an intermediary, or bottleneck, ideally suited for a streamlined regulatory approach to cure the current woes of search. There is hardly a free market of search engines that allows the search user to choose the search engine right for him. There are extremely high costs associated with starting a search engine which creates a barrier to new companies entering the market, effectively creating a monopoly.<sup>95</sup> Professor Grimmelmann assumes that any regulation of search would make it inherently less useful, but that is not necessarily the case.<sup>96</sup>

### *E. An Open Governmental Solution*

Danny Weitzner, an MIT professor and a policy director of the World Wide Web Consortium, recently proposed search engine regulation in the privacy context through an open governmental regime, unlike the secret regime proposed in Part III(C), *supra*.<sup>97</sup> Weitzner is fearful that the merger between Google and Doubleclick, a “global Internet Advertising Solutions company,”<sup>98</sup> will create an extremely powerful “private surveillance machine.”<sup>99</sup> He recommends the creation of an oversight body to investigate the privacy practices of both companies.<sup>100</sup> However,

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<sup>93</sup> *Id.*

<sup>94</sup> See *supra* Part II.

<sup>95</sup> The barriers to entry into the search engine market are extremely high, resulting in a virtual monopoly for the top handful of search engines. See Frank Pasquale, *Copyright in an Era of Information Overload*, 60 VAND. L. REV. 135, 180 (2007) (“In a world in which categorizers need licenses for . . . content they sample [and index], only the wealthiest and most established entities will be able to get the permissions necessary to run a categorizing site.”).

<sup>96</sup> Grimmelmann, *supra* note 92.

<sup>97</sup> See Danny Weitzner, *What to do with Google and Doubleclick? Hold Google to its word with some extreme factfinding about privacy practices*, OPEN INTERNET POLICY (October 8, 2007), available at <http://people.w3.org/~djweitzner/blog/?p=95> (last visited Aug. 18, 2008).

<sup>98</sup> Double Click Home Page, <http://www.doubleclick.com/> (last visited Aug. 18, 2008).

<sup>99</sup> Weitzner, *supra* note 97.

<sup>100</sup> *Id.* Specifically, this solution would include: (1) an expert panel made up of individuals with technical, legal and business expertise from around the world; (2)

Weitzner's proposal is a government solution to a nongovernmental problem. If people are not comfortable with Google having access to their personal information, it is likely that they would be equally uncomfortable with the government having such information.<sup>101</sup> Public hearings are not the answer, but Part IV, *infra*, will suggest that the privacy problem can be solved simply by giving each person access to the data that search engines keep for their particular account, as well as the conclusions drawn from said data.

#### IV. MODIFIED SELF-REGULATION OF SEARCH

Human nature has shown that order can exist without regulations in place commanding how people act.<sup>102</sup> eBay, "The World's Online Marketplace®,"<sup>103</sup> is a modern example of this and home to the largest auction site on the internet.<sup>104</sup> eBay's rapid growth has been nothing short of amazing.<sup>105</sup> In 1995, the first eBay bidder won an auction for a "broken laser pointer" for \$14.<sup>106</sup> According to financial statements filed by eBay, the total dollar value of eBay auctions in 2006 was \$52.4 billion.<sup>107</sup> Sellers peddle

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public hearings at which Google technical experts would be available to answer questions about operational details of personal data handling; (3) questions submitted by the public and organized in advance by the expert panel; (4) staff support for the panel from participating regulatory agencies; (5) real-time publication of questions and answers; and (6) an annual report summarizing what the panel has learned.

<sup>101</sup> See Chopra & White, *Privacy and Artificial Agents*, *supra* note 61.

<sup>102</sup> See generally ROBERT C. ELICKSON, *ORDER WITHOUT LAW*, Harvard University Press (1991) (demonstrating how people frequently resolve their disputes in cooperative fashion without paying any attention to the laws that apply to those disputes).

<sup>103</sup> About eBay, [http://pages.ebay.com/aboutebay.html?\\_trksid=m40](http://pages.ebay.com/aboutebay.html?_trksid=m40) (last visited Aug. 18, 2008).

<sup>104</sup> See Elinor Mills, *Yahoo Bangs Gavel Down on Auction Sites*, CNET NEWS, May 8, 2007 ("eBay has nearly 95 percent of the market share for U.S. traffic to auction sites, while Yahoo's share is 0.19 percent, according to research from Hitwise.").

<sup>105</sup> See generally Fara S. Sunderji, *Protecting Online Auction Sites From the Contributory Trademark Liability Storm: A Legislative Solution to the Tiffany Inc. v. eBay Inc. Problem*, 74 *FORDHAM L. REV.* 909 (2005).

<sup>106</sup> This is not entirely accurate, as eBay was originally named "AuctionWeb" and did not officially change to "eBay" until September 1, 1997. See ADAM COHEN, *THE PERFECT STORE* 79 (2002). However, users referred to the site as "eBay" from the beginning. *Id.*

<sup>107</sup> eBay Inc., Annual Report (Form 10-K), at 22 (Dec. 31, 2006), *available at*

everything from classic cars<sup>108</sup> to high end computer systems<sup>109</sup> to pottery.<sup>110</sup>

When registering to be a buyer or seller on eBay, a user must first accept eBay's User Agreement.<sup>111</sup> Once registered, users may list almost any item for sale, and other users may bid on those items.<sup>112</sup> At the culmination of the bidding period, the highest bidder is awarded the item.<sup>113</sup> Carrying out the final transaction requires a level of trust with the winning bidder. Once the payment is sent, the seller is obligated to ship the item with expediency, but this does not always occur. eBay's creator, Pierre Omidyar, requests that eBay users deal honestly with strangers.<sup>114</sup> If there is an online fraud (such as a buyer paying for an item, but the seller not shipping it, or shipping an item that was not described in the auction), then the seller will be subject to negative feedback, and the buyer may be entitled to a refund.<sup>115</sup>

Due to the rapid growth of the auction site, eBay began using methods of alternative dispute resolution to deal with matters of fraud. Due to the large volume of sales and the relatively small value of most purchases, the traditional legal system is not

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<http://www.sec.gov/Archives/edgar/data/1065088/000095013407004291/f27529e10vk.htm>. This figure represents the "[t]otal value of all successfully closed listings between users on eBay's trading platforms during the year, regardless of whether the buyer and seller actually consummated the transaction." *Id.* at 46.

<sup>108</sup> See eBay Motors, <http://www.ebaymotors.com> (last visited Aug. 18, 2008).

<sup>109</sup> eBay Computers & Networking, [http://computers.ebay.com/\\_W0QQ\\_trksidZp3907Q2em21](http://computers.ebay.com/_W0QQ_trksidZp3907Q2em21) (last visited Aug. 18, 2008).

<sup>110</sup> eBay Pottery & Glass, [http://pottery-glass.shop.ebay.com/Pottery-Glass\\_\\_W0QQ\\_sacatz870?\\_trksid=m38](http://pottery-glass.shop.ebay.com/Pottery-Glass__W0QQ_sacatz870?_trksid=m38) (last visited Sept. 12, 2008).

<sup>111</sup> Your User Agreement, <http://www.pages.ebay.com/help/policies/user-agreement.html> (last visited Aug. 18, 2008).

<sup>112</sup> Examples of banned items include alcohol, animals, firearms, government and transit uniforms, one's virginity, human parts and remains, teacher's edition textbooks, murder memorabilia less than a century old, and Nazi items except documents, coins, and books. See Prohibited and Restricted Items: Overview, available at <http://pages.ebay.com/help/policies/items-ov.html> (last visited Aug. 18, 2008); see also Patricia Sellers, *eBay's Secret*, FORTUNE, Oct. 10, 2004, at 172.

<sup>113</sup> How Do I Buy an Item?, <http://pages.ebay.com/help/buy/questions/buy-item.html> (last visited Aug. 18, 2008).

<sup>114</sup> Letter from eBay's Founder, <http://pages.ebay.com/help/newtoebay/founder-letter.html> (last visited Aug. 18, 2008); see also COHEN, *supra* note 106, at 172. ("Omidyar envisioned eBay as a self-regulating marketplace where users are responsible for their trades.")

<sup>115</sup> This refund would likely come from PayPal, a subsidiary of eBay. The mutual protection that PayPal and eBay offer each other are outside the scope of this Note.

equipped to handle a marketplace like eBay. Self-regulation, however, provided a solution. The first self-regulatory measure eBay created was a “Feedback Forum”<sup>116</sup> to monitor buyers and sellers. If a buyer won an item, but failed to tender payment, the buyer would receive negative feedback.<sup>117</sup> Similarly, if a seller received payment but failed to ship the item, the seller would garner negative feedback.<sup>118</sup> Any such feedback would make users think twice before dealing with that particular buyer or seller again. Hence, buyers and sellers create and maintain online “reputations” that are instrumental to their eBay dealings. The eBay community further continued to monitor itself with the advent of the eBay message boards.<sup>119</sup> These boards developed into a neighborhood-watch system where regular contributors would expose those who committed fraud or those who abused the feedback system to interfere with others’ businesses.<sup>120</sup>

The eBay model of self-regulation is brilliant both in its complexity and simplicity. At first, it seems that it would be almost impossible for a community of millions of buyers and sellers operating at arm’s length to safely police each other. On the other hand, the simplicity of creating an online reputation as well as a community watch group makes buying and selling on eBay about as safe as doing so in a traditional brick-and-mortar store. In fact, eBay currently reports that “less than 0.01% of transactions are reported as fraudulent.”<sup>121</sup>

Another feedback system similar to eBay is that used by Slashdot,<sup>122</sup> an online technology newsletter, that describes itself as “News for Nerds.”<sup>123</sup> Slashdot is comprised of hundreds of thousands of users, who simultaneously submit news stories to the website, then comment on the stories while judging their relevance.<sup>124</sup> In commenting on the submissions and rating their

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<sup>116</sup> COHEN, *supra* note 106, at 27.

<sup>117</sup> *Id.* at 27-28.

<sup>118</sup> *Id.*

<sup>119</sup> eBay Community Discussion Boards, <http://pages.ebay.com/community/boards/index.html> (last visited Aug. 18, 2008).

<sup>120</sup> COHEN, *supra* note 106, at 52.

<sup>121</sup> Sellers, *supra* note 112, at 172.

<sup>122</sup> Slashdot Home Page, <http://www.slashdot.org> (last visited Nov. 7, 2008).

<sup>123</sup> *Id.*

<sup>124</sup> YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION

relevance, Slashdot users (which are not anonymous) are also able to comment on the user that submitted the article. Slashdot, like eBay, uses a system of community control to police the submissions, as well as a second level of “feedback on the feedback” to police the users.<sup>125</sup> By giving many users a small amount of power, the moderation system is able to decrease the amount of irrelevant stories (or commenters) by allowing the aggregate intelligence of the community to weed them out.<sup>126</sup> In contrast, Google uses a secret algorithm to decide what is relevant to a search query and what is not. The community of search users that are relying on the algorithm have no input in how results are displayed and have no control over any unfavorable results.

#### V. *CONDITIONING A FAVORABLE LEGISLATIVE RESOLUTION UPON IMPOSITION OF SELF REGULATION*

Legislation could be implemented requiring Google to self-regulate similarly to eBay, but instead of auction participants leaving feedback for each other, search users would be allowed to comment on any and all Google results. The most efficient way to accomplish this would be to only give search engines CDA and DMCA<sup>127</sup> immunity to the extent that they create a satisfactory self-regulation system. Ideal legislation would be a relatively laissez-faire approach that creates a true free market for search users to patrol search results.

This takes the Pasquale Asterisk to the next step, allowing search users not only to place a response next to information about themselves, but also to place a response next to any other

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TRANSFORMS MARKETS AND FREEDOM 76-77 (2006).

<sup>125</sup> *Id.* at 77 (“Slashdot is very self-consciously organized as a means of facilitating peer production of accreditation; it is at the comments stage that the story undergoes its most important form of accreditation—peer review ex-post.”).

<sup>126</sup> In response to the Frequently Asked Question (“FAQ”), “How do you verify the accuracy of Slashdot stories?”, Slashdot responds:

We don't. You do. :) If something seems outrageous, we might look for some corroboration, but as a rule, we regard this as the responsibility of the submitter and the audience. This is why it's important to read comments. You might find something that refutes, or supports, the story in the main.

Slashdot FAQ Editorials, *available at* <http://slashdot.org/faq/editorial.shtml#ed> 750 (last visited Aug. 18, 2008).

<sup>127</sup> *See supra* note 11.

information. As with eBay, some users will abuse the system, but a community message board (or other second-level feedback system) like the one developed by eBay or Slashdot could effectively patrol these frauds.<sup>128</sup> Critics, such as James Grimmelmann, will likely argue that such legislation is too invasive and that the free market should be able to determine what search engines people use.<sup>129</sup> A true free market, however, can only be obtained once everyone has a voice.<sup>130</sup> The reason that the free market cannot correct the errors of search is that there is no true free market of search. The search engine industry is controlled by a handful of powerful companies, all of which are using the same tactics. Furthermore, the initial investment required to start a search engine that could compete with Google or Yahoo is immense, effectively keeping any small “startup” search engines from challenging the industry norm.

The next step in implementing a new regime for modified self-regulation of search is to ask: How far do we go? Can any search user indiscriminately flag sites that they disagree with? Is this system a cure-all for hate speech on the internet? The answer is that the system will only go as far as we let it. Certainly, a sitting president wouldn't be able to comment on every criticism that is returned by a Google search.<sup>131</sup>

On a substantive level, a feedback regime for search results would allow the online community to police itself. Instead of a person responding only to results about themselves, as in Professor Pasquale's approach, this scheme would allow every user to respond to every search result. A system such as this would eventually allow “bad” search results, such as trademark infringers, to be exposed and, therefore, not rely solely on the results page ranking for visibility. If a search for “Burberry” returned a counterfeit Burberry seller on the first results page, a watchful online community would quickly flag it.

Personal information could also be flagged as inappropriate

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<sup>128</sup> See COHEN, *supra* note 106, at 52.

<sup>129</sup> See Grimmelmann, *supra* note 92.

<sup>130</sup> See Pasquale *supra* note 95.

<sup>131</sup> This is an extreme example, as the President is a public political figure and thus not subject to libel. See *New York Times v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). However, a private citizen may well be able to respond to all Google results for his or her name.



or misleading. A person should be allowed to place the information in "context"<sup>132</sup> by applying a separate "Pasquale asterisk."<sup>133</sup> Thus, Dontdatehimgirl.com<sup>134</sup> websites could (and most likely would) contain a response by each of the accused cheaters telling their side of the story. As a second layer of protection, a message board system similar to that used by eBay<sup>135</sup> or a system where users rate other users such as that used by Slashdot<sup>136</sup> could use the collective intelligence of friends and well-wishers of both parties to again place the online information in the proper context<sup>137</sup> and avoid turning the online reputation dispute into a "he said-she said" argument.

Procedurally, it has been argued that the collective intelligence of a large community is always going to be superior to that of a single entity policing that large community.<sup>138</sup> The system implemented by eBay has even been specifically extolled as a solution to the reputation problem that eBay users were facing.<sup>139</sup> These theories, called "dispersed information," aggregate to become extremely important where anonymity breeds a sense of contempt for "social norms" or any sort of "rule of law," even though none may exist. For example, one may be perfectly comfortable saying negative things about a political candidate anonymously on an internet message board, but the average person would probably not say those things to the candidate's face.

This phenomenon can be statistically measured most accurately by paralleling it to other situations where anonymity is repealed. A similar situation is commercial trucking fleets that use "How's My Driving" stickers. These stickers let members of the public call a phone number posted on the truck to report any

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<sup>132</sup> See Nissenbaum, *supra* note 64, at 137.

<sup>133</sup> See Pasquale, *supra* note 7.

<sup>134</sup> See Dontdatehimgirl.com, *supra* note 57.

<sup>135</sup> See eBay Community Discussion Boards, *supra* note 119.

<sup>136</sup> See Slashdot, *supra* note 122.

<sup>137</sup> See Nissenbaum, *supra* note 64, at 137.

<sup>138</sup> See generally CASS R. SUNSTEIN, *INFOTOPIA: HOW MANY MINDS PRODUCE KNOWLEDGE* (2006); see also BENKLER, *supra* note 124.

<sup>139</sup> See Mikhail I. Melnik & James Alm, *Does a Seller's Ecommerce Reputation Matter? Evidence from eBay Auctions*, 50 J. INDUS. ECON. 337, 340-47 (2002) (noting that a seller's eBay reputation has an effect on the final auction price of products.)

aggressive or illegal conduct by the driver of the truck to the employer.<sup>140</sup> University of Chicago law professor Lior Strahilevitz notes that the use of “How’s My Driving” stickers reduced accident rates in commercial fleets between 20% and 53%.<sup>141</sup> By knowing that they were being constantly policed, truck drivers in these fleets drove safer than they would if they only had to look out for a single police officer on the side of the road with a radar gun.<sup>142</sup> What this article argues for is essentially a global “How’s My Driving” regime for the entire search industry. While the statistics compiled by Strahilevitz are strictly for commercial trucking fleets, search engines would likely experience similar pressure to serve the searching public’s need, rather than their own, if exposed via a true open market of feedback. If a similar community approach is taken to the regulation of search, many problems could be solved before they start.

Google’s collection of personal data,<sup>143</sup> however, is not completely solved by a two-tiered feedback system.<sup>144</sup> An easy solution to this would be to once again condition CDA and DMCA immunity<sup>145</sup> on a search engine giving the public access to whatever information it is keeping and a right to respond. If Google showed a third party the folder that it keeps containing the search strings, e-mails, and calendar events associated with a user’s Google entity, that user would have a right to respond to any information and explain it.<sup>146</sup> This way, if the information truly is harmless and used for marketing purposes, then the user (and only the user) should not be alarmed by anything that is disclosed. Even marketing conclusions that are drawn from the data could be enhanced. If Google decides that a user is a coffee connoisseur based on search strings and e-mails, disclosing that

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<sup>140</sup> See Lior Jacob Strahilevitz, *How’s My Driving? For Everyone (And Everything?)*, 81 N.Y.U. L. REV. 1699, 1708 (2006).

<sup>141</sup> *Id.* at 1699.

<sup>142</sup> *Id.*

<sup>143</sup> See SOLOVE, *supra* note 5.

<sup>144</sup> One might argue that letting people respond to misinformation placed on the internet about themselves would be enough of a solution. However, one person would likely not be able to effectively police the internet for information about themselves. Therefore, another method must be used to effectively keep private information private.

<sup>145</sup> See Kerr, *supra* note 10.

<sup>146</sup> See Pasquale, *supra* note 7.

information to the user would let Google's marketing team know whether it is accurate or not.

In sum, a feedback system similar to that used by eBay or Slashdot would solve or help to solve many of the problems currently faced by search. While this Note does not propose an exhaustive and intricate legislative solution, the concept of giving everyone a "right to respond" to all information returned by search engines, as well as a special second-level power to rate the effectiveness of other users would allow for much greater accuracy of the information on the web. Second, potential trademark infringers would quickly be flushed out and exposed by the online community as opposed to waiting for a single, lumbering government entity to police them.<sup>147</sup> Third, conditioning CDA and DMCA immunity for search engines upon a showing that they can effectively regulate themselves creates a powerful incentive, as search engines could face a myriad of civil and criminal charges should these immunities be repealed.<sup>148</sup> Finally, opening personal files that are currently being stored by search engines to the search users would not only quell privacy concerns, but could also enhance the company's marketing practices.

This self-regulation, conditioned on CDA and DMCA immunity for search engines, effectively would allow the public do what some think<sup>149</sup> should be the government's job. This solution would be more efficient and more effective than government regulation because the collective knowledge of a group is always more efficient than a single regulatory source.<sup>150</sup> Such self-regulation is less invasive than a government body inquiring into the trade practices of search engines and the private information of search consumers,<sup>151</sup> while still allowing greater transparency in the law of search. Rather than corrupting search, as some think,<sup>152</sup> this scheme would actually create a more efficient and less deceptive search environment that would enhance the search experience for all users.

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<sup>147</sup> See *supra* Part IV.

<sup>148</sup> See *supra* note 11.

<sup>149</sup> See Kerr, *supra* note 10; see also Weitzner, *supra* note 97.

<sup>150</sup> See SUNSTEIN, *supra* note 138.

<sup>151</sup> See Weitzner, *supra* note 97.

<sup>152</sup> See Grimmelmann, *supra* note 92.

The legislative solution proposed in this Note would actually create a true free market for search, allowing search results to be policed by the users themselves.<sup>153</sup> eBay has already shown that a simple system involving an online reputation can be extremely effective in regulating an enormous online marketplace that has the potential to be a festering swamp of online fraud.<sup>154</sup>

## VI. CONCLUSION

With the expansive nature of the data on the internet and the role of search engines as the “gatekeepers” to that information, it is important to know that these search engines are doing what is best for both the internet and the people that use it. As these search engines gain in popularity, they “become capable of harms commensurate with their benefits.”<sup>155</sup> While it is very useful that Google lets someone find information quickly and easily, it is not useful when Google buries a relevant search term<sup>156</sup> or deletes one altogether.<sup>157</sup> Similarly, it is damaging to the online community when trademark disputes threaten to confound the entire search industry, costing time and money while still allowing infringers to “reap where it has not sown”<sup>158</sup> by being easily accessed through a search engine based on the goodwill that others have built into the mark. As Google and other search engines compile massive amounts of data about their search users, it is imperative that certain privacy risks also be exercised.

Commentators have attempted to solve these problems piecemeal, from allowing people to correct misinformation about themselves through an asterisk<sup>159</sup> to creating a government oversight body to pry into the hard drives of search engines everywhere, spilling out the personal data that is being kept under the tightest of security.<sup>160</sup> Some have called for no regulation at

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<sup>153</sup> See *supra* Part IV.

<sup>154</sup> See Sellers, *supra* note 112, at 172.

<sup>155</sup> Pasquale, *supra* note 7, at 139.

<sup>156</sup> Search King, Inc. v. Google Tech., Inc., No. CIV-02-1457-M, 2003 WL 21464568 at \*2-3 (W.D. Okla. May 27, 2003).

<sup>157</sup> Google, Inc. v. Am. Blinds & Wallpaper Factory, Inc., No. C 03-05340 JF, 2005 WL 832398 (N.D. Cal. Mar. 30, 2005).

<sup>158</sup> Int'l News Serv. v. Associated Press, 248 U.S. 215, 239 (1918).

<sup>159</sup> See Pasquale, *supra* note 7.

<sup>160</sup> See Weitzner, *supra* note 97; It is also important to note that while Google

all, leaving the supposed “free market” to determine whether people use a certain search engine, or no search engine at all.<sup>161</sup> This is a misconception, however, since there is really no free market for search. The industry is dominated by a few players<sup>162</sup> and the entry costs are prohibitively high for a new search engine to emerge.<sup>163</sup>

The true means to create a “free market” for search is to allow users to police the search engines as well as each other. This is more efficient and more effective than a governmental organization, as well as easier.<sup>164</sup> Pieces of each of the current solutions can be extracted and used to create the proposed solution to search. Orin Kerr’s idea to condition the immunity that search engines currently receive under the CDA and DMCA based on exclusion from search robots is a major part of this solution.<sup>165</sup> This conditioning of the immunities is a simple legislative solution that keeps most of the government out of the process. A feedback system similar to eBay’s reputation system or Slashdot’s rating system would place the burden of regulation on the search engines themselves, with the search users acting as the police force.

This solution has already been proven effective while regulating an online marketplace,<sup>166</sup> and continued regulation of the current search environment is a natural extension of this effective idea. Let the true “free market” dictate what information is retrieved through a search engine, and let that same free market give us an idea as to whether that information is relevant. This solution is simple to legislate, and even simpler for Google and others to implement. It will allow misinformation about certain individuals to still be searchable, but allow those individuals to respond to anything that is said about them.

Search engines have already become the chief organizers of

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appears to have resisted the government subpoena search request on privacy grounds, they actually claimed that the information could disclose company trade secrets.

<sup>161</sup> See Grimmelmann, *supra* note 92.

<sup>162</sup> See McCollum, *supra* note 53.

<sup>163</sup> See Pasquale, *supra* note 7.

<sup>164</sup> See Strahilevitz, *supra* note 140.

<sup>165</sup> See Kerr, *supra* note 10.

<sup>166</sup> See Mills, *supra* note 104.

all of the public information in the world. With that, there should also be a responsibility to the public to promote a goal of an open, free market of *responses* to the ideas and information that is returned by a given search result.<sup>167</sup>

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<sup>167</sup> See Pasquale, *supra* note 7, at 139.