



1-1-2011

Revisiting Search Engine Bias

Eric Goldman

Santa Clara University School of Law, egoldman@gmail.com

Follow this and additional works at: <http://digitalcommons.law.scu.edu/facpubs>



Part of the [Law Commons](#)

Recommended Citation

38 Wm. Mitchell L. Rev. 96 (2011-2012)

This Article is brought to you for free and open access by the Faculty Scholarship at Santa Clara Law Digital Commons. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact sculawlibrarian@gmail.com.

REVISITING SEARCH ENGINE BIAS

Eric Goldman[†]

I. INTRODUCTION.....	96
II. DEVELOPMENTS IN THE LAST HALF-DOZEN YEARS	97
A. <i>Google Rolled Up the Keyword Search Market but Faces Other New Competitors</i>	97
B. <i>Google’s Search Results Page Has Gotten More Complicated</i>	102
C. <i>Google’s Portalization</i>	103
D. <i>“Net Neutrality” and “Search Neutrality”</i>	105
III. THE END OF RATIONAL DISCUSSION ABOUT SEARCH ENGINE BIAS.....	107

I. INTRODUCTION

Questions about search engine bias have percolated in the academic literature for over a decade. In the past few years, the issue has evolved from a quiet academic debate to a full blown regulatory and litigation frenzy. At the center of this maelstrom is Google, the dominant market player.

This Essay looks at changes in the industry and political environment over the past half-dozen years that have contributed to the current situation,¹ and supplements my prior contribution to

[†] Associate Professor and Director, High Tech Law Institute, Santa Clara University School of Law. Email: egoldman@gmail.com. Website: <http://www.ericgoldman.org>. It would be challenging to disclose all of my interactions with Google, but here are a few key ones: I use Google products and services heavily; I am a Google AdSense publisher, although my earnings are meager; and I co-authored an amicus brief (on behalf of numerous law professors) in support of Google’s legal position in the Second Circuit *Rescuecom Corp. v. Google* appeal. 562 F.3d 123 (2d Cir. 2009). However, I have not acted as an attorney, a consultant, or an expert for Google.

1. As I did in my original essay, I focus only on the United States. Related issues are raging in Europe due to a pending European Union (EU) investigation of Google’s organic and paid advertisement search results. See James Kanter, *Europe Inquiry Focuses on Google Business Practice*, N.Y. TIMES (Jan. 13, 2011),

the literature, a 2006 essay entitled *Search Engine Bias and the Demise of Search Engine Utopianism*.²

II. DEVELOPMENTS IN THE LAST HALF-DOZEN YEARS

This section highlights four major developments to the search engine industry over the past half-dozen years:

- (1) Google has dominated the search engine industry but faces emerging competition from entities that are not traditional search engines.
- (2) Google has changed its search results pages substantially.
- (3) Google has expanded its proprietary service offerings, which it promotes on its search results pages.
- (4) The emergence of Net Neutrality as a policy issue has spurred consideration of a “Search Neutrality” analogue.

A. *Google Rolled Up the Keyword Search Market but Faces Other New Competitors*

In the past half-dozen years, Google has largely rolled up the U.S. keyword search industry—both organic search as well as keyword advertising. Google now has a dominant position in both markets. In 2006, it was clear that Google would thrive, but it was less clear that no major new competitors would successfully challenge Google’s dominance in the high-margin multi-billion dollar industry.

At the time, the industry had four major search engines—Google, Microsoft, Yahoo, and Ask³—and several promising start-up efforts. Since then, Ask (a perennial also-ran) stopped maintaining a search index,⁴ and Yahoo stopped generating its own

<http://www.nytimes.com/2011/01/14/technology/14google.html>. The United States and EU differ in a number of important respects, including Google’s market share (in some EU countries, Google has over ninety percent market share), Europe’s comparatively pro-regulatory approach, and the United States’ regulatory restrictions, such as the Constitution and the Communications Decency Act of 1996, 47 U.S.C. § 230 (2010). Due to these differences, search engine developments in Europe may not provide good insights into U.S. policy.

2. Eric Goldman, *Search Engine Bias and the Demise of Search Engine Utopianism*, 8 YALE J.L. & TECH. 188 (2006), available at <http://ssrn.com/abstract=893892>.

3. See Gavin O’Malley, *Google Top Search Engine in November, Per Hitwise*, MEDIAPOST NEWS (Dec. 12, 2007, 7:00 AM), <http://www.mediapost.com/publications/article/72553>.

4. Danny Sullivan, *Ask.com to Focus on Q&A Search, End Web Crawling*, SEARCH ENGINE LAND (Nov. 9, 2010, 1:50 PM), <http://searchengineland.com/ask-com-to-focus-on-qa-search-end-web-crawling-55209>.

search index and outsourced that operation to Microsoft,⁵ although Yahoo still retains control over the results presentation.⁶ Other new entrants have emerged from time to time, but none of them have garnered a meaningful audience.

Given these developments, effectively, the organic search results market now has just two major competitors—Google and Microsoft—and Google dominates the field. Microsoft has contested Google's stronghold through an advertising campaign valued at up to \$100 million,⁷ but it has picked up only a few percentage points of market share.⁸ Even in the keyword advertising market—which Yahoo, Microsoft, and numerous other players continue to contest fiercely—Google remains the dominant player.⁹

It remains unclear why the organic search industry has consolidated so much or what is the socially optimal number of competitors. Possibilities include:

- Running an industry-competitive search engine is really expensive. Yahoo expected to save \$200 million a year by outsourcing its search operations to Microsoft.¹⁰
- Search indexes may have economies of scale. In justifying its deal with Yahoo, Microsoft argued that having higher volumes

5. Shashi Seth, *Yahoo! Transitions Organic Search Back-End to Microsoft Platform*, YAHOO! SEARCH BLOG (Aug. 24, 2010, 9:00 AM), <http://www.ysearchblog.com/2010/08/24/yahoo-transitions-organic-search-back-end-to-microsoft-platform>.

6. *Id.*

7. Abbey Klaassen, *Microsoft Aims Big Guns at Google, Asks Consumers to Rethink Search*, ADAGEDIGITAL (May 25, 2009), http://adage.com/digital/article?article_id=136847.

8. See, e.g., *Top U.S. Search Sites for July 2010*, NIELSEN WIRE (Aug. 25, 2010), http://blog.nielsen.com/nielsenwire/online_mobile/top-us-search-sites-for-july-2010 (showing Bing as having gone from 9% to 13.6% of market share, mostly at the expense of Yahoo instead of Google). See generally Greg Sterling, *Bing's Battle with Google: How Long Is "Long Term"?*, SEARCH ENGINE LAND (Aug. 2, 2011, 11:17 AM), <http://searchengineland.com/bings-battle-with-google-how-long-is-long-term-87823> (wondering how Microsoft measures Bing's success and what happens if Bing continues to be an also-ran). Note that due to methodological differences, different vendors disagree on the exact market share of the various players, but all agree that Google has a supermajority of the organic search market.

9. Jack Marshall, *U.S. Search Ad Spending Sees Strong Growth*, CLICKZ NEWS (Jan. 18, 2011), <http://www.clickz.com/clickz/news/1937903/search-spending-strong-growth> (stating Google's share of search ad spending in quarter four of 2010 was 78.6%).

10. Steve Ballmer & Carol Bartz, *Microsoft-Yahoo! Search Agreement*, MICROSOFT NEWS CENTER (July 29, 2009), <http://www.microsoft.com/presspass/exec/steve/2009/07-29search.msp>.

of search queries helps a search engine improve its search results.¹¹

- Google is not playing fair. Google has encountered increased antitrust scrutiny from U.S. government agencies,¹² Congress,¹³ the Texas attorney general,¹⁴ and private litigants.¹⁵

Another possibility is that “keyword search” conceives the market too narrowly. While Google has dominated its direct competition in the search market, Google faces serious new

11. See, e.g., Office of Pub. Affairs, *Statement of the Department of Justice Antitrust Division on Its Decision to Close Its Investigation of the Internet Search and Paid Search Advertising Agreement Between Microsoft Corporation and Yahoo! Inc.*, U.S. DEP’T OF JUSTICE (Feb. 18, 2010), <http://www.justice.gov/opa/pr/2010/February/10-at-163.html>. But see Tom Krazit, *Google’s Varian: Search Scale is ‘Bogus’*, CNET NEWS (Aug. 14, 2009, 4:00 PM), http://news.cnet.com/8301-30684_3-10309375-265.html, for an interview with Google’s chief economist, Hal Varian.

12. The Department of Justice and the Federal Trade Commission are constantly reviewing many of Google’s activities, including its aborted search advertising outsourcing deal with Yahoo; a purported agreement with Silicon Valley companies to restrict employee poaching; its board interlocks with Apple; its Book Search settlement; and its acquisitions of DoubleClick, Admob, and ITA. See, e.g., Thomas Claburn, *Google Defends Itself Against Antitrust Regulation*, INFORMATIONWEEK (June 11, 2009, 7:30 AM), <http://www.informationweek.com/news/internet/google/217800685>; Brad Stone, *Sure, It’s Big. But Is That Bad?*, N.Y. TIMES, May 22, 2010, <http://www.nytimes.com/2010/05/23/technology/23goog.html>. As of August 2011, the FTC continues to consider a wide-ranging investigation against Google. Thomas Catan & Amir Efrati, *FTC Sharpens Google Probe*, WALL ST. J., Aug. 11, 2011, <http://online.wsj.com/article/SB10001424053111904823804576500544082214566.html>.

13. Declan McCullagh, *FTC, Senate Ratchet up Google Antitrust Probes*, CNET NEWS (June 23, 2011, 8:34 AM), http://news.cnet.com/8301-31921_3-20073689-281/ftc-senate-ratchet-up-google-antitrust-probes.

14. Don Harrison, *Texas Inquires on Our Approach to Competition*, GOOGLE PUB. POL’Y BLOG (Sept. 3, 2010, 4:13 PM), <http://googlepublicpolicy.blogspot.com/2010/09/texas-inquires-on-our-approach-to.html>. As of August 2011, Wisconsin and Ohio were also considering Google’s practices. Sara Forden & Brian Womack, *Google Said to Face Possible Antitrust Probes in Ohio, Wisconsin*, BLOOMBERG (Mar. 24, 2011, 11:01 PM), <http://www.bloomberg.com/news/2011-03-24/google-said-to-face-possible-antitrust-probes-by-ohio-wisconsin-officials.html>.

15. In particular, Google has recently faced two antitrust lawsuits from two “vertical” search engines, TradeComet and myTriggers, both complaining that Google marginalized their visibility to reduce competition. See *TradeComet.com LLC v. Google, Inc.*, 693 F. Supp. 2d 370 (S.D.N.Y. 2010) (dismissing on jurisdictional grounds), *aff’d* 2011 No. 10–911–cv, WL 3100388 (2d Cir. July 26, 2011); *BFS Fin. v. MyTriggers Co.*, No. 09CV-14836 (Franklin Cnty. Ct. C.P. Aug. 31, 2011); see also Seth Hettena, *The Google-Slayers*, AM. LAWYER, May 1, 2010, at 13 (exploring the possible relationships between the lawsuits). Google has faced other antitrust challenges previously, including the Person, KinderStart, and Langdon lawsuits. See *Person v. Google, Inc.*, 346 F. App’x. 230 (9th Cir. 2009); *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622 (D. Del. 2007); *KinderStart.com LLC v. Google, Inc.*, No. C 06-2057 JF, 2007 WL 831806 (N.D. Cal. March 16, 2007).

competitive threats we did not anticipate in 2006. For example, both Facebook and Twitter have emerged as partial alternatives to Google keyword searching.

Twitter does a huge volume of searches on its real-time database.¹⁶ Indeed, recognizing Twitter's success at addressing real-time informational needs, for several years, Google licensed Twitter's real-time content¹⁷ and made Twitter results more prominent on Google's search results pages.¹⁸

Facebook does not directly compete with Google for keyword searches, but Facebook has emerged as a crucial competitor nonetheless. First, Facebook competes with Google for user mindshare. As Facebook captures more user time and attention,¹⁹ these users will utilize Google less. Further, as users experiment with finding information through their social network, Google's keyword searching may become a less important resource.²⁰

16. Kim-Mai Cutler, *Twitter Search Queries Up 33 Percent from April to 800 Million per Day*, SOCIALBEAT (July 6, 2010), <http://social.venturebeat.com/2010/07/06/twitter-search-800-million-queries>.

17. Miguel Helft & Claire Cain Miller, *2 Deals Hint at Revenue for Twitter*, N.Y. TIMES, Oct. 21, 2009, <http://www.nytimes.com/2009/10/22/technology/internet/22twitter.html>.

18. Amit Singhal, *Relevance Meets the Real-Time Web*, THE OFFICIAL GOOGLE BLOG (Dec. 7, 2009, 11:31 AM), <http://googleblog.blogspot.com/2009/12/relevance-meets-real-time-web.html>. Google subsequently created a stand-alone page for searching just real-time content. Claire Cain Miller, *Google Gives Real-Time Search Its Own Page*, N.Y. TIMES BITS (Aug. 26, 2010, 2:21 PM), <http://bits.blogs.nytimes.com/2010/08/26/google-gives-real-time-search-its-own-page>. After the Google-Twitter license expired, Google replaced Twitter's content with posts from Google+. Clint Boulton, *Google+ Posts Now Indexed on Google Search Results*, EWEK.COM (Aug. 15, 2011), <http://www.eweek.com/c/a/Search-Engines/Google-Posts-Now-Indexed-on-Google-Search-Results-745427>. This indicates the importance of real-time content to Google, as well as the possible competitive substitutability between Twitter and Google.

19. Ylan Q. Mui & Peter Whoriskey, *Facebook Passes Google as Most Popular Site on the Internet, Two Measures Show*, WASH. POST, Dec. 31, 2010, <http://www.washingtonpost.com/wpdyn/content/article/2010/12/30/AR2010123004645.html> (noting that Facebook surpassed Google, becoming the most popular website on the Internet); Greg Sterling, *Facebook Passes Google in "Time Spent," What Does It Mean?*, SEARCH ENGINE LAND (Sept. 10, 2010, 9:30 AM), <http://searchengineland.com/facebook-passes-google-in-time-spent-who-should-care-50263> (discussing that web searchers spend more time on Facebook than on Google).

20. See, e.g., Chris Crum, *Facebook Finding More Ways to Compete with Google*, WEBPRONEWS (May 10, 2010, 8:40 AM), <http://www.webpronews.com/facebook-finding-more-ways-to-compete-with-google-2010-05> (portraying Facebook as a growing presence for web searchers); Mike Masnick, *Anyone Notice That Sites Don't Have to Rely on Google So Much for Traffic Any More?*, TECHDIRT (Dec. 23, 2010, 7:39 PM), <http://www.techdirt.com/articles/20101223/14325412399/anyone-notice-that-sites-dont-have-to-rely-google-so-much-traffic-any-more.shtml> (positing that

The emergence of Twitter and Facebook as possible substitutes for Google search demonstrates two key points about Internet competition generally. First, if we evaluate Internet competition only by taking a point-in-time snapshot of existing competitors, we will probably fail to anticipate the identity and business proposition of disruptive new entrants. Second, in a digital environment with low switching costs between vendors, consumers will flock to new entrants that solve their informational needs—even if the competitors offer a very different solution. As a result, a dominant information provider in one technological niche still faces significant cross-elasticity of demand from providers in other technological niches.

With respect to search engine bias, a dominant search engine is potentially disconcerting. I previously argued that consumers would migrate to or from search engines based on relevancy;²¹ but if consumers do not have meaningful choices, search engine bias could create serious issues for online information credibility and accessibility. At the same time, the past half-dozen years have shown that competition from indirect competitors (who serve consumers' informational needs, even if they use different methodologies) can and do keep problematic search engine bias in check by creating meaningful alternatives for consumers.

Because Google has emerged as the dominant search engine, much of the “search engine bias” discussion has merged with a critique of Google’s biased practices. We will revisit this merging later; but for now, this Essay focuses on Google’s practices because they are often considered coextensive with the search engine industry.²²

web searchers use multiple websites besides Google for their web browsing needs); Michael S. Rosenwald, *How You and Google are Losing the Battle Against Spam in Search Results*, WASH. POST, Jan. 29, 2011, <http://www.washingtonpost.com/wpdyn/content/article/2011/01/28/AR2011012803849.html> (noting that web bloggers are criticizing Google for succumbing to spam advertising); Greg Sterling, *Facebook Passes Google: What Does It Mean?*, SCREENWERK (Mar. 16, 2010), <http://www.screenwerk.com/2010/03/16/facebook-passes-google-what-might-it-mean>.

21. Goldman, *supra* note 2, at 197 (noting that web searchers shop around between various search engines if they do not find what they are looking for).

22. Cf. Geoffrey A. Manne & Joshua D. Wright, *Google and the Limits of Antitrust: The Case Against the Case Against Google*, 34 HARVARD J.L. & PUB. POL'Y 171, 218 (2011) (discussing the extent to which Google has a monopoly within its industry).

B. Google's Search Results Page Has Gotten More Complicated

In 2006, most Google search results pages had two primary zones: organic search results and keyword ads.²³ Because the first search result page gets the vast majority of clicks,²⁴ in practice, everyone was trying to squeeze into a very limited space: the top ten organic search results (of which only the top few really matter traffic-wise) and a small number of advertising spots.

Google's ad spots on search results pages have not materially changed,²⁵ but the organic search results have become much more complicated. Instead of a single set of ten organic results, Google now often shows numerous "zones" of search results on a single search results page. These include traditional organic search results, local results, news results, shopping results, video results, highlighted brands, results from sites in the searcher's social network, a map for geographic results, and more.²⁶

Marketers now seek to show up favorably in each subzone. For example, if the local results zone appears after the third organic result, the first local result might generate more traffic than the fourth organic search result. Consequently, being the first organic search result remains commercially valuable, but it is no longer as crucial as it used to be. In effect, Google's search results now create multiple tournaments with multiple winners, thus supplanting the single winner-take-all tournament that prevailed in 2006. The proliferation of results zones increases the number of zones where search results bias might occur, but bias within each zone may be less crucial than in the past.

23. Cf. Greg Lastowka, *Google's Law*, 73 BROOK. L. REV. 1327, 1342 (2008) (discussing the left and right columns, representing organic results and keyword ads, respectively).

24. See Goldman, *supra* note 2.

25. Their positioning has not materially changed, and Google has made various small refinements in their presentation. Perhaps the biggest change is that Google stopped using the term "sponsored links" and now calls the ads "ads." E.g., Barry Schwartz, *Google Does Away with "Sponsored Links" Label, Now Ads Are Labeled "Ads,"* SEARCH ENGINE LAND (Nov. 5, 2010, 3:06 PM), <http://searchengineland.com/google-does-away-with-sponsored-links-label-now-ads-are-labeled-ads-54956>.

26. This is part of Google's "universal search" initiative. See *Google Begins Move to Universal Search*, GOOGLE (May 16, 2007), http://www.google.com/intl/en/press/pressrel/universalsearch_20070516.html (noting Google's plans to deliver a comprehensive search experience); Danny Sullivan, *Google 2.0: Google Universal Search*, SEARCH ENGINE LAND (May 16, 2007, 2:33 PM), <http://searchengineland.com/google-20-google-universal-search-11232> (discussing the new features of Google's universal search).

C. *Google's Portalization*²⁷

For the first several years of Google's existence, Google sought to move users off its site to third-party sites as quickly as possible.²⁸ Google's stated goal was to figure out what consumers wanted and get them to their desired destination fast.²⁹

The "I'm Feeling Lucky" button (still on Google's home page) exemplified this philosophy. Google says, "[a]n 'I'm Feeling Lucky'TM, search means you spend less time searching for web pages and more time looking at them"³⁰—even if getting searchers off the site quickly costs Google money.³¹

Over the past half-dozen years, Google's priorities have changed in two ways. First, Google now attempts to answer many types of queries—including weather predictions, flight tracking, currency conversion, package tracking, stock quotes, sports scores, movie times, and health information³²—directly on the search results page above other organic results, without the searcher needing to click on any search results or go to any third-party websites. As a result, where Google used to send searchers to third-party websites for these factual queries, Google increasingly keeps the searchers on Google's own pages.³³ This implicitly puts Google in competition with third-party websites that would derive

27. See Eric Goldman, *The Portalization of Google*, TECH. & MARKETING L. BLOG (Mar. 27, 2005, 12:17 PM), http://blog.ericgoldman.org/archives/2005/03/the_portalizati.htm (noting that Google-sourced content generally accompanies search results).

28. See Eric Goldman, *Portalization of Google, Redux*, TECH. & MARKETING L. BLOG (Sept. 8, 2010, 9:45 AM), http://blog.ericgoldman.org/archives/2010/09/portalization_o.htm (quoting *Our Philosophy*, WAYBACKMACHINE (June 3, 2004, 2:06 PM), <http://web.archive.org/web/20040603020634/http://www.google.com/corporate/tenthings.html>) ("Google may be the only company in the world whose stated goal is to have users leave **its website** as quickly as possible.").

29. *Our Philosophy*, GOOGLE, <http://www.google.com/about/corporate/company/tenthings.html> (last visited Oct. 9, 2011) (discussing Google's core goals, including its desire for fast web searches).

30. "I'm Feeling Lucky," GOOGLE, <http://www.google.com/support/websearch/bin/answer.py?hl=en&answer=30735> (last visited Oct. 9, 2011) (describing the "I'm Feeling Lucky" button).

31. Nicholas Carlson, "I'm Feeling Lucky" Button Costs Google \$110 Million Per Year, GAWKER (Nov. 20, 2007, 1:38 PM), <http://valleywag.gawker.com/tech/google/im-feeling-lucky-button-costs-google-110-million-per-year-324927.php> (discussing the high costs of the "I'm Feeling Lucky" button).

32. For a complete list of search features, see *Google Search Features*, GOOGLE, <http://www.google.com/help/features.html> (last visited Oct. 6, 2011) (listing the features of a Google search).

33. See Goldman, *supra* note 28.

commercial value from having searchers referred to their websites.

Not surprisingly, some third-party websites are unhappy that Google shows so much indexed information on its own pages. “Google Places” pages³⁴ have been the subject of a particularly public brawl between Google and the websites it indexes. The Places pages compile both objective and subjective content about individual businesses into a single Google page. The indexed websites contributing such content—including most prominently TripAdvisor and Yelp—have loudly complained that Google shows too much of “their” content,³⁵ such that consumers are less likely to click through to their websites. As the indexed websites have pushed back on Google,³⁶ in some cases, Google has honored their requests.³⁷

Second, over the past half-dozen years, Google has expanded the number and scope of content services that it owns,³⁸ such as its

34. John Hanke, *Introducing Google Places*, THE OFFICIAL GOOGLE BLOG (Apr. 20, 2010, 5:00 AM), <http://googleblog.blogspot.com/2010/04/introducing-google-places.html> (providing an overview of Google Places).

35. Pamela Parker, *Review Sites' Rancor Rises with Prominence of Google Place Pages*, SEARCH ENGINE LAND (Jan. 31, 2011, 4:50 PM), <http://searchengineland.com/review-sites-rancor-rises-with-prominence-of-google-place-pages-62980> (discussing that sites like TripAdvisor and Yelp have complained that Google Places gives away too much information to web searchers).

36. Amir Efrati, *Rivals Say Google Plays Favorites*, WALL ST. J. (Dec. 13, 2010), <http://online.wsj.com/article/SB10001424052748704058704576015630188568972.html>; Amir Efrati, *TripAdvisor Says Google Won't Stop Using Its Content*, WALL ST. J. DIGITS (Jan. 21, 2011), <http://blogs.wsj.com/digits/2011/01/21/standoff-continues-between-google-other-sites>; Greg Sterling, *TripAdvisor Blocks Google: The Start of a Larger Trend?*, SEARCH ENGINE LAND (Dec. 9, 2010, 9:31 AM), <http://searchengineland.com/tripadvisor-blocks-google-the-start-of-a-larger-trend-58280> (noting that travel sites are preventing Google Places from showing their reviews).

37. Greg Sterling, *Yelp Unlikely to Come Back to Google Places*, SEARCH ENGINE LAND (Aug. 26, 2010, 2:45 PM), <http://searchengineland.com/yelp-not-coming-back-to-google-places-49430> (stating that Google agreed to remove Yelp's content from Google Places). In July 2011, Google removed all third-party reviews from its Places pages. Erick Schonfeld, *Google Places Stops Stealing Reviews*, TECHCRUNCH (July 21, 2011), <http://techcrunch.com/2011/07/21/google-places-stops-stealing-reviews> (noting that Google Places links to third-party sites instead of showing those sites' reviews).

38. It is also worth noting that Google has massively expanded its non-search offerings, including its free wi-fi service in Mountain View, California, *Welcome to Free WiFi Access for Mountain View*, GOOGLE (Sept. 4, 2011), <http://wifi.google.com>, email services through Gmail, the Android operating system, the Google Chrome web browser, software applications in Google Docs, Google Desktop's hard drive indexing, and telephone calls through Google Voice. *Everything Google*, GOOGLE (Sept. 4, 2011), <http://www.google.com/intl/en/about/products> (linking to all of Google's products).

Google's purchase of Zagat is another sign that Google plans to own more of its

2006 purchase of YouTube.³⁹ As a result, Google increasingly may want to showcase its offerings at the expense of promoting third-party websites that compete with Google-owned properties.⁴⁰

Overall, Google used to view itself as a facilitator between searchers and the rest of the web. Google has evolved into a portal that wants to keep searchers within its offerings. This portalization potentially creates some tension between self-promoting Google's own offerings and providing an optimal searcher experience when that would include showcasing third-party offerings.

D. "Net Neutrality" and "Search Neutrality"

"Net neutrality" is an amorphous and complicated term. Usually, it refers to the nondiscriminatory transmission of data packets irrespective of their contents.⁴¹ Net neutrality became a red-hot topic in the second half of the first decade of the twenty-first century as telecommunications giants and major content owners engaged in a complex, multi-front battle over money, power, operational freedom, and freedom of speech.⁴²

Google publicly participated in the net neutrality debates⁴³ and proclaimed that it "has been the leading corporate voice on the issue of network neutrality over the past five years."⁴⁴ Google's

own content in the future. Marissa Meyer, *Google Just Got ZAGAT Rated*, THE OFFICIAL GOOGLE BLOG (Sept. 8, 2011, 08:27:00 AM), <http://googleblog.blogspot.com/2011/09/google-just-got-zagat-rated.html>.

39. *Google Closes Acquisition of YouTube*, GOOGLE (Nov. 13, 2006), <http://www.google.com/intl/en/press/pressrel/youtube.html>.

40. See Editorial, *The Google Algorithm*, N.Y. TIMES, July 14, 2010, <http://www.nytimes.com/2010/07/15/opinion/15thu3.html>; Eric Goldman, *The Problems with Google House Ads*, SEARCH ENGINE LAND (Aug. 18, 2010, 1:00 PM), <http://searchengineland.com/the-problems-with-googles-house-ads-48325> (noting that Google uses house ads that auction ad space on Google's network).

41. There are many definitions of Net Neutrality. See *Network Neutrality*, WIKIPEDIA, http://en.wikipedia.org/wiki/Network_neutrality#Definitions_of_network_neutrality (last updated Oct. 1, 2011).

42. See Sascha D. Meinrath & Victor W. Pickard, *Transcending Net Neutrality: Ten Steps Toward an Open Internet*, 12 No. 6 J. INTERNET L. 1, 11 (2008). The authors explain that in the highly publicized debate over net neutrality, "the battle lines have been drawn between large telecommunications companies that own the pipes, on one side, and Internet content companies and public interest groups on the other." *Id.*

43. See Eric Schmidt, *A Note to Google Users on Net Neutrality*, GOOGLE (Summer 2006), http://www.google.com/help/netneutrality_letter.html (encouraging Google users to get involved in the net neutrality debate by voicing concerns to their Representatives).

44. Richard Whitt, *Facts About Our Network Neutrality Policy Proposal*, GOOGLE PUB. POLYBLOG (Aug. 12, 2010, 1:46 PM), <http://googlepublicpolicy>

unsuccessful bid in the 700MHz spectrum auction prompted the FCC to impose some neutrality conditions on the successful bidders,⁴⁵ and it jointly announced with Verizon “a suggested legislative framework for consideration by lawmakers” for net neutrality.⁴⁶

Google’s demands for neutrality on Internet connectivity stand in stark contrast to its tight editorial control over its search operations—editorial discretion that Google has steadfastly defended.⁴⁷ Needless to say, Google’s superficially duplicitous position has not gone unnoticed. For example, in 2006, Representative Charles Gonzalez proposed legislation that would prohibit search engines from engaging in discrimination.⁴⁸

In general, charges of Google hypocrisy reflect a misunderstanding about the various “layers” in the telecommunications stack (i.e., the physical layer plays a different role in the information ecosystem than the content layer), which means the exercise of editorial control at the different layers has very different effects on consumers.⁴⁹ Nevertheless, asserting that Google is hypocritical makes for a nifty sound bite.

Attacks on Google’s alleged hypocrisy have popularized a new term, “search neutrality.”⁵⁰ Search neutrality is the inverse of

.blogspot.com/2010/08/facts-about-our-network-neutrality.html.

45. See Press Release, Fed. Trade Comm’n, FCC Revises 700 MHz Rules to Advance Interoperable Public Safety Communications and Promote Wireless Broadband Deployment (July 31, 2007), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-275669A1.pdf; Brian Gardiner, *Google Calls 700-MHz Auction a Major Victory for Consumers*, WIRED (Mar. 20, 2008, 4:43 PM), <http://www.wired.com/epicenter/2008/03/google-calls-70> (explaining that Google’s unsuccessful bid “lock[ed] in the open access rules”).

46. Alan Davidson & Tom Tauke, *A Joint Policy Proposal for an Open Internet*, GOOGLE PUB. POL’Y BLOG (Aug. 9, 2010, 1:38 PM), <http://googlepublicpolicy.blogspot.com/2010/08/joint-policy-proposal-for-open-internet.html>.

47. See, e.g., *Kinderstart.com, LLC v. Google, Inc.*, No. C 06-2057 JF (RS), 2007 WL 831806 (N.D. Cal. Mar. 16, 2007); *Search King, Inc. v. Google Tech., Inc.*, No. CIV-02-1457-M, 2003 WL 21464568 (W.D. Okla. May 27, 2003).

48. See Declan McCullagh, *New Net Neutrality Plan May Ruffle Feathers*, CNET NEWS (June 8, 2006, 6:45 PM), http://news.cnet.com/2100-1028_3-6081887.html.

49. See Kevin Werbach, *Higher Standards Regulation in the Network Age*, 23 HARV. J.L. & TECH. 179, 202 (2009). See generally Kevin Werbach, *A Layered Model for Internet Policy*, 1 J. TELECOMM. & HIGH TECH. L. 37 (2002). The “layers” model generally traces its lineage to the “Open Systems Interconnection” (OSI), developed in the 1980s by the International Organization for Standardization (ISO). *Id.* at 59.

50. See Nate Anderson, *Search Neutrality? How Google Became a “Neutrality” Target*, ARS TECHNICA L. & DISORDER, <http://arstechnica.com/tech-policy/news/2010/04/search-neutrality-google-becomes-neutrality.ars> (last visited Aug. 28, 2011) (tracing the etymology of the term).

search engine bias (i.e., neutrality implies a lack of bias).⁵¹ Because so much attention has been paid to net neutrality, the analogous term “search neutrality” has eclipsed “search engine bias” as the appellation of choice.

The vernacular shift from “search engine bias” to “search neutrality” creates three interrelated problems. First, it invites an apples-to-oranges comparison between net neutrality and search neutrality, even though they address different issues.

Second, given that no one can agree on net neutrality’s definition, importing its semantic ambiguity into the search engine bias debate hardly improves the discourse.

Third, the term “search neutrality” implies the existence of neutral search engines, but those are entirely mythical. Every search engine design choice necessarily and unavoidably reflects normative values.⁵² Thus, the term “search neutrality” implies a Platonic ideal of a search engine that cannot be achieved.⁵³ Naturally, then, Google’s practices fail to conform to this Platonic ideal, but so does every other search engine in the real world.⁵⁴

III. THE END OF RATIONAL DISCUSSION ABOUT SEARCH ENGINE BIAS

Google’s dominance of the search engine industry distorts the discussion about search engine bias in other unfortunate ways. Google has made a lot of enemies on its way to the top,⁵⁵ and many of them are willing to use legal tools to degrade Google’s competitive position. Some of the anti-Google forces are advancing positions that may help tweak Google in the short term, but could ironically conflict with their long-term interests.

51. See Geoffrey A. Manne & Joshua D. Wright, *If Search Neutrality Is the Answer, What’s the Question?*, INT’L CENTER FOR L. & ECON. 3 (Apr. 7, 2011), http://laweconcenter.org/images/articles/search_neutrality_manne_wright_final.pdf (explaining that the term “search neutrality” is increasingly used by scholars, regulators, and policymakers as a remedy for “search engine bias”).

52. See Goldman, *supra* note 2, *passim*.

53. James Grimmelman, *Some Skepticism About Search Neutrality*, in THE NEXT DIGITAL DECADE: ESSAYS ON THE FUTURE OF THE INTERNET 435 (Berin Szoka & Adam Marcus eds. 2010) (requiring search engines to act neutrally makes users more vulnerable to unwanted search results).

54. See Danny Sullivan, *The Incredible Stupidity of Investigating Google for Acting Like a Search Engine*, SEARCH ENGINE LAND (Nov. 30, 2010, 7:52 AM), <http://searchengineland.com/the-incredible-stupidity-of-investigating-google-for-acting-like-a-search-engine-57268>.

55. Jay Greene, *Google’s Enemy List, a Primer*, CNET NEWS (June 24, 2011, 2:25 PM), http://news.cnet.com/8301-1023_3-20074178-93/googles-enemy-list-a-primer.

- Microsoft—who learned a lot about antitrust law from its decade-long antitrust defense—has actively marshaled forces against Google, including spurring efforts to increase the regulation of search engines.⁵⁶ Should those efforts succeed, Microsoft’s own search engine, Bing, ought to be subject to the regulations as well. Thus, Microsoft-instigated regulatory intervention could ultimately hamper Bing’s freedom to operate.
- A number of other intermediaries fear that Google will disintermediate them. As discussed earlier, Yelp and TripAdvisor have fought back against Google Places.⁵⁷ In response to Google’s proposed acquisition of ITA, a group of travel aggregators and others put together an advocacy group misleadingly named “FairSearch.org.”⁵⁸ Hypocritically, some FairSearch members freely engage in the kind of search manipulation that they fear Google will practice.⁵⁹ Should FairSearch succeed in instantiating its stated objectives, its members might be surprised to find their own operations adversely affected.
- As part of their death spiral, newspapers have lashed out against Google because they mistakenly believe Google (especially Google News) unfairly appropriates economic value from them. Indeed, some major newspapers—including the *New York Times*⁶⁰—have published editorials calling for regulation of Google’s search engine bias. Yet, for centuries, newspapers have engaged in their own form of editorial bias that is no more transparent than Google’s;⁶¹ and for decades,

56. See, e.g., Hettena, *supra* note 15; Dave Heiner, *Competition Authorities and Search*, MICROSOFT ON THE ISSUES (Feb. 26, 2010, 11:57 AM), http://blogs.technet.com/b/microsoft_on_the_issues/archive/2010/02/26/competition-authorities-and-search.aspx.

57. See *supra* text accompanying notes 34–37.

58. FAIRSEARCH, <http://www.fairsearch.org> (last visited Oct. 9, 2011).

59. Eric Goldman, *Hypocrisy Alert?! Expedia, a “FairSearch” Member, Marginalizes American Airlines in Its Search Results*, TECH. & MARKETING L. BLOG (Dec. 30, 2010, 1:52 PM), http://blog.ericgoldman.org/archives/2010/12/hypocrisy_alert.htm (alleging that Expedia, a member of FairSearch, disregarded the alliance’s principles without repercussion by downgrading American Airlines in its search results).

60. Editorial, *supra* note 40 (“[T]he potential impact of Google’s algorithm on the Internet economy is such that it is worth exploring ways to ensure that the editorial policy guiding Google’s tweaks is solely intended to improve the quality of the results and not to help Google’s other businesses.”).

61. Danny Sullivan, *The New York Times Algorithm & Why It Needs Government Regulation*, SEARCH ENGINE LAND (July 15, 2010, 2:07 PM), <http://>

many newspapers have been local monopolists⁶² with zero accountability for any abuse of their editorial position.⁶³ It is shamefully hypocritical for newspapers—historically the strongest champion of publishers’ editorial freedom—to advocate against Google’s editorial freedom because the newspapers distrust how Google uses it.

As these examples indicate, truly “neutral” perspectives about search engine bias are increasingly rare. Instead, competitive jostling has overtaken much of the discussion. Given the huge economic stakes associated with the search engine industry, it has become almost impossible to distinguish legitimate discourse from economic rent-seeking.

Amazingly, despite all of this competitive gunning for Google, there is still no strong evidence (or, in my opinion, persuasive evidence) that (1) Google has used illegitimate practices to advance or maintain its industry dominance, or (2) consumers cannot or will not gravitate to the most effective online search tools available to them. Without such evidence, it remains equally plausible that the search engine marketplace continues to function well, and searchers continue to vote with their mice. It just so happens that many of those votes are for Google.

In the rare recent discussions about search engine bias not driven by economic gamesmanship, the discussion often considers whether regulators (or plaintiffs) can “improve” search engine results compared to the results search engines produce guided by marketplace forces.⁶⁴ It can be tempting to believe that an omniscient regulator can improve search engines, but I favor a clear justification before we indulge this censorious temptation. Objectively, we are blessed with historically unprecedented free

searchengineland.com/regulating-the-new-york-times-46521 (“Compared to the New York Times, Google’s a model of transparency.”).

62. See Newspaper Preservation Act of 1970, 15 U.S.C. § 1801 (2006).

63. Cf. *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241 (1974) (holding that, due to the Constitution, newspapers cannot be obligated to offer a right of reply).

64. Although surveys like this usually turn on a question’s exact wording, according to a Rasmussen survey, “77% of Adults say there is no need for government regulation of the way that search engines select the recommendations they provide in response to search inquiries. Just 11% believe such regulation is necessary” *Most Say No to Government Regulation of Search Engines*, RASMUSSEN REPORTS (Jan. 9, 2011), http://www.rasmussenreports.com/public_content/lifestyle/general_lifestyle/january_2011/most_say_no_to_government_regulation_of_search_engines.

search tools that help create enormous social value.⁶⁵ It would be easy for regulators, even well-intentioned ones, to inadvertently eliminate some of this value through misregulation. That outcome is worth fighting against.

65. Kevin Kelly, *Would You Pay for Search?*, THE TECHNIUM (Apr. 26, 2011), http://www.kk.org/thetechnium/archives/2011/04/would_you_pay_f.php (“[T]he value of free search works out to around \$500 per year.”).