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REGULATING SEARCH

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Introduction

Search engines have become the crucial intermediary between Internet users and the onslaught of information that is available online.² Search engines are the equivalent of a phone book, directory assistance, an encyclopedia index, a card catalog, and a librarian, all rolled into one. The Internet has been likened to the Library of Babel and search engines to the omniscient librarian.³ Navigating the World Wide Web without a search engine is almost unimaginable.⁴

Given the centrality of search engines in making the digital world accessible and useful, it is not surprising that a variety of disputes concerning their operation have arisen. The law relating to these disputes has developed, perhaps typically, in a fragmented manner; disputes have been resolved with reference to property law, contract law, trademark law, copyright law, patent law, consumer protection law, and more.⁵ Not surprisingly, much of the scholarly commentary reflects this doctrinal development: commentators have suggested a copyright solution for copyright claims, a trademark fix for trademark problems, a contract tweak to contract claim, and so on.⁶

¹ Assistant Professor, University of Denver Sturm College of Law. I presented this paper at the Intellectual Property Scholars' Colloquium at Stanford Law School, and I thank the participants for their feedback and encouragement; in particular, Eric Goldman provided helpful comments. In addition, I thank Alan Chen, Sam Kamin, Julie Nice, Nantiya Ruan, and Phil Weiser for comments, assistance, and encouragement.

² Frank Pasquale, *Copyright in an Era of Information Overload: Toward the Privileging of Categorizers*, 60 VAND. L. REV. 135 (2007) (hereafter, Pasquale, *Information Overload*) (describing the "information overload" on the World Wide Web).

³ See James Grimmelmann, *Information Policy for the Library of Babel*, 3 J. BUS. & TECH. L. 29 (2007) (hereafter, Grimmelmann, *Information Policy*).

⁴ See Jennifer Chandler, *A Right to Reach an Audience: An Approach to Intermediary Bias on the Internet*, 85 HOFSTRA L. REV. 1095, 1097 (2007) ("Selection intermediaries are necessary because, under conditions of overwhelmingly abundant information of varying quality, listeners must discriminate amongst speakers. We simply cannot pay attention to it all, and the task of finding or avoiding information increases in difficulty in proportion to the amount of information available.").

⁵ See generally Urs Glasser, *Regulating Search Engines: Taking Stock and Looking Ahead*, 8 YALE J. L. & TECH. 201, 208-15 (2006) (describing a variety of search engine disputes).

⁶ See, e.g., Frank Pasquale, *Rankings, Reductionism, and Responsibility*, 54 CLEV. ST. L. REV. 115, 117 (2006) (arguing in favor of "some minor, non-

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Resolving search engine disputes effectively, however, requires looking outside these doctrinal categories. This is so because search engine disputes raise competing policy concerns that cut across doctrinal boundaries. Trade-offs must be made: between privacy and access; between transparency and efficiency; between being found and remaining hidden. A coherent and comprehensive approach to search engine regulation requires the recognition of these trade-offs rather than the application of any particular doctrinal framework. It requires an understanding that the issues that have arisen are interrelated and overlapping.⁷ At present, courts, Congress, the states, and administrative agencies have not recognized or understood the interrelatedness or policy implications of the various issues raised in search engine disputes. Instead, they have reacted to individual problems as they have arisen, and they have failed to recognize and understand the relationship between the various legal claims.

intrusive legal remedies for those who claim that they are harmed by search engine results); Frank Pasquale, *Asterisk Revisited: Debating a Right of Reply on Search Results*, 3 J. BUSINESS L. & TECH. (forthcoming 2008) (same); Greg Lastowka, *Google's Law*, 73 BROOK. L. REV. 1327, 1330 (2008) (proposing a renewed "focus on the 'likelihood of confusion' standard"); Sajjad Matin, *Note: Clicks Ahoy! Navigating Online Advertising in a Sea of Fraudulent Clicks*, 22 BERK. TECH. L. J. 533 (2007) (concerning click fraud); Andrew Sinclair, *Note: Regulation of Paid Listings in Internet Search Engines: A Proposal for FTC Action*, 10 B.U. J. SCI. & TECH. L. 353 (2004). There has been a vigorous debate about, and even a symposium dedicated to, the proper role of the "trademark use" doctrine in the online context. See Stacey L. Dogan & Mark A. Lemley, *Grounding Trademark Law Through Trademark Use*, 92 IOWA L. REV. 1669 (2007); Graeme B. Dinwoodie & Mark D. Janis, *Confusion Over Use: Contextualism in Trademark Law*, 92 IOWA L. REV. 1597 (2007). See also Margreth Barrett, *Internet Trademark Suits and the Demise of "Trademark Use,"* 39 UC DAVIS L. REV. 371 (2005); Uli Widmaier, *Use, Liability, and the Structure of Trademark Law*, 33 HOFSTRA L. REV. 603 (2004); Eric Goldman, *Deregulating Relevancy in Internet Trademark Law*, 54 EMORY L.J. 507 (2005); Kurt M. Saunders, *Confusion is the Key: A Trademark Law Analysis of Keyword Banner Advertising*, 71 FORDHAM L. REV. 543 (2002). See also Michael Carrier & Greg Lastowka, *Against Cyberproperty*, 22 BERK. TECH. L.J. 1483, 1484 (2007) (arguing that property is not the proper analogy for online disputes).

⁷ James Grimmelman, *The Structure of Search Engine Law*, 93 IOWA L. REV. 1, 4 (2007) (hereafter, Grimmelman, *Structure of Search*) (explaining that many search engine disputes revolve around a relatively small set of relationships and information flows and concluding that the concerns "must be balanced with one another because each relates to the same few information flows. Pushing on one affects the others."). See also *id.* at 5 (arguing that "taking a broad view of search yields otherwise-unavailable insights into pressing controversies" and concludes that "failing to consider the larger forces at work in search is antithetical to sensible policymaking.").

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A number of scholars, on the other hand, have begun a lively debate on these issues and on the general question of how search engines ought to be regulated.⁸ That debate has so far been somewhat bipolar, however: some argue for very centralized, intrusive regulation while others take a free market fundamentalist stance.⁹ The former have suggested that highly-centralized regulation of search engines is both appropriate and necessary; the latter have argued that no regulation is necessary and that the market can best regulate search.

In this paper, I trace the outlines of this debate and explain why I find both arguments unsatisfactory. I regard the former proposal as unwarranted, at least at this point, and probably unwise. The latter approach is theoretically appealing but simply unrealistic: we are already regulating search engines through a patchwork of federal and state common law, federal and state statutes, and administrative oversight. This patchwork approach results in no policymaking whatsoever, much less sensible policymaking. If we are in fact regulating search, we should do it thoughtfully.

Thoughtful regulation can only occur if search engine disputes are viewed as raising an interrelated set of problems that flow out of search engines' position at the nexus of some of the most significant online activity.¹⁰ I suggest that, although agency regulation is inappropriate, a more coherent and centralized approach is called for. To that end, federal courts should take on (or be given) the task of regulating search engines and they should,

⁸ See Frank Pasquale and Oren Bracha, *Federal Search Commission? Access, Fairness and Accountability in the Law of Search*, 93 CORNELL L. REV. __ (forthcoming 2008); Grimmelmann, *Structure of Search*, *supra* note __, at 4 (providing "a roadmap to the legal issues posed by search" and "an analytic foundation to distinguish informed decisionmaking from random flailing."); Frank Pasquale, *Internet Nondiscrimination Principles: Commercial Ethics for Carriers and Search Engines*, 16 U. CHI. LEGAL FORUM __ (forthcoming 2008); Eric Goldman, *Search Engine Bias and the Demise of Search Engine Utopianism*, 8 YALE J. L. & TECH. 188 (2006) (hereafter, *Goldman Search Engine Bias*); Eric Goldman, *A Coasean Analysis of Marketing*, 2006 WISC. L. REV. 1151 (2006) (hereafter, *Goldman, Coasean Analysis*); Eric Goldman, *Deregulating Relevancy in Internet Trademark Law*, 54 EMORY L.J. 507 (2005) (hereafter, *Goldman, Deregulating Relevancy*).

⁹ Virtually no one has staked out the middle ground. Many of the commentators have discussed a variety of legal reforms and thus might be described as occupying the middle ground. See *supra* note __ and sources cited therein. Most of this literature does not, however, discuss the larger structural and institutional issues concerning search engine regulation.

¹⁰ Grimmelmann, *Structure of Search*, *supra* note __, at 4-5.

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accordingly, develop federal common law in the interstices of the already applicable federal statutes. A federal common law approach would centralize the consideration of search engine disputes to some extent, allowing courts to see the common nucleus of many search engine claims and would permit and perhaps even encourage consideration of the many policy trade-offs involved.¹¹

In proposing this approach, I look to some of the early scholarship on the regulation of cyberspace and of technology generally. That literature grappled with many of the issues raised by today's search engine disputes. Taking as a starting point the rapidly-changing and unpredictable nature of technology, a number of commentators suggested common law as the best regulatory approach to cyberspace and other technology. That literature is instructive here; a common law approach may work in the context of search engine disputes, and it provides a feasible alternative to both the weak and uncoordinated regulation that currently exists and the nearly diametrically opposed option of federal agency regulation.

This paper proceeds in three parts. In Part I, I briefly provide some background on search engines' crucial role as an intermediary and how that has led to a variety of disputes. In Part II, I discuss the academic scholarship on search engine regulation, and point to some concerns about the proposals that have been put forth so far. Finally, in Part III, I propose an alternative approach. I explain why a federal forum for the resolution of search engine disputes is more likely to encourage a comprehensive assessment of search engine disputes and the accompanying policy issues without presenting the drawbacks of more centralized regulation.

I. Search Engines and Search Engine Disputes

The question of how the law should respond to search engine disputes is important because search engines are a crucial intermediary in the online world and sit at the nexus of a variety of disputes about that world. Search engines are everywhere. Google may be the most famous, but many other general search engines exist and a number of start ups have recently entered the market.¹²

¹¹ I refer to this as a federal common law approach because I propose no new legislation of any kind, only a change in the applicable law.

¹² Other search engines include: Ask.com, <http://www.ask.com/?o=0&l=dir> (last visited September 13, 2008); Yahoo, <http://www.yahoo.com/> (last visited

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Search engines serve one primary purpose: to mediate between users (whether they are individuals or entities) and digital information. The amount of material on the Web presents an enormous opportunity, but it is a potential that cannot be achieved if the information and material cannot be found, categorized, and used.¹³ General purpose web search engines serve this function and, as a result, have been the focus of a variety of disputes about how the online world should be regulated.

A number of scholars have described both how search engines operate and how they have become such a crucial intermediary.¹⁴ A starting point for understanding the significance of search engines: according to one source, Google's website (which contains virtually no content) is the most visited site in the United States (and perhaps the world),¹⁵ indicating the extent to which people use search engines to access the online world. Another data

September 13, 2008). Some of the start-ups are: Cuil, <http://www.yahoo.com/> (last visited September 13, 2008); Powerset, <http://www.powerset.com/> (last visited September 13, 2008). Powerset was recently acquired by Microsoft. <http://venturebeat.com/2008/06/26/microsoft-to-buy-semantic-search-engine-powerset-for-100m-plus/> (last visited September 13, 2008).

¹³ See Grimmelmann, *Information Policy*, *supra* note __, at 30 ("Access to knowledge always depends on access to knowledge infrastructure."); Chandler, *supra* note __, at 1097. See also Pasquale, *Information Overload*, *supra* note __, at 141 ("Just as the production of physical goods burdens the natural environment, the production of copyrightable expression imposes costs on the cultural environment. These information overload externalities induce the increased 'search costs' of finding the particular piece of expression one most wants, increased anxiety, and loss of solidarity via a fragmented public sphere.").

¹⁴ For an overview of how search engines work and how they have come to wield so much power, see Lucas D. Introna and Hellen Nissenbaum, *Shaping the Web: Why the politics of search engines matters*, available at <http://www.nyu.edu/projects/nissenbaum/papers/searchengines.pdf> (last visited September 19, 2008). For a description of the development of search engine technology, see Gasser, *supra* note __, at 203-08 (providing a "brief (and casual) history of search engines."). For a detailed description of how users interact with search engines, see Goldman, *Deregulating Relevancy*, *supra* note __, at 513-21 (stating that "search processes are complex and defy simplistic analysis," but developing "a methodology that applies to many such searches."). For a sense of the vastness of the information available online, see Grimmelmann, *Information Policy*, *supra* note __, at 38 ("It's almost a cliché to assert that the Internet is like a vast library, that it causes problems of information overload, or that it contains both treasures and junk in vast quantities."). For a description of searching the Web and returning ranked results, see Goldman, *Deregulating Relevancy*, *supra* note __, at 532-51.

¹⁵ Alexa.com, Traffic Rankings (United States), http://www.alexa.com/site/ds/top_sites?cc=US&ts_mode=country&lang=none (last visited September 13, 2008).

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point: advertisers are on track to spend eleven billion dollars advertising with search engines this year, reflecting the sheer economic power of the industry.¹⁶ An entirely new industry – search engine optimization (SEO) – has arisen to assist website owners in improving their ranking, emphasizing search engines' function as a gatekeeper.¹⁷ Because of the central role they play and the power they wield, it should not be a surprise that disputes about the rights and obligations of search engines have cropped up persistently.

In the early days of the Internet, search engines were non-existent or simplistic; many users simply entered their guess as to a URL into the address bar. There was less information available, but it was probably more difficult to find. As technology evolved and search engines became more sophisticated, users' interactions with search engines and the information on the Web changed as well. These days, users *may* find websites by entering a url if they are fairly certain of the address, but in many cases users use search engines to narrow down the possibilities (rather than guessing at a url) and navigate through links, returning often to the search results page or formulating a new search query.¹⁸

Today, search engines have become ubiquitous and quite sophisticated. Google is the iconic, but certainly not the only, general-purpose search engine. Google currently operates by caching (or storing) the vast majority of web content on its servers and creating an index for that content; Google updates the content and its index regularly.¹⁹ When a user enters a search query into the Google search box, Google searches the cached content and its own index (rather than the web itself) and returns ranked results

¹⁶ http://www.iab.net/insights_research/iab_research/1675/334424 (last visited September 18, 2008).

¹⁷ Google itself provides a description of search engine optimization, and it describes its view of search engine optimization: "While SEOs can provide clients with valuable services, some unethical SEOs have given the industry a black eye through their overly aggressive marketing efforts and their attempts to manipulate search engine results in unfair ways. Practices that violate our guidelines may result in a negative adjustment of your site's presence in Google, or even the removal of your site from our index." <http://www.google.com/support/webmasters/bin/answer.py?hl=en&answer=35291> (last visited September 13, 2008).

¹⁸ See Goldman, *Deregulating Relevancy*, *supra* note __, at 513-21 (describing the process users go through in formulating and conducting an Internet search).

¹⁹ See generally Google Corporate Information, <http://www.google.com/corporate/tech.html> (last visited September 13, 2008) (describing in general terms how a Google search works).

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based upon a proprietary algorithm.²⁰ The ranked results contain links not to the stored content on Google's servers but to the websites themselves.

For the most part, searching is a black box process: the user inputs search terms and receives the results that Google's PageRank system determines are the most responsive and relevant to those search terms.²¹ It is generally unknown what information Google caches and indexes, what the ranking criteria are, or whether the "best" results have been returned.²² This opaque ranking system – because of the power it wields²³ – has been the subject of a variety of disputes about search engine bias and manipulation of results.²⁴

Other aspects of search engines' operation have raised problems. Google currently operates on an advertising-revenue model. Users do not pay to conduct searches; advertisers pay to have their ads appear generally or in connection with particular search terms or results. Given the amount of advertising dollars

²⁰ See *id.* ("We use more than 200 signals, including our patented PageRank™ algorithm, to examine the entire link structure of the web and determine which pages are most important. We then conduct hypertext-matching analysis to determine which pages are relevant to the specific search being conducted. By combining overall importance and query-specific relevance, we're able to put the most relevant and reliable results first.").

²¹ See Goldman, *Deregulating Relevancy*, *supra* note __, at 534-52 (describing the process by which search engines sort, rank, and return results).

²² Google does provide fairly extensive information to webmasters. See <http://www.google.com/intl/en/webmasters/> ("Welcome to your one-stop shop for webmaster resources that will help you with your crawling and indexing questions, introduce you to offerings that can enhance and increase traffic to your site, and connect you with your visitors."). The specifics are intentionally excluded, however, and Google's algorithm remains proprietary and a closely guarded secret. Websites may opt out of Google's searching and caching and indexing process with "do not search" tags, but users are generally unaware of what is included and what is excluded. Accordingly, users have very little basis for evaluating whether "better" results might have been returned.

²³ Introna & Nissenbaum, *supra* note __, at 23 (discussing the importance to content providers of being ranked on the first page of results). See, e.g., James Grimmelman, *The Google Dilemma*, 53 N.Y.L.S. L. Rev. __ (forthcoming 2008), at 1 ("Web search is critical to our ability to use the Internet. Whoever controls search engines has enormous influence on all of us. They can shape what we read, who we listen to, who gets heard. Whoever controls the search engines, perhaps, controls the Internet itself. Today, no one comes closer to controlling search than Google does.").

²⁴ See, e.g., *Langdon v. Google, Inc.*, 474 F.Supp.2d 622 (D.Del. 2007); *Kinderstart.com LLC v. Google, Inc.*, 2007 WL 831806 (N.D.Cal. 2007); *Search King, Inc. v. Google Tech., Inc.*, 2003 WL 21464568 (W.D.Okla. 2003).

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spent, the number of searches conducted each day, and the importance of advertising generally, it is not surprising that disputes over how advertising appears on Google's results pages have arisen.²⁵

These and other concerns are magnified because of Google's dominant position in the search market.²⁶ By one estimate, 61.9% of Internet searches were conducted with Google in July 2008;²⁷ the majority of the remaining searches go through Yahoo, Microsoft, and Ask.com.²⁸ There were 9.9 billion searches on Google sites in July 2008.²⁹ After Google's acquisition of DoubleClick in early 2008, there were estimates that Google's share of the online advertising market would approach 70%.³⁰ In the wake of Google's ad deal with Yahoo, both the House and the Senate scheduled hearings because of concerns over the anticompetitive consequences of the deal.³¹

Search engines present opportunities and risks across nearly all segments of the economy and culture. Search engines sit at the nexus of a variety of information flows – and therefore a variety of disputes – between users, content providers, and advertisers. Search engines help users find information, but it is impossible to know what is out there, and difficult to understand what criteria the search engine might be using to return results. Very often, users, content providers, and search engines themselves, want more information and transparency, but openness

²⁵ See Lastowka, *Google's Law*, *supra* note ___. See also, e.g., Sajjad Matin, *Note: Clicks Ahoy! Navigating Online Advertising in a Sea of Fraudulent Clicks*, 22 Berk. Tech. L. J. 533 (2007); Andrew Sinclair, *Note: Regulation of Paid Listings in Internet Search Engines: A Proposal for FTC Action*, 10 B.U. J. Sci. & Tech. L. 353 (2004).

²⁶ For example, the FTC investigated, but later approved, Google's merger with DoubleClick. See http://news.cnet.com/FTC-allows-Google-DoubleClick-merger-to-proceed/2100-1024_3-6223631.html (last visited September 19, 2008).

²⁷ See SearchEngineWatch.com, <http://searchenginewatch.com/showPage.html?page=3630718> (last visited September 18, 2008). Hitwise estimates that just over 70% of searches were conducted through Google in July. Hitwise.com, <http://www.hitwise.com/press-center/hitwiseHS2004/google-receives-percentage.php> (last visited September 18, 2008).

²⁸ *Id.*

²⁹ *Id.*

³⁰ See <http://www.searchenginejournal.com/google-now-controls-69-of-online-advertising-market/6632/> (last visited July 14, 2008).

³¹ Frank Pasquale, *Congress Investigates Google-Yahoo Deal*, Concurring Opinions, July 14, 2008, available at http://www.concurringopinions.com/archives/2008/07/congress_invest.html (last visited September 19, 2008).

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and transparency can present fundamental privacy and manipulation concerns.³² Website owners and content providers might want search engines entering their sites to copy and index the content for later searching; at the same time, they might object to their placement in search results. Search engines themselves must have a viable business model; the current advertising model presents issues regarding the use of trademarks in triggering ads and the ability of advertisers to affect search results, among other things. Search engines thus reside at the confluence of these overlapping and sometimes conflicting interests.³³

At the same time that Google has become more than just an Internet company (it is really a cultural force now; its name is a verb, not just a trademark; and its every move makes the front page), the future of search engines, search engine technology, and the related business models and consumer behavior remains fluid, unknown. Google's technology and business model are continually changing. New search engines provide different search functionalities, return different results, and operate in different ways. New companies are entering the market and the future of search is uncertain. Will Google continue to grow? Will "personalized" search fundamentally change how people interact

³² This was demonstrated powerfully in 2006 when AOL released a vast number of search queries, with no names attached, for search purposes. Despite the efforts at maintaining anonymity, it was remarkably easy to determine the identity of the searchers. See <http://www.imediaconnection.com/content/10935.asp> (last visited September 19, 2008).

³³ For an overview of the various kinds of search engine disputes that have arisen, see Gasser, *supra* note ___. As Professor Urs Gasser has noted, the early stages of litigation focused on intellectual property issues – trademark and copyright, primarily. *Id.* at 208-211 ("In sum, a rough overview of the case law prior to 2000 suggests that the growing importance of search engines was widely acknowledged and undisputed as early as 1996. Further, this brief analysis has made clear that initial conflicts surrounding search engine and search practices that made their way into courtrooms dominantly concerned intellectual property rights – a set of claims and issues that can be seen as typical for the transition from the phase of innovation to the phase of commercial exploitation."). See *id.* at 215 ("In the early days of web search and roughly up to 2000, meta tagging was apparently the most frequent subject of litigation involving search engine operators."). The more recent litigation has broadened in scope – to include a variety of state law claims, including unfair competition, trespass to chattels, and breach of contract. *Id.* at 211-16 ("The second generation of lawsuits against search engine operators, however, has become more diverse, although intellectual property issues – probably with a shift from trademark issues towards copyright issues – continue to play an important if not predominant role. An increased number of claims based on trespass to chattels, defamation, privacy, and other grounds might indeed signal that the conflicts surrounding search engine law are broadening.").

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with the World Wide Web? Will we use the term “search engine” in five years or ten years? In thinking about regulating search engines, the uncertainty of the technological future (as well as potential changes in business methods and consumer behavior) is of profound importance.

II. Tracing the Scholarly Debate on Search Engine Regulation

Just as it is not surprising that search engine disputes have emerged, it is not surprising that an academic debate about the appropriate legal response has arisen. One aim of this article is trace the contours of the academic debate about search engine regulation. The literature is still in its infancy,³⁴ but a synthesis of the work done so far yields interesting results. Notably, the scholarly responses have clustered at the ends of the spectrum of possible regulatory options. That is, along the range of institutional choices for regulation, from the least centralized and intrusive to the most centralized, no one has staked out a middle ground.³⁵ Instead, some, taking a free market fundamentalist view, have argued for less intervention and a minimal legal response; others have urged not just a more aggressive or intrusive legal response but structural changes in the form of agency regulation of search engines. Of course, the free market fundamentalists have taken aim at the regulatory proposals just as the proponents of centralized regulation have sharply criticized the free marketers.

In this section, I describe both sides of this bipolar debate and point out some of the problems with each approach. The

³⁴ A number of commentators have urged a “conversation” about search engine regulation: Professors Oren Bracha and Frank Pasquale hope to “make a case for an ongoing conversation on search engine regulation.” Bracha and Pasquale, *supra* note __, abstract. Professor James Grimmelmenn states that a “fuller discussion of these themes [in search engine law] must await other days and other articles. The need for such further study should by now be apparent.” Grimmelmenn, *Structure of Search*, *supra* note __, at 63. Professor Urs Gasser describes the “need for a systematic evaluation of alternative (or competing) approaches to search regulation.” Gasser, *supra* note __, at 201.

³⁵ Many commentators have addressed the variety of specific doctrinal issues that have been raised in connection with these cases and statutory approaches. See *supra* note __ and sources cited therein. These scholars may be characterized as belonging in the legal reform school. Many of them, however, do not address the structural or institutional questions posed here and addressed by Pasquale, Bracha, Goldman and some others. Thus it would be inappropriate to attempt to characterize them as “market fundamentalists,” proponents of agency regulation, or something in between.

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centralized approach can be criticized for being both unwarranted and unwise. On the other hand, the argument for limited legal intervention is also problematic in failing to address some very real problems. After describing the debate in this Part and discussing the problems with each approach, in Part III I seek an alternative approach that addresses some of those real world problems without incurring the substantial costs of centralized regulation.

a. The case for agency regulation (and why it is not persuasive)

Search engines have some of the characteristics of traditionally regulated industries. They can be likened to utilities or essential facilities or common carriers.³⁶ Google may not be a monopoly, but it certainly has a great deal of market power. Network effects exist in the search world to some extent. Accordingly, there is an argument to be made that Google, and perhaps search engines in general, ought to be regulated as the telecoms and the airlines have been regulated. Although many of the arguments have some force, and the concerns that have led to this argument are powerful, the case for agency regulation is ultimately unpersuasive. Agency regulation is not warranted under the traditional justifications; it is not likely to be an effective regulatory tool in this situation; and it is simply not likely to occur.

Professor Frank Pasquale has led the charge in arguing for much more centralized and much more intrusive regulation of search engines. Along with Professor Oren Bracha, he has suggested the creation of a “Federal Search Commission,”³⁷ and he has argued in general for a variety of legal measures to assure greater accountability of search engines and to provide immunity for some search engine operations.³⁸

³⁶ Traditionally, regulated industries – such as telecommunications – were regulated because they exhibited network effects characteristics, because of the presence of economies of scale or density, because they were “common carriers,” and/or because they had market power. For a history and examination of regulation in the telecommunications industry, see JONATHAN E. NUECHTERLEIN AND PHILIP J. WEISER, DIGITAL CROSSROADS: AMERICAN TELECOMMUNICATIONS POLICY IN THE INTERNET AGE 1-22 (2007).

³⁷ Bracha & Pasquale, *supra* note ___, at 5.

³⁸ See Pasquale, *Internet Nondiscrimination*, *supra* note ___, at 14 (analogizing the issues raised in some search engine disputes to those in the net neutrality debate); Pasquale, *Information Overload*, *supra* note ___, at 142 (proposing an adjustment to the fair use doctrine to provide a privilege, of sorts, for categorizers); Pasquale, *Rankings*, *supra* note ___, at 117 (arguing that “some accountability for search engine results is increasingly necessary as they become

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Search engines, and Google in particular, yield enormous power in an interconnected digital world.³⁹ Having some kind of intermediary – between the user and the vast amount of information available online – is essential. There would be no way of harnessing the power of the Internet without the ability to search, sort, and categorize information.⁴⁰ Search engines serve this intermediary function, and they can do so for both good and ill. Pointing to some of the deleterious effects, agency regulation has been suggested as the best means of redress.

It is undisputed that there are negative consequences of search engines' operation. Search engines can – indeed, they must – manipulate search results, and some have asserted that this manipulation should under some circumstances be considered unlawful or improper bias or discrimination.⁴¹ This manipulation or bias implicates the potential for Internet users (both individuals and entities) to exploit their business models, to reach customers, and to exercise their speech rights consistent with legal and societal norms.⁴² Another set of claims against search engines addresses the concern that a variety of advertising methods are “stealth marketing” and thus should be prohibited.⁴³ Concerns over these issues have prompted the call for centralized regulation.

The argument in favor of a strong form of regulation is bolstered by Google's dominance in the search engine market, which magnifies the threats posed by search engine “bias” and “stealth marketing.”⁴⁴ The negative effects, combined with

the primary portal for net users.”) *See also id.* (suggesting not a right to suppress search engine results but the right – in situations in which a site has an “unwanted high ranking” – to “add an asterisk to the hyperlink directing web users to [the results], which would lead to the complainant's own comment on the objectionable result.”).

³⁹ *See supra* Part I.

⁴⁰ *See* Grimmelmann, *Information Policy*, *supra* note __, at 30 (“Access to knowledge always depends on access to knowledge infrastructure.”).

⁴¹ *See, e.g.,* Langdon v. Google, Inc., 474 F.Supp.2d 622 (D.Del. 2007); Kinderstart.com LLC v. Google, Inc., 2007 WL 831806 (N.D.Cal. 2007); Search King, Inc. v. Google Tech., Inc., 2003 WL 21464568 (W.D.Okla. 2003). *See also*, Pasquale, *Internet Nondiscrimination*, *supra* note __, at 35 (“some governmental agent should be able to peer into the black box of search and determine whether or not illegitimate manipulation has occurred.”).

⁴² Bracha & Pasquale, *supra* note __, at 4 (stating their concern “with one aspect of this growing power: search engines' power to manipulate their results, thereby affecting the ability of Internet speakers to reach potential audiences.”)

⁴³ Pasquale, *Internet Nondiscrimination*, *supra* note __, at 35.

⁴⁴ *See id.*, at 16-17

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Google's market power and the arguably substantial barriers to entry in the search engine market, lead to the argument that search engines are a kind of infrastructure and that the services Google (and perhaps others) offers ought to be provided on a universal basis.⁴⁵ The argument flows from these concerns and from the analogy to Internet nondiscrimination principles.⁴⁶ Such regulation may or may not be accomplished by a command-and-control agency, but it is clearly an argument for a substantially more intrusive and centralized form of intervention.

For Bracha and Pasquale, four general concerns animate this argument: democratic values, economic efficiency, fairness, and individual autonomy.⁴⁷ Search engines may undermine democratic values when they intervene with search engine results.⁴⁸ This intervention in search results also raises the fairness concern, which may provide a justification for increased regulatory intervention.⁴⁹ Economic efficiency values may justify federal regulation when control over information extends so far as to stifle competition.⁵⁰ Finally, to the extent that consumers are deceived by search engine practices, a justification for legal intervention exists. While deception may be less of a problem over time as users come to understand how search engines operate, autonomy – the ability to control one's "informational flows" – may be a more persistent concern.⁵¹

⁴⁵ See *supra* Part I. See also Pasquale, *Internet Nondiscrimination*, *supra* note __, at 35 (arguing that dominant search engines "should be required to provide access to their archives and indices in a nondiscriminatory manner.").

⁴⁶ Pasquale, *Internet Nondiscrimination*, *supra* note __, at 35 ("the types of practical accountability that flow from Internet nondiscrimination principles may both clarify current legal uncertainty about search engines' practices and assure that their services develop in a way most likely to serve the public interest.").

⁴⁷ Bracha & Pasquale, *supra* note __, at 24.

⁴⁸ *Id.* at 25 ("Instead of reflecting the synthesized results of a bottom-up filtering process, the search engine imposes from above its own preferences or the preferences of those who are powerful enough to induce it to act. The aggregate result of specific interventions of this kind by search engines that determine which content reaches viewers may be prejudicial to the democratic aspiration of a free, open and diverse expressive sphere.").

⁴⁹ Pasquale and Bracha contend that fairness concerns are "[p]robably the most intuitive problem associated with manipulation of search engine results . . ." *Id.* at 28 ("When a private party occupies an extraordinary position of power that makes it indispensable to others for obtaining certain important resources, goods or services and when alternatives are very limited, traditionally there has been more receptiveness to the application of fairness and accountability norms.").

⁵⁰ Bracha & Pasquale, *supra* note __, at 26.

⁵¹ *Id.* at 30 ("To control one's informational flows in ways that shape and

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These general concerns do not, of course, dictate a particular form of regulation, but Pasquale and Bracha have indeed suggested the need for a “Federal Search Commission,” on the grounds that search engines are the utilities of the 21st century and ought to be regulated as such.⁵² Pasquale and Bracha compare search engines today to the railroads in the nineteenth century. In the case of the railroads, concerns over discriminatory and unfair practices (combined with the network effects present in the interstate transportation system) led to centralized regulation. Pasquale and Bracha do not develop this analogy fully as a justification for federal-level agency regulation of search engines,⁵³ but they do conclude that a substantially more centralized approach to search engine regulation is both justified and likely to be effective.

Without discounting either the seriousness of the problems raised by search engines’ operation or the force of some of the arguments in favor of centralized regulation of search engines, such an approach is problematic. As a general matter, federal agency regulation has substantial – and well-documented – drawbacks.⁵⁴ Federal agencies are subject to capture; federal agency regulation can be a particularly slow-moving process; agency standard-setting may “lock-in” sub-optimal standards or technologies, while at the same time benefiting particular industries or entities; efforts to promote competition may result in inefficiencies instead.⁵⁵ There is no reason to believe that a

constrain her choice is to limit her autonomy, whether that person is deceived or not. Search engine manipulation of results that can highlight or suppress critical information does just that.”).

⁵² *Id.* at 33 (arguing that “the search engine market actually has inherent features that make robust and dynamic competition unlikely” and that search engines exhibit the characteristics of a natural monopoly: high-cost infrastructure, network effects, exclusion power, and high switching costs).

⁵³ Bracha & Pasquale, *supra* note __, at 28-29. Instead, they suggest a “need for direct regulation to limit search engines’ ability to manipulate their results and to offer some relief to the victims of illegitimate manipulation.” *Id.* at 58. *See also* Lastowka, *Google’s Law*, *supra* note __, at 27 (“Bracha and Pasquale are (understandably) vague about exactly how they would like results to be regulated.”).

⁵⁴ *See, e.g.,* Nuechterlein & Weiser, *supra* note __, at 27 (“In general, government management of a monopoly regime inevitably produces not just waste, but also a maze of politically expedient yet economically artificial regulatory distinctions.”).

⁵⁵ *See generally id.* at 28 (“The very premise of capitalism is that a competitive market, as compared to a monopolistic one, creates more innovation, greater product variety, increased efficiency, lower costs, and lower average prices.”);

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“federal search commission” would be able to evade these risks.

With respect to agency regulation of search in particular, it is unlikely to be effective, it is quite unlikely to occur, and it is (as yet at least) unwarranted under the traditional justifications for such regulation. If only because search technology, the related business models, and consumer behavior are all changing so rapidly, it seems improbable that a federal agency could effectively regulate the industry or the technology. For example, it is difficult to imagine that a federal agency would be capable of effectively responding to claims of improper bias in the ranking of search results. Search results are generally dynamic – the information to be searched changes constantly, and the tools and criteria used to search the web changes regularly as well. If, hypothetically, an aggrieved user or content provider were to bring a complaint to the agency, it is most likely that the particular problem complained of would be obsolete within weeks or days, if not hours, and an agency would be unlikely to respond in a time period of less than months. The general problem of technology changing faster than the law seems particularly acute in this instance.

Just as a federal agency is unlikely to be able to address problems of search engine bias in anything close to a timely (and therefore useful) manner, it is similarly unlikely that an agency would do a substantially better job of controlling bias than search engines themselves. As Professor Eric Goldman has described, a federal agency examining a complaint of search engine bias may mandate a different set of results than the search engine found, but that agency result would also be “biased” – in that it would simply reflect another value judgment as to what results *should be* returned based upon a particular search query.⁵⁶ It is difficult to imagine that a federal agency, or anyone else, would be able to come up with an objective set of criteria for evaluating the

see also Peter Huber, LAW AND DISORDER IN CYBERSPACE: ABOLISH THE FCC AND LET COMMON LAW RULE THE TELECOSM (1997). *See also* Tom W. Bell, *The Common Law in Cyberspace*, 97 MICH. L. REV. 1746, 1746 (1998) (reviewing Peter Huber’s LAW AND DISORDER IN CYBERSPACE: ABOLISH THE FCC AND LET COMMON LAW RULE THE TELECOSM) (Bell summarizes Huber’s criticism of “commission law” in the telecommunications context: “the Federal Communications Commission (FC) has warped telecommunications markets, hindered technological advances, and violated constitutional rights.”).

⁵⁶ Goldman, *Search Engine Bias*, *supra* note __, at 197 (“regulatory solutions become a vehicle for normative views about what searchers should see – or should *want* to see.”).

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propriety of search engine results.⁵⁷ Simply put, agencies are likely to be just as biased as search engines companies and are almost certainly less efficient.⁵⁸

Not only is agency regulation unlikely to be effective, it is unlikely to occur. As Professor Greg Lastowka explained, “Whatever one thinks of the call for greater state involvement with search results, the notion of an FCC-equivalent organization that oversees search results generally seems like a distant prospect. At this point there seems little legal footing or focused political will that might support regulating Google’s results *generally*.”⁵⁹ Even Bracha and Pasquale have noted the slim likelihood that an agency will be created to address search engine issues.⁶⁰

Finally, notwithstanding the railroad analogy, the traditional justifications for agency regulation simply are not present. Federal agency regulation has generally been justified in the relatively rare circumstances in which a particular industry is monopolized or in which the utility or service is “essential” and market forces will not adequately provide that service in a socially and economically optimal way.⁶¹ The traditional justifications for federal agency regulation also include the presence of market power by one firm, substantial coordination issues, high fixed costs, and the presence of network economics or economies of scale or density.⁶²

While Google may at some point obtain monopoly status, it is not there yet. The search industry does exhibit network effects, yet the barriers to entry, even if high, are not insurmountable. Indeed, Google has a number of competitors, and there have been

⁵⁷ One problem we may be having is the effort to analogize search engines to a service provided in the pre-Internet world. In the pre-digital world, with so much less information available, it was possible to have some “objective” search results. A phone book, for example, might list all the phone customers in the city of Denver in alphabetical order. In that case, anyone using the phone book knew what the criteria were for inclusion and could evaluate, at least to some extent, the effectiveness of the results.

⁵⁸ Goldman, *Search Engine Bias*, *supra* note __, at 197 (“regulatory intervention that promotes some search results over others does not ensure that searchers will find the promoted search results useful. Instead, government regulation rarely can do better than market forces at delivering search results that searchers find relevant, so searchers likely will find some of the promoted results irrelevant.”).

⁵⁹ Lastowka, *supra* note __, at 27 (emphasis in the original).

⁶⁰ Bracha & Pasquale, *supra* note __, at 77.

⁶¹ See *supra* notes __-__ and accompanying text.

⁶² See *generally*, Weiser & Neuchterlein, *supra* note __.

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numerous search engine start-ups in the last several years.⁶³ Search engines are similar to common carriers in some ways, but that analogy is not a perfect one. It is easier to switch search engines, or to find an alternative to a general-purpose search engine than to switch rail lines. There is no great inefficiency in having more than one search “carrier;” indeed, that probably is efficient.⁶⁴

The argument in favor of centralized regulation relies heavily on the contention that market forces are likely to be ineffective at disciplining search engine misbehavior.⁶⁵ With both sides emphasizing this contrast, it seems the debate has become polarized. As I have explained in this section, I find the case for agency regulation to be unpersuasive, but a market fundamentalist approach is not the only possible response, and I find that argument ultimately unpersuasive as well.

b. The case for minimal intervention (and why it is not persuasive)

At the other end of this polarized debate, some have argued that market forces will adequately, and perhaps optimally, regulate search engines. On this view, regulatory interference is likely to reduce the utility and efficiency of search engines without protecting consumers or the market in an appreciable way. Although I find the case for agency regulation ultimately unpersuasive, I am equally unpersuaded by the free market, minimal intervention arguments. The notion that the market can best regulate search, while theoretically compelling, is simply unrealistic as a policy prescription: there is no perfectly free market in search and there never will be. We are, in fact, already regulating search. A whole variety of legal rules have developed,

⁶³ See *supra* Part I.

⁶⁴ Nuechterlein & Weiser, *supra* note ____.

⁶⁵ Bracha & Pasquale, *supra* note ___, at 31 (“Skeptics are confident that either the market, new technology, or some combination of the two will ‘punish’ the ‘misbehaving’ search engines sufficiently to deter manipulation of search results. There are, however, good reasons to doubt that either markets or technology will provide a satisfactory solution in the near future.”). See also *id.* at 31 (“As for the ability to avoid the search engine’s power, the relevant market, while not completely monopolistic, is dominated by a very small number of players. As we explain below, competition in such a market, while not impossible, is not likely to undermine manipulation, and may even promote it. Moreover, users’ defections are not likely to be correlated with manipulation in the absence of a highly publicized instance of it – and search engines’ notorious secrecy make[s] such an incident almost unlikely.”).

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and legal policymaking institutions – state courts, federal courts, state legislatures, Congress, the FTC, the FCC – have weighed in on search engine disputes. The result is a patchwork of regulation that has not accounted for the cross-cutting policy issues and difficult trade-offs involved in establishing search engine policy and resolving those disputes.

In direct counterpoint to the argument in favor of increased regulation, the free market fundamentalist approach posits that regulatory intervention is vastly more likely to create inefficiencies, warp markets, and inhibit innovation than it is to solve any perceived consumer welfare problem. This standard argument has been advanced in the context of search engine bias and it proceeds as expected: “search engines naturally will continue to evolve their ranking algorithms and improve search result relevancy – a process that, organically, will cause the most problematic aspects of search engine bias to largely disappear. To avoid undercutting search engines’ quest for relevance, this effort should proceed without regulatory distortion.”⁶⁶

As described above in Part II, Professor Goldman has been the most outspoken proponent of the free market approach in the search engine context. Goldman rejects not just Bracha & Pasquale’s proposal, but other suggestions for regulatory intervention, including calls for the public funding of search engines and for mandating changes to ranking and sorting practices.⁶⁷ According to Goldman, search engine bias is “both necessary and desirable” and market forces, in the form of personalized search, perhaps, will provide sufficient discipline for search engines.”⁶⁸ Goldman agrees that search engine bias exists –

⁶⁶ Goldman, *Search Engine Bias*, *supra* note __, at 200.

⁶⁷ *Id.* at 194-95.

⁶⁸ *Id.* at 189. Bracha and Pasquale reject the argument that technological developments, such as personalized search, will restrain search engine manipulation. Bracha & Pasquale, *supra* note __, at 33. As described below, Goldman suggests that personalized search will greatly reduce the problematic aspects of search engine manipulation because it will produce multiple rankings and many “winners” for each search query, reducing the importance of individual rankings and, therefore, the race to manipulate those rankings. Pasquale and Bracha agree that “personalized search may also alleviate problems of universal structural bias against minority interest that are inherent in a one-size fits all system,” *id.* at 40, but they argue that personalized search carries with it its own risks. “Instead of crude manipulations pointed at the entire group of users, search results for the same keyword could be shaped differently based on the profile of the user . . . The search engine would possess a more finely-tuned and more valuable power to shape the results visible to

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in the indexing and ranking of sites, search engines employ “editorial judgment,”⁶⁹ which means that search engine results are not simply automated or objective. The results thus tend to be skewed toward majority preferences.⁷⁰ On this view, this is not a bad thing; search engine bias is necessary because search engines must exercise some editorial control.⁷¹ And editorial control is not a problem because market forces will limit the scope of the bias.⁷² In other words, people will not use search engines that do not return useful results and advertisers will not pay for placement on search engines that people do not use.

Moreover, the free market argument goes, the problems created by regulatory solutions are worse than the problems they seek to address.⁷³ Simply put, regulation is not likely to be less biased than the status quo, and government-mandated search results are likely to be less relevant than those produced by market forces. “Whatever the adverse consequences of search engine bias, the consequences of regulatory correction are probably worse.”⁷⁴ Goldman makes this argument more broadly as well, contending, for example, that market responses to spam, spyware, and adware will ultimately be more effective and consumer-welfare enhancing

various users, and as a consequence would be subject to stronger internal temptations and inducements or pressures to use this power.” *Id.* Ultimately, Pasquale and Bracha conclude that “[i]t is hard to see how the technological fix is any more likely to remedy the problem than market discipline.” *Id.*

⁶⁹ Goldman, *Search Engine Bias*, *supra* note __, at 191 (“the choice of which factors to include in the ranking algorithm, and how to weight them, reflects the search engine operator’s editorial judgments about what makes content valuable.”).

⁷⁰ *Id.* at 193 (“For search engines, the results placement determines how the searcher perceives the search experience. If the top few search results do not satisfy the searcher’s objectives, the searcher may deem the search a failure. Therefore, to maximize searcher perceptions of search success, search engines generally tune their ranking algorithms to support majority interests. In turn, minority interests (and the websites catering to them) often receive marginal exposure in search results.”). *See also id.* (“Beyond promoting search results designed to satisfy majority interests [Google’s] PageRank’s non-egalitarian voting structure causes search results to be biased towards websites with economic power because these websites get lots of links due to their marketing expenditures and general prominence.”).

⁷¹ *Id.* at 196 (“[t]o prevent anarchy and preserve credibility, search engines unavoidably must exercise some editorial control over their systems. In turn, this editorial control will create some bias.”).

⁷² *Id.* at 196-97 (“Search engines that disappoint . . . are accountable to fickle searchers. There are multiple search engines available to searchers, and few barriers to switching between them.”).

⁷³ *Id.* at 197.

⁷⁴ *Id.* at 198.

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than any regulatory response.⁷⁵

Despite its theoretical force, one problem with the free market argument is that a perfectly free market is simply unimaginable. There has been and there will continue to be legal intervention in search engine disputes, so the more realistic response is to consider what sort of legal interventions are appropriate. Thus, my criticism of the free market argument is not on a philosophical basis. Rather, I have concerns with it in operational terms. To advance a free market argument is, to some extent, to accept the current state of the law.

And the current state of the law concerning search engine disputes leaves much to be desired. The current “approach” is merely a mish-mash of federal statutory and common law, state statutory and common law, and mostly random agency interventions. Congress has passed statutes directly or indirectly regulating search engine behavior.⁷⁶ Litigants have brought a whole variety of disputes to state and federal courts and they have been resolved by references to numerous doctrines: copyright, trademark, contract, property, fraud, and tort.

So we are already regulating search, and this approach (which is obviously not a truly free market approach but is at the other end of the spectrum from agency regulation) has some significant drawbacks. One doctrine may be used to subvert the intent or effect of another.⁷⁷ Regulation at multiple jurisdictional levels allows for inconsistent results and a lack of predictability for

⁷⁵ Goldman, *Coasean Marketing*, *supra* note __, at 1220-21 (“As a result, if it were solely up to market forces, Coasean filters would become integral to our information economy. However, regulators are not allowing this technology to evolve. Instead, in an overreaction to adware and spyware technology, regulators are building an anti-Coasean-filter regulatory thicket. This thicket – not the marketing that it putatively tries to abate – represents one of the biggest threats to long-term improvements in social welfare.”).

⁷⁶ See, e.g., Digital Millennium Copyright Act, 17 U.S.C. § 512(d) (providing some immunity for “service providers” who refer or link users to an online location containing infringing material); Communications Decency Act, 47 U.S.C. § 230(c) (providing that “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”).

⁷⁷ Grimmelmann, *Structure of Search*, *supra* note __, at 52-3 (“Those concerned with one particular form of harm are not limited to legal theories directly addressing that harm. If they can gain relief against a search engine on another theory, it may be just as good. Wherever in law this multiplicity appears, it raises a concern that parties not be allowed to subvert one doctrine by appealing to another.”).

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search engine companies and their users. The values that we as a society may want to advance with respect to search engines are less likely to emerge.⁷⁸

Many of the entities addressing search engine disputes have not viewed them as “search engine disputes.” Rather, they have been seen as consumer protection problems, or copyright problems, or obscenity problems, for example. This doctrinal buttonholing results in inconsistent, contradictory and thoughtless regulation.⁷⁹ In other words, this approach has not and cannot lead to sensible policymaking; it can barely be described as policymaking at all.

Sensible policymaking would involve a comprehensive assessment of the various interrelated and often conflicting issues that arise.⁸⁰ For example, the question of how to address the concern of website owners about the intrusion by search engines onto their sites is not a simple one, and it might be resolved by reference to a variety of areas of the law. A website owner may, reasonably or unreasonably, seek to exclude search engines and their crawlers or spiders from entering the site, from cataloging the information on the site, or from copying the contents of the site for later searching. This website owner might turn to state property

⁷⁸ Gasser has suggested three core values that ought to guide decisionmaking: information autonomy, diversity, and information quality. Gasser, *supra* note __, at 227.

⁷⁹ Grimmelmann, *Structure of Search*, *supra* note __, at 51 (“Some of the hardest-fought issues in search policy are all but moot in light of doctrines from other areas. In general, such doctrinal distinctions are unstable; the broad view of search forces us to recognize that the technical centrality of search engines puts strains on many different areas of law.”).

⁸⁰ Gasser, *supra* note __, at 201 (stating that there is a “need for a systematic evaluation of alternative (or competing) approaches to search regulation.”). See also *id.* at 230-31 (“It is important to note that these core values are not necessarily always aligned. Unleashed diversity in the digitally networked environment, for instance, might have negative feedback effects on user autonomy because it increases an individual’s risk to be exposed to undesired information. A regulatory approach aimed at ensuring high-quality information, by contrast, might be in tension with informational autonomy, because it may impose a quality requirement leading to a level of quality that does not meet an individual’s information needs.”). See also Grimmelmann, *Structure of Search*, *supra* note __, at 63 (describing some of the overlapping and conflicting issues that arise in search engine disputes: “the tension between transparency and secrecy in search engine operations; the relationship of competition among providers and among search engines; the power of search engines to promote and infringe upon the privacy of users, providers, and third parties; the role of search engines in enhancing and inhibiting free speech; and the political economy of innovative freedom and others’ claims upon search engines.”).

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law – trespass to chattels – in an effort to prevent the intrusion; the owner might also raise federal copyright claims asserting infringement in the copying of material for later searching.⁸¹ The resolution of either claim individually might not require an analysis of the broader policy questions of when and why search engines ought to be able to gain access to websites and under what circumstances they ought to be excluded. To address these larger policy issues, the decisionmaker must balance concerns regarding efficiency and openness in search engine results against costs to site owners of providing content. And to do this, the courts (or other decision makers) must understand how search engines function, why they are significant, and the larger policy concerns at issue. This is unlikely to occur under the current patchwork approach.

Similarly, the question of search engine bias is broader than any particular doctrinal approach to the problem. Determining whether there is bias in the first place is perhaps not so controversial,⁸² but deciding whether to do anything about it (and, if so, what) is a particularly thorny issue. Resolving it involves balancing the values of transparency and fairness in the cataloging and results process against our interests in efficiency and useful search results. If claims concerning search engine bias are resolved, variously and independently, by reference to state law unfair competition law, federal copyright principles, free speech defenses, and administrative procedures, there is little incentive or opportunity for a comprehensive resolution of the larger issues.

In addition, different policy and dispute resolution approaches at a variety of levels create unpredictability and a problematic lack of uniformity. With states courts, state legislatures, federal courts, Congress, and the FTC (not to mention the international regimes) weighing in at various times, legal rules are hardly likely to be consistent and, thus, none of the entities involved can rely on legal rules as the basis for future action.

⁸¹ See Grimmelmann, *Structure of Search*, *supra* note __, at 24-31.

⁸² Pasquale and Goldman seem to agree on this point; they disagree about whether it is a bad thing and about whether anything should be done about it. Compare Bracha & Pasquale, *supra* note __, at 5 (“We argue that the public and private interests in maintaining the secrecy of the search process should be balanced against the public interest in disclosure and that the proper institutions for achieving this balance may be developed.”) with Goldman, *supra* note __, at 189 (explaining that search engine “bias is both necessary and desirable.”). See also Lastowka, *supra* note __, at 26 (discussing the differing approaches).

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There is, of course, something to be said for variability in legal approach; the notion of states as “laboratories” for legal experiments has a long pedigree.⁸³ There is substantial reason to believe, however, that the “states as legal laboratories” theory works well only in some circumstances. Professor Peter Menell has argued that the states-as-legal-laboratories approach is problematic in regulation Internet-entities.⁸⁴ In particular, he asserts (in the context of spyware regulation) that “state-by-state regulation creates an environment in which prudent Internet-related businesses must conform to every state unfair competition law, producing in effect a national policy based on the standards of the most restrictive state.”⁸⁵ This is a race to the bottom, of sorts, in which we are unable to gain useful information from different types of state regulation because Internet-entities do not or cannot behave differently in different states. Based on his study concerning unfair competition laws applied to spyware disputes, Menell argues for federal preemption of state unfair competition law.⁸⁶

This argument against state regulation of Internet entities resonates in thinking about the problems posed by the current

⁸³ *New State Ice Co. v. Lieberman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

⁸⁴ Peter S. Menell, *Regulating “Spyware”: The Limitations of State “Laboratories” and the Case of Federal Preemption of State Unfair Competition Laws*, 20 BERK. TECH. L.J. 1363, 1371 (2005) (“state experimentation in regulating Internet-related activities creates significant risks for the nation as a whole.”). The more general form of this argument has been made by others. See, e.g., Dan Burk, *Federalism in Cyberspace*, 28 CONN. L. REV. 1095 (1996). And there has been significant debate about federalism and the proper role of states in regulating Internet activities and technology. See, e.g., James Boyle, *Foucault in Cyberspace: Surveillance, Sovereignty, and Hardwired Censors*, 66 U. CINN. L. REV. 177 (1997); Jack Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199 (1998); Mark A. Lemley, *The Law and Economics of Internet Norms*, 73 CHI.-KENT L. REV. 1257 (1998).

⁸⁵ Menell, *supra* note ___, at 1372.

⁸⁶ *Id.* at 1376 (“the characteristics of the Internet favor federal preemption of state regulation as the most appropriate default regime.”). See also *id.* at 1412 (“The general provisions of the Lanham Act and the FTC Act largely parallel state unfair competition and consumer protection regimes. Preempting the state counterparts to these laws in the context of Internet-related activities would substantially harmonize legal standards, reduce business planning costs, and eliminate needless and costly litigation of vague and uncertain state causes of action.”). See also Steven R. Salbu, *Who Should Govern the Internet: Monitoring and Supporting a New Frontier*, 11 HARV. J.L. & TECH. 429, 462-478 (1998) (arguing for preemption in order to promote uniformity).

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regulatory stance toward search engines. Preemption may not be appropriate in the search engine context, but Menell's general argument that the "inherent technological limitations on the ability of states to experiment" in regulating Internet activities should give us pause about the effectiveness of state regulation in certain contexts.⁸⁷

As with other Internet entities, search engines are ubiquitous: search engines operate internationally, and the disputes that have arisen with respect to search engines are not confined to any particular location or jurisdiction. It is difficult to imagine that search engine entities can operate most efficiently taking into account state, federal, and international regimes of regulation. Such multiplicity of regulation certainly might inhibit innovation and increase legal costs; it is also unlikely to result in good or effective legal rules.⁸⁸ For many of the reasons applicable to Internet governance generally, state level regulation of search engines is problematic and national-level regulation is appealing.⁸⁹

⁸⁷ Menell, *supra* note ___, at 1416 ("[t]he ubiquity of the Internet makes state borders largely irrelevant. Therefore, there should be a strong presumption in favor of at least national regulatory governance of most Internet-related activities."). This argument proves too much, perhaps. If there are externalities involved in state-by-state regulation of Internet-related activities, surely those externalities exist at the national level of regulation as well and we ought to be regulating the Internet only at a global level. Menell recognizes this: "The logic of this Article suggests that even the federal level may be too provincial for addressing Internet-related activities. Governance of many aspects of the Internet properly belongs on the global stage . . ." *Id.* Menell concludes, however, that perhaps the national-level regulation can provide the "laboratories" of experimentation for the international community. "In some respects, however, nation-based regulation may provide some of the advantages of policy experimentation that Justice Brandeis endorsed. International jurisdiction, country codes, and languages erect partial barriers that limit the extent to which legal regulation from one nation spills over into the governance of activities in other nations. In these circumstances, nations can obtain the benefits of seeing how particular regulatory constraints affect economic activities." *Id.* at 1417.

⁸⁸ Menell undertook a case study of state unfair competition laws in regulating Internet activities and concluded that "the most restrictive state law regimes have nationwide effect on Internet-related activities. . . . Furthermore, the process by which the first and arguably most restrictive state spyware laws came into existence demonstrates that state legislation can result from the lobbying efforts of even one persistent company." *Id.* at 1410.

⁸⁹ I do not argue that national regulation or the application of federal common law to search engine disputes is required, by the dormant Commerce Clause or some other aspect of federal statutory or constitutional law, but only that it might result in more effective and efficient policymaking. For a summary of the debate over whether the dormant Commerce Clause requires invalidation of state regulation of Internet-related activities, see Jack L. Goldsmith & Alan O.

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What *form* this national-level regulation ought to take is a much more difficult question, however.⁹⁰

III. An Alternative in the Bipolar Debate: A Federal Common Law Approach

The regulatory choice is not a binary one. We are, in fact, already regulating search, and the question is where along the spectrum of policy options we ought to be. The current approach – a patchwork of federal and state, statutory and common law, courts, legislatures, and agencies weighing in on the issues – does not allow for comprehensive analysis of the policy trade-offs involved in search engine regulation. On the other hand, federal agency regulation is most likely both unwarranted and unwise at this point, in addition to being quite unlikely. I suggest here that there is an alternative: a federal forum for search engine disputes. Under this approach, these disputes would be resolved as a matter of federal law and the federal courts would take on (or be given) the task of developing a body of federal common law for the resolution of search engine disputes.⁹¹

Having described the drawbacks of some of the suggested approaches to search engine regulation, in this section I make the case that the middle ground of federal common lawmaking provides a more realistic and more flexible approach than federal agency regulation and a more effective approach than the current scheme. It should be clear that this conclusion is a relative one: no regulatory approach is optimal, but this approach has some advantages over the proposed alternatives.

Compared to agency regulation, the flexibility of a common law approach is more adaptable to technological (and

Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785 (2000-01) (arguing that “the dormant Commerce Clause, properly understood, leaves states with much more flexibility to regulate Internet transactions than is commonly thought.”).

⁹⁰ See Bracha & Pasquale, *supra* note __, at 60 (presenting generally the question of “whether a regulatory framework, either by statute or under the common law, could be crafted as to minimize these risks while preventing improper behavior by search engines.”).

⁹¹ I leave for later discussion the precise definition of “search engine disputes” that ought to be subject to federal jurisdiction. This proposal does give rise to the argument that search engine law is just the latest version of the “law of the horse.” See Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. Chi. Legal Forum 207. I discuss this below. See *infra* notes __ and accompanying text.

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other) change and is less likely to inhibit innovation or lock-in standards. Moreover, a federal common law approach is achievable, whereas agency regulation is quite unlikely. And in contrast to the current patchwork approach, a purely federal system allows for a more comprehensive evaluation of the policy trade-offs involved in search engine disputes and may allow for the development of some consistency and predictability over time.

a. Compared to more centralized regulation, a federal common law approach has the advantages of flexibility and practicality

i. Flexibility allows the common law to accommodate changing technology

As compared to the more centralized approach of agency regulation (or a substantive statutory scheme), one significant advantage of a federal common law approach is flexibility. Agency-level regulation is hardly known for its adaptability to changed circumstances or nimbleness in responding to changing technology.⁹² Indeed, it is precisely the pace of technological change that makes agency regulation seem particularly inappropriate in this circumstance.

I take the rapidly changing nature of search technology to be the single most important factor in considering the appropriate form of regulation (and this may well be true with respect to nearly all technology).⁹³ While there are, of course, periods of rapid change in the law, or at least significant bursts of development, as a general matter legal change is glacial compared with changes in technology, business methods, and consumer behavior. In finding the right regulatory fit, this basic fact must be taken into account.⁹⁴

⁹² See *supra* Part II.

⁹³ Commentators have worked toward developing a theory of law and technology or law, technology, and society. See, e.g., Gaia Bernstein, *Toward a General Theory of Law and Technology: Introduction*, 8 MINN. J.L. SCI. & TECH. 441, 442 (2007) (“The goal of this symposium was to inquire whether the assessment and reaction to each new technology in isolation is the best mode for technology regulation or whether a broader outlook would better serve the social accommodation of new technologies.”). Such a theory would be quite helpful in approaching the question of whether and how to regulate search engines. See *id.* (“A generalized approach would provide guidelines based on prior instances in which technologies disrupted social values or on cases in which the value of privacy [for example] was threatened by new technologies.”).

⁹⁴ See Gregory N. Mandel, *Nanotechnology Governance*, 59 ALA. L. REV. ____ (forthcoming 2008) (available at <http://papers.ssrn.com/sol3/papers.cfm?>

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Related to the *pace* of technological change is the *manner* of that change: technology is likely to change in ways that are unforeseeable, and controlling technology is difficult, if not impossible.⁹⁵ So while it is significant to observe the ways in which a given technology has presented legal disputes, that observation will not remain static; thus an ideal form of regulation would be adaptable to unpredictable changes in technology, as well as changes in business methods, consumer behavior, and so on.

At first blush, the suggestion that federal common law (in the interstices of the current federal statutes), might prove able to accommodate and account for technological change may be counterintuitive, but the iterative, fact-intensive nature of common law development may well be more adaptable in the face of rapid change than a strict statutory structure or a set of agency guidelines formulated in response to an earlier issue or previous-generation technology. Common law development may be slow, but there are advantages to an incrementalist approach: it takes account of the facts on the ground that are really in dispute, the most significant issues are likely to be raised, and while there is no guarantee of achieving the “right” result, the wrong result may be less likely.⁹⁶

The notion that the common law might be the appropriate form of regulation for technology, for Internet entities, or for the Internet itself, is not a new one, but it has not yet appeared in the debate on search engine regulation. Relatively early in the Internet’s development, there much discussion about the proper legal regime for cyberspace,⁹⁷ and quite a number of commentators

[abstract_id=1018707](#)) (in the context of regulating nanotechnology, contending that scientific uncertainty is one of the greatest regulatory challenges and arguing that a regulatory framework that accepts this fact is most likely to be effective).

⁹⁵ See, e.g., Jennifer Chandler, *The Autonomy of Technology: Do courts control technology or do they just legitimize its social acceptance*, 27 BULLETIN SCI. TECH. & SOC. 339 (questioning whether courts can “exert effective control over technology”).

⁹⁶ For an argument that an incremental approach is more likely to be successful in attempts to regulate technology, see Mandel, *supra* note __, at 42 (“Nanotechnology governance should include mechanisms to allow for incremental changes in governance as the need arises. Such an approach simultaneously provides flexibility in governance and limits the likelihood of quickly upsetting settled expectations for industry.”).

⁹⁷ See, e.g., Lawrence Lessig, *The Path of Cyberlaw*, 104 YALE L.J. 1743, 1744 (1995) (discussing whether “cyberspace [is] just an electronic version of ordinary space”); I. Trotter Hardy, *The Proper Legal Regime for “Cyberspace,”* 55 U. PITT. L. REV. 993 (1994) (discussing whether cyberspace raises new legal issues).

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called for a common law solution in some form. For many of those commentators, it was precisely the rapidly-changing and unpredictable nature of technology that led them to embrace a common law approach.

In areas where the technology is changing very rapidly, and in ways that are unpredictable, establishing any kind of regulatory response is difficult. So perhaps the first rule ought to be a rule of caution: do no more than necessary.⁹⁸ The second rule also relates to the pace and nature of technological change: avoid rules that are technology-dependent. The application of these lessons will result in the least-intrusive forms of regulation, though perhaps a ramping up of intervention over time.⁹⁹ A federal common law approach to search engine regulation is obviously not the *least* intrusive approach; we could, conceivably, have no legal rules at all and allow individuals and entities to rely on self-help in coordinating their relationships.¹⁰⁰ We are, obviously, already beyond this in the context of search engine regulation.¹⁰¹ The next step toward regulation, and still in some ways a form of self-help, is contract: allow all the players involved to contract regarding their intentions with the law as an enforcement mechanism.¹⁰² In the search engine context, this has occurred to a great extent,¹⁰³ but parties on all sides of the disputes have also sought the application of various state and federal causes of action. In addition, as described above,¹⁰⁴ Congress and state legislatures have also taken a variety of regulatory steps. The notion that we will employ nothing but market discipline as a regulatory tool is simply unrealistic.

⁹⁸ I draw on Hardy's analysis here. *See id.* at 1025 (stating that the key to determining the appropriate legal response "is the recognition that the technology of computer communications is rapidly changing" and that "[i]n the fact of this very dynamic situation, we ought to be reluctant to impose behavior control that is inflexible and uniform beyond the needs of the situation.").

⁹⁹ *See, e.g., id.* at 995 (" . . . a specific statutory response is only one of many legal reactions. Case-by-case adjudication and its common law build-up of precedents can also be applied to cyberspace legal issues . . .").

¹⁰⁰ *See id.* at 1026.

¹⁰¹ *See supra* Part ____.

¹⁰² Hardy, *supra* note ___, at 1028.

¹⁰³ *See* Google's Terms of Service, <http://www.google.com/accounts/TOS> (last visited September 20, 2008).

¹⁰⁴ *See supra* Part ____.

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Yet the “first do no harm” principle resonates.¹⁰⁵ Federal common lawmaking, in the interstices of the federal statutes, is certainly less intrusive than agency or other centralized regulation, because it, by its very nature, addresses only the facts at issue and does not attempt to set forth rules that will apply to different and unforeseeable future facts. It is this incremental, fact-intensive aspect of common lawmaking that renders it so flexible. The very essence of common lawmaking is that it can adapt to new situations. Under a common law system, the legal principles tend to be more general, and the holding of a case applies to a particular set of facts. Thus the next court to apply the principle is guided, but not dictated, by earlier cases.¹⁰⁶ The principle can be applied differently to different factual situations. The common law operates generally by applying existing rules to new factual situations. Because technology, almost by definition, involves *new* things – new inventions, new business models, and so on – the common law is well-suited to resolving issues relating to new technology.¹⁰⁷

In the context of search engine regulation, this adaptable approach makes good sense, and a primarily common law approach is certainly more adaptable than agency regulation or a complex statutory structure. Under this approach, the federal courts would take a somewhat more “activist” approach in addressing search engine disputes, but this would not be a bad thing compared to the alternatives.¹⁰⁸ As a relative institutional

¹⁰⁵ See Hardy, *supra* note __, at 1054 (concluding that the “most flexible, least intrusive rule-making process” is best).

¹⁰⁶ See, e.g., Jay Dratler, Jr., *Common-Sense (Federal) Common Law Adrift in a Statutory Sea, or Why Grokster Was a Unanimous Decision*, 22 SANTA CLARA COMP. & HIGH TECH. L.J. 413, 435 (contending that the common law approach allows the court to consider “the big picture in making analogies and distinctions”).

¹⁰⁷ Professor Dan Rosen made this argument in the context of the copyright and patent statutes. Dan Rosen, *A Common Law for the Ages of Intellectual Property*, 38 U. MIAMI L. REV. 769, 772 (1984) (“The continuing challenge of intellectual property law . . . is determining whether a new thing is like an old. Put another way, it is the classic problem of the common law: treating like cases alike.”). See also Dratler, *supra* note __, at 443 (The “beauty of the common-law process [is that] it does not attempt the impossible task of making accurate general predictions about the future of technology, the media or copyright-related industries . . . Instead, it develops on a case-by-case basis in tandem with technology and the industry, adding judicial ‘data points’ in the form of facts and legal results useful for analogy and distinction – and occasionally simple, comprehensible general rules – as time goes on.”).

¹⁰⁸ Rosen, *supra* note __, at 770 (Rosen’s article was concerned with the federal intellectual property statutes in particular, and he sought to “examine the

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competence question, the issue is whether the federal courts, Congress, or an agency is more capable of “updating” the law in situations of rapid technological change.¹⁰⁹ Precisely because of the iterative, fact-intensive nature of the common law, the federal courts are in a better position to update the law. Professor Dan Rosen made a similar argument with respect to intellectual property law in general, arguing that the courts *should*, in fact, take a more active role in updating the intellectual property statutes and in determining how new technology fits into the existing statutory structure. Building on Guido Calabresi’s thesis that many statutes become outdated long before Congress acts,¹¹⁰ and contending that technology changes much more quickly than Congress is able to account for those changes, Rosen concluded that compared to other decisionmaking institutions, “the courts are the most capable of ongoing updating.”¹¹¹

Several federal statutory provisions already govern certain aspects of search engine operation. Federal courts are certainly capable of engaging in the process of “ongoing updating” of those statutes and of filling in the gaps between those statutes. Moreover, they are likely to be able to do it more easily than Congress or a federal agency. The political will that it would take to create either a new statutory scheme or a dedicated federal agency is considerable, and thus unlikely.¹¹² Just as it is unlikely to occur, it is unlikely to be effective. Search engine technology is changing rapidly and the ways in which people use search engines is changing just as quickly. Agency regulation is a ponderous process and incapable of changing course quickly.¹¹³ The litigation process is hardly fast, but at most points of the litigation

challenges that new technology places on the copyright and patent law systems for evidence that the system would be better served by courts taking a more active role.”).

¹⁰⁹ See, e.g., Dratler, *supra* note __, at 434 (arguing, based on the Supreme Court’s *Grokster* opinion, that federal common law is, even if far from perfect, better than the alternative in addressing multi-dimensional, technology-driven cases).

¹¹⁰ GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982).

¹¹¹ Rosen, *supra* note __, at 828.

¹¹² Lastowka, *supra* note __, at 27 (“the notion of an FCC-equivalent organization that oversees results generally seems like a distant prospect. At this point there seems little legal footing or focused political will that might support regulating Google’s results *generally*.”) (emphasis in original).

¹¹³ Cf. Rosen, *supra* note __, at 795 (“The weakness of the common law method – incrementalism – is its strength. Moreover, by the time Congress studies this issue, holds hearings, and passes legislation, its timetable may turn out to be just as slow.”).

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the parties are forced to address the facts on the ground; if the original issues become moot for some reason (changing technology, changing business models), those issues are unlikely to be pursued.¹¹⁴ New theories, approaches, and facts can be addressed at many (though not all) points during the litigation process. In other words, courts may not be very good at updating statutory schemes, but with respect to new technology, Congress and agencies are likely to be even worse.¹¹⁵

ii. The flexibility of the common law renders it less likely to inhibit innovation or lock-in standards

In the context of regulating technology, the flexibility of the common law approach has other advantages. In particular, the common law provides, in some ways, a slower approach to regulation, which allows for disputes, important issues, and technology to develop over time and percolate through the system. In this way, the common law is less likely to inhibit innovation, lock in standards or particular technologies, or otherwise get it “wrong.”¹¹⁶ This is not to say that the courts will necessarily get it right, but the risks are fewer and less dramatic than with more centralized regulation.

The common law is less likely to inhibit innovation for the same reason that it can better adapt to new technology: the “pacing” that it provides is more flexible than other regulatory approaches.¹¹⁷ Common law rules or principles rarely, if ever,

¹¹⁴ The common law process is hardly perfect, of course. *See, e.g.*, Dratler, *supra* note __, at 435-441 (describing some of the drawbacks of a common law approach to regulating technology).

¹¹⁵ Rosen’s argument is the relative one: courts are certainly not perfect, but Congress and agencies have been particularly bad at updating the law in dynamic areas like technology. “That being so,” he then argues, “the argument for judicial activism is a strong one – courts, not legislatures, are the bodies with experience in such matters.” Rosen, *supra* note __, at 772. *See also* Dratler, *supra* note __, at 453 (arguing in favor of a common law approach to regulating copyright technology, and describing the “demise of Section 512(h) . . . as an early warning to Congress and lobbyists of the wages of the sin of pride: thinking they can predict technology’s future, or imagining that technology will stay put.”).

¹¹⁶ *See* Lessig, *The Path of Cyberlaw*, *supra* note __, at 1745 (contending that “if we had to decide today, say, just what the First Amendment should mean in cyberspace, my sense is that we would get it fundamentally wrong.”).

¹¹⁷ *Id.* at 1745 (“Unlike other lawmaking, what defines the process of the common law is small change, upon which much large change gets built; small understandings with which new understandings get made. What counsels it here

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emerge quickly, but this makes it possible for a discussion – between the affected parties, courts, and policymakers – of the most hotly contested issues to develop over time.¹¹⁸ Professor Lawrence Lessig advocated a common law approach to cyberspace regulation because of this pacing. He considered the “inefficiency” of the common law to be one of its advantages because the rules that emerge are less likely to be “wrong”¹¹⁹ and the technology would be more likely to develop organically.

Just as Lessig argued with respect to cyberspace, a common law approach to regulating search engines will allow for a better understanding of the issues over time and, ultimately – hopefully – better policymaking.¹²⁰ It may be that a statutory structure could

is the way this process will function to create in an as yet uninhabited, unconstructed, world.”). See also Lawrence Lessig, *Reading the Constitution in Cyberspace*, 45 EMORY L.J. 869 (1996) (discussing the difficulties of constitutional interpretation in the face of new technology).

¹¹⁸ In 1994, Lawrence Lessig discussed *The Path of Cyberlaw* and suggested that the common law, while not perfect, might be a good initial approach to regulating cyberspace. Lessig, *The Path of Cyberlaw*, *supra* note __, at 1744 (Lessig argued that given the “newness” of cyberspace and the uncertainty about how it would develop, caution in regulation was of great importance: “if we do not start with a world to regulate, but must build it, then what the system of cyberspace regulation will need is a way to pace any process of regulation – a way to let the experience catch up with the technology, a way to give the ordinary language a chance to evolve, and a way to encourage new languages where the old gives out.”). In *Reading the Constitution in Cyberspace*, Lessig suggested that a diversity of judicial viewpoints might help develop the important questions and issues raised in the cyberspace world and he proposes a moderate kind of activism: “The practice of rationalization that cyberspace will launch can be questioned; courts can force us to consider its consequences. Courts can, that is, act strategically to push certain questions to the fore.” Lessig, *Reading the Constitution*, *supra* note __, at 908.

¹¹⁹ Lessig, *The Path of Cyberlaw*, *supra* note __, at 1745 (“if we had to decide today, say, just what the First Amendment should mean in cyberspace, my sense is that we would get it fundamentally wrong.”). I recognize that there is a substantial body of scholarship concerning the most efficient rule-making. Some have concluded that case-by-case adjudication increases the efficiency of the law and is the most likely to create efficient rules. See Bell, *supra* note __, at 1767 & n. 105 (and sources cited therein). I am not concerned here with determining the most efficient rule-making process, and I certainly do not intend to enter into this debate. It is possible, however, that in some contexts the common law may be slow-moving (i.e., inefficient) but still more adaptable (because of its incrementalism) than some other forms of regulation and less likely, perhaps, to reach the wrong result. That is, the common law may not be an ideal form of regulation, but it may be the best of a number of imperfect options. *Id.* at 1751 n. 26 (“Note that Lessig advocates common law processes as merely a temporary expedient in the face of our current ignorance over how best to regulate the telecosm.”).

¹²⁰ Lessig, *The Path of Cyberlaw*, *supra* note __, at 1752 (“A prudent Court –

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emerge based on the knowledge and experience gained through the common law process. For now, though, centralized regulation is relatively less likely to result in sensible policymaking.

We are still in the early stages of search engine technology and the use of that technology. It is easy to see that for a variety of search engine disputes, more information and a better understanding of the issues would be quite valuable. The issue of search engine bias is a good example. Imagine that a federal agency, or Congress, set forth a statutory or regulatory scheme for evaluating search engine results, or mandated particular results in response to particular search queries. Even assuming that the scheme could be enacted quickly enough to address the perceived wrong, the new approach is likely to be biased as well.¹²¹ And even if that were not a problem, the mandated structure might lead to a lock-in of a particular technology or business model, and thus has the potential to inhibit or distort innovation in search technology. This is true because to the extent that the law creates a safe harbor of some sort, industry is more likely to stay within that safe harbor rather than to experiment with new approaches.¹²² Finally, if an agency or Congress were to weigh in on this point, the resulting rule is much more likely to be tied to a particular technology and to apply to a particular factual circumstance. Even if the result were “correct,” it may be of little practical value (to the extent business models or technology changed) and may well hamstring further development (to the extent that search companies are risk averse).

iii. A federal common law approach is achievable

A final advantage to a federal common law approach, compared to more complex and centralized regulation, is that it is both practical and achievable. A substantial body of federal law

Supreme Court, that is – would find ways to let these questions simmer for a while, to let the transition into this new space advance, before venturing too boldly into its regulation. Not that no court should decide these issues – for again, there is great value and an important need for lower courts to wrestle with these questions, if only to create a body of legal material from which others may draw in considering these questions.”).

¹²¹ See *supra* Part II.

¹²² See, e.g., Sean P. Gates, *Standards, Innovation, and Antitrust: Integrating Innovation Concerns into the Analysis of Collaborative Standard Setting*, 47 Emory L.J. 583, 601 (1998) (“it is well recognized that standard-setting activities may lock in technology and inhibit innovation.”).

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applicable to search engine disputes already exists. Thus the development of federal common law in the interstices of the already-applicable federal statutes would require a change in the legal approach, but that change would be neither drastic nor overly difficult. In addition, the federal courts are well-practiced in statutory interpretation and common law development.

Federal law already regulates search engine disputes to a significant extent. Litigants often have turned to federal courts and federal law to resolve search engine disputes.¹²³ A number of federal statutes govern various aspects of search engine behavior. For example, copyright law dictates what uses of website information – such as caching for search engine use – are fair.¹²⁴ Section 512 of the DMCA provides a statutory safe harbor in some circumstances for websites that serve as conduits for others' information.¹²⁵ Copyright and patent law may govern the proprietary nature of search engine algorithms and software. Federal trademark law speaks to the question of whether certain words or names can be used to trigger pop-up and other advertising. Section 230 of the Communications Decency Act provides immunity for providers of “interactive computer services” who publish information furnished by others.¹²⁶ Thus the federal courts have already addressed a whole variety of search engine claims and there is a basis on which the courts can engage in the process of “ongoing updating.”

Federal courts are also, obviously, familiar with the common law approach. In applying federal statutes, federal judges

¹²³ See *supra* notes ____.

¹²⁴ 17 U.S.C. § 107; see also Pasquale, *Information Overload*, *supra* note ___, at 143-46 (discussing the limits of fair use in this context). See also Jonathan Band, *Google and Fair Use*, 3 J. BUS. & TECH. L. 1, 2 (2007) (explaining “the centrality of fair use to current search engine technology.”).

¹²⁵ 17 U.S.C. § 512.

¹²⁶ 47 U.S.C. § 230. There have been other responses on the federal level. The Federal Trade Commission, in response to complaints, issued recommendations concerning the disclosure of paid placement in search results. See <http://www.ftc.gov/os/closings/staff/commercialalertattatch.shtm> (relying on Section 5 of the FTC Act) (last visited September 20, 2008). The FTC did not take any formal action, but reserved its right to do so in the future. *Id.* (“Finally, although the staff of the Bureau of Consumer Protection has determined not to recommend that the Commission take formal action with respect to the Commercial Alert complaint, that determination should not be construed as a determination by either the Bureau of Consumer Protection or the Commission as to whether or not the practices described in the complaint violate the FTC Act or any other statute enforced by the Commission.”).

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regularly interpret the language of the statute in accordance with the common law approach.¹²⁷ In addition, judges applying federal statutes also regularly create common law in the course of resolving a dispute. For example, in applying the works made for hire provision of the Copyright Act, the Supreme Court held that the federal common law definition of “employee,” rather than the law of any particular state, governed.¹²⁸ Seen in this way, a federal common law approach that builds on existing statutes is not a particularly revolutionary idea.¹²⁹ The federal courts are certainly capable of it; it would not require the creation of vast swaths of law; nor would it require the political will that would be needed for an overhaul of the statutory structure or the delegation of regulatory authority to an agency.¹³⁰

A primarily federal approach might be achieved in a variety of ways. Congress could – but is quite unlikely to – adopt a statutory scheme, with some preemptive effect, setting forth substantive regulation of search engines. In this case, the federal courts would be forced to apply and interpret that statute and would, of necessity, develop a related body of federal common law over time. This approach would have many of the drawbacks of more centralized regulation, outlined above, however. Congress could also simply delegate to the federal courts the jurisdiction over search engine disputes, tasking the federal courts with the development of a governing body of law.¹³¹ This also seems

¹²⁷ See Rosen, *supra* note ___, at 828 (in applying the language of existing statutes to new technology, “courts will not be imposing their own value choices. Rather, they will be fitting new technology into the choices already reflected in the statutes.”).

¹²⁸ *Community for Creative Nonviolence v. Reid*, 490 U.S. 730 (1989).

¹²⁹ See Dratler, at 419 (“When Congress is mute or unintelligible on an important point in an otherwise comprehensive statutory scheme, it is up to the courts to fill in the gaps. Doing so is neither judicial legislation nor judicial activism. Rather, it is an exercise in developing federal common law, within the interstices of federal statutes, universally recognized as legitimate, notwithstanding *Erie*.”).

¹³⁰ There is, of course, bad common lawmaking. See Dratler at 422 (“[p]roblems arise, however, when the courts, in developing federal common law on a case-by-case basis, promulgate rules with the specificity and apparent authority of statutory prescriptions.”).

¹³¹ There are, of course, constitutional issues related to these various approaches. Congress certainly has some power, under the Commerce Clause or otherwise, to regulate search engines. Whether, how, and to what extent Congress could simply delegate regulatory authority to the federal courts is a difficult question, and one I do not address here. See, e.g., Carole E. Ambrose-Goldberg, *The Protective Jurisdiction of the Federal Courts*, 30 U.C.L.A. L. REV. 542, 542 (1982) (discussing “Congress’ power to confer ‘protective jurisdiction’ on the

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unlikely, although it is probably an easier political sell than a substantive statutory structure or a new federal agency. The federal courts could also begin to take a liberal view of supplemental jurisdiction in search engine cases and parties could begin to frame their disputes as “search engine disputes,” both of which would put the primary responsibility for resolving search engine disputes in the hands of the federal courts. In any event, this would result in a more comprehensive approach that would permit the evaluation of numerous claims and the related policy issues and trade-offs.

I propose here essentially a common law solution in that the statutes in place often do not speak directly to the questions raised in search engine disputes and thus would require both interpretation in their application to particular cases and common law making in the gaps between the statutes. This would include, in some circumstances, the creation of a federal common law of contract, unfair competition, and so on. If the federal courts treated these disputes as “search engine” disputes and adjudicated them by applying existing federal statutes where relevant and filled in the interstices with federal common law, they would be much more likely to undertake a more rigorous and comprehensive evaluation of the various doctrines, issues, and policy concerns implicated in search engine disputes. The common law approach would allow some of the most difficult issues to percolate over time in different circuits and permit a fact-intensive approach that risks some inefficiency but is much less subject to capture, is more adaptable to changing technology, and perhaps less likely to hinder innovation than agency regulation.

b. Compared to the current approach, a federal common law approach would allow for more comprehensive and predictable policymaking

As noted above, the arguments here are very much relative: a middle ground approach has some advantages over a highly centralized regulatory scheme, but it is far from perfect. Similarly, a federal common law approach has some advantages over the current regulatory “scheme,” but, again, it is not ideal. Vis-à-vis the current patchwork approach, some degree of centralization – without going so far as to establish an entirely new regulatory scheme – is likely to allow for more comprehensive and predictable policymaking.

federal courts over claims derived wholly from state law . . .”).

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i. Comprehensiveness

It goes without saying that the current approach does not promote comprehensive policymaking. Under a federal common law approach, the federal courts may or may not end up developing a body of search engine specific law, but the important element of this approach is the ability of the federal courts to evaluate most of all aspects of a search engine dispute at the same time. Ideally, the federal courts would begin to treat the disputes as *search engine disputes*.¹³² In other words, the federal courts (not just academics) should be having a conversation about search engine law and policy.¹³³

There are numerous examples of instances in which it would be helpful for the court to consider a whole variety of claims together and to develop an understanding of the policy issues and trade-offs involved that supersedes the consideration of any particular doctrinal approach. Professor James Grimmelmann provides a thorough description of the many overlapping and conflicting issues raised in search engine disputes. As he makes clear, the parties in search engine disputes rely on a variety of legal claims, and these claims often serve as functional substitutes for each other.¹³⁴ When this is the case, it is important for the decisionmaker to consider as many aspects of a particular dispute as possible. Doing so ought to result in an assessment of conflicting policy concerns and intersecting doctrinal issues.¹³⁵ A federal common law approach, as compared to the current patchwork of unrelated interventions, will at least permit the evaluation of the various “strands of search engine law

¹³² See Grimmelmann, *Structure of Search*, *supra* note __, at 4 (“the concerns discussed in this Article must be balanced with one another because each relates to the same few information flows. Pushing on one affects the others.”).

¹³³ See *supra* note __.

¹³⁴ Grimmelmann, *Structure of Search*, *supra* note __, at 52-53 (“Multiple lines of legal communication exist between search engines and other parties. Those concerned with one particular form of harm are not limited to legal theories directly addressing that harm. If they can gain relief against a search engine on another theory, it may be just as good. Wherever in law this multiplicity appears, it raises a concern that parties not be allowed to subvert one doctrine by appealing to another.”).

¹³⁵ *Id.* at 54 (“Lawyers in search engine disputes will not respect boundaries between legal fields when framing their cases. Those who make law and policy for search engines must be alert to these overlaps and end runs. *Considering the various strands of search engine law together will help make such possibilities clear.*”) (emphasis added).

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together.”¹³⁶

If a content provider is unhappy with Google’s crawlers and spiders indexing its site and is also unhappy with its placement in the results for certain search queries it might bring claims against Google for trespass to chattels (for the spiders’ “invasion” of the site), breach of contract (for violation of the browsewrap agreement), copyright infringement (for caching copies of the site on its servers), trademark infringement (for the use of its trademarks in keyword advertising). Some of these claims are potentially separate legal wrongs for which there should be separate liability and recovery; some of them, however, may be functional substitutes for the others.¹³⁷ That is, some of them may really be overlapping claims seeking recovery for essentially a single legal wrong.¹³⁸ And these various claims implicate a set of larger policy issues: What role do search engines play in our economy and our politics? How do we encourage search engines to do the good that they do, while minimizing the very real risks that they present?

These questions are more likely to be addressed if search engine disputes are brought in a single forum: parties will be more likely to raise a multiplicity of issues and claims, and courts will be more likely to consider them. This is certainly true as compared to the current approach in which the various decisionmaking bodies have little incentive (and perhaps no authority) to consider the overarching and cross-cutting issues. If search engine disputes were consistently resolved in the same horizontal plane of the federal district courts, the judges and the parties would be more likely to address the various cross-cutting issues involved, rather than just applying a particular doctrinal framework. As the various federal district courts resolve these questions over time, the most highly contested issues will get “teed up” for the Supreme Court or Congress to address.

Other issues that arise in search engine disputes also cut across a variety of doctrinal and policy categories and thus require a comprehensive evaluation if they are to be resolved sensibly and thoughtfully. The competing concerns of transparency in search engine results (of great interest to users as well as content owners)

¹³⁶ *Id.*

¹³⁷ See generally Grimmelmann, *Structure of Search*, *supra* note ___, at 24-7.

¹³⁸ *Id.* (discussing the overlapping and interrelated interests involved in resolving these disputes).

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and search engine manipulation, which is directly correlated to transparency, are particularly knotty. That is, there are very good reasons to require search engines to disclose their algorithms (or other methods) for arriving at search results.¹³⁹ At the same time, the more transparent those methods are, the more manipulation occurs and the less useful the results become.¹⁴⁰ In responding to claims of search engine bias, search engine companies have asserted that search engine results are protected speech. In *Search King, Inc. v. Google*, the plaintiff brought a claim for tortious interference with contract and Google's defense was that its search results were statements of opinion and therefore protected.¹⁴¹ In a case like this, there are overlapping authorities with some jurisdiction: federal court, state court, state regulators, federal regulators, and Congress. And there are overlapping substantive issues: traditional and non-traditional trademark claims, free speech concerns, fraud and unfair competition allegations, and so on. It would be better to consider all of these claims, and corresponding issues and policy considerations, together,¹⁴² and the federal courts are more likely to do this if their jurisdiction over these disputes is exclusive (or substantially so).

With respect to advertising disputes as well, the concerns in the search engine context cut across a variety of doctrinal and jurisdictional areas. One persistent issue is the propriety of one entity using the trademark of another in its metadata or as a keyword triggering advertising. These uses generally are invisible to consumers and have thus presented various new problems for trademark law. The state courts, the federal courts, state legislatures, and the Federal Trade Commission have all responded in one way or another to these disputes.¹⁴³ The Utah legislature passed a statute prohibiting the use of trademarks as key words in advertising. The statute was later held preempted. In addition, the FTC has taken a few tentative steps toward regulating the use of

¹³⁹ See Bracha & Pasquale, *supra* note ____.

¹⁴⁰ See *id.* See also Goldman, *Search Engine Bias*, *supra* note ___, at 536 (discussing the reasons why search engines “constantly change their relevancy algorithms.”).

¹⁴¹ *Search King, Inc. v. Google Tech., Inc.*, 2003 WL 21464568 (W.D.Okla. 2003).

¹⁴² See Grimmelmann, *Structure of Search*, *supra* note ___, at 56 (discussing the cross-cutting issues involved in resolving questions about search engine bias and concluding that “considering one without considering the other would be reckless.”).

¹⁴³ For a discussion of the trademark issues raised by advertising in connection with search engine results, see, e.g., Lastowka, *Google's Law*, *supra* note ____.

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key words in advertising.¹⁴⁴ All of these strands of law and authority overlap in discussing the question of, for example, whether Google may permit advertisers to use a competitor's trademark as a keyword that triggers the placement of an ad and whether and how Google may use that trademark in considering what search results to return.

These issues, and many others, are better addressed in the context of how search engines operate and how people use search engines rather than within any particular doctrinal framework. A federal common law approach, in which search engine disputes are resolved as a matter of federal (statutory or common) law is more likely to promote and permit a comprehensive evaluation of this issues. Granted, it is probably less likely to provide a comprehensive approach than agency regulation, but, as discussed, the federal common law approach does not have some of the drawbacks of that form of regulation.

ii. Predictability

In addition to providing an opportunity for a comprehensive evaluation of search engine disputes, a federal forum is likely to bring a somewhat greater degree of consistency and predictability to the law. Of course, each judge will not resolve the questions in the same way, and a body of search engine law will not necessarily form, but if all or most aspects of a particular dispute are resolved in a single forum, there is an opportunity for consistency and predictability to develop. In addition, the exclusive application of federal statutory and common law allows the courts to avoid the thorny choice of law problems that arise in search engine disputes.¹⁴⁵

¹⁴⁴ See *supra* note ____.

¹⁴⁵ Choice of law problems are not unique to Internet-related entities and activities, but the problems may be particularly acute in these areas. Jurisdiction and choice of law issues in many search engine disputes may be putatively controlled by one or more browsewrap or clickwrap agreements, as well as, potentially, the law of numerous states. One partial way out of this morass is the application of federal common law. For an argument that federal common law should be developed to resolve choice of law problems in online libel cases, see Note, *Let the Chips Fall Where They May: Choice of Law in Computer Bulletin Board Defamation Cases*, 26 U.C. DAVIS L. REV. 1045, 1051 (1992-93) ("This Comment argues that federal courts should solve the choice-of-law problem by applying a federal common law to computer bulletin board defamation cases. Such an approach would allow judges to fashion a defamation law that is relevant to electronic communication. It would also avoid the conceptual difficulties of applying choice-of-law rules to torts that have little relation to a

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A federal common law approach would bring some measure of predictability and consistency as compared the current patchwork of legal interventions.¹⁴⁶ With respect to search engine regulation, there are a variety of applicable federal statutes that provide principles for guiding common law decisionmaking. Those principles, applied over time to search engine disputes, and supplemented by a developing federal common law, just might provide a degree of stability and predictability in the law. Under the current approach, which involves little coordinated thinking about search engine disputes or search engine policy, there is likely to be neither stability nor predictability. Compared to agency regulation, the federal common law approach is less likely to promote stability, but it does not present many of the drawbacks of such regulation either.¹⁴⁷

To be sure, there will never be *a* single approach to search engine policy or the disputes that arise. Any consistency and predictability will develop slowly. These are good things, though. It would take time for the various disputes to trickle through the system; few of them would go to trial; even fewer would result in appellate opinions. But federal courts would be able to refer to other federal court opinions; some diversity of results would occur, allowing for a “laboratory” of law, experimenting with search engine disputes but in a slightly more controlled way.¹⁴⁸ In fact, developing a federal regime for search regulation might be a way to experiment with a common law approach to regulating

single geographical area.”). *See also* Kevin K. Ban, Note, *Does the Internet Warrant a Twenty-Seventh Amendment to the United States Constitution*, 23 J. CORP. L. 521 (1997-98) (proposing that “admiralty law serve as a model for building a federal common law regime to govern the Internet.”).

¹⁴⁶*See, e.g.*, Dratler, *supra* note __, at 426 (“[P]erhaps paradoxically, analogy and distinction when properly applied can create greater certainty than application of an abstract rule.”). With respect to copyright law, at least, Dratler urged that “it is preferable to have technology-independent copyright legislation based on broad, general principles with a faint hope of remaining timeless, at least in the medium term.” *Id.* at 429.

¹⁴⁷ Dratler primarily compares the common law approach to a complex statutory regime, arguing that the common law provides more stability and predictability than statutes aimed at regulating technology. He describes the “dismal recent history of [copyright] statutory prescriptions,” and uses the Audio Home Recording Act and the Digital Millennium Copyright Act “to demonstrate the point, which may be counterintuitive to some, that the common-law process can provide greater clarity, certainty and predictability in the law than a vain attempt to specify and control all possible future contingencies in advance through statutes.” *Id.* at 445.

¹⁴⁸ *See supra* notes __ and accompanying text.

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technology generally. As described above, there have been a number of calls for this approach more broadly. Search engine regulation would provide a test case for this more general theory.

One criticism of a purely federal approach to resolving search engine disputes is likely to be that the creation of an independent body of search engine law, which may well result, is a bad thing. More than ten years ago, Judge Frank Easterbrook famously mocked the study of the law of “cyberspace” as being as silly as the study of the “Law of the Horse.”¹⁴⁹ It would make no sense, he argued, to have a law of the horse because of the variety of legal doctrines that might arise and the substantial possibility that “horse” is not the proper lens through which to view tort or contract or real property law.¹⁵⁰ For Easterbrook, “[o]nly by putting the law of the horse in the context of broader rules about commercial endeavors could one really understand the *law* about horses.”¹⁵¹ Cyberlaw is the law of the horse, according to Easterbrook, and not worth studying. Instead, he suggests, “[d]evelop a sound law of intellectual property, then *apply* it to computer networks.”¹⁵²

Lawrence Lessig responded to this argument, in a Harvard Law Review article and later in *Code and Other Laws of Cyberspace*.¹⁵³ Lessig agrees that the “Law of the Horse” might not be a useful line of study, but he points out that there could be value in thinking “about how law and cyberspace connect.”¹⁵⁴ With respect to cyberspace, he argues, “[w]e see something when we think about the regulation of cyberspace that other areas would not show us.”¹⁵⁵ Search engines are not cyberspace, of course, but there is reason to believe that search engines present problems that are new in kind or degree, or both. To ignore what makes search engines different (and what makes them the same) is to sacrifice the possibility of effective policymaking.

¹⁴⁹ Easterbrook, *supra* note ___, at 208.

¹⁵⁰ *Id.* at 208 (“Far better for most students – better, even for those who plan to go into the horse trade – to take courses in property, torts, commercial transactions, and the like, adding to the diet of hors cases a smattering of transactions in cucumbers, cats, coal, and cribs.”).

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501 (1999).

¹⁵⁴ *Id.* at 502.

¹⁵⁵ *Id.*

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It may be that an examination of the *thing* (cyberspace, horses, search engines) may be very useful in telling us about the regulation of the thing. It is not that we need a separate law of “cyberproperty” or of search engines but that an analysis of the ways in which law may affect search engines or be applied to search engines requires a broader lens than a particular doctrinal approach. In other words, to ignore what is different or unusual or specific to search engines would be folly.¹⁵⁶

Conclusion

Something may be gained by thinking about search engine policy in a broad sense. I believe it is this notion that has prompted the calls for agency or other highly centralized regulation. Such regulation is not the only way to achieve some measure of comprehensive policymaking, however, and it is problematic in a variety of ways. The proposed alternative – market discipline – is unsatisfactory as well. In seeking an alternative in this polarized debate, I have proposed a federal law approach as allowing for some of the advantages of centralization without incurring some of its costs. One criticism of this middle ground approach is sure to be that it will merely combine the problematic aspects of both the current approach and of centralized regulation. This is, of course, a possibility, but it seems to me that the federal common law approach is a fairly low-risk option: it may not be better than current law, but it is unlikely to be worse and might be a substantial improvement.

¹⁵⁶ Cf. Grimmelmann, *Structure of Search*, *supra* note ___, at n. 7 (citing Easterbrook and Lessig and stating that “[s]earch engines are more important in the consideration of what law should do than in the consideration of what law is.”).