A RIGHT TO REACH AN AUDIENCE: AN APPROACH TO INTERMEDIARY BIAS ON THE INTERNET

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I. INTRODUCTION

". . . like First Amendment manna from heaven . . . ."[1]

Some of the thorniest problems of communications law and policy were supposed to have been solved by the Internet.[2] The issue of who

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1. Kathleen M. Sullivan, *First Amendment Intermediaries in the Age of Cyberspace*, 45 UCLA L. REV. 1653, 1669 (1998) (describing the high expectations observers had for the Internet).

2. The enthusiasm is reflected in the language of the Supreme Court in *Reno v. American Civil Liberties Union*:

This dynamic, multifaceted category of communication includes not only traditional

can speak, or access the means of speech, was said to have been solved by the arrival of ubiquitous, relatively cheap access to the Internet. The problem of media concentration was supposed to have been solved now that so many more speakers could contribute. Like "First Amendment manna from heaven," the Internet thus seemed to offer a solution to the vexing communications policy problems of scarcity, diversity, and access.

As it turns out, we might have been too quick. While the Internet has undoubtedly assisted with these problems, the early optimism[3] must now be tempered by the recognition that new gatekeepers have arisen, and that their actions are not necessarily supportive of the values underlying the right of free speech.[4] Yet, we now know that it is structurally possible to have a communications environment in which there is rough equality of access to a major means of mass communication—both as speaker and as listener—that smaller speakers and speakers addressing minority interests can find an audience, and that listeners can have much more autonomy in their choice of information. Any argument for a deviation from these gains must be justified against this background; it is not enough simply to say that such things are utopian.

Forty years ago, Professor Jerome Barron wrote an important article in which he noted that the right to free speech was more romantic myth than reality when access to the means of effective mass speech were

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> print and news services, but also audio, video, and still images, as well as interactive, real-time dialogue. Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer. As the District Court found, "the content on the Internet is as diverse as human thought."

521 U.S. 844, 870 (1997) (quoting ACLU v. Reno, 929 F. Supp. 824, 842 (E.D. Pa. 1996)).

3. *See, e.g.*, MARTIN H. REDISH, MONEY TALKS: SPEECH, ECONOMIC POWER, AND THE VALUES OF DEMOCRACY 191-92 (2001); Jerry Berman & Daniel J. Weitzner, *Abundance and User Control: Renewing the Democratic Heart of the First Amendment in the Age of Interactive Media*, 104 YALE L.J. 1619, 1619 (1995) ("[T]he deployment of innovative new technologies—such as high-capacity computer networks . . . and increasingly accessible online services—heralds the arrival of new, interactive communications media."); Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805, 1806-07 (1995) (stating that new information technology will reduce the cost of speech and lead to a "more democratic and diverse" media environment).

4. Others have raised concerns about the effect of the Internet on social solidarity and democratic debate. They have warned of the fragmentation of society into narrowly defined and increasingly extremist speech communities, as well as the loss of broadly shared media experiences. *See generally* RICHARD MOON, THE CONSTITUTIONAL PROTECTION OF FREEDOM OF EXPRESSION 211-13 (2000); CASS R. SUNSTEIN, REPUBLIC.COM 51-88 (2001) (discussing group polarization on the Internet).

closed to novel and unpopular ideas.[5] He argued for a broader understanding of the right to free speech, encompassing more than the traditional freedom from government censorship. Instead, he argued, free speech should encompass a right of access to the media.[6] While the problem of access to the means of speech seems to have been greatly alleviated by the Internet, the chokepoint has now shifted downstream to a class of intermediaries that select and filter information en route to listeners.[7] Examples of this class of "selection intermediaries" include search engines, software filters, Internet Service Providers ("ISPs") that block or filter content, and spam blocklists.

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. Search engines find information, but equally importantly, they offer some assessment of what is most useful. In theory, filters permit sensitive listeners to avoid information so that everyone else can still speak or listen if they wish. ISPs can protect their subscribers from the influx of spam or malicious communications and can offer an information selection service through their portals. These are the positive stories. There are also numerous stories of how these selection intermediaries undermine the flow of information from speaker to listener. They do so by censoring content and applying bases for discrimination that listeners would not have chosen, in a manner that undermines the values embodied in the First Amendment.

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5. Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1641 (1967):

> Our constitutional theory is in the grip of a romantic conception of free expression, a belief that the "marketplace of ideas" is freely accessible. But if ever there were a self-operating marketplace of ideas, it has long ceased to exist. The mass media's development of an antipathy to ideas requires legal intervention if novel and unpopular ideas are to be assured a forum . . . .

6. *Id.* at 1666-78.

7. *See* Lucas Introna & Helen Nissenbaum, *Defining the Web: The Politics of Search Engines*, COMPUTER, Jan. 2000, at 54, 61.

> Many have observed that for the Web to become a democratizing technology and a public good, we must first take the question of access seriously. We agree, but would define the question in broader terms. Access is not merely a computer and a network hookup, even when coupled with the skills and know-how that enable effective use. Rather, access implies a comprehensive mechanism for finding and being found. Thus our concern with the politics of search engines—a politics that at present seems to push the Web in a direction that favors special interests at the expense of marginalizing the general public.

Id.

It is true that we have long been surrounded by too much information, and we have relied on various intermediaries to assist us in finding and choosing information. Why, then, is the role of selection intermediaries on the Internet worthy of comment? In my view, the Internet offers an opportunity for us to craft new approaches to the selection intermediary function in a way that enables us to keep as much of the speech freedom engendered by the Internet as possible. There is a danger that by reflexively drawing analogies to familiar old selection intermediaries, such as libraries or bookstores, we will settle for the imposition of selection criteria that erode the freedom of speech made possible on the Internet.

This Article draws its inspiration from Professor Barron's article, suggesting that, in the age of the Internet, a complete First Amendment theory must explicitly address the effects of selection intermediaries and recognize as protected each of the steps involved in the communicative relationship between speaker and listener. This includes not only the right to speak and the right to hear, but also the right to reach an audience free from the influence of extraneous criteria of discrimination imposed by selection intermediaries. If selection intermediaries block or discriminate against a speaker on grounds that listeners would not have selected, that speaker's ability to speak freely has been undermined.

The United States Congress is now contemplating the Global Online Freedom Act,[8] which is aimed at prohibiting cooperation by United States search engine and online content hosting businesses with the censorship requirements of foreign governments. I choose to discuss it at the end of this Article in order to explore further the legal implications of understanding the right of free speech as including a right to reach an audience. At first glance, this bill looks like a suspect attempt to apply American law extraterritorially. At second glance, however, could the blocking of United States content be said to have "effects" within the United States?[9] An understanding of a speaker's right of free speech as including a right to reach a willing audience suggests that foreign filtering has effects on the free speech rights of

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8. H.R. 4780, 109th Cong. (2006). This version was replaced on June 22, 2006 by a softened version during subcommittee deliberations. *See* Markup Before the Subcomm. on Afr., Global Human Rights, and Int'l Operations of the H. Comm. on Int'l Relations of H. Res. 860, H.R. 4319, H.R. 4780 and H.R. 5382, 109th Cong., H.R. REP. No. 109-173, at 80 (2006); *see also* discussion *infra* Part V.

9. With respect to websites providing services, another argument against filtering may be based on international trade law. *See* Tim Wu, *The World Trade Law of Censorship and Internet Filtering*, 7 CHI. J. INT'L L. 263, 263 (2006) (investigating Internet filtering under the rules of the World Trade Organization).

Americans residing in the United States. Although I doubt the wisdom of the initial version of the Global Online Freedom Act, it does offer a useful opportunity to test the possible legal effects of the recognition of a right to reach an audience.

This Article will proceed as follows: Part II will make a case for the recognition within the right to free speech of a right to reach an audience. Part III will illustrate the ways in which selection intermediaries are undermining speakers' ability to reach an audience. The selection intermediaries upon which I focus in Part III are primarily search engines and ISPs, although other intermediaries such as software filters, spam blocklists, and others could be included here as well. Part IV will consider whether regulations to address these problems would be vulnerable to the charge that they violate selection intermediaries' own First Amendment rights. Part v. will explore the Global Online Freedom Act and whether its jurisdictional legitimacy is enhanced by viewing free speech as including a right to reach an audience.

II. A RIGHT TO REACH AN AUDIENCE?

The right to free speech has traditionally been understood as a negative right held by speakers. In other words, speakers are protected from state censorship by the constitutional guarantee of freedom of speech. The traditional understanding of the right as a negative right,[10] rather than a positive right (which would require the government to ensure that citizens have an effective ability to speak), has not changed even though most people recognize that handing out handbills and soapbox oratory are no longer socially or politically meaningful ways to speak in a large and diverse society.[11]

However, the courts have recognized in a variety of contexts that a right to free speech is not held just by speakers. Listeners, too, have a

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10. *See* MOON, *supra* note 4, at 7.

11. Justice Kennedy wrote:

> Minds are not changed in streets and parks as they once were. To an increasing degree, the more significant interchanges of ideas and shaping of public consciousness occur in mass and electronic media. The extent of public entitlement to participate in those means of communication may be changed as technologies change.

Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 802-03 (Kennedy, J., dissenting) (citations omitted). As Moon points out, one might add that those still operating in the streets and parks are more apt to be regarded as "cranks" to be avoided now that the expectation is that important issues and opinions will be aired in the mass media. *See* MOON, *supra* note 4, at 171. Owen Fiss writes that "[t]he problem, however, is that today the street corner has become marginal to public debate, and the doctrinal edifice [built around the protection of the street corner speaker] is largely unresponsive to the conditions of modern society." OWEN M. FISS, LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER 13 (1996).

First Amendment right to receive speech.[12] In *Griswold v. Connecticut*,[13] the Supreme Court suggested that the specific guarantees in the Bill of Rights have "penumbras" of associated rights that are "formed by emanations from those guarantees that help give them life and substance."[14] Although the case turned on the penumbral right of privacy, the Court made statements in passing about the right to receive information:

> [T]he State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read and freedom of inquiry, freedom of thought, and freedom to teach . . . . Without those peripheral rights the specific rights would be less secure.[15]

If the right to free speech is made up of a range of "corollary," "penumbral," or "peripheral" rights beyond simply "the right to utter or to print," what is the best way to understand the full content of the right to free speech? Clues may be drawn from the theoretical justifications for the right of free speech as well as from an examination of the nature of communication itself. The understanding of speech as a communicative relationship between speaker and listener assists in constructing a more realistic and complete picture of what it is we are seeking to protect.

Humans are a social species with a highly developed faculty for communication. Communication itself is a social activity, and speech has meaning as communication only in a social relationship established between a speaker and a listener.[16] Many of us "speak to ourselves" sometimes, but we hardly need constitutional protection to do so. What we mean by freedom of speech is the ability to speak *to someone else*—in other words, the ability to communicate.

In his philosophy of free speech, Frederick Schauer reviewed the leading theoretical justifications for free speech, concluding that what we are getting at by protecting free speech is the communicative aspect of speech.[17] The "search for the truth" or "marketplace of ideas"

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12. *See* Jamie Kennedy, *The Right to Receive Information: The Current State of the Doctrine and the Best Application for the Future*, 35 SETON HALL L. REV. 789, 789-90 (2005); Susan Nevelow Mart, *The Right to Receive Information*, 95 LAW LIBR. J. 175, 175 (2003).

13. 381 U.S. 479 (1965).

14. *Id.* at 484.

15. *Id.* at 482-83 (citations omitted).

16. *See* MOON, *supra* note 4, at 22.

17. FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 92 (1982).

explanation of the right of free speech[18] and the democratic self-governance free speech justification[19] are based in part upon the effects of speech on listeners. As a result, these explanations depend on the establishment of a communicative relationship between speakers and listeners, and they ought to justify the protection of all elements of that relationship.

The argument for free speech that is based on individual autonomy and self-development[20] also depends upon the unimpeded ability to communicate both by hearing others and speaking to them. Schauer notes the long lineage of the idea that communication and personal relationships are vital aspects of being human, and concludes that if this is true, the special protection of communication is easily justified.[21]

Ultimately, Schauer suggests that the protection of the freedom to communicate is fundamentally based on individual "self-development."[22] However, is it not too narrow to say that the value of communication is that it promotes self-development? Communications which arguably do not greatly develop one's reasoning capacity are still valuable in that they offer individuals an escape from solitude through the exchange of meaning within social relationships. The creation of meaning is a social process, and communication is a social activity in

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18. The "search for the truth" theory suggests that the discovery of truth and the progress of human knowledge are most likely to occur if all opinions can be publicly heard and weighed against one another in a "marketplace of ideas." These ideas were embodied in different language in the work of John Stuart Mill. *See* JOHN STUART MILL, ON LIBERTY 26-33 (The Electric Book Company 2001).

19. The "democratic self-governance" justification for freedom of speech, which is closely associated with Alexander Meiklejohn, holds that the right of free speech is implicit in democratic self-government, for without this freedom, the citizenry can neither make wise public policy choices nor control the government. *See* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 93-102 (1948).

20. This variety of justification focuses on the direct value of free speech to the individual, rather than on its indirect consequences for the listener or society more generally. These justifications suggest that the denial of free speech violates the inherent autonomy and dignity of the individual or that freedom of speech is essential for the development of the uniquely human capacities for thought and reasoning, and the realization of a full life. *See* MOON, *supra* note 4, at 19; SCHAUER, *supra* note 17, at 49.

21. SCHAUER, *supra* note 17, at 54 ("The theory that communication and personal relationships are central features of human development has roots in the writings of Aristotle. If man is a political and social animal, then communication and the use of language are vital components of humanity . . . .").

22. *Id.* at 55, 58. Schauer questions why we would protect this aspect of "self-development" over other needs or desires. *Id.* at 55. Schauer's concern seems to be to establish a robust right to free speech that is immune to abridgment by governments in the name of the interests of others. However, the right of free speech is unlikely to be absolute in this way, and the recognition that it is *a* critical value, even if not *the* critical value, is still of great utility.

which individuals establish and renew relations with others.[23]

The recognition of the social and interactive nature of communication suggests that freedom of speech must necessarily include each of the steps and elements within the communicative relationship. In particular, freedom of speech must protect the steps needed to establish and maintain the communicative relationship. This must include the ability to hear the communicative overtures launched by others in the society, as well as the ability to launch one's own communicative overtures to an audience.

None of this means that a listener must listen, or that a speaker has a right to the listener's attention. Indeed, the suggestion that a listener is bound to listen to any speaker ignores the fact that the freedom of both parties requires that the communicative relationship be voluntary on both sides.

However, under conditions in which speakers are able to speak in great and overwhelming numbers, listeners must ignore much of what is said to them. Listeners will have their own personal criteria for discrimination among speakers. A speaker can hope—but cannot demand—that the listener change his reasons for discrimination. Given the large amount of information, listeners may require assistance in making their selections, and sometimes a selection intermediary will be interposed between speaker and listener. That selection intermediary will also apply some criteria of discrimination in order to select the speech to which the listener's attention will be drawn. Where the selection criteria are those that the listener would have employed, no distortion is thus introduced by the intermediary. Where the selection intermediary uses criteria of discrimination that the listener would not have selected, the selection intermediary is undermining the establishment of a communicative relationship in a manner that restricts the freedom that both speaker and listener would otherwise have had.

In light of the potential distortion introduced by selection intermediaries who use extraneous criteria of discrimination undesired by listeners, it is perhaps helpful to make explicit a third element within the right to free speech. One might summarize the necessary components of a right to free speech as follows:

(1) unimpeded access to the speech of others;
(2) the ability to speak unimpeded by censorship, fear of reprisals, compulsion to utter certain speech, etcetera (i.e., the conventional understanding of free speech); and

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23. *See* MOON, *supra* note 4, at 21.

(3) the unimpeded ability to reach an audience (i.e., the right to be free of the imposition of discriminatory filters that the listener would not otherwise have used).[24]

This third element overlaps to some extent with the other two. However, I think there is value in separating it from the others, particularly for the purpose of considering the role of selection intermediaries. The first two elements are more commonly associated with actions that block communication altogether. The third element enables a discussion of the effects of selection intermediaries who do not necessarily block speech, but who select certain speech for preference, sometimes effectively silencing disfavored speakers.

III. THE EFFECTS OF SELECTION INTERMEDIARIES ON FREEDOM OF SPEECH

In *Reno v. American Civil Liberties Union*,[25] the Supreme Court spoke glowingly of the Internet, referring to it as a "vast democratic for[um],"[26] and an exploding "new marketplace of ideas."[27] It also noted that the Internet offers "relatively unlimited, low-cost capacity for communication of all kinds,"[28] dramatically facilitating individual access to a powerful means of mass speech. Indeed, the Internet's capacity to permit "individuals to be creators of content rather than just passive recipients, and active participants in dialogue instead of just bystanders"[29] has been welcomed for its democratizing potential. As a result, the average individual is now able to speak using a medium of mass communication, and also benefits as a listener from a much greater degree of autonomy in the choice of information.

Ironically, in proportion to its success in enabling speech, the Internet decreases the likelihood that any individual speaker will be found in the resulting "information glut."[30] From the speaker's perspective, while the Internet may have solved the problem of access to a means of mass speech, it has exacerbated the new challenge of

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24. This could be articulated from the listener's perspective as a right to discriminate among speakers using one's own criteria of discrimination rather than those imposed by another.

25. 521 U.S. 844 (1997).

26. *Id.* at 868.

27. *Id.* at 885.

28. *Id.* at 870.

29. ANDREW L. SHAPIRO, THE CONTROL REVOLUTION 15 (1999).

30. *See* DAVID SHENK, DATA SMOG: SURVIVING THE INFORMATION GLUT 102 (1997).

reaching a receptive audience.[31]

From the listener's perspective, one has more choice of speakers, but the Internet, with its billions of webpages, has complicated the task of selecting among them. In response to the listener's problem, new forms of selection intermediaries have arisen. An obvious example is the search engine, which assists not only in finding information, but also in discriminating among speakers according to their quality and utility, as expressed in the ordering of webpages in the search results.[32]

We have long been surrounded by too much information, and have had to rely on a variety of information intermediaries to assist us in finding and selecting what we want. For example, in the past, publishers, bookstores, and libraries selected which authors would be able to reach an audience. Similarly, journalists and the media have selected which news stories and newsmakers will reach an audience. One might legitimately ask why the existence of novel intermediaries is worthy of comment now. I think it is important because a large part of the initial excitement over the Internet was that it permitted speakers to get around the traditional intermediaries, which had, particularly in the case of the media, come under criticism for their selection criteria. We have an opportunity with these novel information intermediaries to craft new approaches to the intermediary function that enable us to keep as much of the Internet's free speech benefits as possible in a context where we are hopefully not bound by "the way it has always been."

An illustration of the importance of revisiting the selection intermediary's role in the Internet context is illustrated by the Supreme Court's decision in *United States v. American Library Association, Inc.*,[33] which dealt with the constitutionality of legislation that made certain funding for libraries contingent on the installation of Internet filtering software on library computers. Chief Justice Rehnquist treated as equivalent the selection of printed materials and the selection (by filter) of Internet materials, noting that the Internet "is 'no more than a technological extension of the book stack.'"[34] Accordingly, he reasoned that libraries have the same discretion to select materials on the Internet as they do for their print collections.[35] However, this analysis misses the important advance in information access that the Internet has brought about. The Internet makes possible access to an enormous quantity of

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31. *Id.*
32. *See infra* notes 49-50 and accompanying text.
33. 539 U.S. 194 (2003).
34. *Id.* at 207 (quoting S. REP. NO. 106-141, at 7 (1999)).
35. *Id.* at 208.

information, without the constraints that apply to the selection of print materials (i.e., space and money). The "default" position of the Internet is comprehensive access, and so the appropriate analogy for the Court's reasoning was not the process of selecting print materials for inclusion in a collection, but the decision to *remove* materials from the collection.[36] Justice Souter's dissenting opinion makes this point clearly:

> In the instance of the Internet, what the library acquires is electronic access, and the choice to block is a choice to limit access that has already been acquired. . . . The proper analogy therefore is not to passing up a book that might have been bought; it is either to buying a book and then keeping it from adults lacking an acceptable "purpose," or to buying an encyclopedia and then cutting out pages with anything thought to be unsuitable for all adults.[37]

The key opportunity presented by the Internet is unfiltered and essentially unbiased access to a vast quantity of speech. This is the "default" position. To the extent that selection intermediaries undermine this access by imposing criteria of discrimination that listeners would not choose, they undermine the free speech benefits of the Internet. The fact that we accepted such discrimination by selection intermediaries in the past, or that we accept it for other media, does not mean that we must do so for the Internet.

What then are the novel selection intermediaries in the Internet context? The list includes entities designed to locate and recommend certain information online, including search engines and directories. It also includes entities and software programs designed to locate and exclude certain information, such as filtering software or spam blocklists.[38] One could also add software programs such as virus scanning software which also identify and exclude certain information. In addition, a debate over "network neutrality" has been raging over the last year since certain network operators suggested that they would like to offer preferential delivery of the content of paying speakers online. This would introduce another form of selection and preference in the flow of information online.

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36. See the discussion in Kennedy, *supra* note 12, at 813-18.

37. *Am. Library Ass'n*, 539 U.S. at 237 (Souter, J., dissenting).

38. A spam "blocklist" is a list of known sources of spam which can be queried by mail servers in order to decide whether to accept a message or not. *See* Spamhaus, Understanding DNSBL Filtering, http://www.spamhaus.org/dnsbl_function.html (last visited Mar. 3, 2007). For a discussion of the legal issues surrounding spam filters and blocklists, see Jonathan I. Ezor, *Busting Blocks: Appropriate Legal Remedies for Wrongful Inclusion in Spam Filters Under U.S. Law*, (Touro Coll. Law Ctr. Inst. for Bus. Law & Tech., Working Paper Series, 2006), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=944551.

A. Search Engines and Free Speech

Search engines now occupy a position of central importance on the Internet. They are used by more than eighty percent of American web users,[39] and the major search engines, Google and Yahoo!, ranked as the second and third most used websites in January 2007.[40] The rise in the importance of search engines in online communications is reflected in the quickening pace of litigation involving them.[41] The early cases involved disputes between businesses over the use of a competitor's trademark within the "meta tags" on a business' website.[42] Since then, there have been a growing number of disputes over unstated commercial bias in search engine results, ranking demotions within search engine results, and the removal of websites altogether from search engine indices or search results.

The importance of search engines is also reflected in the energy that webmasters put into ensuring that they are included in search engine indices and in attempting to improve their ranking within search results. These efforts may legitimately flow from a sophisticated understanding of how search engines work, but other techniques may fairly be characterized as abusive.[43] Those practices considered abusive are sometimes known as "spamdexing" or "search engine spamming" and involve a range of practices designed to fool or manipulate search engines into placing a website in the top search results.[44]

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39. Memorandum from Deborah Fallows, PIP Senior Research Fellow, Lee Rainie, Director, & Graham Mudd, comScore Senior Analyst, Pew Internet & Am. Life Project, on The Popularity and Importance of Search Engines (Aug. 2004), http://www.pewinternet.org/pdfs/PIP_Data_Memo_Searchengines.pdf.

40. Nielsen NetRatings makes some statistics publicly available on its website, including lists of the top ten websites on a monthly and weekly basis for both home use and work use. For January 2007, Google and Yahoo! were in second and third position for both work and home use. *See* Nielsen/NetRatings, Global Index Chart, http://www.nielsen-netratings.com/resources.jsp?section=pr_netv&nav=1 (follow "United States" hyperlink; then follow "Home Panel: Monthly Top 10 Parent Companies" and "Work Panel: Monthly Top 10 Parent Companies" hyperlinks) (last visited Mar. 3, 2007).

41. For a good history of search engine litigation, see Urs Gasser, *Regulating Search Engines: Taking Stock and Looking Ahead*, 8 YALE J.L. & TECH. 201, 208-16 (2006).

42. *See id.* at 209-10. Meta tags are information included in the code for a website that is not visible to the viewer but used to be used by search engines in identifying the content of the website. *See* Danny Sullivan, *How to Use HTML Meta Tags*, SEARCHENGINEWATCH, Dec. 5, 2002,http://searchenginewatch.com/showPage.html?page=2167931.

43. *See* Andrew Goodman, *Search Engine Showdown: Black Hats v. White Hats at SES*, SEARCHENGINEWATCH, Feb. 17, 2005, http://searchenginewatch.com/showPage.html?page=3483941.

44. For an overview of practices that are problematic, see Marziah Karch, *Top 10 Google Dont's—Things You Should Never Do for Search Engine Optimization*, ABOUT, http://google.about.com/od/searchengineoptimization/tp/badseo.htm (last visited Mar. 3, 2007). This

In one of the key early papers on the socio-political impact of search engines, Lucas Introna and Helen Nissenbaum observed that inclusion in search engine indices is critical to being found online.[45] Even though there are other means of reaching websites, such as following links or guessing at URLs, search engines are the most prominent.[46] Not only is it important for a website to be included within a search engine, but its ranking within search engine results will also determine whether it is visible to searchers. The phenomenon of "screen bias," (or the preference for results listed in the first screen of search results) is familiar from the conflict over airline computerized reservation systems in the 1980s.[47]

From the perspective of searchers, too, the value of search engines lies not only in gathering information about the information available on the Web, but also in ranking it according to its quality or relevancy to the search query. As of November, 2004, Google reported its index to contain more than eight billion pages.[48] To put this in perspective, one would have to read almost 440,000 pages per day, every day, for fifty years in order to review Google's index. An essential element of search engine utility is thus the ranking of websites in response to search queries.

In short, the ability of a speaker to reach an audience online is greatly affected by the inclusion of the speaker's website in search

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topic has produced an academic subfield known as Adversarial Information Retrieval. *See* AIRWeb, Adversarial Information Retrieval on the Web, http://airweb.cse.lehigh.edu/ (describing the annual workshops put on by an organization called Adversarial Information Retrieval on the Web) (last visited Mar. 3, 2007).

45. Introna & Nissenbaum, *supra* note 7, at 54; *see also* Eric Goldman, *Search Engine Bias and the Demise of Search Engine Utopianism*, 8 YALE J.L. & TECH. 188, 189 (2006) (noting that search engines wield "significant power to shape searcher behavior and perceptions . . . [and] the choices that search engines make about how to collect and present data can have significant social implications").

46. Introna & Nissenbaum, *supra* note 7, at 54.

47. *See, e.g.*, Pam Fair, *Anti-Competitive Aspects of Airline Ownership of Computerized Reservation Systems*, 17 TRANSP. L.J. 321, 333 (1989); *see also* Introna & Nissenbaum, *supra* note 7, at 56 ("[A]necdotal evidence suggests that seekers are likely to look down a list, then cease looking when they find a good match for their search. A study of travel agents who use computerized airline reservations systems showed an overwhelming likelihood that they would select a flight from the first screen of search results. Such findings suggest similar behavior among Web users at large.").

48. Google Corporate Information, Google Milestones, www.google.com/corporate/timeline.html (last visited Mar. 3, 2007); Danny Sullivan, *New Estimate Puts Web Size at 11.5 Billion Pages & Compares Search Engine Coverage*, SEARCHENGINEWATCH, May 17, 2005, http://blog.searchenginewatch.com/blog/050517-075657. Prior to 2004, Yahoo! did not report its index size, but in August 2005, it claimed over 19 billion Web documents. Danny Sullivan, *The End of the Size Wars? Part I*, CLICKZ NETWORK, Oct. 5, 2005, www.clickz.com/showPage.html?page=3553266.

engine indices, as well as the website's ranking within search results. The policies of search engines with respect to inclusion and ranking thus become important to the free speech of both speakers and listeners online.

Certain forms of bias seem inherent in the structure of the Web. To the extent that search engines build their indices using automated software agents ("bots") which follow hyperlinks between websites,[49] and search engines use the number of links to a site as a proxy for its quality,[50] the link structure of the Web may favour popular and highly-linked sites. This popularity-based ranking system produces a bias toward majoritarian interests and sites with the economic resources to purchase advertising.[51]

Nevertheless, debate has arisen over additional forms of bias introduced by search engines, including (1) the removal of websites from the search engine index, (2) the reduction of website ranking, (3) the refusal to accept keyword-triggered advertisements from certain websites, and (4) the practice of providing preferences in indexing or ranking for paying websites. Each of these will be briefly outlined below.

B. Removal of Websites from the Search Engine Index

On occasion, search engines remove websites from their indices. Google has indicated that it does so only when legally compelled or when a webmaster has attempted to manipulate its search results.[52] Google has removed a website containing allegedly copyright-infringing material in response to a takedown demand from the Church of Scientology under § 512(c)(3) of the Digital Millennium Copyright Act.[53] A search in Google for "xenu.net" (the site involved in the

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49. Google writes: "Links help our crawlers find your site and can give your site greater visibility in our search results." Google Webmaster Help Center, How Can I Create a Google-friendly Site?, www.google.com/support/webmasters/bin/answer.py?answer=40349&topic=8522 (last visited Mar. 3, 2007).

50. Google informs webmasters that "Google counts the number of votes a page receives as part of its PageRank assessment, interpreting a link from page A to page B as a vote by page A for page B. Votes cast by pages that are themselves 'important' weigh more heavily and help to make other pages 'important.'" *Id.*

51. Goldman, *supra* note 45.

52. In response to a petition to remove an anti-Semitic website that had reached the first position in the search results for a search using the keyword "Jew," Google explained that the only sites it omits are those that it is "legally compelled to remove or those maliciously attempting to manipulate [its] results." Google, An Explanation of Our Search Results, www.google.com/explanation.html (last visited Mar. 3, 2007).

53. Matt Loney, *Cult Forces Google to Remove Critical Links*, ZDNET UK, Mar. 21, 2002,

dispute) produced a result page on which Google has posted a notice which states, "[i]n response to a complaint we received under the US Digital Millennium Copyright Act, we have removed 1 result(s) from this page. If you wish, you may read the DMCA complaint that caused the removal(s) at ChillingEffects.org."[54]

Jonathan Zittrain and Benjamin Edelman have also described the removal of white supremacist material from the German and French versions of Google.[55] Google includes notifications in German and French, respectively, of the removal of results and directs searchers to ChillingEffects.org.[56] Alta Vista and Google have also removed links to a website containing information on how to sabotage railway systems after the Deutsche Bahn threatened to sue them if they did not do so.[57]

C. Reduction of Website Ranking

Google assigns a ranking to websites, known as PageRank. The ranking is one of the factors that is used in determining a website's placement within the search engine results. Consequently, PageRank is an important attribute, and sudden drops in rating have produced great unhappiness among webmasters. Sometimes, the reason for the drop is unclear. However, on occasion the demotions appear to be a response by Google to a website's abusive attempts to manipulate the search engine results.[58] Google warns webmasters that they should not engage in "illicit practices," which will result in penalties.[59] The Webmaster Guidelines list certain specific practices, but note that Google may

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http://news.zdnet.co.uk/internet/0,1000000097,2107088,00.htm.

54. *See* David F. Gallagher, *New Economy; A Copyright Dispute With the Church of Scientology is Forcing Google to Do Some Creative Linking*, N.Y. TIMES, Apr. 22, 2002, at C4. Google directed interested users to Scientology's complaint on chillingeffects.org. *Id.*

55. Jonathan Zittrain & Benjamin Edelman, *Localized Google Search Result Exclusions: Statement of Issues and Call for Data*, BERKMAN CENTER FOR INTERNET & SOCIETY, HARVARD LAW SCHOOL, Oct. 26, 2002, http://cyber.law.harvard.edu/filtering/google/.

56. A search on www.google.fr for one of the sites tested by Zittrain and Edelman (site:stormfront.org) produces the following notice indicating that 2004 results have been removed, and directing the searcher to ChillingEffects.org: "En réponse à une demande légale adressée à Google, nous avons retiré 2004 résultat(s) de cette page. Si vous souhaitez en savoir plus sur cette demande, vous pouvez consulter le site ChillingEffects.org." http://www.google.fr/search?hl=fr&q=site%3Astormfront.org&btnG=Rechercher&meta=lr%3D.

57. Joris Evers, *AltaVista, Google Remove Controversial Links*, PC WORLD, Apr. 18, 2002, www.pcworld.com/article/id,94843-page,1/article.html.

58. *See, e.g.*, *Help, My Site Has Been Banned by Google!*, PANDIA, www.pandia.com/features/banned.html (last visited Mar. 4, 2007).

59. Google Webmaster Help Center, Webmaster Guidelines, www.google.com/support/webmasters/bin/answer.py?answer=35769 (last visited Mar. 4, 2007).

punish other misleading practices that are not listed.[60] Google provides a mechanism for webmasters to request re-inclusion of their sites.[61]

In February 2006, Google announced that it would remove the websites of BMW Germany and Ricoh Germany from its index because they had used banned methods to manipulate the search engine.[62] There have also been at least four lawsuits over ranking demotions.[63] At least one of the demotions appears to have resulted from practices contrary to Google's Webmaster Guidelines. *Search King, Inc. v. Google Technology, Inc.*[64] dealt with a dispute over Google's ranking demotion of the plaintiff's website. Search King offered a match-making service designed to assist clients to buy and sell links from highly ranked websites in the hope of increasing the ranking of the linked-to websites.[65] Google admitted that it had deliberately decreased the ranking of the Search King websites, stating that it was entitled to do so because Search King's actions undermined the integrity of its PageRank system.[66] Search King, on the other hand, argued that Google had demoted its websites because it was competing with Google, and sued for tortious interference with contractual relations.[67]

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60. *Id.*

61. Google Webmaster Help Center, How Do I Request Reinclusion of My Site?, www.google.com/support/webmasters/bin/answer.py?answer=35843 (last visited Mar. 4, 2007).

62. *See* Matt Cutts: Gadgets, Google, and SEO, Ramping Up on International Webspam, www.mattcutts.com/blog/ramping-up-on-international-webspam/ (Feb. 4, 2006, 16:44 EST).

63. *See, e.g.*, Kinderstart.com LLC v. Google, Inc., No. C 06-2057 JF (RS), 2006 WL 3246596, at *3 (N.D. Cal. July 13, 2006); Roberts v. Google, Inc., No. 1-06-CV-063047 (Cal. Super. Ct. May 12, 2006), *reported in* Eric Goldman: Technology and Marketing Law Blog, Google Avoids Another Lawsuit Over Rankings (For Now)—*Roberts v. Google*, www.blog.ericgoldman.org/archives/2006/06/google_avoids_a.htm (June 5, 2006, 11:00 EST); Datner v. Yahoo!, Inc., No. BC355217 (Cal. Super. Ct. July 11, 2006), *reported in* Eric Goldman: Technology and Marketing Law Blog, Another Day, Another Lawsuit Over Search Engine Placement—*Datner v. Yahoo*, http://blog.ericgoldman.org/archives/2006/07/another_day_ano.htm (July 14, 2006, 9:36 EST); Search King, Inc. v. Google Tech., Inc., No. CIV-02-1457-M, at *2-3 (W.D. Okla. Jan. 13, 2003) (order denying plaintiff's motion for preliminary injunction); Search King, Inc. v. Google Tech., Inc., No. CIV-02-1457-M, 2003 WL 21464568 (W.D. Okla. May 27, 2003).

64. Search King, Inc. v. Google Tech., Inc., No. CIV-02-1457-M, at *2-3 (W.D. Okla. Jan. 13, 2003) (order denying plaintiff's motion for preliminary injunction); Search King, Inc. v. Google Tech., Inc., No. CIV-02-1457-M, 2003 WL 21464568 (W.D. Okla. May 27, 2003).

65. Search King, Inc. v. Google Tech., Inc., No. CIV-02-1457-M, at *2-3 (W.D. Okla. Jan. 13, 2003) (order denying plaintiff's motion for preliminary injunction); *see also* Danny Sullivan, *Google Sued Over PageRank Decrease*, SEARCHENGINEWATCH, Nov. 4, 2002, http://searchenginewatch.com/showPage.html?page=2165111.

66. Search King, Inc. v. Google Tech., Inc., No. CIV-02-1457-M, at *2 (W.D. Okla. Jan. 13, 2003) (order denying plaintiff's motion for preliminary injunction).

67. Search King, Inc. v. Google Tech., Inc., No. CIV-02-1457-M, 2003 WL 21464568, at *2 (W.D. Okla. May 27, 2003).

D. Refusal to Accept Keyword-Triggered Advertisements

Advertising is now a major revenue stream for search engines.[68] Low-ranked websites also find the purchase of spots in the sponsored listings to be a useful means of gaining public exposure.

Google offers two advertising programs: AdSense and AdWords. AdWords is a keyword-based advertising service in which advertisements are placed next to the search results generated for a particular keyword.[69] Google is about to start offering site-based advertising services in which advertisers may pay to have their advertisements placed on certain sites within the Google content network.[70] AdSense is a program in which website publishers may sign up to carry Google-delivered advertising on their websites.[71] Website publishers are assured that they may filter out certain kinds of advertisements (including the ads of competitors, or "death/chaos/war ads") and that Google editors pre-approve ads to remove content such as "adult" material.[72]

Several disputes have arisen over search engine refusals to include advertisements. In *Langdon v. Google*, *Inc.*,[73] the plaintiff complained that Google would not let him purchase ads to advertise his websites, which criticized the North Carolina Attorney General (www.ncjusticefraud.com) and the Chinese government (www.chinaisevil.com).[74] Google refused his anti-North Carolina Attorney General ad, citing its policy against advertisements that "advocate against an individual, group or organization."[75] Google failed to issue any decision regarding the plaintiff's short anti-China

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68. According to Google's latest quarterly earnings report, about ninety-nine percent of its revenues are derived from advertising. *See* Press Release, Google Investor Relations, Financial Release: Google Announces Third Quarter 2006 Results (Oct. 19, 2006), http://investor.google.com/releases/2006Q3.html.

69. Google AdWords, https://adwords.google.com/select/Login (last visited Mar. 4, 2007).

70. Google AdWords, All About Site-Targeted Ads, www.google.com/ads/sitetargeted.html (last visited Mar. 4, 2007).

71. Google AdSense, Discover Your Site's Full Revenue Potential, www.google.com/adsense/ (last visited Mar. 4, 2007).

72. Google AdSense, Show Only Appropriate Ads, www.google.com/services/adsense_tour/page7.html (last visited Mar. 4, 2007).

73. Complaint at 1, Langdon v. Google, Inc., 474 F. Supp. 2d 622 (D. Del. 2007).

74. *See* Posting of Ryan Singel & Kevin Poulsen to Wired Blogs, http://blog.wired.com/27bstroke6/2006/06/google_sued_for.html?entry_id=1497511 (June 7, 2006, 22:27 EST); Eric Goldman: Technology and Marketing Law Blog, "Must Carry" Lawsuit Against Search Engines—*Langdon v. Google*, http://www.blog.ericgoldman.org/archives/2006/06/must_carry_laws.htm (June 8, 2006 12:46 EST). Chris Langdon explains his complaints on his website at www.chinaisevil.com/googlegagarchipelago.html.

75. *See* Posting of Ryan Singel & Kevin Poulsen to Wired Blogs, *supra* note 74.

advertisement, which linked to his website www.chinaisevil.com.[76]

Dawn Nunziato cites several more examples, including Google's suspension of ads for a political site that promoted the owner's book, *Basic Documents About the Detainees at Guantanamo and Abu Ghraib*, on the ground that Google policy does not permit advertisement of websites containing "sensitive issues."[77] She also cites Google's suspension of ads for a website that contained an article criticizing President Bush on the ground that ads advocating against an individual violate its policy.[78] Nunziato recounts the case of an attempt to advertise anti-Iraq War bumper stickers with a headline "Who Would Jesus Bomb?"[79] Initially, Google refused to run the ad, but agreed to reinstate it if the website was edited "'to show both sides of the argument' over attacking Iraq."[80] After a long and interesting exchange of emails in which the advertiser and Google's ad reviewing team discussed the matter, Google eventually agreed to run the ad.[81]

E. Preferential Treatment in Indexing and Search Results

In 2001, the consumer advocacy group Commercial Alert sent a request to the Federal Trade Commission asking that it investigate certain search engines for violations of § 5 of the Federal Trade Commission Act,[82] due to the practices of paid placement (payment for higher placement in search engine results) and paid inclusion (payment for inclusion in an index, speedier inclusion in an index, more frequent updating within the index, or the inclusion of more sub-pages in an index).[83] The practice of paid placement would clearly introduce a significant commercial bias that would likely be inconsistent to some degree with a ranking based on quality or relevancy. The effects of paid inclusion are more subtle. Paid inclusion does not guarantee a particular placement in search results, but it does help a website ensure that it is included in the index quickly and comprehensively, while non-paying

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76. *Id.* The text of the ad read "Communist China Has Murdered Millions: Boycott China." *Id.*

77. Dawn C. Nunziato, *The Death of the Public Forum in Cyberspace*, 20 BERKELEY TECH. L.J. 1115, 1124 (2005).

78. *Id.*

79. *Id.* at 1124 n.28.

80. *Id.*

81. *See* Unknown News, Google Refuses Our Ad, www.unknownnews.net/google.html (last visited Mar. 4, 2007).

82. 15 U.S.C. §§ 41-58 (2000 & Supp. III 2005).

83. Letter from Gary Ruskin, Executive Dir., Commercial Alert, to Donald Clark, Sec'y of the Comm'n, Fed. Trade Comm'n (July 16, 2001), *available at* http://www.commercialalert.org/PDFs/SearchEngines.pdf.

websites do not have this advantage.

The FTC declined to investigate, but did send a letter to the search engines encouraging them to ensure that (1) "any paid ranking search results are distinguished from non-paid results with clear and conspicuous disclosures," (2) "the use of paid inclusion is clearly and conspicuously explained and disclosed," and (3) "no affirmative statement is made that might mislead consumers as to the basis on which a search result is generated."[84] In addition, search engines were encouraged to communicate with third parties to whom they supply search results to ensure that appropriate disclosures are made on the third party sites as well.[85]

At present, Google clearly separates "sponsored links" in a column on one side of the search results page. Google does not offer paid inclusion, and it invites anyone to submit a link to a website without guaranteeing inclusion.[86] Yahoo! runs a column of "sponsor results" on one side of its search results page. In addition, the first couple of results under the heading of "search results" are identified (far to the right of the frame) as "sponsor results." Above the unpaid search results, Yahoo! also offers a "Yahoo! Shortcut" which may also include sponsored material.[87] Another band of sponsor results and Yahoo! shortcuts are included below the unpaid results. As a result of all of this advertising, a typical Yahoo! search results page for a query that would be of commercial interest contains more advertising results than unpaid results.[88] Yahoo! also suggests alternate search terms that may include the names of commercial entities.[89] Yahoo! invites anyone to submit a URL for inclusion in its index, but it also runs a paid inclusion system which offers customers guaranteed inclusion as well as the refreshment

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84. Letter from Heather Hippsley, Acting Assoc. Dir., Div. of Adver. Practices, Fed. Trade Comm'n, to Gary Ruskin, Executive Dir., Commercial Alert (June 27, 2002), *available at* http://www.ftc.gov/os/closings/staff/commericalalertletter.htm.

85. *Id.*

86. Google, Add Your URL to Google, www.google.com/addurl/?continue=/addurl (last visited Mar. 4, 2007).

87. Yahoo! provides the following explanation: "A Yahoo! Shortcut is a quick way to get to the information you want. A Yahoo! Shortcut automatically appears when it is relevant to your search and can contain links to useful content from Yahoo!, its partners, or across the web. Some of the content may come from partners who pay to be included in Yahoo! or have another financial relationship with Yahoo!." Yahoo!, Yahoo! Shortcuts, http://tools.search.yahoo.com/shortcuts/ (last visited Mar. 4, 2007).

88. For example, I ran a search for "books," which produced ten unpaid results, fourteen sponsored links, and two batches of Yahoo! Shortcuts (containing six links). Yahoo! also suggested alternate terms that included Amazon (three times) as well as other booksellers. A similar pattern existed for the search term "computers."

89. *Id.*

of their website in the index every forty-eight hours.[90] Yahoo! also charges a fee for inclusion in its Directory.[91]

A 2005 Pew survey examined user expectations in relation to search engine results.[92] The survey found that only thirty-eight percent of users were aware of the difference between paid (or "sponsored") results and unpaid results, and only one in six said they could always tell which results were sponsored and which were not.[93] This is quite troubling from the free speech perspective, as it raises questions about whether users are aware of the commercial bias introduced through search engines. To the extent that users would not have filtered their information in a similar manner, these practices introduce extraneous considerations and interests in a way that undermines the communication of information between speakers and listeners online. As discussed further below, the solution may not be to stop these practices, particularly since the search engines derive a significant portion of their revenue from this type of advertising. However, it does suggest that greater efforts may be required to clearly identify advertising and to clearly inform users of how the indices and directories are populated.

F. Recommendations

Several authors have noted the problem of bias in search engines, although they differ widely in their recommended solutions.[94] Several have called for a transparency requirement to be imposed on search engines. This transparency requirement should include (a) disclosure of the way in which the search engines work and how they rank search results,[95] (b) clear identification of paid links,[96] and (c) notification when

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90. Yahoo!, Yahoo!search: Submit Your Site, http://search.yahoo.com/info/submit.html (last visited Mar. 8, 2007).

91. Yahoo!, Yahoo! Directory Listings, https://ecom.yahoo.com/dir/submit/intro/ (last visited Mar. 8, 2007).

92. Press Release, Pew Internet & American Life Project, Internet Users Are Very Happy with Their Experiences Searching the Internet, but Many Are Naïve About How They Search and the Results They Find (Jan. 23, 2005), www.pewinternet.org/PPF/r/96/press_release.asp.

93. *Id.*

94. A selection of recent papers includes Gasser, *supra* note 41 (advocating a complete assessment of alternative regulatory approaches prior to deciding legislative intervention is the best solution); Goldman, *supra* note 45 (arguing that search engine bias is necessary and desirable, and that regulatory intervention is unwarranted); Frank Pasquale, *Rankings, Reductionism, and Responsibility*, 54 CLEV. ST. L. REV. 115, 135-39 (2006) (proposing legal remedies for harms claimed to flow from unwanted inclusion or exclusion in search engine results); Andrew Sinclair, Note, *Regulation of Paid Listings in Internet Search Engines: A Proposal for FTC Action*, 10 B.U. J. SCI. & TECH. L. 353, 364-66 (2004) (advocating, among other things, FTC action against search engines that use paid listings without disclosing this fact to consumers).

95. Introna & Nissenbaum, *supra* note 7, at 61; Gasser, *supra* note 41, at 232-34.

information is blocked or removed pursuant to law.[97] In addition, Introna and Nissenbaum call for the development of a publicly-supported search engine in order to increase transparency and access.[98] Another suggestion is that the search engines establish ombudsmen to address the concerns of webmasters who feel that they have been unfairly treated.[99] Frank Pasquale also suggests that webmasters should have some opportunity to know the reasons for rank demotions.[100]

Eric Goldman, on the other hand, is less concerned. He suggests that market forces will satisfactorily limit the scope of bias.[101] In his view, search engines that deliver heavily commercial or irrelevant information will be dropped by users, who will switch to competing search engines.[102] This is likely true to some extent, but there are reasons to remain watchful. First, it is not clear that users will be able to monitor effectively for other kinds of bias, such as deletions from the index or manipulations of ranking. Commercial bias is more visible than the removal of websites or the manipulation of search results that causes disfavored websites to appear far down the results list. Second, the search engine space is quite concentrated. There are four major players who produce their own independent indices, and together they accounted for about ninety-seven percent of the United States search market share in the spring of 2006, with Google and Yahoo! representing seventy-eight percent of the market.[103] It may be that the resources required to launch an independent, similarly comprehensive search index have become a significant barrier to entry.[104]

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96. Gasser, *supra* note 41, at 233. *But see* Sinclair, *supra* note 94, at 372.

97. Gasser, *supra* note 41, at 233-34.

98. *See* Introna & Nissenbaum, *supra* note 7, at 61.

99. Posting of Danny Sullivan to SEARCHENGINEWATCH, http://blog.searchenginewatch.com/blog/060706-075235 (July 6, 2006).

100. Pasquale, *supra* note 94, at 137-38.

101. Goldman, *supra* note 45, at 196.

102. *Id.* at 196-97.

103. *Economist* reports the following market shares for April 2006: Google (and AOL, which is powered by Google), fifty percent; Yahoo!, twenty-eight percent; MSN, thirteen percent; and Ask.com, six percent. *Internet Search Engines: The un-Google*, ECONOMIST, June 17, 2006, at 65; *see also* Bruce Clay, Inc., Search Engine Relationship Chart, www.bruceclay.com/searchenginechart.pdf (last visited Mar. 9, 2007) (illustrating that of the major search engines, only Google, Yahoo!, Ask.com, and MSN produce their own spider-based indices).

104. *See Internet Search Engines*, *supra* note 103, at 65 ("[B]ecause barriers to entry in the search business are high—the engineering talent is limited and data centres that can simultaneously support millions of searches are expensive—most analysts think that the four big search engines will stay ahead of the tiny ones."); *see also* Susan Kuchinskas, *Peeking Into Google*, INTERNETNEWS.COM, Mar. 2, 2005, http://www.internetnews.com/xSP/article.php/3487041 (explaining that Google deals with more than ten billion web pages and ten terabytes of information in a way that makes it both reliable and rapid).

Goldman also predicts that emerging technologies will resolve any concerns regarding bias.[105] In particular, he sees hope in the possibility of personalized search engines. Personalized systems would alleviate the consequences of the current system, which, in his view, creates highly ranked winners and invisible losers and satisfies majoritarian but not minority interests.[106] There are movements toward customized search engines among the leading search engines. Both Yahoo! and Google now offer customized services that allow users to specify which sites are to be included and excluded from a personalized index, or which will receive highest priority.[107]

From the free speech perspective adopted in this Article, the appropriate solution is one that respects a speaker's right to reach an audience, and the listener's right to choose among speakers according to the listener's own criteria, free of extraneous discriminatory influences. The following requirements would help to address the problems discussed above in a way that protects to the extent possible these free speech interests.

First, search engines should not remove websites from their indices unless required by law to do so. The removal of any website and the reason for the removal should be made known within a publicly-accessible list. Although Google's present practice of notifying searchers who search specifically for a website that pages have been removed from the search results is an excellent start, users who are searching more generally for information within which the website would have appeared might never know of its removal. The creation of a centralized list of deletions would strike a compromise between addressing the illegality of the website by withdrawing the assistance of the search engine, while not misleading users as to the comprehensiveness and neutrality of the search engine.

Second, search engines should make clear the nature of their indexing and search result ranking criteria. They cannot make the exact details known, as this would invite too much "gaming" of the system by unscrupulous webmasters, but search engines should adhere strictly to their publicized indexing and search result ranking practices.

Third, search engines should not manipulate individual search results except to address instances of suspected abuse of the system. Where this is found to have occurred, notification of the nature of the

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105. Goldman, *supra* note 45, at 198-99.

106. *Id.* at 198.

107. Erica Ogg, *Google Releases Customizable Search*, CNETNEWS.COM, Oct. 23, 2006, http://news.com.com/Google+releases+customizable+search/2100-1038_3-6128807.html.

offense and of the steps required for reinstatement should be sent automatically to the offending webmaster.

Fourth, significant efforts should be made to specify which search results are paid advertisements and which are not. Users should not have to dig through "about us" pages to find out how commercial bias is introduced into the system. While Google does a good job of making its paid results clear, Yahoo!'s approach is far inferior. Most users would not know that Yahoo! offers preferential inclusion into its index for a fee. In addition, they might not know that Yahoo!'s directory listings are paid for, particularly since a search of directory listings provides a results page with a column of "sponsor results" on one side (the misleading implication being that the directory listings are not also paid listings).

G. Network Operators and the "Net Neutrality" Debate

The "network neutrality" debate has been simmering for some time, but it achieved sudden new prominence in early 2006 when major network operators began to float the idea of charging content providers an extra fee for preferential handling of their traffic.[108] The concept of "network neutrality" includes a broader set of ways in which a network operator may discriminate against content providers and applications traveling over its network.[109] One key concern with this type of discrimination is the potential for anticompetitive behaviour by network operators (e.g., preferential access only for the operator's own content or that of its affiliates) as well as the erosion of innovation in network applications and content production if the network operators are permitted to choose what to carry.[110]

The "network neutrality" debate also has clear implications for free speech. Some network operators are pushing for a model which may roll back some of the key benefits of the Internet for freedom of speech,

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108. Marguerite Reardon, *AT&T Chief, FCC Chair Clarify on Net Neutrality*, CNETNEWS.COM, Mar. 21, 2006, http://news.com.com/AT38T+chief%2C+FCC+chair+clarify+on+Net+neutrality/2100-1034_3-6052239.html?tag=nl; Anne Broache, *Push for Net Neutrality Mandate Grows*, CNETNEWS.COM, Mar. 17, 2006, http://news.com.com/Push+for+Net+neutrality+mandate+grows/2100-1028_3-6051062.html.

109. *Net Neutrality: Hearing Before the S. Comm. on Commerce, Sci., and Transp.*, 109th Cong. 28-30 (2006) (statement of Earl W. Comstock, Pres. & CEO, Comptel) [hereinafter *Hearing on Net Neutrality*].

110. *See* Paul Ganley & Ben Allgrove, *Net Neutrality: A User's Guide*, 22 COMPUTER L. & SEC. REP. 454, 457 (2006); *Hearing on Net Neutrality*, *supra* note 109, at 53-55, 58 (2006) (statement of Lawrence Lessig, C. Wendell and Edith M. Carlsmith Prof. of Law, Stanford Law School).

namely the rough egalitarianism in access to an effective means of mass speech for a huge number of speakers. It is true that, even apart from the practices at the heart of the network neutrality debate, the Internet does not provide a truly level playing field for all speakers or for all types of speech. Well-heeled speakers can design more attractive content, purchase search engine optimization advice or search engine preferences to make their websites more visible, buy advertising for their sites, and so forth. In addition, they can buy more bandwidth to ensure that that their speech is easily accessible to listeners, and they can contract with content hosting services to increase the speed of access to their speech by making it available at several points throughout the Internet.[111] Therefore, some speakers are better able to reach an audience online even if basic access is within reach of many. In addition to the Internet's imperfect egalitarianism with respect to access, the technology inherently discriminates against certain types of applications. The network's current mode of handling traffic is one of treating all data packets equally according to "best efforts." Under conditions of congestion, packets may be delayed or dropped.[112] Certain types of applications, such as streaming video, are less tolerant of delay or dropped packets, and so the present system disfavors them when the network is congested.[113]

Nevertheless, it is quite clear that the Internet does provide a platform for a remarkable increase in the number of speakers, and a much greater degree of equality of access than we have had before with respect to mass communication technologies. As a result, to the extent that network operators desire to adopt business strategies that will erode these gains, it is important to consider how this will affect freedom of speech.

The most obvious free speech problem in terms of discrimination by network operators arises where they block access to particular speakers. Unfortunately, examples exist of network operators singling out speakers for censorship. In 2005, the Canadian ISP Telus blocked access to a website supporting the company's labour union during a

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111. Ganley & Allgrove, *supra* note 110, at 457; *see also* Postings of Christopher S. Yoo & Timothy Wu to Legal Affairs Debate Club, http://www.legalaffairs.org/webexclusive/debateclub_net-neutrality0506.msp (May 1-4, 2006) (debating whether net neutrality will be beneficial or detrimental to innovation and democracy).

112. *See* Freedom to Tinker, Nuts and Bolts of Network Discrimination, www.freedom-to-tinker.com/?p=983 (Mar. 2, 2006, 17:30 EST); Freedom to Tinker, Nuts and Bolts of Network Discrimination: Part 2, www.freedom-to-tinker.com/?p=986 (Mar. 7, 2006, 10:54 EST).

113. *See* Tim Wu, *Network Neutrality*, *Broadband Discrimination*, 2 J. TELECOMM. & HIGH TECH. L. 141, 148 (2003).

labour dispute.[114] In the United States, AOL has been accused of blocking access to communications criticizing its pay-to-email scheme, although AOL has maintained that the blocking was an inadvertent malfunction.[115] Clearly, the ability and demonstrated willingness of network operators to block speakers offers a serious challenge to free speech. Network operators have also shown themselves willing to block access to competing applications. On occasion, telecommunications service providers have blocked access to voice over Internet protocol ("VOIP") services over their broadband networks, presumably in order to protect their own voice services from competition.[116] In 2005, the Federal Communications Commission investigated Madison River Communications in North Carolina after complaints were made that it had blocked its broadband Internet subscribers' access to VOIP service.[117] Access was restored after the FCC intervened. The threat in this case of the blockage of an application like VOIP is to competition and innovation, rather than necessarily to freedom of speech.

Apart from concerns over blocking, freedom of speech may also be affected by "access-tiering." Access-tiering refers to a practice of creating different levels of service quality by discriminating amongst data packets so that certain packets will receive preferential delivery over others.[118] Preferential treatment could be given to specific applications, so that particular kinds of traffic that are sensitive to delay and dropped packets would be favored.[119] It could also be done, as various network operators have now publicly stated, by offering preferential treatment to the traffic of paying content providers.[120] Presumably, such a system would work best if it were adopted by network operators generally. If a transmission must travel across several

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114. *See Telus Cuts Subscriber Access to Pro-union Website*, CBC NEWS, July 24, 2005, www.cbc.ca/canada/story/2005/07/24/telus-sites050724.html.

115. *See* Stefanie Olsen, *AOL Charged With Blocking Opponents' E-mail*, CNETNEWS.COM, Apr. 14, 2006, http://news.com.com/AOL+charged+with+blocking+opponents+e-mail/21001030_3-6061089.html.

116. *See* Ben Charny, *Mexico Telephone Operator Under VoIP Fire*, CNETNEWS.COM, Apr. 25, 2005, http://news.com.com/Mexico+telephone+operator+under+VoIP+fire/2100-7352_3-5681542.html.

117. *See* Declan McCullagh, *Telco Agrees to Stop Blocking VoIP Calls*, CNETNEWS.COM, Mar. 3, 2005, http://news.com.com/Telco+agrees+to+stop+blocking+VoIP+calls/2100-7352_3-5598633.html; *In re* Madison River Commc'ns, LLC, DA 05-543 (FCC Consent Decree Mar. 3, 2005), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-05-543A2.pdf.

118. *See* Ganley & Allgrove, *supra* note 110, at 454-55.

119. *See id.* at 457.

120. *See Hearing on Net Neutrality*, *supra* note 109, at 28-29 (statement of Earl W. Comstock, Pres. & CEO, Comptel); Ganley & Allgrove, *supra* note 110, at 457; Christopher Stern, *The Coming Tug of War Over the Internet*, WASH. POST, Jan. 22, 2006, at B1.

networks, the preferential treatment will be most effective if it is applied by all of the network operators that carry the transmission.[121]

For obvious reasons, network operators would be pleased to be able to extract payment from content providers, in addition to relying on fees from their subscribers. Some network operators claim that they are justified in seeking fees for tiered access on the ground that major content providers, such as Google, Yahoo!, or Vonage, are using their lines "for free."[122] However, both content providers and subscribers pay for network access, and can hardly be said to be getting carriage "free."[123] The difficulty from the perspective of a given network operator may be that it does not directly receive the funds from the major content providers. The major content providers may buy their access from another operator, and their traffic may travel across a variety of carriers' networks through transit or peering arrangements before it arrives on the complaining operator's network for delivery to its subscribers.[124] This does not mean that the Googles and Yahoo!s are using the pipes for free, but that the current system of transit and peering arrangements between network operators is inadequate to permit efficient revenue-sharing between network operators.[125]

Network operators also justify their desire to offer tiered access by claiming that they need more funds in order to invest in greater network capacity.[126] This may or may not be true, but it does not necessarily follow that tiered access is the best way to do it. Network operators can increase subscription fees, as well as the fees that they charge directly to content providers who contract with them for bandwidth.

Another argument in favour of tiered access relies upon the need to provide preferential treatment for applications that are less tolerant of the delay and packet loss that may occur when networks are congested. Not everyone feels that the solution to congestion is to provide preferential delivery for sensitive applications. Gary R. Bachula of Internet2 suggests that it is cheaper to build more bandwidth than to create a scheme for variable quality of service.[127]

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121. *See Hearing on Net Neutrality*, *supra* note 109, at 29 (statement of Earl W. Comstock, Pres. & CEO, Comptel).

122. Ganley & Allgrove, *supra* note 110, at 459.

123. *Id.*

124. Rob Frieden, *Network Neutrality or Bias?—Handicapping the Odds for a Tiered and Branded Internet*, 14-20 (Social Science Research Network Working Paper Series, Sept. 2006) *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=893649.

125. *Id.* at 20-22 (discussing peering and transiting relationships, noting that they are difficult to study because they normally are covered by comprehensive nondisclosure agreements).

126. Ganley & Allgrove, *supra* note 110, at 459.

127. *See Hearing on Net Neutrality*, *supra* note 109, at 66 (statement of Gary R. Bachula, Vice

Access-tiering would have harmful effects on freedom of speech. It provides a greater preference than already exists for wealthy speakers, as the preferential carriage granted to their speech may make it increasingly easy to access in comparison with others. To the extent that network operators dedicate much of their capacity for preferred access (for their own speech, their affiliates' speech, or the speech of paying content providers), the speech of others will have to share a smaller portion of bandwidth. One assumes that, unless network capacity is increased, this would mean that during times of congestion, users will find it more difficult than it is at present to access the speech of these other speakers.[128]

> If a network operator starts to give preference to packets from one source (that perhaps pays the operator for preference), what happens to all of the other, ordinary packets? We know that when an ambulance or fire truck comes down a congested highway, everybody else has to pull over and stop. For emergencies, and for public safety, that is accepted, but what if UPS trucks had the same preference? Giving a preference to the packets of some potentially degrades the transport for everyone else.[129]

The degradation of the speech of those who do not buy preferential treatment, paired with the improved accessibility of the information provided by paying speakers, will undermine the democratizing effect of the Internet. Among the benefits of the Internet is that it enables those who were formerly passive audience members to participate as speakers, which greatly increases speech diversity. Access-tiering appears to undermine a speaker's ability to reach an audience free of unnecessary extraneous discrimination, as well as a listener's freedom to choose among speakers according to his or her own criteria. Instead, network operators will choose who will be able to reach an audience more easily, and who the listeners will be able to hear more easily.

H. Recommendations

Network operators ought not to be permitted to block access to websites unless the filtering is known to subscribers and in accordance with their real interests and wishes. In other words, an ISP which offered

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Pres., External Affairs, Internet2).

128. *See* Ganley & Allgrove, *supra* note 110, at 457 (noting that Verizon intends to reserve eighty percent of its network in this way).

129. *See Hearing on Net Neutrality*, *supra* note 109, at 65 (statement of Gary R. Bachula, Vice Pres., External Affairs, Internet2).

its subscribers spam filtering or firewalls would be assisting listeners in giving effect to their own preferences with respect to content. An ISP that filtered out websites with which it disagreed or blocked access to competing information providers would be undermining the freedom of speech of speakers and listeners.

With respect to the access-tiering proposal of certain network operators, some have suggested that it would be far less harmful if network operators raised the revenues that they require for investment in the network by increasing access fees to their subscribers.[130] Different rates can be charged to ensure that subscribers who make heavy use of bandwidth contribute more to the construction of additional network capacity, while access fees remain lower for light users.[131] They also suggest that network operators be permitted to discriminate among applications (e.g., data, streaming video, voice, etc.) but not among content providers.[132]

These suggestions would be better than access-tiering from the perspective of free speech. It would be best for the network operators to increase their revenues by charging higher access fees to all and by ensuring that the arrangements between network operators fairly share

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130. *See Hearing on Net Neutrality*, *supra* note 109, at 12 (statement of Vinton G. Cerf, Vice Pres. & Chief Internet Evangelist, Google, Inc.).

> The broadband carriers already are fully compensated by their residential customers for their use of the network. These companies can charge their own customers whatever they want, in order to make back their investments. Trying to extract additional fees from web-based companies—who are not in any way "customers" of the provider—would constitute a form of "double recovery." Google takes no issue with the broadband carriers' ability to set prices for Internet access that compensate for the costs and risks associated with their network investments.

Id.

131. *See* Adam L. Penenberg, *Internet Freeloaders: Should Google Have to Pay for the Bandwidth it Consumes?*, SLATE, Jan. 17, 2006, www.slate.com/id/2134397/.

132. *See Hearing on Net Neutrality*, *supra* note 109, at 12 (statement of Vinton G. Cerf, Vice Pres. & Chief Internet Evangelist, Google, Inc.).

> Some applications, such as voice over IP, take up very little bandwidth. Other activities, such as multi-player real-time gaming or streaming video, may require more capacity. However, such applications could be subject to additional customer charges, based on the access speeds required (as opposed to the source, destination, or content of the traffic)—but without discriminating based on who is providing the service.

Id.; *see also Hearing on Net Neutrality*, *supra* note 109, at 55 (statement of Lawrence Lessig, C. Wendell and Edith M. Carlsmith Prof. of Law, Stanford Law School).

> There's nothing wrong with network owners saying "we'll guarantee fast video service on your broadband account." There is something wrong with network owners saying "we'll guarantee fast video service from NBC on your broadband account." And there is something especially wrong with network owners telling content or service providers that they can't access a meaningful broadband network unless they pay an access-tax.

Id.; *see also* Ganley & Allgrove, *supra* note 110, at 463.

the high bandwidth fees paid by large content providers. To the extent that this prices some retail subscribers out of the market, the government might respond through targeted subsidization of poorer subscribers and through improved public access points such as public libraries.

In addition, if network congestion is impeding the delivery of certain types of applications, and capacity cannot be increased as quickly as needed, then it may be necessary to introduce discrimination among types of applications. However, the fees for the improved quality of service for specific applications should be charged to listeners, and not to speakers. This would avoid biasing speech using the new applications in favour of wealthy speakers. Listeners would thus buy access to a certain type of application and would select among all speakers using that application rather than being restricted to those chosen by network operators.

IV. THE FREE SPEECH INTERESTS OF SELECTION INTERMEDIARIES AS AN IMPEDIMENT TO REGULATION

This Article has suggested that we should view interference with a speaker's ability to reach an audience as undermining the right of free speech. It has further suggested that a speaker cannot expect more than that listeners apply their own criteria for discriminating amongst speakers, and so any selection intermediary that stays close to those criteria would not be interfering with a speaker's right to reach an audience.

The selection intermediaries discussed above, namely search engines and network operators, have adopted or are contemplating practices that introduce various forms of bias that listeners might not have adopted. First, the removal of websites from search engine indices or the blocking of websites by network operators may have this effect, depending upon the reason for the removal. Second, measures that discriminate in favor of certain websites in order to promote the commercial or other interests of the network operator may also have this effect. A rule of transparency with respect to the discriminatory measures may be considered sufficient in some cases to remove the risk to free speech values where a listener can change selection intermediaries in order to find one whose criteria for discrimination are close to the listener's own. However, where there is no choice and the use of a selection intermediary is essential, a rule of transparency will not be sufficient. For example, the discriminatory impact on speech that may be caused by access-tiering would not be solved by merely informing everyone of the practice if subscribers did not have

meaningful alternative sources of Internet access.

If it is true that the impugned practices described in Part III can be considered to undermine the free speech rights of speakers and listeners on the Internet, this does not necessarily give rise to a First Amendment claim against the selection intermediaries. On the contrary, Supreme Court jurisprudence dealing with whether there is a First Amendment right of expressive access to private property suggests that this type of claim is unlikely to succeed.[133] Indeed, several scholars have noted the danger that First Amendment guarantees may be mostly unavailable in the Internet context since private actors are largely in control of speech online.[134]

Instead, if we wish to respond to the threats to free speech that are posed by selection intermediaries, state involvement through regulation may be required. However, regulations aimed at controlling the bias introduced by selection intermediaries such as search engines and network operators are vulnerable to the claim that they violate the First Amendment rights of the intermediaries themselves. The measures recommended above are of two main types. The first type includes prohibitions on blocking access to websites in a manner that listeners do not know about or would not have chosen, such as the removal of websites from search engine indices (or the refusal to index) or the blocking of a website by a network operator. The second type are regulations aimed at preventing selection intermediaries from introducing extraneous bias into the relationship between speaker and listener, either by manipulating search engine results to introduce commercial or other bias (but excluding temporary manipulation to respond to the abuse of the system by webmasters), or by introducing commercial or other bias through the preferential treatment of certain speakers by network operators.

The difficulty with these kinds of rules is that they may be vulnerable to the argument that they constitute violations of the First Amendment rights of the selection intermediaries. This argument might take the form of a claim that the regulation is an impermissible interference with editorial freedom, or that a regulation requiring a

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133. *See* Lloyd Corp. v. Tanner, 407 U.S. 551, 569-70 (1972); Nunziato, *supra* note 77, at 1135-36 (tracing the history of the unsuccessful attempts to apply in the cyberspace context the reasoning from *Marsh v. Alabama*, 326 U.S. 501 (1946) and *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc*., 391 U.S. 308 (1968) (both holding that the First Amendment protected expressive access to privately owned property under certain circumstances)).

134. *See, e.g.*, Nunziato, *supra* note 77, at 1143; Neil Weinstock Netanel, *Cyberspace Self-Governance: A Skeptical View from Liberal Democratic Theory*, 88 CAL. L. REV. 395, 459 (2000); Sullivan, *supra* note 1, at 1667.

selection intermediary to select a certain speaker constitutes compelled speech. Indeed, these arguments have already been raised in the context of search engines. The dispute in *Search King, Inc. v. Google Technology, Inc.*[135] dealt with Google's reduction of the "PageRank" of the plaintiff's website. Google argued, *inter alia*, that its website rankings were speech protected by the First Amendment.[136] The Court found that the rankings were opinions regarding the significance of websites in relation to search queries, and that they were entitled to First Amendment protection.[137] Google has raised similar arguments in the ongoing ranking dispute in *Kinderstart.com LLC v. Google, Inc.*[138]

It seems likely that the courts would treat a selection intermediary's choices as protected by the First Amendment. The Supreme Court has protected the editorial function of newspapers against government-mandated inclusion of speech.[139] It has also recognized a cable system operator's selection of which stations to carry[140] and a parade organizer's selection of contingents to be included in a parade[141] as speech protected by the First Amendment. However, this freedom is not absolute. In *Turner Broadcasting System, Inc. v. FCC*, the Supreme Court treated a rule requiring a cable system operator to set aside a certain proportion of its carrying capacity for broadcast television stations as constitutionally acceptable because the rule did not raise the concerns that are typical in cases of "compelled speech."[142] The must-carry rule was not an attempt to counterbalance the operator's own speech, and it was content neutral. As a result, it would not interfere with the cable operator's editorial discretion by encouraging it to change its choices of programming in order to avoid triggering the must-carry rule, nor would it cause the "cable operators to alter their own messages to respond to the broadcast programming they are required to carry."[143] *Turner* also indicates that courts will monitor for the potential of the

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135. Search King, Inc. v. Google Tech., Inc., No. CIV-02-1457-M, 2003 WL 21464568 (W.D. Okla. May 27, 2003) (order granting Google's motion to dismiss).

136. *Id.* at 3.

137. *Id.* at 7. In addition, in *Playboy Enters., Inc. v. Netscape Commc'ns Corp.*, 55 F. Supp. 2d 1070, 1084 (C.D. Cal. 1999), which dealt with a trademark dispute over the sale of advertising attached to the plaintiff's trademark, the court held that search engine results are speech protected by the First Amendment.

138. Kinderstart.com LLC v. Google, Inc., No. C 06-2057 JF (RS), 2006 WL 3246596 (N.D. Cal. July 13, 2006). Note that the suit was dismissed, but Kinderstart was granted leave to amend and refile, which it has done.

139. Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974).

140. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 667-68 (1994).

141. Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group, 515 U.S. 557, 570 (1995).

142. *Turner*, 512 U.S. at 667-68.

143. *Id.* at 655.

monopolistic control of an information conduit.

> The potential for abuse of this private power over a central avenue of communication cannot be overlooked. The First Amendment's command that government not impede the freedom of speech does not disable the government from taking steps to ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas.[144]

The relevance of a monopolistic opportunity to shut out speakers was affirmed in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*.[145] However, where monopolistic control does not exist, as was held by a court with respect to Internet access, access requirements are less likely to be upheld as constitutional.[146]

The recent Supreme Court decision in *Rumsfeld v. Forum for Academic & Institutional Rights*[147] addressed the question of compelled speech. The case concerned an objection by law schools to a rule making certain funding contingent on the schools' providing access for military recruiters on the same terms as other recruiters. In a point relevant to the present concern with discrimination among speakers, the Court drew a distinction between a forced message and a rule prohibiting discrimination in access among speakers, saying that the two are simply not the same.[148] Furthermore, an access requirement becomes objectionable when "the complaining speaker's own message [is] affected by the speech it [is] forced to accommodate."[149] Another relevant criterion is whether the complaining speaker would be viewed as endorsing the speech it was required to accommodate.[150] The decision in *Forum* did not address the full range of First Amendment concerns raised in previous Supreme Court cases dealing with the constitutionality of regulations providing for expressive access to private property. A review of a range of cases suggests that the following attributes raise concerns from the First Amendment perspective:

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144. *Id.* at 657 (internal citation omitted).

145. 515 U.S. at 577-78.

146. *See* Comcast Cablevision of Broward County, Inc. v. Broward County, 124 F. Supp. 2d 685, 696, 698 (S.D. Fla. 2000).

147. 126 S. Ct. 1297 (2006).

148. *Id.* at 1308:

> Compelling a law school that sends scheduling e-mails for other recruiters to send one for a military recruiter is simply not the same as forcing a student to pledge allegiance, or forcing a Jehovah's Witness to display the motto "Live Free or Die," and it trivializes the freedom protecting in [our prior cases] to suggest that it is.

Id.

149. *Id.* at 1309.

150. *Id.* at 1310.

(a) the speech that must be carried uses communicative space such that the private property owner's own ability to speak must be curtailed;[151]
(b) the access requirement enables the government to discriminate in favor of certain messages by dictating who is to be granted access;[152]
(c) the access requirement forces the private property owner to associate with messages that it finds objectionable;[153]
(d) the private property owner runs the risk that listeners will think it endorses the messages where there is no practicable way to disclaim its association with the messages;[154]
(e) the private property owner might be forced to speak in order to respond to the messages it is required to carry;[155] and
(f) the private property owner may alter its own speech in an effort to avoid triggering the access requirement.[156]

The case law also illustrates that the absence of these factors weighs in support of an access regulation. For example, a regulation may be acceptable where:

(a) the access requirement does not embody a government preference for particular speakers or messages;[157]
(b) the access requirement does not deprive the property owner of its own ability to speak;[158]
(c) a disclaimer would effectively permit the property owner to dissociate itself from the speech granted mandatory access;[159]
(d) the history of the medium or location means that listeners would not assume that the property owner endorsed the speech;[160]
(e) the access requirement would not cause the property owner to alter its own message in order to respond;[161] and
(f) the access requirement would not cause the private property owner

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151. *See* Pacific Gas & Elec. Co. v. Pub. Utilities Comm'n of Cal., 475 U.S. 1, 23-24 (1986) (Marshall, J., concurring) (distinguishing *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980) on this basis); Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group, 515 U.S. 557, 580 (1995) (same).

152. *See Pacific Gas*, 475 U.S. at 12-15.

153. *Id.* at 15-16.

154. *See Hurley*, 515 U.S. at 576-77.

155. *Pacific Gas*, 475 U.S. at 15 n.11.

156. Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 257 (1974).

157. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 655 (1994); *Pacific Gas*, 475 U.S. at 12-13; PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 87 (1980).

158. *See Hurley*, 515 U.S. at 579-80 (distinguishing *PruneYard* on this basis); *Pacific Gas*, 475 U.S. at 23-24 (Marshall, J., concurring) (same).

159. *PruneYard*, 447 U.S. at 87.

160. *See Turner*, 512 U.S. at 655-56; *PruneYard*, 447 U.S. at 87.

161. *Turner*, 512 U.S. at 655.

> to alter its own speech in order to avoid triggering the access requirement.[162]

In light of the foregoing, how would the recommended measures fare against a selection intermediary's constitutional challenge? Undoubtedly this would depend on how the rule is designed, and I have done no more than roughly sketch potential rules. However, it seems that a rule requiring transparency with respect to selection criteria would not offend the First Amendment, particularly where there is the possibility for listeners to be misled.

A prohibition against blocking access to websites or refusing to include them in a search engine index would prima facie be an interference with the selection intermediary's selection freedom. However, the factors outlined above suggest that such a rule would not raise the concerns typically associated with compelled speech. This is because such a rule is content neutral, it would not curtail the selection intermediary's ability to speak, the selection intermediary would not be understood to endorse the website (or it could post disclaimers) and the selection intermediary would not be forced to modify its own speech to respond or to avoid triggering the rule.

The second group of recommended rules is aimed at preventing selection intermediaries from introducing extraneous bias into the relationship between speaker and listener, either by slanting search engine results, or by introducing bias through access-tiering by network operators. Once again, such rules would seem to constrain the full exercise of "editorial freedom" by selection intermediaries by prohibiting the preferential treatment of selected speakers. However, with the possible exception of a network operator's complaint that its inability to preferentially carry its own traffic curtails its own ability to speak, such rules would not seem to raise the concerns associated with compelled speech.

V. THE RIGHT TO REACH AN AUDIENCE IN THE INTERNATIONAL CONTEXT

Yahoo!, Microsoft, and Google have recently come under intense criticism for their apparent cooperation with the Chinese government's online censorship and surveillance policies.[163] This concern has

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162. *Id.* at 656; *see also PruneYard*, 447 U.S. at 88 (distinguishing *Tornillo* on this basis).

163. *See* AMNESTY INT'L, UNDERMINING FREEDOM OF EXPRESSION IN CHINA 4 (2006), http://www.amnesty.org.uk/uploads/documents/doc_17068.pdf; HUMAN RIGHTS WATCH, RACE TO THE BOTTOM: CORPORATE COMPLICITY IN CHINESE INTERNET CENSORSHIP 4 (2006),

culminated in the proposed Global Online Freedom Act of 2006[164] ("GOFA"), which was introduced in the House of Representatives on February 16, 2006. On June 22, 2006, a substitute version of GOFA ("GOFA (June)") was introduced in the Subcommittee on Africa, Global Human Rights and International Operations.[165] The original version of GOFA required United States content hosting and search engine businesses operating in "Internet-restricting" countries not to comply with those countries' filtering requirements.[166] The substitute version has significantly loosened these requirements, but continues to instruct United States businesses to behave in a manner that may contravene foreign laws.[167] The issue of the legitimacy of the extraterritorial extension of United States law in this way seems not to have attracted much attention. Nevertheless, it is an issue which ought to be considered, and which may benefit from interpreting freedom of speech as encompassing the ability to reach an audience.

China operates a system of Internet filtering.[168] A range of content, including political dissent, as well as speech on religion and pornography, is blocked.[169] This blocking is carried out at various layers of the Internet infrastructure, including at the backbone level, by ISPs, as well as by application service providers including search engines and blog service providers.[170]

Human rights organizations have reported that search engines such as Yahoo! assist with filtering.[171] Yahoo! has responded that it filters in compliance with Chinese laws, and that there is no alternative other than to withdraw from doing business in China.[172] It has stated that it "will

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http://www.hrw.org/reports/2006/china0806/china0806web.pdf.

164. H.R. 4780, 109th Cong. (2006) (the preamble to the bill states that its purpose is "[t]o promote freedom of expression on the Internet, [and] to protect United States businesses from coercion to participate in repression by authoritarian foreign governments").

165. Markup Before the Subcomm. on Afr., Global Human Rights, and Int'l Operations of the H. Comm. on Int'l Relations of H. Res. 860, H.R. 4319, H.R. 4780 and H.R. 5382, 109th Cong., H.R. REP. No. 109-173, at 80 (2006).

166. H.R. 4780, 109th Cong. §§ 101-02, 202 (2006).

167. Markup Before the Subcomm. on Afr., Global Human Rights, and Int'l Operations of the H. Comm. on Int'l Relations of H. Res. 860, H.R. 4319, H.R. 4780 and H.R. 5382, 109th Cong., H.R. REP. No. 109-173, § 202, at 103 (2006).

168. OPENNET INITIATIVE, INTERNET FILTERING IN CHINA IN 2004-2005: A COUNTRY STUDY 3 (Apr. 14, 2005), http://www.opennetinitiative.net/studies/china/ONI_China_Country_Study.pdf.

169. *See id.* ("Chinese citizens seeking access to Web sites containing content related to Taiwanese and Tibetan independence, Falun Gong, the Dalai Lama, the Tiananmen Square incident, opposition political parties, or a variety of anti-Communist movements will frequently find themselves blocked.").

170. *Id.*

171. *See id.* at 18; HUMAN RIGHTS WATCH, *supra* note 163, at 32.

172. *Id.* at 38.

strive to achieve maximum transparency to the user" when it is required to restrict search results.[173] Microsoft also removes results from its search engine results in China,[174] and has also been criticized for censoring Chinese bloggers who use certain politically sensitive words in their blog postings in Microsoft's MSN spaces.[175] Under public pressure, Microsoft has agreed to include notifications to users indicating when and why access to content has been blocked.[176]

Google has also adjusted to Chinese censorship requirements in its Google News service, leaving out links to headlines from sites that are blocked by China.[177] Google also operates a censored version of its search engine for China.[178] Google does notify users that the "search results are not complete, in accordance with Chinese laws and regulations."[179] Google apparently also includes a link to the uncensored Google.com,[180] although service quality is often degraded due to censorship of those results at other levels, such as by ISPs.[181]

As previously noted, GOFA was originally introduced in the House of Representatives on February 16, 2006.[182] On June 22, 2006, a substitute version of GOFA was introduced in the Subcommitttee on Africa, Global Human Rights and International Operations.[183] The substitute Act contemplates restrictions on United States businesses providing services in "designate[d] Internet-restricting countries."[184] The Act would initially designate specific countries, including China, as "Internet-restricting countries,"[185] and this list would be replaced with a

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173. *Id.* at 39. In July 2006, Yahoo! began to include a Chinese disclaimer notice on its search pages stating, "According to relevant laws and regulations, some search results may not appear." *Id.* at 40.

174. *Id.* at 42.

175. *Id.* at 43.

176. *Id.* at 45, 50.

177. *Id.* at 54.

178. *Id.* at 55.

179. *Id.* at 58.

180. *Id.* at 61.

181. *See id.* at 58-59 & 59 n.121.

182. *See supra* note 164 and accompanying text.

183. *See supra* note 165 and accompanying text.

184. *See* Markup Before the Subcomm. on Afr., Global Human Rights, and Int'l Operations of the H. Comm. on Int'l Relations of H. Res. 860, H.R. 4319, H.R. 4780 and H.R. 5382, 109th Cong., H.R. REP. No. 109-173, §§ 201-06, at 101 (2006) (listing various restrictions on U.S. business and potential civil and criminal penalties for violations). Pursuant to § 3(11), this would include entities with a principal place of business in the United States or organized under a U.S. law, issuers of securities registered under § 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 78l), and foreign subsidiaries of U.S. businesses where the U.S. businesses either control the voting shares of the subsidiary or authorize the acts of the subsidiary that are prohibited by GOFA.

185. *Id.* § 105(a)(3)(B), at 99.

new one prepared by the President six months after enactment of the law.[186]

Under § 202 of the original version of GOFA, businesses that provide search engine services would be prohibited from altering the operation of the search engine with respect to "protected filter terms"[187] at the request of the governments of "designate[d] Internet-restricting countries," or in a manner that would be likely to produce different search results for users accessing the service from within the designated countries.[188] This requirement was removed from GOFA (June).

Under § 203 of GOFA (June), businesses providing search engine services would be required to report to a newly-created Office of Global Internet Freedom the terms and requirements for filtering that are specified to them by the governments of designated countries.[189] In addition, the revised law would require that any business providing content hosting services provide to the Office of Global Internet Freedom a URL link to all content that the business removes or blocks at the request of the governments of specified countries.[190]

One of the problems with GOFA is that it would penalize United States businesses for doing in a country such as China something that is either legal there or required by Chinese law. Although the June version substantially softens GOFA, removing many of the provisions that would most likely require United States businesses to contravene foreign laws, it retains the prohibition of blocking "United States-supported Web site[s]" or "United States-supported content,"[191] which includes material created by the United States Government and government-supported international broadcasting entities.[192] Contravention of this provision exposes United States businesses to both civil and criminal penalties.[193]

To the extent that GOFA requires actions to be taken (or not taken) within China, it is an extraterritorial exercise of American legislative

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186. *Id.* § 105(a)(1), at 99.

187. H.R. 4780, 109th Cong. § 202 (2006). These protected filter terms would be specified by a newly created Office of Global Internet Freedom. *See id.* §§ 104(a)-(b)(4)(A).

188. *See id.*

189. Markup Before the Subcomm. on Afr., Global Human Rights, and Int'l Operations of the H. Comm. on Int'l Relations of H. Res. 860, H.R. 4319, H.R. 4780 and H.R. 5382, 109th Cong., H.R. REP. No. 109-173, § 203, at 104 (2006).

190. *Id.* § 204, at 104. The original version required that copies of all blocked or removed information had to be sent to the Office of Global Internet Freedom. H.R. 4780, 109th Cong. § 205 (2006).

191. Markup Before the Subcomm. on Afr., Global Human Rights, and Int'l Operations of the H. Comm. on Int'l Relations of H. Res. 860, H.R. 4319, H.R. 4780 and H.R. 5382, 109th Cong., H.R. REP. No. 109-173, § 205, at 105 (2006).

192. *Id.* § 3(13), at 90.

193. *Id.* § 206, at 105.

jurisdiction.[194] The Restatement (Third) of Foreign Relations Law of the United States sets out the bases of legislative jurisdiction that are recognized under United States law.[195] The principle of territoriality is the most commonly accepted basis for authority to prescribe, and grants legislative jurisdiction to a country with respect to actions taking place on its territory.[196] The so-called "effects doctrine" is treated by the Restatement as an aspect of territorially-based jurisdiction. It suggests that a state may assert jurisdiction to prescribe law with respect to "conduct outside its territory that has or is intended to have substantial effect within its territory."[197] The United States has historically taken a broad and controversial approach to effects-based jurisdiction, recognizing jurisdiction where many other countries would not.[198]

Legislative jurisdiction may also be based on nationality. The Restatement provides that a state may assert jurisdiction to prescribe law with respect to "the activities, interests, status, or relations of its nationals outside as well as within its territory."[199] Once again, the United States has tended to take a more permissive approach to its legislative jurisdiction than other countries, and the application of United States laws to foreign subsidiaries of United States corporations has been controversial abroad.[200] The assertion of control over the acts of foreign subsidiaries (which are non-nationals) in foreign jurisdictions lacks a solid foundation in either the traditional territorial or nationality bases of jurisdiction.[201]

Even if one of the bases for extraterritorial jurisdiction applies, the Restatement cautions that a state may still not exercise jurisdiction where to do so would be unreasonable.[202] Where it is reasonable for two

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194. To the extent that filtering and blocking of content destined for China can be done outside China, the extraterritoriality problem may not arise as starkly. However, where these actions take place within China, an American legislative requirement that U.S. businesses operating in China do so would be an extraterritorial extension of U.S. legislation.

195. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 cmt. c (1987).

196. *Id.*; Paul Coggins & William A. Roberts, *Extraterritorial Jurisdiction: An Untamed Adolescent*, 17 COMMONWEALTH L. BULL. 1391, 1392-93 (1991).

197. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1)(c) (1987).

198. *Id.* § 401. "Controversy has arisen as a result of economic regulation by the United States and others, particularly through competition laws, on the basis of economic effect in their territory, when the conduct was lawful where carried out." *Id.* § 402 cmt. d.

199. *Id.* § 402(2).

200. John Ellicott, *Between a Rock and a Hard Place: How Multinational Companies Address Conflicts Between U.S. Sanctions and Foreign Blocking Measures*, 27 STETSON L. REV. 1365, 1366-67 (1998).

201. *Id.* at 1367.

202. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(1)

states to legislate, and the prescriptions are in conflict, the state with the lesser interest should defer to the state whose interest is clearly greater.[203] A further provision dealing with conflicting prescriptions provides that where the laws of the two states conflict, there is a preference for the law of the state in which an act is to take place rather than the state whose tie is based on nationality.[204] This rule is not absolute: Where the conduct abroad is particularly egregious, it may be reasonable for the state of nationality to assert jurisdiction.[205] In addition, where the conduct abroad has direct effects in both the foreign state and the state of nationality, it may be reasonable for the state of nationality to exercise jurisdiction.[206]

It would seem that GOFA is on shaky ground with respect to its claim to extraterritorial application. First of all, its prohibitions appear to apply to non-nationals (i.e., foreign subsidiaries of United States businesses) as well as nationals.[207] Second, if GOFA's requirements apply to actions taken on the territory of a foreign country, which seems likely to be the case at least some of the time, territorially-based jurisdiction is also weak.

Although it is not well-accepted abroad, the "effects doctrine" might offer some justification for GOFA, particularly when one takes a

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(1987). Section 403(2) sets out the factors according to which reasonableness is to be assessed:

> (a) [T]he link of the activity to the territory of the regulating state, *i.e.*, the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;
>
> (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;
>
> (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;
>
> (d) the existence of justified expectations that might be protected or hurt by the regulation;
>
> (e) the importance of the regulation to the international political, legal, or economic system;
>
> (f) the extent to which the regulation is consistent with the traditions of the international system;
>
> (g) the extent to which another state may have an interest in regulating the activity; and
>
> (h) the likelihood of conflict with regulation by another state.

Id. § 403(2).

203. *Id.* § 403(3).

204. *Id.* §§ 441(a)-(b), 441(2)(a)-(b).

205. *Id.* § 441 cmt. b.

206. *Id.*

207. Markup Before the Subcomm. on Afr., Global Human Rights, and Int'l Operations of the H. Comm. on Int'l Relations of H. Res. 860, H.R. 4319, H.R. 4780 and H.R. 5382, 109th Cong., H.R. REP. No. 109-173, § 3(11), at 89 (2006).

more comprehensive approach to understanding the necessary elements of the right of free speech. When one understands website blocking as a wrong not just against the Chinese listeners but also against speakers (United States speakers seeking to speak to willing Chinese listeners), a more direct United States interest emerges. The "victims" of the filtering carried out by United States companies and their foreign subsidiaries are not just foreigners, but also include United States nationals, and the effects are felt within the territory of the United States where those Americans reside.

Some acknowledgement of these effects is contained within GOFA. The bill suggests that political censorship degrades the quality of the Internet in both the United States and abroad.[208] It also suggests that the transmission of uncensored information via the Internet implicates United States export interests.[209] The bill also notes that Chinese censorship harms the United States by promoting xenophobic (particularly anti-American) nationalism in China.[210]

To this, one might add that foreign censorship has the further effect within the United States of abridging the freedom of Americans to communicate with interested Chinese listeners, undermining the freedom of speech not just of Chinese citizens but also of Americans. Although I am not convinced that GOFA is wise legislation,[211] the example is provided, nonetheless, as an illustration of how a more comprehensive enumeration of the elements of free speech may affect legal argument in a broad range of contexts.

VI. CONCLUSION

The Internet has been "First Amendment manna from heaven,"[212] in many respects, appearing to solve the communications policy problems of ensuring a diversity of voices as well as broad access to an effective means of mass speech. However, the problem identified forty years ago by Professor Jerome Barron is still alive in this new environment. Speakers may now have access, but selection intermediaries may block or bias the transmission of speech to listeners.

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208. *Id.* § 2(6), at 82.

209. *Id.* § 2(5), at 81.

210. *Id.* § 2(12), at 83.

211. Some have suggested that GOFA would have counter-productive effects, reducing online freedom if U.S. businesses decide to withdraw from China. *See id.* at 114 (statement of Rep. Earl Blumenauer, D-Or.); *see also* HUMAN RIGHTS WATCH, *supra* note 163, at 47-48 (comments of a censored Chinese blogger); Eric J. Sinrod, *Let Global Online Freedom Ring?*, CNETNEWS.COM, July 5, 2006, http://news.com.com/Let+global+online+freedom+ring/2010-1028_3-6090725.html.

212. Sullivan, *supra* note 1, at 1669.

This Article has suggested that we must understand the type of discrimination introduced by selection intermediaries as undermining the values inherent in the First Amendment. The theories of free speech all depend fundamentally on communication, within a relationship between speaker and listener. As a result, it is not enough simply to be able to speak or to receive information, the right to free speech must also protect all steps in establishing and maintaining the communicative relationship. This includes the processes of reaching an audience or finding a speaker. These processes often rely on selection intermediaries to find, assess and recommend information to listeners. Speakers and listeners alike have a right to require that the listeners' own criteria for discrimination among speakers, rather than the extraneous interests of selection intermediaries, be applied. To the extent that search engines and network operators seek to introduce other criteria of discrimination, they undermine the advances for free speech that have been achieved by the Internet. The fact that, in the past, we may have expected and tolerated the injection of the selection intermediaries' own extraneous interests into the relationship between speaker and listener does not mean that we must do so now. With the Internet, we have an example illustrating that this is not structurally necessary.

This Article has suggested some regulations designed to protect against the injection of extraneous bias by selection intermediaries. However, as Professor Barron pointed out long ago, First Amendment jurisprudence offers arguments against government attempts to give effect to free speech values by fostering expressive access to private property. Although selection intermediaries have already raised the cries of "editorial freedom" and "compelled speech," in private lawsuits regarding selection bias, the kinds of regulations recommended in this Article do not really raise the concerns typically associated with compelled speech. It may be worthwhile, then, to consider legislative intervention to protect the flow of information on the Internet.

This Article has also sought to illustrate the legal implications of recognizing a right to reach an audience by pointing to the recent United States Congressional consideration of a law that would prohibit United States businesses from blocking access to websites at the request of foreign governments. Such legislation appears to have extraterritorial reach that is not well-founded on the usual factors that justify prescriptive jurisdiction (i.e., territory or nationality). If one re-examines the question, taking into account the rights of United States speakers seeking to speak to willing foreign listeners, an additional argument might be made that foreign filtering and blocking of websites has effects in the United States, thus engaging the American "effects doctrine" in

support of the legislation.