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Media & Technology Committee
ABA Section of Antitrust Law

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From the Editors

In this issue, we have an article from one of the leading First Amendment experts in the United States, Eugene Volohk, who has in recent years generated a lot of discussion and some controversy in the antitrust bar around the issue of the inter-relationship between the First Amendment and antitrust.

To explore the area further, the Media & Technology Committee organized a brown bag with the following panelists: Professor Eugene Volohk of UCLA Law School, Berin Szoka of Techfreedom, Suzanne Munck of the FTC, Professor Frank Pasquale of Seton Hall Law School and Bradley Lui of Morrison & Foerster and with Emilio Varanini of the California Attorney General's Office as the moderator. The brownbag addressed multiple issues at the intersection of First Amendment and antitrust, including questions related to search result rankings, net neutrality, F/RAND commitments and more. On the heels of that brown bag, the Committee solicited articles for joint publication in Icarus and in the State Bar of California's Antitrust and Unfair Competition Law Section's journal, Competition.

The four interesting and ground-breaking articles accompanying Professor Volokh's article are the results, including an article by one of the leading property-law experts in the U.S., Professor Epstein.

As always, the views expressed in these articles are those of the authors alone, and do not represent the views of the Committee or its leadership.

If you have comments on any of this issue's articles or, better yet, an article idea for a future issue of *ICARUS*, please let us know. We appreciate your engagement with the Committee and look forward to seeing you at future programs.

— Sujal J. Shah
— Emilio E. Varanini

First Amendment Protection for Search Engine Search Results[1]

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I. INTRODUCTION

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

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

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

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1 This article was originally a white paper commissioned by Google, but the views within it should not necessarily be ascribed to Google.

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

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

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

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

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

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

II. ACCUSATIONS AND FACTS

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

III. THE FIRST AMENDMENT FULLY PROTECTS SEARCH ENGINE RESULTS

Two federal court decisions have held that search results, including the choices of what to include in those results, are fully protected by the First Amendment. *Search King, Inc. v. Google Technology, Inc.* concluded that Google's rankings of pages were "subjective result[s]" that constituted "constitutionally protected opinions" "entitled to full constitutional protection." No. CIV-02-1457-M, 2003 WL 21464568, at *4 (W.D. Okla. May 27, 2003) (internal citations and quotation marks omitted). Likewise, *Langdon v. Google, Inc.*, refused to order Google and Microsoft to prominently list plaintiff's site in their search results, reasoning: "The First Amendment guarantees an individual the right to free speech, 'a term necessarily comprising the decision of both what to say and what not to say.' . . . [T]he injunctive relief sought by Plaintiff contravenes Defendants' First Amendment rights." 474 F. Supp. 2d 622, 629—30 (D. Del. 2007) (citing *Riley v. National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796—97 (1988), *Miami Herald Pub'g Co. v. Tornillo*, 418 U.S. 241, 256 (1974), and other cases). Just as newspapers cannot be forced to print either editorial content or advertising, the court held, so search engines cannot be forced to include links that they wish to exclude. *Id.* at 630.

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

A. The First Amendment Fully Protects Internet Speech

To begin with, the First Amendment protects communications delivered over the Internet as much as it protects traditional print communications. *Reno v. ACLU*, 521 U.S. 844 (1997). The Supreme Court's First Amendment precedents "provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium [the Internet]." *Id.* at 870.

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

Just as the First Amendment fully protects Internet speech, it also fully protects Internet speakers' editorial judgments about selection and arrangement of content. As the Supreme Court held in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974), the freedom to speak necessarily includes the right to choose what to include in one's speech and what to exclude. And the Court later reinforced that principle: "'Since *all* speech inherently involves choices of what to say and what to leave unsaid,' *Pacific Gas & Electric Co. v. Public Utilities Comm'n of Cal.*, 475 U.S. 1, 11 (1986) (plurality opinion) (emphasis in original), one important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say,' *id.* at 16." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 573 (1995).

A speaker is thus entitled to choose to present only the speech that "in [its] eyes comports with what merits" inclusion. *Id.* at 574. And this right to choose what to include and what to exclude logically covers the right of the speaker to choose what to include on its front page, or in any particular place on that page. The government may not tell the Huffington Post or the Drudge Report how to rank the news stories or opinion articles to which they link. Likewise, it may not do so for other speakers, such as search engines.

And this is true even when the government argues that a speaker's choices are unfair to others. "A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated." *Miami Herald*, 418 U.S. at 256. The "point" of the rule that speakers may choose what to include and what to exclude "is simply the point of all speech protection, which is to shield just those choices of content that in someone's eyes are misguided, or even hurtful." *Hurley*, 515 U.S. at 574.

The Court has also made clear that this right to choose what to include and what to exclude in one's speech is not "restricted to the press, being enjoyed by business corporations generally and by ordinary people engaged in unsophisticated expression as well as by professional publishers." *Hurley*, 515 U.S. at 574; *id.* at 575—76 (applying *Miami Herald* to protect the rights of a parade organizer). "The concerns that caused [the Court] to invalidate the compelled access rule in [*Miami Herald*] apply to appellant [a utility company sending material to its customers] as well as to the institutional press." *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal.*, 475 U.S. 1, 11 (1986) (plurality opinion); *id.* at 21—26 (Marshall, J., concurring in the judgment) (not noting any disagreement with the majority on this matter). And this in turn is just a special case of the broader principle that First Amendment rights extend equally to the institutional press and to other speakers. *See, e.g.*, *Citizens United v. FEC*, 130 S. Ct. 876, 905 (2010) ("We have consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers.") (quotation marks and internal citations omitted); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 782 n.18 (1978) (rejecting the "suggestion that communication by corporate members of the institutional press is entitled to greater constitutional protection than the same communication by [non-institutional-press businesses]"); *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938) (stating that the freedom of the press "embraces pamphlets and leaflets" as well as "newspapers and periodicals," and indeed "comprehends every sort of publication which affords a vehicle of information and opinion"). Google, Microsoft's Bing, Yahoo! Search, and other search engine companies are rightly seen as media enterprises, much as the New York Times Company or CNN are media enterprises. And in any event, the First Amendment fully protects speech by all speakers, whether they are media enterprises or not.

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

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

Such automation does not reduce the First Amendment protection afforded to search engine results, for three related reasons. First, the computer algorithms that produce search engine output are written by humans. Humans are the ones who decide how the algorithm should predict the likely usefulness of a Web page to the user. These human editorial judgments are responsible for producing the speech displayed by a search engine. For instance, Google's ground-breaking use of the volume of links from other sites as a criterion for ranking search results was itself the result of Google engineers' editorial judgment that inbound links provided a sound and quantifiable measure of a site's value. Search engine results are thus the speech of the corporation, much as the speech created or selected by corporate newspaper employees is the speech of the newspaper corporation.

Second, the First Amendment value of speech also stems from the value of the speech to listeners or readers. *See, e.g.*, *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976); *Lamont v. Postmaster General,* 381 U.S. 301, 307—08 (1965) (Brennan, J., concurring). As we mentioned, the automation process only increases the value of the speech to readers beyond what purely manual decision-making can provide. Finally, the objections to Google's placement of its thematic search results arise precisely because Google employees are said to have made a conscious choice to include those results in a particular place.

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

Much of the speech distributed by search engines responds to searches on political, religious, or scientific topics. And if the government asserts the power to constrain Google's ordering of search results, that power would logically extend to search results for political queries (e.g., "the best book about Mitt Romney" or "is global warming happening") as much as for other queries. The First Amendment clearly forbids such use of government authority. *See, e.g.*, *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96 (1972) (holding that the government acting as regulator may not prefer some ideas over others).

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

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

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

And the First Amendment also protects the collection and communication of facts as much as it protects opinions, including facts that are not ideologically laden—such as names of crime victims in three-sentence crime reports, names of accused juvenile offenders, lists of bestselling books, lists of tenants who had been evicted by local landlords, information in a mushroom encyclopedia, recipes in a cookbook, and computer program source code. *See, respectively, Florida Star v. B.J.F.*, 491 U.S. 524 (1989); *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308 (1977); *Blatty v. New York Times Co.*, 728 P.2d 1177 (Cal. 1986); *U.D. Registry, Inc. v. State*, 40 Cal. Rptr. 2d 228, 230 (Ct. App. 1995); *Winter v. G.P. Putnam's Sons*, 938 F.2d 1033, 1037 (9th Cir. 1991); *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 447 (2d Cir. 2001) (dictum); *Junger v. Daley*, 209 F.3d 481, 485 (6th Cir. 2000). As the Supreme Court has held, "information is speech," *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2667 (2011),[4] and "[the] general rule, that the speaker has the right to tailor the speech [by choosing what to say and what to leave unsaid], applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid," *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 573 (1995). Any theory that search results lack full First Amendment protection because they are "mere facts" thus lacks support.

Of course, search engine results are in reality not simply facts: They are collections of facts that are organized and sorted using the judgment embodied in the engines' algorithms, and those judgments and algorithms represent the search engine companies' opinions about what should be presented to users. *See, e.g.*, *Search King, Inc. v. Google Technology, Inc.*, No. CIV-02-1457-M, 2003 WL 21464568, at *4 (W.D. Okla. May 27, 2003) (concluding that Google's rankings of pages were "constitutionally protected opinions"). But even to the extent that search engine results could be treated as primarily consisting of facts rather than opinions, they remain fully constitutionally protected.

[4] In *Sorrell* there was an argument that the speech was subject to the somewhat lower protection offered for commercial advertising, because the speech itself was used as part of an advertising transaction. This is not so for Google's speech discussed here, and it was not so in the other cases mentioned in this paragraph. But *Sorrell*'s broader point remains applicable: Whether or not speech is commercial advertising, the protection given to factual speech is the same as that given to ideas.

E. The First Amendment Fully Protects Interactive Media

Search engine output is in many ways more interactive than traditional print—users get different results depending on the particular queries they enter, as well as on the user's location, the user's search history, and other factors. But the First Amendment protects interactive media as well as noninteractive ones, and new media as well as the centuries-old ones. *See Brown v. Entertainment Merchants Ass'n*, 131 S. Ct. 2729, 2738 (2011) (holding that even violent video games are constitutionally protected, despite their interactivity). Indeed, the fact that interactive search engine outputs are more personalized than a traditional book or newspaper simply makes them especially valuable to readers.

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

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

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

Hurley v. Irish-American Gay, Lesbian & Bisexual Group, 515 U.S. 557, 570 (1995). And that was so even when the parade was highly unselective, allowing nearly all applicants to march. *Id.* at 569—70. Search engines are vastly more selective, with the first page of the output containing only a tiny fraction—though, in the search engine companies' views, the most useful fraction—of all the potentially relevant Web pages. Search engines' selectivity is much more comparable to the selectivity of newspaper op-ed pages, which choose to feature only a small fraction of potential columns. Thus, even though the search engine does not generate the content that is linked to by its results, the judgments and opinions about how to rank and present those results are fully protected by the First Amendment.

So what is true for parades and newspaper op-ed pages is at least as true for search engine output. When search engines select and arrange others' materials, and add the all-important ordering that causes some materials to be displayed first and others last, they are engaging in fully protected First Amendment expression—"[t]he presentation of an edited compilation of speech generated by other persons." *Id.* at 570.

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

Some contents of a Web page may be acted on mechanically, with no user judgment, and may therefore be more subject to regulation in some circumstances. Thus, for instance, if a Web page contains a virus, courts and legislatures may be able to impose liability on the producer of the page.[5] The same would be true if the page knowingly displays a link that, when clicked on, triggers such a virus. Analogous examples with paper publications are rare, but one can imagine some: If some of the chemicals used in a fashion magazine's "scratch and sniff" perfume insert prove poisonous to some readers, that might lead to liability.

This conclusion might also support the results in the aeronautical charts cases, in which people were allowed to recover damages against manufacturers who provided factually erroneous aeronautical charts. *See, e.g.*, *Brocklesby v. United States*, 767 F.2d 1288, 1294—95 (9th Cir. 1985). As we noted above, even purely factual information—such as that given in an encyclopedia of mushrooms—is constitutionally protected. But as a federal appellate court explained in distinguishing aeronautical charts from the mushroom encyclopedia, "[a]eronautical charts are highly technical tools" akin to compasses, which are "like a physical 'product'" rather than like speech. *Winter v. G.P. Putnam's Sons*, 938 F.2d 1033, 1036 (9th Cir. 1991).

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

But search engines' speech about goods and services, which people read and evaluate at leisure and often with skepticism, is not "a physical 'product'" akin to a compass. Rather, like the mushroom encyclopedia, the information output by a search engine "is pure . . . expression," *id.*, and restrictions on the format and distribution of such information implicate the First Amendment, *id.* at 1037.

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

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

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

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

The precedents bear this out. That the *Times* bestseller list is said to be "based on computer-processed sales figures from about 2,000 bookstores in every region of the United States" cannot justify a lawsuit objecting to the *Times*' supposedly misleading exclusion of one book, on the theory that the *Times* represented the list as an "objective, unbiased and accurate compilation of actual sales." *Blatty v. New York Times Co.*, 42 Cal. 3d 1033, 1046 n.2 (1986). And an information technology advisor's describing its "analysis [as] being 'fact-based and knowledge-centric,' 'built on objectivity,' and founded on a methodology it says ensures the 'ultimate objectivity'" cannot justify a lawsuit objecting to a particular ranking as being supposedly contrary to the publisher's assurance of objectivity and therefore misleading. *ZL Technologies, Inc. v. Gartner, Inc.*, 709 F. Supp. 2d 789, 797—98 (N.D. Cal. 2010). Even such express assertions of an objective foundation, the *ZL Technologies* court held, "are insufficient to transform the tenor of the rankings . . . from opinion to fact," *id.* at 798, and thus to diminish the speaker's right to exercise its judgment in crafting such rankings. This is so even when the rankings are allegedly biased by the speaker's economic incentives, *id.* at 801 n.4.

It is clearer still that the government may not demand that a search engine live up to some hypothetical and undefined expectations of abstract objectivity. Reasonable users understand that determining which of the billions of Internet pages are the most useful responses to any particular query necessarily involves a great deal of subjective judgment, and that search engine companies might well conclude that material produced by themselves will be especially useful and thus merits being prominently displayed. And reasonable users would not expect that Google would lock itself into a set of ranking and display criteria used at any particular time—indeed, given the rapid innovation that has characterized the Internet generally and search engines specifically, change in algorithm design should and would be expected.

If users do find Google's results to be unreliably skewed, Google will be punished by the marketplace, as frustrated users shift to other easily available search engines.[6] Users' appreciation of

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[6] Google's rivals are naturally promoting what they say is the superior quality of their search technology, both as to its selection decisions and as to the arrangement of results on the page—that is to say, their own supposedly superior editorial judgment—in order to persuade users to switch. *See, e.g.*, Tim Addington, *Bing Will Take Market Share from Google*, B & T (Australia), Nov. 15, 2011, http://www.bandt.com.au/news/latest-news/bing-will-take-market-share-from-google- (quoting "Stefan Weiz, senior director of Bing search," as saying, "I think we are going to take share away in certain areas because we are going to have a better experience and they are going to maintain share in certain areas because they have a good experience"); Dr. Jan Pedersen, Chief Scientist for Core Search at Bing, *Bing Search Quality Insights: Whole Page Relevance*, Mar. 5, 2012, http://www.bing.com/blogs/site_blogs/b/search/archive/2012/03/05/bing-search-quality-insights-whole-page-relevance.aspx (promoting the result selection and

the usefulness of Google's search results is what brought so many users to Google in the first place. If users start doubting the usefulness of Google's results, the users will switch to another search engine. But the First Amendment denies government the power to police the "fairness" of search engine speech, just like the First Amendment denies government the power to police the fairness of newspaper speech.[7]

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

Businesses that engage in speech, like other businesses, are covered by antitrust law when it comes to restrictions on their nonspeech business practices, such as the licensing of content. *Associated Press v. United States*, 326 U.S. 1 (1945). But antitrust law itself, like other laws, is limited by the First Amendment, and may not be used to control what speakers say or how they say it.

A clear example of this comes in the *Noerr/Pennington* line of cases. Antitrust law generally prohibits organizations from unreasonably restraining competition. But when organizations try to restrain trade by speaking to legislators and to the public, and urging the listeners to enact anticompetitive regulations, such speech is immunized from liability. A contrary conclusion, the Court has held, would "invade" the protection offered by the First Amendment. *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *see also United Mine Workers v. Pennington*, 381 U.S. 657 (1965). Indeed, the Supreme Court took the view that it should interpret the antitrust laws to avoid any interpretation that would even "raise important constitutional questions."

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arrangement technology of Microsoft's Bing as supposedly being better for users); UKTeam, *Bing Announces Significant Improvements to Instant Answer and News Searches*, Apr. 26, 2011, http://www.bing.com/blogs/site_blogs/b/uk/archive/2011/04/26/bing-announces-significant-improvements-to-instant-answer-and-news-searches.aspx (discussing changes in Microsoft's Bing search, and closing with "The search improvements are a result of customer feedback and research, and closely follow news that Bing has gained a greater market share in the UK. With more and more room to grow we look forward to further developments in the future and will continue to keep you all updated. We hope you enjoy the new features!"); Dave Copeland, *Is Microsoft Driving at Google with Bing Maps Improvements & Patent?*, Jan. 5, 2012, READWRITEWEB, http://readwrite.com/2012/01/05/is_microsoft_driving_at_google_with_bing_maps_impr ("Microsoft announced enhancements to its Bing Maps, including a change to the algorithm that allows the service to process directions requests twice as fast and help drivers avoid traffic. Those changes, along with a newly-awarded patent for a feature that allows Bing Maps to route pedestrians away from unsafe neighborhoods, suggest Microsoft is driving to surpass Google Maps, which has dominated the space since surpassing MapQuest in site traffic and queries in 2008.").

[7] For a particularly effective—and amusing—illustration of the analogy between calls for regulating search and what would be clearly unconstitutional calls for regulating news, *see* Danny Sullivan, SEARCH ENGINE LAND, July 15, 2010,. http://searchengineland.com/regulating-the-new-york-times-46521.

Noerr, 365 U.S. at 138; *see also FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 424 (1990) (noting the *Noerr* Court's interpretation of the Sherman Act "in the light of the First Amendment[]").

Likewise, antitrust law cannot be used to require a speaker to include certain material in its speech product. *Associated Press v. United States*, the 1945 Supreme Court case that held that the press may generally be covered by antitrust law, stressed that the lower court's decree "does not compel AP or its members to permit publication of anything which their 'reason' tells them should not be published," 326 U.S. at 20 n.18. And the Court has since made clear, in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256 (1974), that the First Amendment bars orders that a newspaper "print that which it would not otherwise print," even when those orders apply antitrust law:

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

To be sure, it is constitutionally permissible to stop a newspaper from "forcing advertisers to boycott a competing" media outlet, when the newspaper refuses advertisements from advertisers who deal with the competitor. *Lorain Journal Co. v. United States*, 342 U.S. 143, 152, 155 (1951). But the newspaper in *Lorain Journal Co.* was not excluding advertisements because of their content, in the exercise of some editorial judgment that its own editorial content was better than the proposed advertisements. Rather, it was excluding advertisements solely because the advertisers—whatever the content of their ads—were also advertising on a competing radio station. The *Lorain Journal Co.* rule thus does not authorize restrictions on a speaker's editorial judgment about what content is more valuable to its readers. *See also FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 426 (1990) (stressing that a boycott violated antitrust law not because of the defendants' speech or lobbying, but because of the "concerted refusal" to engage in commercial transactions); *National Society of Professional Engineers v. United States*, 435 U.S. 679, 697 (1978) (stressing that an injunction against a professional association's adoption of a ban on competitive bidding was constitutional because the ban was implemented in reaction to a Sherman Act violation that consisted of an "agreement among competitors to refuse to discuss prices with potential customers until after negotiations have resulted in the initial selection of an engineer," *id.* at 692).

Search engines' decisions about where to display certain search results do not involve any such illegal agreements, or attempts to force advertisers to boycott the search engines' competitors. Instead, search engines' selection and arrangement decisions reflect editorial judgments about what to say and how to say it, which are protected by the First Amendment. As the Tenth Circuit made clear in *Jefferson County Sch. Dist. No. R-1 v. Moody's Investor Servs.*, 175 F.3d 848, 860 (10th Cir. 1999), cases such as *Lorain Journal*, *Superior Court Trial Lawyers Ass'n*, and *National Society of Professional Engineers* "do not suggest that merely engaging in protected speech may constitute an antitrust violation." "[T]he First Amendment does not allow antitrust claims to be predicated solely on protected speech." *Id.* Likewise, the Ninth Circuit has concluded that even a newspaper that was plausibly alleged to have a "substantial monopoly" could not be ordered to run a movie advertisement that it wanted to exclude, because "[a]ppellant has not convinced us that the courts or any other governmental agency should dictate the contents of a newspaper." *Associates & Aldrich Co. v. Times Mirror Co.*, 440 F.2d 133, 135 (9th Cir. 1971). And the Tennessee Supreme Court similarly stated that "[n]ewspaper publishers may refuse to publish whatever advertisements they do not desire to publish and this is true even though the newspaper in question may enjoy a virtual monopoly in the area of its publication." *Newspaper Printing Corp. v. Galbreath*, 580 S.W. 2d 777, 779 (Tenn. 1979).

This principle that even generally applicable economic regulations may not be used to require a speaker to include certain material in its speech product is not confined to antitrust law; it is equally visible, for example, in the labor law cases. Labor law, like antitrust law, is aimed at protecting against misuse of economic power. And labor law, like antitrust law, may usually be lawfully applied to most business decisions by newspapers and other speakers. Yet the Court has stressed "the full freedom and liberty of" a speaker "to publish the news as it desires it published or enforce policies of its own choosing with respect to the editing and rewriting of news for publication." *Associated Press v. NLRB*, 301 U.S. 103, 133 (1937).

Likewise, federal appellate courts have reaffirmed that "the First Amendment erects a barrier against government interference with a newspaper's exercise of editorial control over its content." *McDermott v. Ampersand Pub., LLC*, 593 F.3d 950, 959 (9th Cir. 2010). The NLRB, for instance, is not allowed to force newspapers to yield editorial control to union members, keep publishing an employee's column, or keep an employee as part of the publisher's editorial writing staff. *See, respectively, id.*; *Passaic Daily News v. NLRB*, 736 F.2d 1543, 1558 (D.C. Cir. 1984); *Wichita Eagle & Beacon Pub. Co., Inc. v. NLRB*, 480 F.2d 52, 56 (10th Cir. 1973) (holding that the NLRB's ruling blocking the transfer of an employee from the editorial writing department "infringe[s] upon the newspaper's freedom to determine the content of its editorial voice in an atmosphere of free discussion and exchange of ideas"). "The Supreme Court has implied consistently that newspapers have absolute discretion to determine the contents of their newspapers." *Passaic Daily News*, 736 F.2d at 1557. "Implementation of a remedy that requires governmental coercion gives rise to a confrontation with the First Amendment." *Id.* at 1558. The First Amendment bars the government from controlling what speakers say and how they say it, even when the government's motivation is to correct a perceived unfair use of economic power.

And, as discussed above, these principles apply equally to all speakers, whether they create newspapers or other speech. Indeed, the *Miami Herald v. Tornillo* principle has been applied even to parades, including ones that have far more viewers than other parades are likely to have. Even when "the size and success of [a] parade makes it an enviable vehicle for the dissemination of [a speaker's] views," that sort of influence on the parade's part cannot justify ordering the parade to include floats that the organizers want to exclude. *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 577—78 (1995).

Moreover, the one case in which the Court did uphold a law that required speakers to include certain kinds of speech, *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994), relied on the fact that the speakers in that case—who were cable system operators—were physically able to "prevent . . . subscribers from obtaining access to programming [the operator] chooses to exclude." *Id.* at 656. The Court stressed that its decision to uphold the must-carry law did not stem simply from a judgment that a cable company had market power. The Court made clear that its analysis would not apply to newspapers, "no matter how secure [their] local monopoly," because such a newspaper "does not possess the power to obstruct readers' access to other competing publications." *Id.* Instead of focusing on market share, the Court focused on the physical power of the cable operator to block speakers: "A cable operator, unlike speakers in other media, can . . . silence the voice of competing speakers with a mere flick of the switch." *Id.*

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

As the later *Hurley* case explained, *Turner* also rests on the fact that cable system operators were seen at the time as merely "a conduit" for others' speech that viewers did not perceive as edited or compiled into a coherent item by the cable operator. *Hurley*, 515 U.S. at 575; *Turner*, 512 U.S. at 629 ("the cable system functions, in essence, as a conduit for the speech of others, transmitting it on a continuous and unedited basis to subscribers"). But the *Turner* approach does not apply where the speaker is compiling and editing a speech product of its own—such as a single page that contains text selected and presented in a way that "in the [speaker's] eyes comports with what merits" inclusion. *Hurley*, 515 U.S. at 574 (stating this as to parades).

As *Hurley* held, the *Turner* "conduit" metaphor is "not apt" where the inclusion of some item of speech "would likely be perceived as having resulted from the [speaker's] customary determination . . . that [the] message [of any component of the speech] was worthy of presentation." *Id.* at 575. That is precisely the perception that users are likely to have when viewing search engine results: Users assume that each link was judged by the search engine as "worthy of presentation," because the very point of using a search engine is to narrow down the billions of Web pages into those that the engine views as worth presenting.

In such a situation, whether it involves a parade, a newspaper, or a page of results displayed by a search engine, the First Amendment fully protects the speaker's "autonomy to control [its] own speech." *Id.* For search engine output, as for the contents of a parade or of a newspaper, "'[t]he choice of material . . . and the decisions made as to limitations on the size and content . . . —whether fair or unfair—constitute the exercise of editorial control and judgment'" upon which the State cannot intrude. *Id.* at 575 (quoting *Tornillo*, and explaining why *Turner* is inapplicable).

V. CONCLUSION

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

The Irrelevance of the First Amendment to the Modern Regulation of the Internet

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I. INTRODUCTION

One of the most vexing challenges to any legal system is to answer this question: Should established legal principles be modified with the advent of new technologies that in turn require the creation of new property rights? The trivial answer is simply "yes." It is a commonplace observation that the creation of new property rights regimes is often dependent upon the creation of new technologies. For example, no one was in a position to ask who owned the electromagnetic spectrum—at least at invisible frequencies—until the technology became available to exploit it. But once communications through the spectrum became possible, someone had to organize it, lest physical interference in the use of frequencies render it useless for all concerned. Does this new generation of regulation pose a problem for the protection of speech under the First Amendment? Does it, for that matter, pose any difficulties under conventional conceptions of the antitrust law? After all, any exclusive system of property rights in the spectrum necessarily blocks the speech rights of all individuals except for that favored person.

The answer to these and similar questions does not depend on the novelty of, for example, spectrum, for the same answer could also be made with respect to land. As Pierre-Joseph Proudhon famously observed, "property is theft"[2] because its creation limits the rights of non-owners to access land as they could have before it was reduced to private ownership. Whether Proudhon's observation is false, it does not carry the weight that he sought to attach to it with either land or the electromagnetic spectrum. In both instances, if you leave property in a commons, no individual is in a position to exploit it. Allow the first possessor to make exclusive use of it, and, for example, agriculture and manufacturing become possible. Other individuals can reduce other parcels of land to private possession, and the persons who start out without property can acquire wealth by labor or land by purchase.

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2 PIERRE-JOSEPH PROUDHON, WHAT IS PROPERTY? 13 (Donald R. Kelley & Bonnie G. Smith eds. & trans., Cambridge Univ. Press 1994) (1840).

The key observation in this article is that identical arguments carry against any claim that individual efforts to reduce the spectrum to private ownership necessarily violate other individuals' free speech rights. The organization of the spectrum, for example, creates a coherent set of property rights that allows more speech to be heard over time than under any alternative arrangement. Any limitation of speech in the individual case is more than offset by the overall social gains. The First Amendment does not let any and every person speak as he pleases wherever he pleases. Instead, all claims for freedom of speech have to be embedded within a system of property rights that gives some individuals exclusive control over key resources. For example, under the law of copyright, it is not a violation of your free speech rights for me to enjoin your publication of an infringing copy of my book.[3]

To be sure, there have always been some well-defined exceptions to the exclusive use of one's own property. For example, people can enter the land of another in order to save their own lives. More relevant here, the law of copyright recognizes the privilege of "fair use," whereby others can quote short passages from works that they wish to criticize, lest all criticism be stopped. Property rights, be they physical or intellectual, are not absolute, and their exercise is of course subject to conventional antitrust limitations on the creation or exploitation of monopoly power.

The same is true of rights to speech. Although it is a presumptive violation of the right of free speech to impose restrictions on the use you may make of your own telephone or printing press, it is not a violation of your rights to free speech for me to say that you cannot enter my house to use my telephone or printing press against my will.[4] By the same token, all speakers in a given industry cannot collude to raise prices and divide territories.[5]

In all cases, freedom of speech must always be embedded in some larger system of property rights for it to be coherent. People do not have the right to trespass on the lands of others in order to voice their messages. Indeed, the one case that hinted at this approach, *PruneYard Shopping Center v. Robins*,[6] applied only to the distinctive setting of shopping centers, which are analogous to traditional public forums like streets and parks. The approach has never been applied, for example,

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3 *See, e.g.*, Harper & Row v. Nation Enterprises, 471 U.S. 539 (1985) (discussing 17 U.S.C. § 107).

4 As with copyright, it is easy to imagine rare occasions of necessity, but the cases are likely to be few and far between where I could claim (at least in the pre-cell phone age) the legal privilege to use your telephone to protect my own life, or the lives of third persons. *See, e.g.*, Soldano v. O'Daniels, 190 Cal. Rptr. 310 (Cal. App. 1983).

5 Associated Press v. United States, 326 U.S. 1 (1945), discussed infra at n.37.

6 447 U.S. 74 (1980). For my views, see Richard A. Epstein, *Takings, Exclusivity and Speech: The Legacy of* PruneYard v. Robins, 64 U. CHI. L. REV. 21 (1997).

to residential apartment complexes.[7] There are too many alternative ways for speakers to reach their intended audiences without commandeering the property of others. Likewise, newer technologies create tensions between property and speech rights, but in the end these tensions are generally amenable to the same solution: Establish the basic systems of property rights correctly, and any concerns with the protection of speech take care of themselves, by the general protections against the use of force (and the threat of force), misrepresentation (and concealment), and monopoly. But if that property rights system falters, no invocation of the First Amendment could restore balance to the overall system.

In order to illustrate these problems, I shall look at the following questions. The first asks whether the First Amendment trumps the law of trade secrets. The second asks whether the First Amendment limits website owners from restricting unauthorized entry by other users. The third asks whether the First Amendment restricts the application of the principles of rate regulation and antitrust to new technologies in the common carrier setting. In all these settings, the answer is the same. If one understands how property and speech fit together as a matter of first principle, nothing in the Constitution requires that the First Amendment trump, limit, or restrict the outcomes in any of these three scenarios. There is less novelty here than meets the eye. Technology becomes a diversion that does not alter the guiding principle.

II. TRADE SECRETS

In most situations, there is little conflict between the First Amendment and the law of trade secrets. In business, one who steals a trade secret has every incentive to keep his theft secret. The value of a trade secret lies in the extent to which the use of particular information necessarily supplies some competitive advantage to the person who holds the information over those without it. The benefit of that trade secret can be confined to its owner, or the secret can be licensed to other individuals subject to conditions of confidentiality on an exclusive or nonexclusive basis. But in both cases the value of the secret lies in the ability to restrict the class of individuals who use it. Nobody has any incentive to let the world in on a good idea for free. Indeed, in typical commercial settings, the last thing that the thief of any trade secret wants to do is announce his success publicly to the rest of the world, and thus lose the value of what he has stolen.

But this iron logic of trade secrets might not apply when the theft of a trade secret occurs not for private profit, but rather for political ends advanced by disclosing the trade secret publicly. Two famous instances of this behavior occurred over a decade ago, in *Ford Motor Co. v. Lane* and in *DVD Copy Control Ass'n, Inc. v. Bunner.*

In *Ford Motor Co. v. Lane*,[8] the Ford Motor Company sought to enjoin the publication of key business plans that had been leaked by a Ford employee to Lane, who published that information on

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7 *See, e.g.*, Golden Gateway Center v. Golden Gateway Tenants Ass'n, 29 P.3d 797 (Cal. 2001) (denying a tenants association "the right to distribute its newsletter in a privately owned apartment complex").

8 67 F. Supp. 2d 745 (E.D. Mich. 1999).

his own website. The subsidiary issue was whether an injunction of that speech violated the First Amendment prohibition on prior restraint given that the defendant knew he had received the information from an unauthorized source.

The district court took a wooden approach to First Amendment law by applying the normal First Amendment prohibition on prior restraint to the stolen material, which resulted in a denial of the injunctive relief sought. I regard that outcome as a serious categorical error. It is of course the case that injunctions should not be issued to restrain the publication of defamatory speech. In that area, prior restraint carries the serious risk of suppressing vital speech critical of either a key government official or public figure. The safer course is to let the speech be published, so long as the aggrieved party retains the ability to sue for a damages remedy in cases of defamatory harm.

The situation is, however, wholly different with the illegal disclosure of trade secrets, whose value is lost with public disclosure, and for which a damage award is a weak substitute for injunctive relief that preserves the exclusive right of use. Nor does the unauthorized publication of technical specifications for a new product, a customer list, or a litigation strategy rate First Amendment protection, when none of these could be pried out of their owner by legal process.[9] In this respect, the proper analogy is to the bad faith purchaser of stolen goods, who nowhere gains rights superior to those of the original thief under private law.[10] And once the owner of a trade secret can enjoin its publication as of right by those who have come unlawfully into its possession, it follows that any third person who receives that trade secret should be subject to the same relief if he knows that the information in question has been purloined from its owner. In this context, the law of freedom of speech should never confer some special immunity on the press for tort liability that would not be granted to any other bad faith recipient of stolen property whose value is diminished or destroyed. Never encourage a senseless cat-and-mouse game by adopting a consciously inferior set of remedies that allow the holder of a trade secret to use any and all measures of self-help to protect that secret,[11] while denying a call for legal assistance when some outsider, or worse, employee turned thief, has taken the information and handed it over to a third party, who to a moral certainty knows of its illegal acquisition from the intermediate party. [12]

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9 *Compare* United States v. Alvarez, 132 S. Ct. 2537, 2547-48 (2012) (plurality op.) (rejecting the view that all fraudulent speech receives First Amendment protection when striking down a statute that subjects a person to criminal sanctions for lying about receiving military medals).

10 *See* Saul Levmore, Variety and Uniformity in the Treatment of the Good Faith Purchaser, 16 J. LEGAL STUD. 43, 46 (1987).

11 The phrase is used in Intel Corp. v. Hamidi, 114 Cal. Rptr. 2d 244 (Cal. App. 2001): "We conceive of no public benefit from this wasteful cat-and-mouse game which justifies depriving Intel of an injunction. *Id.* at 249.

12 *See* Pamela Samuelson, *Principles for Resolving Conflicts Between Trade Secrets and the First Amendment*, 58 HASTINGS L.J. 777, 777 (2007) (defending injunctive relief in trade secret cases); Andrew

The same analysis also applies to the well-known case of *DVD Copy Control Ass'n, Inc. v. Bunner,*[13] on which I coauthored an amicus brief supporting the DVD Copy Control Association (DVDCCA).[14] One major concern of copyright holders is that their material will be pirated by persons who have not paid for its creation. In order to forestall that threat, members of the DVDCCA encoded their copyrighted material under a Content Scrambling System ("CSS") in order to deny access to it from those who had not purchased the appropriate key. As is commonly the case, this encryption system can be reverse-engineered, allowing an unauthorized person to make the key needed to unlock the content. In this instance, Jon Johansen was able to reverse-engineer the protected software and develop a decryption program called deCSS that used confidential elements of CSS to allow users to play pirated DVDs. He did so even though he knew that the software that he had acquired contained a licensing agreement that specifically prohibited that practice.

If these prohibitions against reverse-engineering can be ignored with impunity, it is only a matter of time before someone cracks the code, thereby allowing everyone to gain access to pirated content without paying a fee. Nor is it sufficient to enforce this prohibition only against the first buyer of the copyrighted material. That prohibition must also be enforced against any third party, such as Bunner, who takes and discloses that information with knowledge that it had been stolen. Thus, First Amendment issues disappear from view just as they did in *Ford Motor Co. v. Lane*. *Bunner* does not limit the ability of others to speak their own minds. It merely blocks efforts to transfer the plaintiff's property for free. To be sure, once the information has been made public, it is fair to ask whether an injunction helps limit its further spread.[15] But that genuine concern is no argument for denying a plaintiff an injunction that may slow the spread of pirated material, even if it cannot staunch the flow altogether. This First Amendment claim should fail because it upsets the basic framework of intellectual property rights.

Beckerman-Rodau, *Prior Restraints and Intellectual Property: The Clash Between Intellectual Property and the First Amendment from an Economic Perspective*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1, 67 (2001) (same); Richard A. Epstein, *Privacy, Publication, and the First Amendment: The Dangers of First Amendment Exceptionalism*, 52 STAN. L. REV. 1003, 1035—46 (2000) (same, given the valuation difficulties in these cases).

13 75 P.3d 1 (Cal. 2003).

14 Amicus Brief of Microsoft Corporation, et al., DVD Copy Control Ass'n, Inc. v. Bunner, 75 P.3d 1 (Cal. 1993) (No. S102588), *available at* https://w2.eff.org/IP/Video/DVDCCA_case/20020718_bunner_ms_amicus_brief.pdf.

15 *See, e.g.,* DVD Copy Control Ass'n v. Bunner, 10 Cal. Rptr. 3d 185, 192-96 (Cal. App. 2004).

III. UNAUTHORIZED TRESPASS

Unauthorized trespasses into computer networks should be treated like the theft of trade secrets: once again, exclusive property rights should trump any novel First Amendment claim, notwithstanding judicial decisions to the contrary.

The earlier discussion of the *PruneYard* case shows how this tension between speech and trespass should play out in the case of land. That same issue also arose in the celebrated case of *Intel Co. v. Hamidi*,[16] for which I also prepared an amicus brief, this time in support of Intel's effort to enjoin Hamidi's trespass into its private computer network. At issue was whether Intel could enjoin Hamidi, a former employee it had fired, from making unauthorized use of Intel's servers to email Intel's employees. The messages were highly inflammatory, but Intel's claim was for trespass to its equipment, not for defamation. In framing its claim this way Intel achieved two things. First, it narrowed the issue so that it was not asking the court to enjoin any messages that Hamidi sent to Intel employees from non-Intel servers. Second, it relieved itself of the duty to prove the messages were defamatory.

Intel sought relief under the trespass to chattels doctrine, which in effect makes it impermissible for any person to use force to either take or dispossess another person of his chattels.[17] By a narrow four-to-three vote, the California Supreme Court denied the injunction on the grounds that there was no physical damage to Intel's computers. That conclusion may make some sense in those cases where the self-help measures give perfect protection to the property owner, as is the case when, to use the example provided by the Restatement of Torts, the defendant's conduct consists of pulling the ears of someone else's dog without harming it.[18] The implicit subtext is that the owner can get the dog out of harm's way.

But the Internet is not a dog, let alone a conventional chattel. In this instance, the self-help remedy is decidedly imperfect, as Hamidi was able on several occasions to skirt those software defenses with mass mailings that roiled Intel's employees. Hamidi also had full knowledge that his actions were unauthorized. Once again, the law of remedies contains no principle that should deny a simple injunction against the performance of an admittedly unlawful act, when the parallel remedy is routinely available, for example, in cases of trespass to land. Nor is there any First Amendment argument on behalf of Hamidi that justifies his trespass in this case, any more than the First Amendment would justify using someone else's office lobby to speak to his or her employees. Indeed, in this case, the free speech issue cuts *in favor of* Intel because, as the dissenters in that case

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16 71 P.3d 296 (Cal. 2003).

17 RESTATEMENT (SECOND) OF TORTS §§ 217—18.

18 RESTATEMENT (SECOND) OF TORTS § 218 cmt. e illus. 2.

argued, Intel and its employees had to receive Hamidi's unwanted messages from his unauthorized use of Intel's facilities.[19]

The Internet is, as I argued in the amicus brief,[20] a complex institution that contains key elements of common and private property in cyberspace. Its organization is parallel to that governing the use of open access highways and private homes in ordinary physical space. There is no risk that strong trespass remedies designed to protect houses beside the highway will limit the traffic along the public road, and the same conclusion holds here.

The right to prevent trespasses applies with equal force to efforts to scrape information from someone else's website, which is yet another form of unauthorized activity that should receive no First Amendment protection. Anyone who wishes to acquire this information can do so efficiently through the standard voluntary protocols commonly used to expedite complete and accurate data transfers.[21] Indeed in most cases, a firm that posts its information publicly on its website should not be understood to make it available by scraping to its competitors. The recent Federal Trade Commission (FTC) investigation of Google's practice of "scraping" information off rival websites to use in building its search results demonstrates that rival websites have property rights in their own compilations of publicly available information.[22] In this setting, Google faces a strong parity constraint because its competitors can scrape information from Google's website if Google can scrape information from theirs. Scraping has been attacked on various grounds, including trespass to chattels, where the claim has drawn blood precisely because the technique can impose physical damage, induce inferior performance on the scraped system,[23] and even lead to lost advertisement revenue when unique visitors do not enter through an advertisement portal. The disposition of this issue in the FTC's investigation of Google resulted not just in a TKO for the FTC but in an affirmation of property rights in developing and presenting information online. The Report's brief discussion says it all:

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[19] *See Hamidi,* 71 P.3d at 318 (Brown, J. dissenting).

[20] Amicus Brief of California Employment Law Council, et al., Intel Corp. v. Hamidi, 71 P.3d 296 (Cal. 2003) (No. S103781), 2002 CA S. Ct. Briefs LEXIS 39. The claim was explicitly criticized by Judge Werdegar. *Hamidi*, 71 P.3d at 309—11. For my extended reply, see Richard A. Epstein, *Intel v. Hamidi: The Role of Self-Help in Cyberspace*, 1 J. LAW, ECON. & POL. 147 (2005).

[21] *See* EF Cultural Travel BV v. Zefer Corp., 318 F.3d 58, 64 (1st Cir. 2003) (allowing injunction against scrapers in cases involving "misuse of confidential information").

[22] *See* Feist Publications, Inc. v. Rural Telephone Service Co., Inc., 499 U.S. 340, 344-51, 358-59, 361-62 (1991) (factual compilations may often be copyrighted, but not the information in white pages which lacks even the smidgen of the required originality).

[23] *See e.g.*, eBay, Inc. v. Bidder's Edge, Inc., 100 F. Supp. 2d 1058, 1066 (N.D. Cal. 2000).

> The Commission considered whether this conduct could have diminished the incentive of Google's rivals to invest in bringing new and innovative content and services to the Internet in the future or reduced Google's own incentive to innovate in the relevant markets, and if so whether this conduct was actionable as an unfair method of competition within the meaning of Section 5 of the FTC Act, 15 U.S.C. § 45. Chairman Leibowitz, Commissioner Brill and Commissioner Ramirez found the record evidence to support strong concerns about Google's conduct in this regard, and Google has committed to refrain from this conduct in the future.[24]

It is worth noting in this context that Google did not seek to protect that practice, in part because it would object strongly if the tables were turned. The creation of these property rights does not offend the basic principle that the legal system affords no protection to simple ideas, any more than it does to the laws of nature.[25] So long as the basic property rights system fits these requirements, the First Amendment does not impose any additional constraints in this area.

IV. MISAPPROPRIATION

A similar analysis applies to the common law tort of misappropriation, where once again the proper principles of dispute do not implicate the First Amendment. The origins of the modern misappropriation tort lie in the 1918 United States Supreme Court decision in *International News Service v. Associated Press*,[26] which introduced the tort of misappropriation of information to deal with conflicts between direct competitors. INS engaged for a time in collecting information off the AP's bulletin boards in New York for use in INS newspapers on the Pacific Coast. At no point in the case did INS argue that it had a First Amendment right to use information that the AP had collected from its own sources. In affirming the lower court decision to enjoin INS from copying AP's news stories, Justice Pitney cautioned: "It is to be observed that the view we adopt does not result in giving to complainant the right to monopolize either the gathering or the distribution of the news, or, without complying with the copyright act, to prevent the reproduction of its news articles, but only postpones participation by complainant's competitor in the processes of distribution and reproduction of news that it has not gathered, and only to the extent necessary to prevent that competitor from reaping the fruits of complainant's efforts and expenditure, to the partial exclusion of complainant."[27] Thus, the remedy afforded in Justice Mahlon Pitney's opinion was shaped so as

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[24] In the Matter of Google Inc., Statement of the Federal Trade Commission Regarding Google's Search Practices, at 3 n.2 FTC File No. 111-0163 (Jan. 3, 2013), *available at* http://www.ftc.gov/os/2013/01/130103googlesearchstmtofcomm.pdf.

[25] *See* Laboratory Corp. of America Holdings v. Metabolite Laboratories, Inc., 548 U.S. 124, 126 (2006) (approving limits on the patenting of laws of nature or abstract ideas by analogy of the limits of copyright protection for "ideas").

[26] 248 U.S. 215 (1918).

[27] *Id.* at 241.

not to prevent anyone else from obtaining and disseminating the underlying public facts by independent effort. Rather, it only prevented the freeloading in *information gathering* that would make it less desirable for AP to generate the information in the first place.

One of the great achievements of the *INS* decision was its temporal limitation. The protection disappeared a day later, with the next day's news cycle. Consequently, the protection applies when it is needed most, but it is promptly and automatically lifted when the wide circulation of the information from multiple public sources renders this form of protection ineffective. If one sums private and public value over the full news cycle, this division of entitlements maximizes the total value of the information to all players at all times—a neat achievement that responds to the need to limit the dimension of the property right far more dramatically than for either inventions or writings. Correspondingly, it also shows how crafting the scope of the property right in question protects short-term production without impairing long-term access to valuable information, all without invoking the First Amendment. Indeed, one could imagine the First Amendment being used in such a way as to hinder the useful result achieved in *INS*: if INS were to claim a First Amendment right to reuse information acquired by others, that misguided claim would start to resemble *Harper & Row v. Nation Enterprises*,[28] which rejected the parallel First Amendment claim in the copyright context.

Similar business practices in related contexts also maximize the value of information, thereby serving First Amendment values, without explicitly invoking the First Amendment. It is commonplace today, for example, for radio talk shows to get leads from written articles. But, since these outlets do little investigative reporting of their own, there is no way that the print media can rely reciprocally on the broadcast media for leads, let alone detailed information on which they could profitably rely. Accordingly, the usual mode of implicit compensation, which helps both sides, is for the radio talk-show host to thank the written source for starting the story. On the one side, that practice gives recognition for work done that could expand readership. On the other, it also lends credibility to the talk-show host, so that this wide-open public system is largely self-enforcing, and continues on indefinitely without complaint from either side.

V. COMMON CARRIERS AND ANTITRUST REGULATION

As noted earlier, no well-articulated system of property rights blocks the use of both common carrier regulation and antitrust laws to prevent the acquisition or exercise of monopoly power. Here too the institutional risk is that overblown First Amendment claims can hinder the sensible development of these bodies of law in cases involving misappropriation, theft of trade secrets, trespass, or scraping, as for example with net neutrality laws.[29] The seminal discussion is

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28 471 U.S. 539 (1985).

29 Under net neutrality telecommunications, cable companies are obliged "to route traffic without regard to the source or content of the packets of data that move across the Internet, the application with which those packets are associated, or the sender's willingness to pay." Christopher S. Yoo, *Network Neutrality or Internet Innovation*, 1 (University of Pennsylvania Law School, Institute for Law and Economics, Research Paper No. 10-06, April 2010). The Federal

found in Sir Matthew Hale's *De Portibus Maris*, or Concerning the Gates to the Sea, which examined just these questions under the heading of businesses that were "affected with the public interest."[30] Hale concluded that special rules were required for those firms that acquired either a legal or a natural monopoly over a particular commodity in a particular area, so that only one firm can operate. His view, still valid today, was that such firms must serve all customers on reasonable and nondiscriminatory terms. The motivation behind that limitation was to make sure that the firm did not reap monopoly profits. Implementing this program is not easy, for it must at the very least allow for differentiation among customers for whom the cost of service is different. This principle led to the system of rate regulation that applied after the Civil War to railroads and public utilities.

The doctrine developed in cases involving rate regulation for railroads has special relevance for the Internet. Railroads and the Internet are both networks, which means at the very least that no party who controls access to either can refuse to deal with customers without cause. But the quid pro quo for the duty to deal was and is the requirement that the common carrier or public utility receive over the long haul a rate of return on its invested capital that would allow it to attract and retain capital.[31]

What is relevant, however, is how these basic principles carry over to today's key issue of net neutrality, which refers to the extent to which the firms who own the "pipes" through which data is transmitted are duty-bound to supply equal service to any and all users of the system. The analysis contains an added layer of complexity whenever the owner of the pipes seeks to send its own messages across its own networks. So how best to handle these situations?

Not by invoking the First Amendment. The reason why that amendment is irrelevant is that the scope of a common carrier duty is not enlarged when it is involved with the transmission of ideas rather than the shipment of goods. Today's telecommunications carrier may incorrectly argue that it is being forced to carry speech with which it disagrees under net neutrality, for which it might invoke Justice Robert Jackson's famous pronouncement in *West Virginia v. Barnette*,[32] in the flag salute cases, where public schools sought to compel students to salute the flag or recite the pledge of

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Communications Commission has promulgated net neutrality rules in what is known as its Open Internet Order. *See* In the Matter of Preserving the Open Internet Broadband and Industry Practices, FCC 10-21 (Federal Communications Commission Dec. 23, 2010), http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-10-201A1_Rcd.pdf (last visited Sept. 14, 2013).

30 Matthew Hale, *De Portibus Maris*, in 1 A COLLECTION OF TRACTS RELATIVE TO THE LAW OF ENGLAND 77-78 (Francis Hargrave ed., 1787).

31 I ignore here the complex calculations needed to determine reasonable rates of return in public utility pricing . For a convenient discussion of permissible methodologies, see Duquesne Light Co. v. Barasch, 488 U.S. 299 (1989).

32 319 U.S. 624 (1943).

allegiance: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[33] But the carrier's use of that analogy is hopeless. For years railroads have been required to carry cartons of books even if they disagree with their content. No one assumes that the carrier endorses the positions represented in the information that is shipped on its network. The same is true with respect to the modern set of internet connections, which do not "force citizens," or for that matter corporations, to confess by word or act their faith in anything. It is equally vacuous to argue that imposing general rules of carriage in some way limits the freedom of speech of the persons who use the network.

It follows, therefore, that the standard rules of the game should apply to today's common carriers as applied to those historically, which require setting reasonable and nondiscriminatory terms for their use of their monopoly power.[34] The modern embodiment of that ancient principle is a more cautious version of the modern principle of "net neutrality." But in dealing with ordinary common carriers, nothing in the restrained account of the nondiscrimination principle prevents the carrier from charging premium rates for more rapid service, and that same flexibility given to FedEx or UPS, or for that matter, the U.S. Post Office, should be allowed here as a regulatory matter (if not a First Amendment one). Whenever different packets of information have different value, it would be absurd to force valuable information to wait in the queue as reams of spam-like material sashay across the pipes. To avoid just that risk, it should be made perfectly clear that any carrier should be allowed to use tiered pricing to allow for sorting of content by importance, which is done by the content provider in response to a pricing schedule, thus eliminating the risk of selective approval that can raise First Amendment issues.

In this situation, moreover, it does not matter whether the carrier itself wishes to push its own content through the pipes because there is no way that it can give its own content preferential treatment. To be sure, the fee paid just goes from one pocket to another. But that does not matter, because the key point is that by taking the spots at the head of the queue, the common carrier forfeits the revenues for premium services that it could collect from others, so that its opportunity cost becomes the proper estimate of the social value of its own information.[35] The First

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33 *Id.* at 642.

34 *See* United States of America v. Terminal Railroad Ass'n of St. Louis et al., 224 U.S. 383, 392-400, 404-05, 411-12 (1912) (terminal company that gained control of every railroad bridge across the Mississippi could be forced to grant access to all carriers on reasonable and non-discriminatory terms).

35 It remains an open question whether tiered pricing should be subject to a total revenue constraint similar to that in old public utility regulation. The Federal Trade Commission's Maureen K. Ohlhausen noted that "[t]echnology industries are notoriously fast-paced, particularly industries involving the Internet." In the Matter of Google Inc., Statement of Commissioner Maureen Ohlhausen of the Federal Trade Commission Regarding Google's Search Practices, FTC File No. 111-0163, at 1, *available at*

Amendment adds nothing to the protection of speech, but only clouds the application of the older common law duties of common carriers that developed outside the speech area.

If rate regulation fails, what about the use of antitrust laws? Here it is necessary to stress the now-familiar theme that the First Amendment does not aid in finding the correct analysis. Historically, the United States Supreme Court has long allowed antitrust regulation of conduct with only an incidental impact on speech.[36] Thus, the 1945 Supreme Court decision in *Associated Press v. United States*[37] held that a cooperative agreement of newspapers was not immune from prosecution under the Sherman Act just because the defendants were involved in the transmission of news information and opinion, which receives the highest protection under the First Amendment. That decision is correct because it is never clear whether the AP's members are entitled to invoke the First Amendment to keep the information private, or whether the INS subscribers should invoke that reverse trump card to gain access to information they need. Neither argument has any traction. The proper analysis just notes that cartels tend to reduce output, raise prices, and result in a loss of social welfare that may be remedied by either damages or injunctive relief against participants in the collusive behavior.

That same approach carries over to modern technologies as well. Thus, in *United States v. Microsoft*,[38] the question was whether Microsoft abused its monopoly power when it sought to

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http://www.ftc.gov/os/2013/01/130103googlesearchohlhausenstmt.pdf. The persistent rapid decline in rates owing to technological improvements makes setting maximum rates completely otiose. At this point, an obligation to take all comers under tiered pricing is the most that can be expected. More aggressive rate regulation in this industry leads to a dead end.

[36] *See, e.g.,* Citizen Publishing Co. v. United States, 394 U.S. 131 (1969) (upholding injunction prohibiting newspaper publishers from entering into joint operating agreement); National Society of Professional Engineers v. United States, 435 U.S. 679 (1978) (striking down under the antitrust laws a professional association's ethical ban on competitive bidding for engineering services); American Society of Mechanical Eng'rs v. Hydrolevel Corp., 456 U.S. 556 (1982) (inaccurate professional association report on safety issues violated the antitrust laws when used to undermine a competitor's product); Federal Trade Comm'n v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 430-32 (1990) (bar association's boycott of case assignments involving indigent defendants violated the antitrust laws even though the boycott involved expression); *see also e.g.,* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758 n.5 (1985) (citation omitted) (exchange of pricing and production information by competitors can be proscribed under the antitrust laws).

[37] 326 U.S. 1 (1945).

[38] 253 F.3d 34 (D.C. Cir. 2001). For my account, see Richard A. Epstein, ANTITRUST CONSENT DECREES IN THEORY AND PRACTICE: WHY LESS IS MORE, ch. 4 (AEI Press 2007); Richard A. Epstein, *Monopolization Follies: The Dangers of Structural Remedies under Section 2 of the Sherman Act*, 76 ANTITRUST L.J. 205, 231—37 (2009).

leverage the control of its operating system into control over the market for key applications, most notably web browsers. The monopolization charge raised under Section 2 of the Sherman Act echoed the basic theme associated with the common carrier cases. Microsoft was placing entry barriers against other suppliers of particular competitive applications. That charge could not be answered by Bill Gates' famous, if uninformed, remark that Microsoft had no more duty to accommodate Netscape on its operating system than Coke had a duty to make room for Pepsi bottles in its cartons[39] simply because Microsoft had become a common carrier in a way that Coke has not. Given that connections could be established at a zero price point, a material difference from other "common carriers," the only point of contention was the scope of the interconnection obligations fashioned on remand by Judge Colleen Kollar-Kotelly.[40]

To elaborate, Coke and Pepsi are not network industries, which the Internet surely is, so the duties of common carriers could apply to Microsoft to the extent that its operating system enjoyed a monopoly position. Normally the antitrust law cannot be used to regulate a market for a zero-priced good because, as with telecommunications, the regulator has to set specific nonzero rates. But that administrative action is not needed for Microsoft when all interconnections should be done at zero price. The key point here is that the Microsoft settlement ultimately reduced itself to forcing interconnection obligations on Microsoft on reasonable terms, which was the right course generally, though it was arguably bungled on remand.[41] But again note that the problem goes away when multiple hubs obviate both the antitrust and the common carrier obligations, a result that furthers First Amendment values of diversity without relying on the First Amendment.

A related analysis explains why the antitrust claim against Google did not gain much traction either. As in *Microsoft*, the charges against Google were for monopolization, only in this instance by the use of algorithms that gave Google entries higher places on the search queue than those entries from its competitors. But this opening gambit is where the difficulties begin. Most critically, the higher ranking that Google gives its own entries is not an undivided bad. It may have some negative effect on consumer search costs, but by the same token, even if that were true, several powerful ripostes eventually carried the day. First, its competitors often exhibited the same pattern of search results. Second, the actual Google rankings did not seem off base in comparison with those supplied by others, so allegations of consumer harm were difficult to sustain. Third, users are able

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[39] *See, e.g.,* U.S. v. Microsoft — *It's a Battle over Metaphors*, C.S. MONITOR (n.d.), http://www.csmonitor.com/1998/0522/052298.us.us.5.html/%28page%29/2 (last visited Sept. 14, 2013).

[40] *See Open Law: The Microsoft Case*, BERKMAN CENTER FOR INTERNET & SOCIETY, http://cyber.law.harvard.edu/msdoj/.

[41] *See* William H. Page & Seldon J. Childers, *Measuring Compliance with Compulsory Licensing Remedies in the American Microsoft Case*, 76 ANTITRUST L.J. 239 (2009).

in part to detect and correct those ranking errors. Fourth, even if there were some preference, it does not follow that such results are bad for users. With search engines, there are the same trade-offs as with patents. Cutting Google, as the generator of the system, a bit of slack has the additional benefit of inducing a somewhat more rapid deployment of new technologies. In the end, the exhaustive FTC search concluded that the game was not worth the candle.[42] And for what it is worth, no invocation of the First Amendment could, or should, alter the outcome of the case—whenever Google, Microsoft, or any high technology company acquires market power.

VI. CONCLUSION: BEWARE OF NOVEL FIRST AMENDMENT CLAIMS

This very rapid tour of modern communications law reveals an established truth. It is always necessary to ask how traditional legal doctrines carry over to the novel institutions and practices of a new technological age. The answer is that the older principles may need a bit of tweaking here and there; but in general, if they were sound in their inception, they will do quite well in a new context.[43] That result applies in this case whether we look at the novel forms of misappropriation that are generated on the Internet or the principles of common carrier or antitrust regulation of these same technologies. Physical invasions and the misappropriation of information still remain issues, but these can be handled by standard tools of analysis within customary frameworks.

Once that is done, a further proposition becomes clear. Virtually all of these new situations involve the control and dissemination of information, which clearly bring the First Amendment into play. But strangely enough, not for long. The complications about stealing information from websites do not differ all that much from the theft of information from old-style bulletin boards. The antitrust and common carrier rules are driven more by issues of monopoly and its regulation than by the First Amendment, which plays no more role here than it does in cases of rate regulation of common carriers that carry cartons of books to their destination. Plus ça change, plus c'est la même chose: The more things change, the more they remain the same.[44]

[42] *See In the Matter of Google, Inc., supra*, Statement of the Federal Trade Commission Regarding Google's Search Practices at 2-3.

[43] *See* Richard A. Epstein, *The Static Conception of Common Law*, 9 J. LEGAL STUD. 253 (1980).

[44] *Wikitonary*, http://en.wiktionary.org/wiki/plus_%C3%A7a_change,_plus_c%27est_la_m%C3%AAme_chose (last visited Sept. 14, 2013).

The Supreme Court in *Borough of Duryea v. Guarnieri* Signals a Retreat from *PRE*'s Broad Deference to the Right to Petition

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I. INTRODUCTION

This spring marks the twentieth anniversary of the U.S. Supreme Court's decision in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.* ("*PRE*"),[2] a seminal case determining when one can sue one's competitor without antitrust scrutiny. The *PRE* Court, faced with an allegation that an anticompetitive lawsuit violated the Sherman Act,[3] posited that a lawsuit is a petition to the judicial branch of government, protected by the First Amendment's Petition Clause.[4] Because of this constitutional protection, the *PRE* Court held that only in narrow circumstances could a lawsuit against one's competitors be exposed to antitrust scrutiny.

Two decades later, the Court in its most recent right to petition case, *Borough of Duryea v. Guarnieri*,[5] cast doubt on this critical First Amendment rationale. In *Borough of Duryea*, the Court limited the right of public employees to sue their employers in light of the substantial competing public interests that had to be balanced against those fostered by the Petition Clause.[6] Furthermore, *PRE*'s own author, Justice Thomas, declared in an opinion concurring in the judgment: "I seriously doubt that lawsuits are 'petitions' within the original meaning of the Petition Clause of the First

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2 508 U.S. 49 (1993).

3 Section 1 of the Sherman Act provides in part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ." Section 2 of the Act provides in part: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . ." 15 U.S.C. §§ 1 and 2.

4 "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances." U.S. CONST. amend. I.

5 131 S. Ct. 2488, 2501 (2011).

6 *Id.*, 131 S. Ct. at 2497-2500.

Amendment."[7] While this does not necessarily portend the death knell for *PRE*'s First Amendment immunity for competitor litigation, it does demonstrate the evolving views of the justices on the scope of the Petition Clause, which invites a reappraisal of *PRE*'s basic holdings and approach. This article concludes that *Borough of Duryea* represents a rejection of an absolute deference to the right to petition and that its more nuanced approach to that right necessitates a recalibration of *PRE*'s broad First Amendment immunity for firms that sue competitors.

II. THE PATH TO *PRE*

PRE was the latest in a line of cases in which the Supreme Court considered the protection of the Petition Clause for business conduct that otherwise might violate the antitrust laws.[8] The cases covered petitioning to all branches of the government (legislative,[9] executive,[10] and judicial[11]), at all levels of government (federal,[12] state,[13] and local[14]). The principle that emerged from this line of cases was that a competitor—even a monopolist—could engage in anticompetitive activities with the intent to eliminate competition, without violating the Sherman Act as long as those activities constituted petitioning of the government under the First Amendment. This defense to antitrust

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7 *Id.* at 2501 (Thomas, J., concurring in the judgment).

8 At the outset, it should be noted that the Supreme Court has not stated definitively whether this doctrine is grounded wholly in the Petition Clause or partly in a limiting construction of the Sherman Act. See, e.g., Fed Trade Comm'n, *Enforcement Perspectives on the Noerr-Pennington Doctrine* 6 (2006), *available at* http://www.ftc.gov/reports/P013518enfperspectNoerr-Penningtondoctrine.pdf ("Although the Court has not provided a consistent source for the doctrine, it appears to be rooted in a construction of the Sherman Act to avoid conflict with the constitutional right to petition the government for redress of grievances and the principle of effective government decision-making.") This article presumes that the better view is that the Petition Clause is essential to the Court's doctrine of immunity; without it, there would be no justification for shielding firms from the antitrust laws.

9 Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 135-138 (1961) (Noerr).

10 *Id.*; *see also* United Mine Workers v. Pennington, 381 U.S. 657, 669-670 (1965) (Pennington); California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972).

11 *California Motor Transport*, 404 U.S. at 510.

12 *Id.*; *Pennington*, 381 U.S. at 669-670.

13 *Noerr*, 365 U.S. at 135-138; *California Motor Transport*, 404 U.S. at 510-511.

14 Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492 (1988); City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365 (1991).

liability came to be known as "*Noerr* immunity," or "*Noerr-Pennington* immunity," after the first cases to articulate the doctrine.[15]

The doctrine was originally developed in cases addressing petitioning to the legislative and executive branches of government. The Supreme Court reasoned that because the government has the authority to restrain or eliminate competition,[16] the people must be free to urge the legislative and executive branches to enact restraints of trade.[17] This principle applied even when those petitioning the government, with anticompetitive intent, sought anticompetitive legislation or action.[18] A related rationale derived from the government's separation of powers. The Court cautioned against judicial branch intrusion into the decision-making processes of the legislative and executive branches.[19] The Court ultimately declared that lawsuits, too, were First Amendment petitions to the government—the judicial branch itself—and were similarly entitled to immunity from antitrust scrutiny.[20]

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15 *Noerr*, 365 U.S. at 135-138; *Pennington*, 381 U.S. at 669-670.

16 *Noerr*, 365 U.S. at 136 (citing United States v. Rock Royal Co-op., 307 U.S. 533 (1939), and Parker v. Brown, 317 U.S. 341 (1943)).

17 *Id.*

18 *Id.* at 139 ("[T]he right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot be properly made to depend upon their intent in doing so."); *Pennington*, 381 U.S. at 670 ("*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose.").

19 *Noerr*, 365 U.S. at 136 ("[U]nder our form of government the question whether a law of that kind [resulting in trade restraints or monopoly] should pass, or if passed be enforced, is the responsibility of the appropriate legislative or executive branch of government so long as the law itself does not violate some provision of the Constitution.").

20 California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972) ("Certainly the right to petition extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right of petition."). The Court and commentators, however, recognized that petitioning of the courts is subject to more formalized rules than is petitioning of legislative and executive officials. *Id.* at 512-513; *see also* PHILLIP E. AREEDA & HERBERT HOVENKAMP, 1 ANTITRUST LAW ¶203e (3rd ed. 2006) ("As compared with the legislative process, improper behavior in the adjudicatory or judicial context is more readily identified as improper and more widely regarded as reprehensible. . . . Indeed, there are well developed and highly elaborated definitions of what is or is not proper behavior by litigating parties.").

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Noerr immunity was not absolute, however. The Court developed a corresponding exception, known as the "sham" exception, which recognized that some ostensible petitioning fell outside of First Amendment protection.[21] In *Noerr*, the Court's initial conception of "a mere sham" focused on conduct that could be deemed separate from attempts to influence legislative or executive officials—that is, conduct that was "nothing more than an attempt to interfere directly with the business relationships of a competitor."[22] In later cases, the Court perceived the potential for sham within the petitioning process itself. A classic formulation of this kind of sham recognized the "use [of] the governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon."[23] The first case in which a complaint adequately pleaded a sham involved this kind of bad-faith petitioning: The antitrust defendants allegedly filed multiple administrative or judicial proceedings against competitors, "with or without probable cause and regardless of the merits of the cases."[24] In short, the sham exception to *Noerr* immunity recognizes that a fairly narrow interest in competition might trump the right to petition where governmental proceedings are clearly being abused in order to suppress competition.[25]

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21 *Noerr*, 365 U.S. at 144. There also is a "misrepresentation" exception to *Noerr* immunity, applicable when a party, instead of being indifferent to the outcome of a governmental process, actually seeks and obtains governmental action, but does so through the use of misrepresentations to an adjudicatory body. *See*, *e.g.*, In re Union Oil Co., 138 F.T.C. 1, 25 (2004) ("Although Supreme Court law remains unsettled, the weight of lower court authority, spanning more than thirty years, has recognized that misrepresentations may preclude application of *Noerr-Pennington* in less political arenas than the legislative lobbying at issue in *Noerr* itself."). *See also* AREEDA & HOVENKAMP, *supra* note 20, at ¶203f ("[T]he policy is more important than the underlying labels, and in most cases it makes little difference whether we say that the provision of false information is unprotected by *Noerr* to begin with or that it falls into the 'sham' exception to *Noerr*.") (citations omitted).

22 *Noerr*, 365 U.S. at 144. The challenged conduct in *Noerr* was a publicity campaign intended to influence the passage of anticompetitive legislation.

23 City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 380 (1991) (emphasis in original). *See also* AREEDA & HOVENKAMP, *supra* note 17, at ¶204a ("The injury to the rival springs directly from the antitrust defendant's action rather than from a government decision.").

24 *California Motor Transport*, 404 U.S. at 512 ("[T]he allegations are not that the conspirators sought 'to influence public officials,' but that they sought to bar their competitors from meaningful access to adjudicatory tribunals and so to usurp that decisionmaking process.").

25 *See* ROBERT H. BORK, THE ANTITRUST PARADOX 159 ("Misuse of courts and governmental agencies is a particularly effective means of delaying or stifling competition. We are here speaking of legal processes undertaken without regard to the merit of the claim advanced, in order to harm an actual or potential business rival."). *See also* Gary Myers, *Antitrust and First Amendment Implications of* Professional Real Estate Investors, 51 WASHINGTON &

In *PRE*, the Supreme Court addressed the sham exception in the context of competitor-versus-competitor litigation. The central question was the relevance of a litigant's intent when its lawsuit against a competitor is challenged as a sham—that is, "whether litigation may be sham merely because a subjective expectation of success does not motivate the litigant."[26] The Court decided that anticompetitive intent alone was insufficient to support a finding of sham litigation; even further, a litigant's intent was irrelevant unless its lawsuit was first shown to be "objectively baseless."[27]

In *PRE*, eight motion picture studios filed a copyright infringement lawsuit against a resort hotel operator ("PRE") that rented movie videos to guests to watch in their rooms.[28] The studios contended that PRE's rentals infringed their copyrights on the movies.[29] PRE denied infringement and counterclaimed under the Sherman Act, alleging that the studios' lawsuit "was a mere sham that cloaked underlying acts of monopolization and conspiracy to restrain trade."[30] At summary judgment, the movie studios lost their copyright action when the court ruled that movie rentals for in-room viewing did not constitute public performance of a copyrighted work in violation of the Copyright Act.[31] The U.S. Court of Appeals for the Ninth Circuit affirmed.[32]

On remand regarding PRE's antitrust counterclaims, the movie studios moved for summary judgment, invoking *Noerr* immunity for their copyright suit.[33] PRE argued that *Noerr* immunity was inapplicable because the studios "did not honestly believe that the infringement claim was

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LEE L. REV. 1199, 1201 (1994) ("It is well established that litigation and other forms of petitioning activity can be part of a firm's anticompetitive strategy."); Susan A. Creighton et al., *Cheap Exclusion*, 72 ANTITRUST L.J. 975, 992-993 (2005).

26 *PRE*, 508 U.S. 49, 57.

27 *Id.* at 51.

28 *Id.* at 51-52.

29 *Id.* at 52.

30 *Id.*

31 *Id.* at 53.

32 Columbia Pictures Industries, Inc. v. Professional Real Estate Investors, Inc., 866 F.2d 278 (9th Cir. 1989).

33 Columbia Pictures Industries, Inc. v. Professional Real Estate Investors, Inc., 944 F.2d 1525, 1527 (9th Cir. 1991).

meritorious" and their suit thus had been a sham.[34] This placed the studios' intent squarely at issue, and PRE sought further discovery on why the studios had sued.[35] The district court rejected PRE's argument, finding that the studios' lawsuit "was clearly a legitimate effort and therefore not a sham."[36] The court saw both subjective good faith and objective merit in the studios' suit: "It was clear from the manner in which the case was presented that [Columbia was] seeking and expecting a favorable judgment," and "[T]he case was far from easy to resolve. . . . I find that there was probable cause for bringing the action . . . ."[37] The court denied PRE's request for further discovery on the studios' intent.[38]

The Court of Appeals affirmed, setting forth a two-part test for sham litigation that separated the objective and subjective elements.[39] The court required antitrust plaintiffs to show "(1) that the suit is baseless—a legal question [citation omitted]; and (2) that the suit was brought as part of an anticompetitive plan external to the underlying litigation—a question of fact."[40] The court agreed that PRE could not show that the movie studios' copyright suit was objectively baseless (the first prong), and so concluded that the district court was correct in denying further discovery on the studios' intent (the second prong).[41] In an assertion the Supreme Court subsequently adopted, the court said: "[A] suit brought with probable cause does not fall within the sham exception to the *Noerr-Pennington* doctrine."[42]

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34 *Id.* at 1530.

35 *Id.* at 1527.

36 *PRE*, 508 U.S. at 53.

37 *Columbia Pictures Industries*, 944 F.2d at 1528.

38 *Id.*

39 *Id.* at 1532.

40 *Id.*

41 *Id.* at 1532-1533.

42 *Id.* at 1532 (*see also PRE*, 508 U.S. 49, 54). This represented a narrower reading of the sham exception than the Supreme Court's *California Motor Transport* decision, which held that proceedings brought "with or without probable cause" could be deemed shams. California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 512 (*see also* AREEDA & HOVENKAMP, *supra* note 20, at ¶205c: "In *California Motor* itself, the Supreme Court held that a sham claim was stated by allegations of repetitive suits brought 'with or without probable cause,'[ ] and this was true even though the trial court had found that 21 out of 40 proceedings initiated by the antitrust defendants had 'resulted in action favorable to the defendants.'[ ]"

The Supreme Court affirmed.[43] In an opinion by Justice Thomas, the Court first reiterated that a lawsuit is subject to *Noerr* immunity for petitioning activity, citing *California Motor Transport*.[44] The Court then surveyed its precedents and found that a plaintiff's subjective intent had never been the sole criterion for determining whether litigation amounted to a sham.[45] To the contrary, the Court said, "the sham exception contains an indispensable objective component."[46] The Court then set forth its own two-part test for determining when a lawsuit would be deemed a sham and thus exposed to antitrust scrutiny:

> First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. . . . Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation. Under this second part of our definition of sham, the court should focus on whether the baseless lawsuit conceals 'an attempt to interfere *directly* with the business relationships of a competitor' (emphasis added), through the 'use [of] the governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon' (emphasis in original).[47]

(citations omitted).) The Ninth Circuit subsequently distinguished *PRE* from *California Motor Transport* by noting that *PRE* involved one lawsuit, whereas *California Motor Transport* involved multiple proceedings. USS-POSCO Industries v. Contra Costa County Building & Construction Trades Council, 31 F.3d 800, 810 (9th Cir. 1994).

43 *PRE*, 508 U.S. 49.

44 *Id.* at 57-58.

45 *Id.* at 57-60.

46 *Id.* at 58. This assertion seemed to have merit, but the Court undermined its credibility with a related statement: "Our original formulation of antitrust petitioning immunity required that unprotected activity lack objective reasonableness." *Id.* at 57 (citing *Noerr*, 365 U.S. at 138, 143). In fact, *Noerr* said nothing about a sham lacking objective reasonableness; *Noerr* instead described a sham as activity "ostensibly directed toward influencing governmental action" that was "a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor . . . ." 365 U.S. at 144. *Noerr*'s concern thus was with defendants engaging in non-petitioning activities and trying to invoke the protection of petitioning activities; the concern was not about the objective reasonableness of real petitioning efforts.

47 *Id.* at 60-61 (citations omitted). The Court observed that a plaintiff meeting this two-part test still would have to prove an antitrust violation. *Id.* at 61.

The Court, drawing on the tort of wrongful civil proceedings, defined objectively baseless as lacking in probable cause to sue,[48] and emphasized that even if a plaintiff loses a lawsuit (as the movie studios did), the plaintiff should be found to have had probable cause if its belief in the chance of success was objectively reasonable.[49]

To support this test for sham litigation, the Supreme Court relied on "fidelity to precedent."[50] The Court omitted discussion of the Petition Clause itself (perhaps because previous *Noerr* opinions had done the same).[51] The Court also omitted any extended consideration of the public interest that could be harmed by this kind of petitioning—*i.e.*, litigation's potential to harm economic competition and consumer welfare. In other words, *PRE* did not engage in the balancing of the public interests served by the Petition Clause with those served by the antitrust laws, such as it did in *Borough of Duryea v. Guarnieri*, the recent case interpreting the right to petition. The Court's broad interpretation of the constitutional right to litigate in *PRE* is difficult to reconcile with the Court's narrower interpretation in *Borough of Duryea*.[52]

PRE came under criticism as overprotective of antitrust defendants, starting with Justice Stevens' opinion concurring in the judgment.[53] While he agreed that the movie studios' lawsuit was

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48 *Id.* at 62-63.

49 *Id.* at 60 n.5.

50 *Id.* at 60.

51 *PRE* mentioned the right to petition once in general terms ("Those who petition government for redress are generally immune from antitrust liability"), *id.* at 56, and once in reviewing the *Noerr* decision and its legislative and executive context ("Nor did we 'impute to Congress an intent to invade' the First Amendment right to petition."), *id.* at 56 (citing *Noerr*, 365 U.S. 127, 138). *PRE* thus protected a firm's First Amendment right to litigate without quoting the relevant clause of the First Amendment or otherwise discussing its history or purpose. By contrast, the majority opinion in *Borough of Duryea v. Guarnieri* signaled its intent to explore the public interests that animate the Petition Clause from its opening statement: "Among other rights essential to freedom, the First Amendment protects 'the right of the people . . . to petition the government for a redress of grievances.' U.S. Const., Amdt. 1." 131 S. Ct. 2488, 2491 (2011).

52 *PRE*'s protection of lawsuits as part of the right to petition is even harder to reconcile with Justice Thomas' view in *Borough of Duryea*: "I seriously doubt that lawsuits are petitions within the original meaning of the Petition Clause." 131 S. Ct. 2488, 2501 (Thomas, J., concurring in the judgment).

53 *PRE* at 67-76 (Stevens, J., joined by O'Connor, J., concurring in the judgment). *See also*, *e.g.*, Gary Myers, *Antitrust and First Amendment Implications of* Professional Real Estate Investors, 51 WASHINGTON & LEE L. REV. 1199, 1226 ("This definition of unreasonableness is overly narrow because it unnecessarily permits the use of litigation as an anticompetitive tool.");

not a sham,[54] Justice Stevens found the Court's new rule unnecessarily broad: "I would not . . . use this easy case as a vehicle for announcing a rule that may govern the decision of difficult cases, some of which may involve abuse of the judicial process."[55] Justice Stevens preferred to leave federal courts freer to perform their traditional role under the Sherman Act of distinguishing between legitimate and illegitimate conduct, with a litigant's intent having more relevance.[56]

> The label "sham" is appropriately applied to a case, or series of cases, in which the plaintiff is indifferent to the outcome of the litigation itself, but has nevertheless sought to impose collateral harm on the defendant by, for example, impairing his credit, abusing the discovery process, or interfering with his access to governmental agencies. It might also apply to a plaintiff who had some reason to expect success on the merits but, because of its tremendous cost, would not bother to achieve that result without the benefit of collateral injuries imposed on its competitor by the legal process alone.[57]

Litigation as a Predatory Strategy: Hearing Before the Subcomm. on Intellectual Property, Competition, and the Internet of the H. Comm. on the Judiciary, 112th Cong. (2012) (statement of Marina Lao, Professor of Law, Seton Hall University School of Law) ("In the absence of a meaningful doctrinal limit to the expansive *Noerr* immunity principle, there are greater risks that dominant firms could bring actions against smaller competitors that they would not have rationally brought, in order to impose heavy costs on a small rival in the hope of excluding it from the market, diminishing its ability to compete on the merits, or deterring entry by other firms.").

54 *Id.* at 69 ("Access to the courts is far too precious a right for us to infer wrongdoing from nothing more than using the judicial process to seek a competitive advantage in a doubtful case.").

55 *Id.* at 76. Justice Stevens also questioned one of the Court's rationales for its rule: conflicting appellate decisions on sham litigation ("To an unnecessary degree . . . the Court has set up a straw man to justify its elaboration of a two-part test describing all potential shams."). *Id.* at 69.

56 On this point, Justice Stevens quoted at length from Judge Posner's opinion in *Grip-Pak v. Illinois Tool Works, Inc.*, 694 F.2d 466, 476 (7th Cir. 1982), including this passage: "[W]e are not prepared to rule that the difficulty of distinguishing lawful from unlawful purpose in litigation between competitors is so acute that such litigation can never be considered an actionable restraint of trade, provided it has some, though perhaps only threadbare, basis in law. . . . The difficulty of determining the true purpose is great, but no more so than in many other areas of antitrust law."

57 *PRE* at 68-69 (Stevens, concurring in the judgment).

Some commentators agreed that a firm's intent to inflict "collateral harm" on a competitor through litigation should have greater relevance when the competitor alleges the litigation is a sham:

> In many cases one can preserve the objective nature of the query without going as far as the Court did and requiring an objectively baseless suit. The objective query would then be presumably whether, objectively considered, the value of the antitrust defendant's lawsuit was the anticipated judicial decision or the anticipated consequences upon rivals without regard to the merits of the case.[58]

III. REVISITING THE RIGHT TO PETITION

In *Borough of Duryea v. Guarnieri*, the Supreme Court interpreted the First Amendment right to petition in another context: a public employee's lawsuit against his employer.[59] In this case, the Court left an employee unprotected by the Petition Clause against retaliation by an employer in light of the history and purpose of the right to petition and the "substantial government interests"[60] that would be harmed by "[u]nrestrained" petitioning[61] by public employees. This approach differed from the Court's approach in *PRE*, where a firm's right to sue competitors was protected with scant analysis of the competing public interests served by the Petition Clause and our antitrust laws.

Perhaps the most striking aspect of *Borough of Duryea* was the view expressed by Justices Scalia and Thomas that litigation may not even be entitled to First Amendment protections. In a dissenting and concurring opinion, Justice Scalia declared: "The Court has never actually *held* that a lawsuit is a constitutionally protected 'Petition,' nor does today's opinion hold that. . . .¶ I find the proposition that a lawsuit is a constitutionally protected 'Petition' quite doubtful."[62] In a separate opinion concurring in the judgment, Justice Thomas agreed. "For the reasons set forth by JUSTICE SCALIA, I seriously doubt that lawsuits are 'petitions' within the original meaning of the Petition Clause of the First Amendment. . . . Unreasoned statements to the contrary in this Court's prior

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58 AREEDA & HOVENKAMP, *supra* note 20, at ¶205b. The reality is that one's view of the *PRE* test depends on the danger that one is most concerned about: the possible suppression of parties' rights to seek a judicial vindication of their rights, or the potential of a commercial plaintiff to suppress competition with a predatory lawsuit. Regardless of one's view, the point is that a constitutional doctrine should be grounded in adequate constitutional analysis that gives due regard to all statutory rights after balancing their respective weight and the public's interests. In that regard, this article considers *Borough of Duryea* to be far better reasoned than *PRE*.

59 Borough of Duryea v. Guarnieri, 131 S. Ct. 2488, 2501 (2011).

60 *Id.* at 2495.

61 *Id.* at 2496.

62 *Id.* at 2503 (emphasis in original).

decisions do not convince me otherwise."[63] This view appears to contradict the rationale for the *PRE* opinion of two decades ago, which Justice Thomas authored and Justice Scalia joined.

The majority opinion in *Borough of Duryea* was less willing to exclude lawsuits from the right to petition (which would have overruled both *California Motor Transport* and *PRE*). However, the majority's analysis contained important observations about the scope of the right to petition.

A. The Case

In *Borough of Duryea*, the Supreme Court applied the "public concern" test for public employee speech rights[64] to a public employee's right to sue his employer. In doing so, the Court necessarily explored and explained the purpose of the First Amendment's Petition Clause. While the Court confined the application of its conclusions to the public employment context, these conclusions nevertheless have significant implications for the proper application of the Petition Clause in other areas of law, including antitrust.

In *Borough of Duryea*, after a town council fired its police chief (Guarnieri),[65] the chief responded by filing a union grievance. The grievance went to arbitration, and the arbitrator ordered Chief Guarnieri reinstated. The town council then passed several measures instructing Guarnieri in the performance of his duties (including directives that the borough's police car was for official business only and that the borough's municipal building was smoke-free). Guarnieri responded by filing another union grievance, which resulted in some of the directives being revised or withdrawn. Guarnieri then sued the borough, the council, and individual council members in federal court under 42 U.S.C. § 1983.[66] In his lawsuit, Guarnieri contended that his initial union grievance over his termination had been a petition protected by the First Amendment, and that the council had retaliated against him by issuing the directives instructing him in his duties. Guarnieri later amended his lawsuit to add another allegation of retaliation by the council, this time for his filing of the

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63 *Id.* at 2501.

64 Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205, Will Cnty., Illinois, 391 U.S. 563, 568 (1968); Connick v. Myers, 461 U.S. 138, 142 (1983).

65 The factual and procedural history in this and the following paragraph is taken from *Borough of Duryea* at 2492-2493. (The opinion does not discuss the reasons for Guarnieri's termination, but notes that he was reinstated after a disciplinary suspension.)

66 The statute provides in part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ."

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lawsuit itself. He alleged that the council had denied a request that he made for overtime compensation because of his lawsuit, which also was a protected petition.

At trial, the district judge instructed the jury that Guarnieri's union grievance and lawsuit were protected activities under the Constitution, and that the defendants could be found liable if there was a sufficient connection between those protected activities and the alleged retaliation against him. The jury found for Guarnieri and awarded him compensatory damages, punitive damages, and attorneys' fees totaling more than $142,000. The U.S. Court of Appeals for the Third Circuit affirmed on the question of liability,[67] quoting from an earlier circuit case: "[A] public employee who has petitioned the government through a formal mechanism such as the filing of a lawsuit or grievance is protected under the Petition Clause from retaliation for that activity, even if the petition concerns a matter of solely private concern."[68] The court rejected the defendants' argument that Guarnieri's petitions were not protected by the First Amendment because they did not address matters of public concern (the test applied in some other circuits to Petition Clause claims by public employees). The Third Circuit said that only if a public employee's petition is a "sham" would it be unprotected under the First Amendment.

The Supreme Court reversed, framing the issue as follows: "This case concerns the extent of the protection, if any, that the Petition Clause grants public employees in routine disputes with government employers."[69] Writing for a seven-member majority, Justice Kennedy looked to the Court's doctrine on public employee speech rights and applied it to public employee petitioning rights. The Court held that when a public employee sues his or her employer on a matter of private concern, the public entity may retaliate against the employee without violating his or her First Amendment right to petition.[70] If the public employee sues the employer "as a citizen" on a matter of public concern, retaliation by the employer will violate the employee's right to petition only when the employee's First Amendment interest outweighs the government's interest in effective and efficient management.[71] The Court concluded: "The right of a public employee under the Petition Clause is a right to participate as a citizen, through petitioning activity, in the democratic process. It

67 The appeals court found the evidence insufficient to support an award of punitive damages.

68 *Borough of Duryea*, 131 S. Ct. at 2493 (quoting *Borough of Duryea v. Guarnieri*, 364 Fed.Appx. 749, 753 (3rd Cir. 2010)) (in turn quoting *Foraker v. Chaffinch*, 501 F.3d 231, 236 (3rd Cir. 2007)).

69 *Id.* at 2491.

70 *Id.* at 2500. The Court emphasized that government employees often have statutory and regulatory protections against "improper retaliation or discipline" and added: "The Petition Clause is not an instrument for public employees to circumvent these legislative enactments when pursuing claims based on ordinary workplace grievances." *Id.* at 2497.

71 *Id.* at 2501.

is not a right to transform everyday employment disputes into matters for constitutional litigation in the federal courts."[72]

As with its limit on public employee speech rights, the Court justified its limit on public employee petitioning rights in part by emphasizing the potential for these petitions to harm a substantial public interest: "the efficient and effective operation of government.[73] Public employees, the Court said, could "use petitions to frustrate progress towards the ends they have been hired to achieve."[74] Public employees also could "use the courts to pursue personal vendettas or to harass members of the general public," and consequently undermine public confidence in the government entity.[75] Further, the Court cautioned, such petitions could lead to an improper role for the federal courts: "Unrestrained application of the Petition Clause in the context of government employment would subject a wide range of government operations to invasive judicial superintendence. . . . This would raise serious federalism and separation-of-powers concerns."[76]

The Court also grounded its rule in "the historic and fundamental principles" underlying the Petition Clause.[77] Some petitions, the Court said, merit greater First Amendment concern than others. "In analogous cases under the Speech Clause, this Court has noted the 'Constitution's special concern with threats to the right of citizens to participate in political affairs,' even though it is likely that, in this and any other age, most speech concerns purely private matters. . . . ¶ Petitions to the government assume an added dimension when they seek to advance political, social, or other ideas of interest to the community as a whole."[78] The Court based this conclusion on the rich history of English and American petitioning, including Magna Carta, the Petition of Right of 1628, the Declaration of Right of 1689, and the Declaration of Independence, and its central preoccupation with freedom and governance.[79] "The right to petition is in some sense the source of other

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[72] *Id.*

[73] *Id.* at 2495.

[74] *Id.*

[75] *Id.* at 2496.

[76] *Id.* This echoed the Court's concern in *Noerr*, in the antitrust context, about the judicial branch intruding in the domain of the legislative and executive branches. Of course, when a court evaluates whether the lawsuit before it is a sham, separation of powers is not a concern.

[77] *Id.* at 2498.

[78] *Id.* (citation omitted).

[79] *Id.* at 2499-2500.

fundamental rights, for petitions have provided a vital means for citizens to request recognition of new rights and to assert existing rights against the sovereign."[80]

Given the historical importance of petitions on matters of public concern as opposed to private concerns, and given the inherent potential of public employee lawsuits to interfere with government operations, the Supreme Court in *Guarnieri* established limitations on a public employee's right to sue his or her employer and thus exercise the right to petition. However, the Court reserved discussion of the First Amendment right to litigate outside of the public employment context. It suggested in its ruling might be limited to similar scenarios, observing that in this case:

> [r]estraints are justified by the consensual nature of the employment relationship and by the unique nature of the government's interest. . . . Although retaliation by a government employer for a public employee's exercise of the right of access to the courts may implicate the protections of the Petition Clause, this case provides no necessity to consider the correct application of the Petition Clause beyond that context.[81]

Similarly, the Court reserved discussion of whether petitions on matters of private concern might receive more protection in other areas of law. "The Petition Clause undoubtedly does have force and application in the context of a personal grievance addressed to the government. . . . Outside the public employment context, constitutional protection for petitions does not necessarily turn on whether those petitions relate to a matter of public concern."[82]

B. The New View of Two Justices

In an opinion concurring in part and dissenting in part,[83] Justice Scalia set forth a significantly different view of the protections of the Petition Clause. Historically, he argued, the people had petitioned the legislative and executive branches of government, not the judicial branch.[84] Thus, he challenged the majority's premise that a lawsuit is a petition to the judicial branch within the protection of the First Amendment.[85] Of particular interest to the antitrust field, Justice Scalia contended that *California Motor Transport* contained only "pure dictum" regarding First

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80 *Id.* at 2500.

81 *Id.* at 2494.

82 *Id.* at 2498.

83 *Id.* at 2502-2507.

84 *Id.* at 2503-2504.

85 *Id.* at 2502-2504.

Amendment protection of lawsuits.[86] "The Court has never actually *held* that a lawsuit is a constitutionally protected 'Petition,' nor does today's opinion hold that. . . . I find the proposition that a lawsuit is a constitutionally protected 'Petition' quite doubtful."[87]

While disagreeing with the majority's broader application of the right to petition, Justice Scalia proffered a broader view of the kinds of petitions that merit First Amendment protection. He took issue with the majority's distinction between petitions on matters of public concern and private concern, pointing to the private nature of most historical petitioning.[88]

> We have decided innumerable cases establishing constitutional rights with respect to litigation, and until today not a one of them has so much as hinted that litigation of public concern enjoys more of those rights than litigation of private concern. . . . [T]here is no basis for believing that the Petition Clause gives special protection to public petitions.[89]

In his own opinion concurring in the judgment,[90] Justice Thomas agreed with Justice Scalia regarding the constitutional status of lawsuits. His opinion opened with this statement: "For the

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86 *Id.* at 2503.

87 *Id.* (emphasis in original). Justice Scalia also asserted: "The fact that the Court never affirmed a First Amendment right to litigate until its unsupported dictum in 1972—after having heard almost 200 years' worth of lawsuits, untold numbers of which might have been affected by a First Amendment right to litigate—should give rise to a strong suspicion that no such right exists." *Id.* at 2504. However, Justice Scalia conceded that the question of Petition Clause protection of lawsuits was not before the Court ("[T]he parties have not litigated the issue, and so I agree we should leave its resolution to another day."). *Id.*

88 *Id.* at 2504-2505.

89 *Id.* at 2505-2506. On the question before the Court, Justice Scalia said: "[W]e should hold that the Petition Clause protects public employees against retaliation for filing petitions unless those petitions are addressed to the government in its capacity as the petitioners' employer, rather than its capacity as their sovereign." *Id.* at 2056. This would have withheld First Amendment protection from Guarnieri's union grievance, but would have extended First Amendment protection to his federal lawsuit.

90 *Id.* at 2501-2502. On the question before the Court, Justice Thomas also endorsed Justice Scalia's framework on public employee petitioning rights, but favored adding a further restriction: "Even where a public employee petitions the government in its capacity as sovereign, I would balance the employee's right to petition the sovereign against the government's interest as an employer in the effective and efficient management of its internal affairs." *Id.* at 2502.

reasons set forth by JUSTICE SCALIA, I seriously doubt that lawsuits are 'petitions' within the original meaning of the Petition Clause of the First Amendment. . . . Unreasoned statements to the contrary in this Court's prior decisions do not convince me otherwise."[91] Justice Thomas did not, however, mention any unreasoned statements in his *PRE* opinion, which not only assumed the existence of constitutional protection for litigation but strengthened it.

IV. SHAM LITIGATION AFTER *BOROUGH OF DURYEA*

Borough of Duryea analyzed the right to petition in a way the Supreme Court has yet to do in the antitrust context. Several points are worth consideration.

A. The Right to Petition

In the *Noerr* line of cases, the Supreme Court offered little analysis of the history or purpose of the Petition Clause in reaching its results. By contrast, in *Borough of Duryea*, the Court analyzed the interests and principles informing the right to petition at length. In doing so, it concluded that petitions on "political, social, or other ideas of interest to the community as a whole" lie at the core of the people's right to petition their government.[92] This became one of the Court's justifications for limiting Petition Clause protection of public employees who sue their employers. That is, if a public employee's lawsuit addresses a matter of private concern, the employee is not protected by the First Amendment against employer discipline or retaliation.

This reading of the Petition Clause necessarily raises the question of whether *PRE*'s strong protection of petitions to the government on matters of purely private concern—*i.e.*, commercial lawsuits—remains justified. After *Borough of Duryea*, the question becomes what degree of First Amendment protection a firm should receive when it sues a competitor on a matter of private concern, given that public employees receive no First Amendment protection when they sue their employers on matters of private concern (and possibly no protection even when they sue on matters of public concern). The Supreme Court expressly left this question open outside the public employment context.[93]

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[91] *Id.* at 2501.

[92] *Id.* at 2498.

[93] Other questions about the Petition Clause remain unanswered in the antitrust context. For example, while *Borough of Duryea* addressed an individual's right to sue under the Petition Clause, the Supreme Court has yet to undertake a meaningful analysis of a commercial entity's right to sue. That is, the Court has yet to explain why the language of the First Amendment—i.e., the right of "the people" to petition government—applies to commercial entities. *But cf.* Citizens United v. Federal Election Commission, 130 S. Ct. 876, 899 (2010); First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978) (extending First Amendment protection to corporate speech). Another point is that commercial speech receives less First Amendment protection than individual speech. Central Hudson Gas & Electric Corp. v. Public Service Commission of New

Over the years, the Court has offered some insight regarding the importance of petitioning on commercial matters.[94] However, *Borough of Duryea* made clear that "the 'Constitution's special concern' "protected by the Petition Clause derived from concerns for preservation of the right to petition on political affairs.[95] Just as *Noerr* stated that "[t]he proscriptions of the [Sherman] Act, tailored as they are for the business world, are not at all appropriate for application in the political arena,"[96] it seems reasonable to inquire whether the freedom of the Petition Clause, tailored as it is for the political world, is appropriate for or should be accorded the same weight in its application in the business arena.

B. The Public Interest

In *Borough of Duryea*, the Supreme Court contemplated the tension between an individual's right to petition and the public's interest in effective government. The Court resolved this tension by imposing a limit on the individual right to petition: "In light of the government's interests in the public employment context, it would be surprising if Petition Clause claims by public employees were not limited as necessary to protect the employer's functions and responsibilities."[97] The potential for harm to the public interest, then, was another justification for limiting a public employee's right to petition (along with the purpose of the Petition Clause itself, as discussed above).

By contrast, the *PRE* opinion focused on a competitor's right to litigate and omitted any real evaluation or weighing of that right as against the important public interests served by the nation's

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York, 447 U.S. 557, 566 (1980). Just as it looked to its doctrine on free speech for guidance on individual petitioning in *Borough of Duryea*, the Court could look to its doctrine on commercial speech for guidance on commercial petitioning in the antitrust context.

94 *See*, *e.g.*, *Noerr*, 365 U.S. 127, 139 ("A construction of the Sherman Act that would disqualify people from taking a public position on matters in which they are financially interested would . . . deprive the people of their right to petition in the very instances in which that right may be of the most importance to them."); *California Motor Transport*, 404 U.S. 508, 510-511 ("We conclude that it would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests vis-à-vis their competitors.").

95 *Borough of Duryea*, 131 S. Ct. at 2498 (citation omitted).

96 *Noerr*, 365 U.S. 127, 141.

97 *Borough of Duryea*, 131 S. Ct. at 2497.

antitrust laws.[98] Clearly, the antitrust laws foster and further fundamental interests in free enterprise and consumer welfare that are critical public interests: "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms."[99]

After *Borough of Duryea*, a proper analysis of the right to sue a competitor should take into account the importance of this public interest. There, the Supreme Court limited the right to petition based upon the public's interest in efficient government operation. In a hierarchy of public interests, one could readily conclude that the public interests in freely operating markets, which the legislature chose to enshrine in the antitrust laws, would be given greater weight than the unlegislated interests in efficient government recognized in *Guarnieri*.[100] Similarly, one could argue that the potential for public harm from antitrust violations eclipses any that could arise from public employee grievances, given the broader impact of anticompetitive conduct on the populace as a whole.

While commercial litigation may serve to enforce, not frustrate, the public interest in lawful competition—for example, by vindicating a copyright or patent—the same could be said for according public employees the right to petition to uphold legislated labor principles. But often commercial litigation can hinder and impede the public's interest in free competition and is pursued by the litigant for purely personal gain and profit. Why this litigation should be uncritically accorded the protection of the right of petition and insulated from the antitrust laws, particularly when some of the justices have tethered that right to vindication of public interests, seems particularly hard to justify after *Guarnieri*.

The Supreme Court has long recognized the broad reach of the Sherman Act: "That Congress wanted to go to the utmost extent of its Constitutional power in restraining trust and monopoly agreements . . . admit[s] of little, if any, doubt."[101] The Court, as a general rule, has long

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[98] After its initial citation of the Sherman Act, the *PRE* opinion made no further mention of the Act or its purposes.

[99] United States v. Topco Associates, Inc., 405 U.S. 596, 610 (1972).

[100] *Cf.* Los Angeles County Metropolitan Transp. Authority v. Alameda Produce Market, LLC, 52 Cal. 4th 1100, 1113-14 (2011) ("Our role as a court is not to 'sit in judgment of the Legislature's wisdom in balancing such competing public policies.' Instead, 'due respect for the power of the Legislature and for the separation of powers' requires us to 'follow the public policy choices actually discernible from the Legislature's statutory enactments.' ") (internal citations omitted); Planning & Conserv. League v. Dept of Fish & Game, 55 Cal. App. 4th 479, 494 (1997) ("Exemptions cannot be judicially created" in the absence of an explicit statutory exemption).

[101] United States v. South-Eastern Underwriters, 322 U.S. 533, 558 (1944).

exercised restraint when considering constitutional challenges to statutes.[102] If the Court does perceive "a constitutional flaw in a statute," then "the touchstone for any decision about remedy is legislative intent, for a court cannot 'use its remedial powers to circumvent the intent of the legislature.'"[103] Nevertheless, that is arguably what the Court did in the *PRE* case on the strength of its interpretation of the right to petition in purely private matters. In antitrust enforcement, Congress has directed the courts to determine where conduct is unduly restricting competition.[104] But restricting a court by judicial fiat to a technical judgment of a lawsuit's objective merit prevents the kind of contextual inquiry that Congress made central to antitrust enforcement, and does so on the dubious justification of the right to petition.

V. CONCLUSION

Litigation has long been recognized as an effective tool to suppress competition. "Predation by abuse of governmental procedures, including administrative and judicial processes, presents an increasingly dangerous threat to competition. . . .¶ As a technique for predation, sham litigation is theoretically the most promising."[105] The challenge is to devise a fair framework that respects firms' right to petition the judicial branch "in the very instances in which that right may be of the most importance to them,"[106] while recognizing the potential for the "use [of] the governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon."[107] The *PRE* opinion skewed this balance, giving great weight to the First Amendment right to litigate without adequate constitutional justification and without recognition of the important public interest served

[102] *Cf.* Regan v. Time, Inc., 468 U.S. 641, 652 (1984) (plurality opinion) ("A ruling of unconstitutionality frustrates the intent of the elected representatives of the people.").

[103] Ayotte v. Planned Parenthood of Northern New England, 546 U.S. 320, 328, 330 (2006) (citations omitted).

[104] Congress not only expressed the public interest in economic competition in the antitrust laws, but also entrusted the federal courts with deciding what is lawful and unlawful competition under those laws. The concern expressed in *PRE* was that judges would arbitrarily detect sham litigation; however, Congress has directed judges to "discern and draw" that "difficult line." *California Motor Transport*, 404 U.S. 508, 513. And of course, judges certainly are capable of determining when the judicial process is being abused. *See* BORK, *supra* note 25, at 357-358 ("Judges . . . have far more experience with and understanding of litigation than of economics and business behavior. They are far less likely to make mistakes about the former.").

[105] BORK, *supra* note 25, at 347.

[106] *Noerr*, 365 U.S. 127, 139.

[107] City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 380 (1991) (emphasis in original).

by our antitrust laws that might be harmed. *Borough of Duryea* represents a better reasoned and better balanced doctrine that would be more faithful to the First Amendment's purpose and to the letter and spirit of our antitrust laws.

Is a Search Engine Result an "Opinion" for which the First Amendment Can Be Raised As a Defense to any Government Antitrust Enforcement Action?

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I. INTRODUCTION

For several years now, Google has faced allegations from various fronts of purported violations of the antitrust laws in regards to its manipulation of its vertical shopping search engine results.[2] Vertical shopping competitors[3] have filed complaints with the FTC and the State Attorneys General;[4] those complaints alleged, among other things, that Google violated the antitrust laws[5] by

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[1] The author is a Deputy Attorney General for the State of California in the Antitrust Law Section. The views and opinions expressed in this page are strictly those of the author and are not the views or opinions of the Office of the California Attorney General, the American Bar Association, or the State Bar of California. Annette Goode-Parker, Sr. Legal Analyst, provided invaluable assistance in the research and writing of this article.

[2] This article distinguishes between vertical shopping search engine results and organic search engine results. "*Organic search results* are listings on search engine results pages that appear because of their relevance to the search terms, as opposed to their being advertisements." *Organic Search*, WIKIPEDIA (Sept. 14, 2013), *available at* http://en.wikipedia.org/wiki/Organic_search; A *vertical search engine*, as distinct from a general web search engine, focuses on a specific segment of online content. *Id., Vertical Search, available at* http://en.wikipedia.org/wiki/Vertical_search. This distinction could be a basis for determining the relevant market for establishing monopoly power.

[3] Google's 10-K for the year ending December 31, 2012 describes these vertical shopping engines as "competitors." *See* Google, Inc., Annual Report (Form 10-K), at 8 (Jan. 29, 2013) ("Our business is characterized by rapid change and converging, as well as new and disruptive, technologies. We face formidable competition in every aspect of our business, particularly from companies that seek to connect people with information on the web and provide them with relevant advertising. We face competition from: Vertical search engines and e-commerce websites, such as Kayak (travel queries), Monster.com (job queries), WebMD (for health queries), and Amazon.com and eBay (e-commerce)"), *available at* http://www.sec.gov/Archives/edgar/data/1288776/000119312513028362/d452134d10k.htm.

[4] Google's competitors have also filed complaints with the European Commission, which are not discussed herein due to this paper's focus upon the First Amendment of the U.S. Constitution.

giving itself preferential treatment in the search results of its own properties through the manual manipulation of its search engine algorithm in order to demote the offerings of rivals, notwithstanding in some cases the alleged superior content of the rival pages.[6]

This article will address only one issue: whether Google search engine results are "opinions" and, as such, would be protected by the First Amendment of the U.S. Constitution[7] and/or its state counterparts[8] from any regulation based on alleged violations of the antitrust laws.[9]

To do so, this article will first examine whether computerized search engine results are the equivalent of speech and whether such speech amounts to being an opinion. Next, this article will

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5 Whether this conduct violates the antitrust laws has been the subject of great debate. Indeed, the Federal Trade Commission determined that ranking system's benefits to consumers outweigh any harm suffered by rivals and declined to take formal action against Google under Section 5 of the FTC Act. In the Matter of Google, Inc., Statement of the Federal Trade Commission Regarding Google's Search Practices, FTC No. 111-0163 (Jan. 3, 2013), *available at* http://ftc.gov/os/2013/01/130103googlesearchstmtofcomm.pdf.

6 *See* http://www.fairsearch.org/ for a complete discussion of these competitors' positions and concerns.

7 "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." U.S. CONST., amend. I, *available at* http://www.law.cornell.edu/constitution/first_amendment.

8 For California's version of the First Amendment, *see* CAL. CONST., art. I, § 2, *available at* www.leginfo.ca.gov/.cons/.article_1.

9 Outside of the antitrust enforcement context, search engines often enjoy special protections from liability as a statutory matter. For example, Section 230 (c) (1) of the Communications Decency Act, 47 U.S.C. § 230 (c) (1), provides that "no provider … of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." According to the Ninth Circuit, "the touchstone of section 230(c) is that providers of interactive computer services are immune from liability for content created by third parties." However, in Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157 (9th Cir. 2008), the United States Court of Appeals for the Ninth Circuit noted: "[O]rdinary search engines do not use unlawful criteria to limit the scope of searches conducted on them, nor are they designed to achieve illegal ends—as Roommate's search function is alleged to do here. Therefore, such search engines play no part in the 'development' of any unlawful searches." *Id.* at 1167. This article will not address those special exemptions, whether such exemptions are valid, or whether such exemptions should be imported in some fashion into the antitrust context.

examine whether, if such speech amounts to being an opinion, whether is it entitled to First Amendment protection from government action, in particular, enforcement of the antitrust laws. Through its examination of various cases, including two in which Google asserted a First Amendment defense against private parties, this article will explore the applicable factors and applicable level of constitutional scrutiny assuming that some level of First Amendment protection applies. Ultimately, this article will conclude that a First Amendment defense is likely not available to Google should a government enforcer bring an action on the ground that Google's search engine's mode of operation violates the antitrust laws.

II. SEARCH ENGINE RESULTS DERIVED FROM COMPUTER CODE ARE SPEECH

Search engine results are formulated through the use of algorithms. An *algorithm* is a computer code that provides a step-by-step procedure for calculation or data processing.[10] It is as much a language as English with a structure and a vocabulary that can be used to carry out complex functions or express complex thoughts. Even though algorithms use the language of computer code, and ultimately carry out their functions on a computer via the use of binary code with ones and zeros, such code may still be regarded as "speech" for constitutional purposes.[11] In *Universal City Studios Inc. v. Corley* ("*Corley*"), the United States Court of Appeals for the Second Circuit drew an analogy between computer code and musical compositions or mathematical equations, indicating that the obscurity or difficulty of understanding what is written does not make "computer code … distinguishable from conventional speech for First Amendment purposes."[12] In that case, the court found that computer code, which instructed the computer to perform certain functions which were "capable of being understood and assessed by human beings," qualified as speech for First Amendment purposes.[13]

In turn, *Corley* was one of several federal decisions[14] relied upon by the California Supreme Court in *DVD Copy Control Association, Inc.* v. *Bunner*[15] to determine that computer code qualified as

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[10] *Algorithm,* WIKIPEDIA (Sept. 14, 2013)*, available at* http://en.wikipedia.org/wiki/Algorithm.

[11] Universal City Studios Inc. v. Corley, 273 F.3d 429, 446 (2nd Cir. 2001) ("Corley").

[12] *Id.*

[13] *Id.*

[14] *See, e.g.,* Junger v. Daley, 209 F.3d 481, 485 (6th Cir. 2000) (regarding export of encryption software :"Because computer source code is an expressive means for the exchange of information and ideas about computer programming, we hold that it is protected by the First Amendment"); Universal City Studios, Inc. v. Reimerdes, 111 F.Supp.2d 294, 326 (S.D.N.Y. 2000), *aff'd* 273 F.3d 429 (2d Cir. 2001) ("Reimerdes") (regarding decryption software - "It cannot seriously be argued that any form of computer code may be regulated without reference

speech protected by the First Amendment. In *Bunner*, Andrew Bunner was accused of misappropriation of trade secrets under California's Uniform Trade Secrets Act. Bunner posted on his website the hacked code for DVD CCA's "content scramble system" also known as "CSS." Once Bunner was enjoined from further distribution of the broken code, he appealed, claiming the injunction violated his First Amendment free speech rights. Ultimately, though the California Supreme Court found that the dissemination of computer code was speech, it also found that the First Amendment does not prohibit courts from enjoining speech to protect a legitimate property right, in this case, DVD CCA's encryption code, which was a trade secret. Therefore, the First Amendment did not stand in the way of enjoining Bunner from distribution of the computer code.[16]

III. SINCE SEARCH ENGINE RESULTS ARE SPEECH, ARE THEY ALSO OPINIONS?

Based on these cases, this article views computer code as being equivalent to speech for First Amendment purposes. That being said, being "speech" does not automatically qualify such code for First Amendment protection. For instance, it is understood that falsely yelling "fire" in a crowded theatre might be speech, but not protected speech.[17] Therefore, the next question for consideration is what type of speech would be a search engine result: Is a search engine result an opinion or something else? In an April 2012 paper commissioned by Google, with the caveat that "the views within it should not necessarily be ascribed to Google," UCLA Professor Eugene Volokh made the case for Google's search engine's results being treated as a judgment or opinion for First Amendment purposes. He stated:

> Search engines' selectivity is much more comparable to the selectivity of newspaper op-ed pages, which choose to feature only a small fraction of potential columns. Thus, even though the search engine does not generate the content that is linked to

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to First Amendment doctrine. The path from idea to human language to source code to object code is a continuum."); United States v. Elcom, Ltd., 203 F.Supp.2d 1111, 1126 (N.D. Cal. 2002) (anti-trafficking" provisions of the Digital Millennium Copyright Act — "Computer software is expression that is protected by the copyright laws and is therefore 'speech' at some level"); *see also* Bernstein v. U.S. Dept. of State, 922 F.Supp. 1426, 1436 (N.D.Cal.1996) (First Amendment extends to source code); Karn v. U.S. Dept. of State, 925 F.Supp. 1, 10 (D.D.C.1996) (assuming First Amendment extends to source code).

15 DVD Copy Control Association, Inc. v. Bunner, 31 Cal. 4th 864 (2003) ("*Bunner*").

16 *Id.* at 877-85.

17 *See e.g.*, Schenck v. U.S., 249 U.S. 47, 52 (1919) ("The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.").

> by its results, the judgments and opinions about how to rank and present those results are fully protected by the First Amendment.[18]

The "opinion" is thus, according to Professor Volokh, Google's decision as where to place results and how to rank those results.[19] Therefore, it is argued that an antitrust action directed at decision-making conduct involving such "opinions" would be barred by the First Amendment.

Google rivals, on the other hand, make three primary contentions as to why that argument is not so: first, Google's decisions or manipulations are intended to foreclose competition as to vertical shopping results; second, manual manipulation of the algorithmic results places Google's own results ahead of the placement of rivals' results that Google's own algorithm otherwise determined to be superior, thus giving Google a competitive advantage; and third, Google just simply intends to destroy vertical shopping competitors who seek to tap into Google's approximate "235 million active users across …Google properties"[20] as potential customers of Google's competition.

The difference between Google's and its competitors' viewpoints as to the operation of Google's search engine is whether the algorithm's determination is just an ad hoc editorial judgment based upon objective criteria or instead consists of manipulated results that are falsely represented to be objective and are used in an anticompetitive manner. In other words, are these search engine results opinions or factual commercial statements (that are, in fact, false or manipulated according to Google's competitors)?

A. The Search Engine Process for Formulating "Opinions"

To answer this question, it is necessary to discuss the search engine process. Google contends that its "search technologies sort through an ever-growing amount of information to deliver relevant and useful search results in response to user queries."[21] Put another way, search engines provide "answers" by crawling and indexing websites, calculating relevancy and serving the results to user queries. To do this, an Internet web page crawling device, also known as a "bot,"

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18 Eugene Volokh, First Amendment Protection for Search Engine Search Results, at 15 (April 20, 2012) ("*Volokh*"), http://www.volokh.com/wp-content/uploads/2012/05/SearchEngineFirstAmendment.pdf.

19 "When search engines select and arrange others' materials, and add the all-important ordering that causes some materials to be displayed first and others last, they are engaging in fully protected First Amendment expression— "[t]he presentation of an edited compilation of speech generated by other persons." *Volokh*, *supra* at note 18, at 15-16 (Citations omitted).

20 Google 10-K, *supra* note 3, at 3.

21 Google 10-K, *supra* note 3, at 4.

seeks out words on web pages from which an index is created. The Internet user uses keywords to search the index for directions to the relevant websites.

In Google's own words, its engineers "write programs and formulas"—an algorithm—which is "designed to deliver the best results possible" [22] in response to user queries. The algorithm is a constantly evolving document: Google claims its "algorithms rely on more than 200 unique signals or "clues" that make it possible for Google to guess what any user might really be looking for. These signals include things like the terms on websites, the freshness of content, your region, and PageRank.[23]" To keep results "relevant," Google fights spam[24] "24/7 mainly through an automatic process but sometimes by manual manipulation."[25] Google has long maintained that any changes it makes by manipulation of the original algorithm search results are intended to give the consumer a better experience, not to preserve its own market share.[26] So does this process amount to an opinion or to commercial statements of fact or simply to statements of fact? The answer can make a critical difference as to the degree of First Amendment protection.

1. Opinion or Statements of Fact

The meaning of "opinion" has continuously evolved since its common law definition: speech that appears to convey a fact, I think the sky is grey, is treated as conveying an opinion.[27]

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22 Google, How Search Works — The Story, http://www.google.com/insidesearch/howsearchworks/thestory/ (last visited Sept. 14, 2013).

23 *See* http://www.google.com/insidesearch/howsearchworks/algorithms.html (last visited Sept. 14, 2013). PageRank is a Google algorithm which ranks the importance of a page as a function of the number of incoming links to that page. *See* PageRank, WIKIPEDIA (Sept. 14, 2013), *available at* en.wikipedia.org/wiki/PageRank#Description. The greater the number of incoming links to a page, the more important the page and thus the higher the ranking in the search results.

24 *See* http://www.google.com/insidesearch/howsearchworks/thestory/index.html (last visited Sept. 14, 2013); *see also* http://www.google.com/insidesearch/howsearchworks/fighting-spam.html (last visited Sept. 14, 2013).

25 *See supra* note 24.

26 *F.T.C. Still Expects to Resolve Google Antitrust Inquiry by Year's End*, NEW YORK TIMES BITS BLOG (Sept. 19, 2012), *available at* http://bits.blogs.nytimes.com/2012/09/19/f-t-c-still-expects-to-resolve-google-antitrust-inquiry-by-years-end/?src=rechp.

27 For a detailed discussion of "opinion" jurisprudence, s*ee* Robert D. Sack, Protection of Opinion under the First Amendment: Reflections on Alfred Hill, "Defamation and Privacy under the First Amendment", 100 COLUMBIA L. REV. 294 (2000), *available at* http://www.jstor.org/stable/1123560.

Justice Powell's opinion for the Court in *Gertz* v. *Robert Welch, Inc.*[28] ("*Gertz*") is, in turn, the lead case for the proposition that statements appearing to be false are still protected under the First Amendment if they qualify as an opinion.[29] In that case, the plaintiff, Gertz, was a lawyer who filed a defamation suit against the John Birch Society, which was legally known as Robert Welch, Inc., claiming defamation based upon a society publication which contained many "serious inaccuracies" about him. Accepting that the statements were false but qualified as the opinion of the John Birch Society, Justice Powell's consideration of the case started with what he called "common ground," that is:

> Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in "uninhibited, robust, and wide-open" debate on public issues.[30]

Justice Powell stated in his opinion that: "The First Amendment requires that we protect some falsehood in order to protect speech that matters"; his opinion held that "… so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual."[31] "Because the jury was allowed to impose liability without fault and was permitted to presume damages without proof of injury, a new trial is necessary."[32]

Gertz was interpreted in a very expansive manner in treating *all* false statements of fact as amounting to nothing more than opinion, and hence being protected under the First Amendment. For example, in *Blatty* v. *New York Times Co.*,[33] the California Supreme Court found that "First Amendment limitations are applicable to all claims, of whatever label, whose gravamen is the alleged injurious falsehood of a statement."

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[28] 418 U.S. 323 (1974).

[29] *See e.g.,* Cianci v. New Times Publishing Co., 639 F.2d 54, 61 (2nd Cir. 1980). This passage "has become the opening salvo in all arguments for protection from defamation actions on the ground of opinion, even though the case did not remotely concern the question."

[30] *Gertz*, 418 U.S. at 339-340.

[31] *Id.* at 347.

[32] *Id.* at 352.

[33] Blatty v. New York Times Co., 42 Cal.3d 1033 (1986) ("*Blatty*").

However, sixteen years later, in *Milkovich* v. *Lorain Journal Co.*,[34] the Court would find that cases after *Gertz* misconstrued its holding, requiring clarification that not all false statements of fact could be labeled as opinions. *Milkovich* involved the issue of whether a high school wrestling coach could sue a local newspaper and one of its reporters for defamation for accusing him of having committed perjury. Although the lower court granted summary judgment, the Court reversed, noting that the dispositive question was whether the challenged statements could be reasonably interpreted to state a fact.[35]

The *Milkovich* Court stated the "false idea—pernicious opinion" much quoted passage from *Gertz* was not intended to create a "wholesale exemption for anything that might be labeled 'opinion.'" The Court described the categorical rule adopted by lower courts as a product of "mistaken reliance on the *Gertz* dictum."[36] Instead the Court indicated that, read in context, "the fair meaning of the passage is to equate the word 'opinion' in the second sentence with the word 'idea' in the first sentence."[37] The relevant sentence from *Gertz*, quoted above, should have been read as: "Under the First Amendment there is no such thing as a false idea. However pernicious an *idea* may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." The Court saw the quote as "a reiteration of Justice Holmes' classic 'marketplace of ideas' concept presented in his dissenting opinion in *Abrams v. United States*.[38] The Court saw[39] the "marketplace of ideas" origin of this passage as pointing "strongly to the view that the 'opinions' held to be constitutionally protected were the sort of thing that could be corrected by discussion."[40]Thus, the Court distinguished between false ideas or opinions, such as "rhetorical hyperbole" and "imaginative expression," and false or deceptive statements of fact.[41]

This correction has important implications for the issue of Google's search engine being protected under the First Amendment as set out in the prescient dissent of California Supreme Court Justice Grodin in *Blatty*, which preceded *Milkovich*:

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[34] Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990) ("*Milkovich*").

[35] *Id.*

[36] *Id.,* at 17-18.

[37] *Id.,* at 18.

[38] Abrams v. United States , 250 U.S. 616, 630 (1919)

[39] Citing Cianci v. New Times Publishing Co., 639 F.2d 54, 62 n.10 (2nd Cir. 1980)

[40] *Id.*

[41] *Milkvoich*, 497 U.S. at 20-21 (distinguishing between statements that can be reasonably interpreted as being ones of fact versus those that can be interpreted to be statements of "imaginative expression" or "rhetorical hyperbole").

> Suppose that the New York Times, after conducting its normal survey of representative bookstores throughout the country, found that Blatty's novel was, indeed, the top selling book for a particular week based on its own statistics. Suppose further that, despite this information, the Times purposefully substituted one of its own publications for Blatty's book at the top of its best seller list in order to enhance its own book's sales, and entirely omitted Blatty's book from the list… If a plaintiff can prove that a media defendant knowingly published a false statement for the purpose of inflicting financial injury on him personally, I do not believe that the free speech provisions of either the state or federal Constitution would be offended if the defendant were held liable in damages for such conduct, even if it were not obvious on the face of the publication who the defendant was intending to injure.[42]

The accusations against Google contend that it has done just that: favored its own inferior search results over those of competitors in a manner that is deceptive. Moreover, these search results are not like the kinds of opinions or ideas discussed in *Milkovich* that could be corrected in the court of public opinion. *Milkovich*, taken in conjunction with this dissent in *Blatty*, would thus suggest such a result is not protected opinion. However, the fact that search engine results are not opinions, and thus automatically protected under the First Amendment, does not mean that they are free to be regulated under the First Amendment. The next step is to determine what *kinds* of speech are search engine results: commercial speech or ordinary statements of fact.

2. Commercial Statements of Fact or Ordinary Statements of Fact

This article now turns to this next step of determining whether search engine results are commercial speech. The test for identifying commercial speech is whether the expression at issue proposes a commercial transaction.[43] There may be a distinction, however, between speech that is part of a commercial transaction, as that appears possibly to involve private matters more beyond the purview of the First Amendment, and speech that proposes a transaction as that appears likely to involve more public matters such as advertising that can trigger enhanced First Amendment scrutiny. This distinction is most noticeable in the case of *Dun & Bradstreet, Inc. v. Grove*[44] ("*Dun & Bradstreet I*") and *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.* ("*Dun & Bradstreet II*").[45]

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42 *Blatty*, 42 Cal.3d at 1049.

43 Va. Pharmacy Bd. v. Va. Consumer Council, 425 U.S. 748, 762 (1976).

44 404 U.S. 898 (1971).

45 472 U.S. 749 (1985).

Dun & Bradstreet I involved a publisher of credit reports that confidentially analyzed plaintiff, among many other companies, from time to time at the request of suppliers and creditors.[46] Even though the publisher erred in reporting that there was an unpaid judgment against plaintiff as opposed to plaintiff's predecessor corporation (though an error that the publisher retracted), the trial court issued a judgment notwithstanding a jury verdict of libel in favor of the publisher, noting that such an innocent error was not libel under First Amendment law.[47] On appeal, the United States Court of Appeal for the Third Circuit reversed, finding that such confidential factual reports on matters of private concern did not trigger enhanced First Amendment protections applicable to matters of public concern or matters involving an opinion.[48] Though the United States Supreme Court denied certiorari,[49] Justice Douglas, who dissented, proposed that any false statement, private or public, commercial or not commercial, on matters of fact could not be proscribed under the First Amendment as being libelous.[50]

Dun & Bradstreet II involved the same publisher of credit reports who was sued again for defamation, this time for a false, though quickly corrected, report that the plaintiff had filed for voluntary bankruptcy.[51] The Vermont Supreme Court reversed a trial verdict in favor of plaintiff in drawing a media versus non-media distinction.[52] The United States Supreme Court affirmed the Vermont Supreme Court *but* on different grounds.[53]

In particular, Justice Powell, the author of *Gertz*, who was writing for a majority of the Court, found that the credit report involved matters of private concern and, as such, enjoyed a less stringent measure of First Amendment protection.[54] Interestingly, the Court analogized this situation to other circumstances in which the flow of information was regulated without offending

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46 *Id.* at 898.

47 *Id.* at 898-99.

48 *Id.* at 899.

49 *Id.* at 898.

50 *Id.* at 898-906 (Douglas, J., dissenting).

51 472 U.S. at 750-51.

52 *Id.* at 752-53.

53 *Id.* at 753.

54 *Id.* at 758-62 & n.5.

the First Amendment, including the exchange of price and production information among competitors.[55]

In noting that that speech did have some degree of First Amendment protection, the *Dun & Bradstreet II* Court cited a particular statement in its earlier opinion of *Connick v. Myers*[56] that speech on matters of private concern cannot be suppressed altogether unless it "falls within one of the narrow and well-defined classes of expression which carries so little social value, such as obscenity, that the State can prohibit and punish such expression by all persons within its jurisdiction."[57] This suggests that, absent a complete ban on private communications as part of commercial transactions, only rational basis scrutiny would apply under the First Amendment.[58] However, *Dun & Bradstreet II* stressed the private and confidential nature of these credit reports, distinguishing the situation in which the flow of such information, even if that information were economic or commercial, was public.[59]

As with *Dun & Bradstreet I*, there was a dissent.[60] Basically, the dissent argued that libel actions should not be allowed on any matters of public or private concern under the First Amendment.[61] However, the dissent recognized that, even under First Amendment jurisprudence, there is a strong cognizable state interest in protecting consumers and regulating commercial transactions where such speech is concerned that could justify appropriate regulation.[62]

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[55] *Id.* at 758 n.5 (citing Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978)).

[56] 461 U.S. 138 (1983).

[57] *Id.* at 147 (cited in *Dun & Bradstreet II*, 472 U.S. at 760).

[58] *See, e.g.,* United States v. Alvarez, 132 S. Ct. 2537, 2552 (2013) (Breyer, J., concurring, joined by Kagan, J.) (noting that there are three levels of scrutiny under the First Amendment: strict (with near-automatic condemnation), rational (with implicitly near-automatic approval), and intermediate (with a proportionality analysis)); Glickman v. Wileman Bros. & Elliot, Inc., 521 U.S. 457, 473-75 & n.16 (1997) (applying rational-basis scrutiny to First Amendment challenge to compelled assessments of fruit growers, manufacturers, and handlers for generic advertising).

[59] *Dun & Bradstreet II*, 404 U.S. at 762 & n.8.

[60] *Id.* at 774 (Brennan, J., dissenting on behalf of himself and three other justices).

[61] *Id.* at 778-95 (dissenting op.). Interestingly, the dissent pointed out that it could be argued that the speech set out in these credit reports should be entitled to even greater protection than commercial advertising. *Id.* at 791-92.

[62] *Id.* at 795 (citing *Ohralik*, 436 U.S. at 460).

Accordingly, what may flow from *Dun & Bradstreet I* and *Dun & Bradstreet II* is that proposing a commercial transaction may enjoy a higher standard of protection under the First Amendment than the commercial transaction itself, especially if that transaction is not public. In this regard, Google's alleged market manipulation seem to be a hybrid between involving a commercial transaction and proposing one since it uses the search results (a commercial transaction) both to sell its own products and sell it search results. Google summarizes its search engine queries into three basis categories: "Action intent — Users want to accomplish a goal or engage in an activity, such as download software, play a game online, send flowers, find entertaining videos, etc. These are "do" queries: users want to do something; Information intent — Users want to find information. These are "know" queries: users want to know something; Navigation intent — Users want to navigate to a website or webpage. These are "go" queries: users want to go to a specific page."[63] Competitor allegations have implicated all three types of searches: competing vertical shopping site for purchases of goods have been ranked lower or blocked,[64] competitor product or service reviews have been hijacked[65]; and searches have been claimed to redirect searches from an offering company to Google's own products.

However, Google does not present its opinions as such but rather as facts derived from predetermined algorithm private sources. Google's own policies make various statements that would lead a user to believe that search results are not opinions but rather factual statements based on private sources. For example, such policies claim that "Google's index merely reflects that the page exists on the wider web, and not that Google endorses it"[66]; or that, "There is very little that we remove from search results on a discretionary basis. Aside from spam, the main cases where we might take action are certain types of sensitive information and adult spam."[67] That being said, there still remains one perhaps critical difference between the credit reports at issue in *Dun &*

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[63] Search Quality Rating Guidelines, Version 1.0, November 2, 2012, at 9, http://static.googleusercontent.com/external_content/untrusted_dlcp/www.google.com/en/us/intl/en_us/insidesearch/howsearchworks/assets/searchqualityevaluatorguidelines.pdf (last visited Sept. 14, 2013).

[64] Adam Raff and Shivaun Raff , *How Google's Universal Search Mechanism Threatens Competition and Innovation on the Internet* (February 23, 2010), *available at* http://www.foundem.co.uk/Foundem_Preferencing_Data_and_Arguments.pdf.

[65] James Temple, *Google Places draws complaints from Yelp, others*, S.F. CHRON. (July 29, 2011), *available at* http://www.sfgate.com/business/article/Google-Places-draws-complaints-from-Yelp-others-2352896.php.

[66] Remove information from Google, https://support.google.com/websearch/troubleshooter/3111061 (last visited Sept. 14, 2013).

[67] Removal Policies, https://support.google.com/websearch/answer/2744324?hl=en (last visited Sept. 14, 2013).

Bradstreet I and *Dun & Bradstreet II* and Google's search engine results: while those results are available only to the individual who requests them, the search engine itself and its algorithm operate via the medium of the Internet, which is open to the public.

This suggests on balance that Google's search engine results could fall in the commercial transaction bucket, like credit reports, and as such could enjoy only a rational basis level of protection under the First Amendment. But that is far from being established.

3. False Commercial Speech or True Commercial Speech

Even if Google's hybrid speech could be treated as commercial speech, it would still be subject to rational basis protection (if at any at all) under the First Amendment if it were being regulated only as to its falsity. In this respect, allegations continue to be made that Google's search engine results are in effect "false" because they are manually manipulated in contrast to Google's representations, and such "false" speech or advertising alone may remove any First Amendment protection that even commercial speech might otherwise enjoy.[68] Indeed, for almost eighty years, the notion that false or misleading advertising has an anticompetitive effect, and as such can and should be regulated, has prevailed.[69] This is not to say, of course, that false speech outside the economic or commercial realm is not entitled to First Amendment protection since the absence of such protection would give the government too broad a "censorial power."[70]

IV. OTHER FACTORS TO CONSIDER REGARDING WHETHER SEARCH ENGINE RESULTS ARE PROTECTED

Consequently, this article finds in the first instance that the nature of Google's search engine results at best would elicit rational basis protection under the First Amendment because, while it is

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68 *Va. Pharmacy Bd.*, 425 U.S. at 773 ("What is at issue is whether a State may completely suppress the dissemination of *concededly truthful information* about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients. Reserving other questions, we conclude that the answer to this one is in the negative." (Emphasis added.)). From this quote, it would appear that untruthful information can be suppressed without running afoul of the First Amendment.

69 *See e.g.*, FTC v. Algoma Lumber Co., 291 U.S. 67, 79-80 (1934) (finding a false advertisement to be unfair competition).

70 United States v. Alvarez, 132 S. Ct. 2537, 2547-48 (2012) (plurality op.) (distinguishing false speech involving fraudulent economically related speech from lying about receiving military medals or asserting that all false speech is outside the purview of the First Amendment); *see id.* at 2554-55 (Breyer, J., concurring, joined by Kagan, J.) (noting that statutes prohibiting false statements have additional limitations that do not make the simple telling of a lie by itself actionable and contrasting those statutes with the one before the Court as lacking those limitations).

speech, it is not an opinion; it is not commercial speech; and even if it were commercial speech, it could be regulated for its falsity or deception. However, the nature of the regulation proposed here, namely an application of the antitrust laws, would also support an application of rational basis scrutiny under the First Amendment as a general matter. It is to this point that this article turns.

A. Appropriate Level of Scrutiny of Any Enforcement Action

Conceding that the Google algorithm is speech, the appropriate level of scrutiny or evaluation for antitrust regulation of that speech (or any speech) must still be determined.[71] Courts have three levels of scrutiny or review that are used to weigh the government's interest against the infringement of a constitutional right such as the First Amendment: (1) *strict* - "suspect legal restrictions …must [be subjected] to the most rigid scrutiny"[72]; (2) *intermediate* -"content neutral" and "narrowly tailored to serve a significant governmental interest"[73]; or (3) *rational basis* - a reasonable means to an end that may be legitimately pursued by the government. This latter test requires that the governmental action only be "rationally related" to a "legitimate" government interest.[74] As it turns out, at best rational basis applies simply because the antitrust laws are viewed as having only an incidental impact on speech in their regulation of commercial transactions.

Strict scrutiny can only apply as a conceptual matter only where pure non-commercial speech is concerned. Pure speech has never been definitively defined, but the cases suggest that such speech either "editorializes on any subject, cultural, philosophical, or political," reports upon "newsworthy facts" or makes "generalized observations even about commercial matters" and is different from commercial speech.[75] At best, it would appear that Google's vertical shopping results are commercial speech, as discussed above.[76] Nor would antitrust regulation typically tread on the kind of pure speech involved here. Therefore, strict scrutiny should not apply.

However where commercial speech is involved, an argument can now be made that the form of scrutiny is a higher form of intermediate, heightened level of scrutiny, even if not strict scrutiny.

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[71] *Id.*

[72] *See e.g.*, Korematsu v. United States, 323 U.S. 214, 216 (1944).

[73] *See, e.g.,* Madsen v. Women's Health Center, 512 U.S. 753, 762-764 (1994).

[74] *See, e.g.,* United States v. Carolene Products Company, 304 U.S. 144, 154 (1938); *see also, e.g., Alvarez*, 132 S. Ct. at 2552 (Breyer, J., joined by Kagan, J., concurring).

[75] *Va. Pharmacy Bd.*, 425 U.S. at 760-761.

[76] *Id.*

For instance, in *Sorrell v. IMS Health Inc.*,[77] the Court was faced with a law which on its face contained "content-and speaker-based restrictions on the sale, disclosure, and use of prescriber-identifying information."[78] That law was aimed at pharmaceutical marketers, and did not apply to other non-commercial purveyors of that same information. The Court acknowledged that "restrictions on protected expression are distinct from restrictions on economic activity or, more generally, on non-expressive conduct."[79]

The Court further noted, in what turns out to be an important distinction, that "the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech," and as an example, noted that "antitrust laws can prohibit agreements in restraint of trade."[80] Ultimately, the Court in *Sorrell* found that Vermont's law imposed a burden based on the content of speech and the identity of the speaker such that "heightened judicial scrutiny" is warranted.[81] Although some commentators have seen *Sorrell* as an expansion of First Amendment protections to the mere dissemination of information via software,[82] it is unlikely that this case has any impact at all on antitrust enforcement given that it expressly distinguished said enforcement as not falling within the scope of the First Amendment. The goal of antitrust regulation is unrelated to the suppression of expression on the basis of neither source nor content.[83]

Indeed, numerous cases have found and proscribed restraints of trade in various First Amendment contexts in spite of speech being involved in one capacity or another: *Associated Press v.*

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[77] 131 S. Ct. 2653 (2011).

[78] *Id.* at 2663.

[79] *Id.* at 2665.

[80] *Id.* (citing Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949)). The citation to *Giboney* is important because picketers in *Giboney* were attempting peacefully to publicize truthful facts about a labor dispute as a means to force a manufacturer to agree to stop selling ice to nonunion peddlers. The Court held in *Giboney* that a course of conduct that is illegal can still be thwarted even if the conduct was in part initiated, evidenced, or carried out by means of language, spoken, written, or printed. 336 U.S. at 502.

[81] 131 S. Ct. at 2664.

[82] *See e.g.*, Andrew Tutt, *Software Speech*, 65 STAN. L. REV. ONLINE 73 (November 15, 2012), *available at:* http://www.stanfordlawreview.org/online/software-speech

[83] *See* R.A.V. v. St. Paul, 505 U. S. 377, 389 (1992) ("[W]ords can in some circumstances violate laws directed not against speech but against conduct.").

United States[84] (preventing members from selling news to nonmembers, and also making it difficult for nonmembers to join were restraints of trade); *Lorain Journal Co. v. United States*[85] (antitrust laws violated by a newspaper publisher's refusal to publish advertisements from businesses that also placed advertisements with competing radio station); *Citizen Publishing Co. v. United States*[86] (upholding injunction prohibiting newspaper publishers from engaging in joint operating agreement); *National Society of Professional Engineers v. United States*[87] (professional association's ban on competitive bidding for engineering services violated the antitrust laws even though one means of carrying out the ban was through the publication of an ethical code); *American Society of Mechanical Eng'rs v. Hydrolevel Corp.*[88] (professional association violated the antitrust laws through the issuance of an inaccurate safety report used to undermine a competitor's product); *Federal Trade Comm'n v. Superior Court Trial Lawyers Ass'n*[89] (an attorneys' association's boycott of assignments to cases involving indigent defendants violated the antitrust laws even though the boycott had an expressive component); and *Wilk v. American Medical Ass'n*[90] (a medical association's boycott of chiropractors violated the antitrust laws even though one means of enforcing the boycott was through the association's code of ethics). And, as set out in the debates of the Court between the majority and the dissent in such opinions as *Dun & Bradstreet II*, antitrust regulation is viewed as generally not offending the First Amendment. This suggests that, at best, only rational basis review applies where the application of the First Amendment laws, absent viewpoint discrimination,[91] which is not an issue here.

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[84] 326 U.S. 1, 6-7, 19-20 (1945).

[85] 342 U.S. 143, 155-56 (1951).

[86] 394 U.S. 131, 135 (1969).

[87] 435 U.S. 679, 694-95, 697 (1978).

[88] 456 U.S. 556, 569-72 (1982).

[89] 493 U.S. 411, 430-32 (1990).

[90] 895 F.2d 352, 357-58, 371 (7th Cir. 1990).

[91] *See, e.g., R.A.V.*, 505 U.S. at 384-89 (listing examples for the proposition that, even if speech is outside the purview of the First Amendment altogether, such as obscenity, or can be heavily regulated without running afoul of the First Amendment, such as regulating price advertising in one industry but not another, the Government cannot engage in viewpoint discrimination). But the proscription against viewpoint discrimination does not apply where the viewpoint in question has associated with the particular harms that the Government seeks to redress. *See, e.g.,* Virginia v. Black, 538 U.S. 343, 361-63 (2003) (distinguishing *R.A.V.* and addressing a statute proscribing cross-burning with the intent to intimidate).

B. Though a First Amendment Defense Must Be Examined on a Case-by-Case Basis Where High-Technology Is Concerned, the Allegation of False or Deceptive Speech Means that the Result Does Not Change

Where the First Amendment is concerned, it is not just a matter of examining the applicable level of scrutiny as a general matter. First Amendment jurisprudence is in a constant state of flux insofar as such high-technology issues as computer code or the operation of the Internet is concerned. Courts have been reluctant to generally answer "categorically" what violates the First Amendment. Instead, courts have taken, as described by the Second Circuit in *Name.Space, Inc. v. Network Solutions, Inc.*,[92] "an "evolutionary" or "as-applied" approach to the task of tailoring familiar constitutional rules to novel technological circumstances, favoring "narrow" holdings that would permit the law to mature on a "case-by-case" basis."[93] Thus, the constitutional questions presented in regard to any violation of the antitrust/consumer protection laws must be examined as applied to the specific facts of any case where the high-technology industry is concerned.

But here, competitors claim that the Google algorithm search result is manually manipulated in such a way as to be false. And, as the Court has stated: "[T]here is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues."[94] It would not seem that the nature of the high-technology industry should or would somehow cause society to have to revisit that truism. The analysis, however, cannot end here.

In Professor Volokh's paper supporting Google,[95] he contends: "[t]wo federal court decisions have held that search results, including the choices of what to include in those results, are fully protected by the First Amendment." The two cases cited, *Search King v. Google Technology* (which is unpublished) and *Langdon v. Google, Inc.* each purport to address this First Amendment as a defense[96] issue, although neither case involves government law enforcement. However, these cases serve to highlight only how, at best, the examination of First Amendment issues should occur on a case-by-case basis.

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[92] 202 F.3d 573, 584 n.11 (2d Cir. 2000).

[93] *Id.*

[94] *E.g., Gertz*, 418 U.S. at 340.

[95] *Volokh*, *supra* note 18, at 6-7.

[96] In another case, Kinderstart.com, LLC v. Google, Inc., Case No. C 06-2057 JF (RS) (N.D. Ca., March 16, 2007), the plaintiff asserted that Google violated the plaintiff's First Amendment rights. That decision is available on line at http://www.wsgr.com/attorneys/BIOS/PDFs/kinderstart_google.pdf.

In *Search King v. Google Technology*,[97] the plaintiff alleged tortious interference with contract. Google admitted that it demoted Search King's, and an related entity's, PR Ad Network ("PRAN") page ranks after Google learned that PRAN was profiting by selling ad space on web sites ranked highly by Google's PageRank system. Defendants argued that the plaintiff could not state a claim for violation of his right to free speech under either the United States or Delaware Constitution because they were not state actors.

The district court rejected this claim in drawing an analogy to *Jefferson County School District No. R-1 v. Moody's Investor's Services, Inc.*[98] ("*Jefferson County School District*"). In *Jefferson School District*, Moody's published an article regarding the bonds in its "Rating News," an electronically distributed information service sent to subscribers and news services. Moody's stated that although it had not been asked to rate the bonds, it intended to assign a rating to the issue subsequent to the sale. Moody's then discussed the bonds and the School District's financial condition, concluding that "[t]he outlook on the district's general obligation debt is negative, reflecting the district's ongoing financial pressures due in part to the state's past underfunding of the school finance act as well as other legal uncertainties and fiscal constraints." That negative report was then repeated in the *The Dow Jones Capital Market Reports*.

The court in *Search King* made the following analogy to the claims in *Jefferson County School District* in dismissing the plaintiff's claims:

> Like the review in Jefferson County, a PageRank is an opinion - an opinion of the significance of a particular web site as it corresponds to a search query. Other search engines express different opinions, as each search engine's method of determining relative significance is unique… the PageRanks do not contain provably false factual connotations. *While Google's decision to intentionally deviate from its mathematical algorithm in decreasing SearchKing's PageRank may raise questions about the "truth" of the PageRank system*, there is no conceivable way to prove that the relative significance assigned to a given web site is false. A statement of relative significance, as represented by the PageRank, is inherently subjective in nature. Accordingly, the Court concludes that Google's PageRanks are entitled to First Amendment protection.[99]

Since no government actors were involved, it would appear that consideration of the First Amendment issue was not necessary to the determination of the case. But what is interesting is the Court's nod to the "truth" of the PageRank system.

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[97] Search King, Inc. v. Google Technology, Inc., No. Civ-02-1457-M (W.D. Okla., Jan. 13, 2003), *available online* at http://www.yale.edu/lawweb/jbalkin/telecom/searchkingvgoogle.pdf.

[98] 175 F.3d 848 (10th Cir. 1999).

[99] Search King, supra n.97 (emphasis added.)

The dicta from the dissent in *Blatty,*[100] coupled with the case-by-case determination requirement from First Amendment jurisprudence, would suggest a different outcome in light of *Milkovich*[101] if government enforcers were to bring a case based on their uncovering actual misrepresentations involved with the advertisement of Google's search engine results. The actual falsity of the page ranking, as shown by evidence, might indeed remove the ranking from the protection of the First Amendment notwithstanding *Search King*.

The second case is *Langdon v. Google, Inc.*[102] In that case, the pro se plaintiff alleged that his First Amendment freedoms were violated by Google's refusal to place web advertisements for plaintiff's two sites, which were critical of North Carolina officials, as well as a separate site critical of the Chinese government. As a defense, Google asserted that to "compel it to speak in a manner deemed appropriate by Plaintiff and to prevent Google from speaking in ways that Plaintiff dislikes" would contravene the First Amendment.

While the pro se plaintiff did not brief this issue, the district court did address the issue anyway in detail, citing three newspaper cases for the proposition that "the injunctive relief sought by Plaintiff contravenes Defendants' First Amendment rights." One of those cases, *The Miami Herald Publishing Co. v. Tornillo,*[103] involved a decision by the United States Supreme Court declaring unconstitutional Florida's "right of reply" statute that had granted a political candidate a right to equal space to answer criticism and attacks on his record by a newspaper, and made it a misdemeanor for the newspaper to fail to comply. That statute was declared unconstitutional by the *Tornillo* Court as a content-based violation of the First Amendment's right of freedom of the *press* rather than speech.

Another case, *Sinn v. The Daily Nebraskan,*[104] involved a decision from the United States Court of Appeals for the Eighth Circuit and, as it addressed the editorial discretion of a state university publication, also involved freedom of the press rather than freedom of speech. The last, *Associates & Aldrich Co.* v. *Times Mirror Co.*,[105] an old case from the United States Court of Appeals of the Ninth Circuit — that predated even *Gertz* let alone *Milkovich* — involved a movie producer's objection to changes being made to his advertising copy pursuant to the Los Angeles Times'

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[100] *See supra* note 52.

[101] *See supra* note 53.

[102] Langdon v. Google, Inc., 474 F. Supp. 2d 622 (D. Del. 2007), *available at* http://www.wsgr.com/attorneys/ BIOS/PDFs/langdon_google.pdf.

[103] The Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).

[104] Sinn v. The Daily Nebraskan, 829 F.2d 662 (8th Cir. 1987).

[105] Associates & Aldrich Co. v. Times Mirror Co., 440 F.2d 133 (9th Cir. 1971).

censorship code. As noted by the court, the movie producers' First Amendment rights were not implicated, since the *Times* was not a government actor.

Langdon thus has very limited precedential value even if one were not to factor in the lack of government actors or the presence of a *pro se* plaintiff who did not even brief the issue in question.

V. CONCLUSION

While the computer code involved in Google's search engine processes and results constitutes speech, those results do not qualify as an opinion and it can be questioned as to whether they even qualify as commercial speech. If they do not qualify as commercial speech, or if they did, but could be shown to be false, then their regulation under the antitrust laws would involve only rational basis review.

In fact, the application of the antitrust laws has generally been upheld under the First Amendment, as the application of those laws is viewed as having only an incidental impact on speech. This also suggests that, at most, absent viewpoint discrimination, only rational basis would apply.

And, while the courts have shown solicitude for applying a case-by-case analysis where the First Amendment and high-technology is concerned, it is hard to imagine how such an analysis would yield a different result here if (as Google's competitors alleged) Google's search engine results were false or deceptive.

It is true, of course, that Google's algorithm is a constantly evolving program and has continued to change since the time of publication of the various Google cases. As a result, not only is it the case that those cases — in which Google was victorious — do not have any precedential value as to any government enforcement case that may be brought, but it also remains true that any case brought against Google has to be judged on its own facts, especially where high technology is involved.

Do First Amendment Principles Limit the Antitrust Agencies' Ability to Prohibit Enforcement of Standards-Essential Patents?

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Recent antitrust enforcement actions have called attention to the potential that application of the antitrust laws, like all governmental action, is limited by the constraints of the First Amendment. This is not a new development. The half-century old *Noerr-Pennington* doctrine reflects, at least in part, limitations placed on the reach of the antitrust laws by the First Amendment right of petition. Recent developments at the interface between antitrust and patent enforcement have brought renewed attention to the potential for antitrust enforcement to run afoul of constitutional limits.

The issue is starkly illustrated by dueling comments issued by commissioners of the Federal Trade Commission ("FTC") addressing recent agency settlements that limited the defendants' ability to enforce their standards-essential patents in the courts by seeking injunctive relief. The commissioners disagreed on the proper application of *Noerr-Pennington* immunity, which shields genuine attempts to influence governmental action from antitrust liability irrespective of their effects on competition. In each case, the FTC opined that the owner of patents essential to the practice of industry standards could be subjected to liability for seeking injunctions against parties that were prepared to enter patent licenses, contrary to their prior commitments to license those patents on Fair, Reasonable, and Non-Discriminatory ("FRAND") terms. Commissioner Maureen Ohlhausen dissented in both cases, arguing that "the *Noerr-Pennington* doctrine precludes Section 5 liability for conduct grounded in the legitimate pursuit of an injunction or any threats incidental to it."[3] The

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[3] In the Matter of Motorola Mobility LLC and Google, Inc., Dissenting Statement of Commissioner Maureen K. Ohlhausen at 1, FTC File No. 121-0120 (Jan. 3, 2013) ("*Google* dissent"); *see also In the Matter of Robert Bosch GmbH*, Statement of Commissioner Maureen K. Ohlhausen at 1-2, FTC File No. 121-0081, (Nov. 26, 2012) at 1-2 (copy of document in possession of authors).

FTC majority's response to that objection was that enforcing Section 5 does not offend the First Amendment when it merely "requires those making promises to keep them."[4]

Antitrust law is often invoked to regulate activities that could be regarded as within a class protected by the First Amendment. At least in some sense, price fixing and other agreements in restraint of trade entail both "association" and "speech." However, since early in the last century, antitrust jurisprudence has paid little attention to First Amendment limitations, with the exception of *Noerr-Pennington* immunity and the occasional limits on the remedial powers of courts to regulate ongoing behavior by entities, like newspapers, for which expression is their stock in trade. If expressive conduct causes competitive harm that brings it into conflict with the antitrust laws, the conduct generally has not been treated as protected by the First Amendment. No court has suggested that the Constitution gives cartelists the privilege to utter "I agree" without consequence.

This article examines how First Amendment principles can affect the application of the antitrust laws by first summarizing how courts have previously viewed the interaction between antitrust law and the First Amendment, then setting out the background behind the controversy over standards-essential patents and FRAND commitments, and finally evaluating the dueling positions articulated by the commissioners in these recent FTC matters against the backdrop of principles courts have applied when assessing whether law enforcement implicates First Amendment concerns.

I. FIRST AMENDMENT LIMITS ON ANTITRUST LIABILITY

The antitrust laws prohibit many activities involving speech, association, and petitioning, yet the First Amendment is seldom a successful defense to liability. One commentator characterizes antitrust law as "almost wholly untouched by the First Amendment."[5] There are two major exceptions to this principle: certain politically motivated boycotts receive constitutional protection, as do genuine attempts to petition the government. This state of affairs arises from the interaction of several basic First Amendment principles.

The Supreme Court recognizes certain "narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem."[6] As a general matter, these categories involve speech viewed as having minimal social value, but which

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[4] In the Matter of Motorola Mobility LLC and Google, Inc., Statement of the Federal Trade Commission at 4-5, FTC File No. 121-0120 (Jan. 3, 2013) ("*Google* decision") (citation omitted); *see also* In the Matter of Robert Bosch GmbH, Statement of the Federal Trade Commission, at 2-3, FTC File No. 121-0081 (Nov. 26, 2012) at 2-3.

[5] Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1781-82 (2004).

[6] Chaplinsky v. State of New Hampshire, 315 U.S. 568, 571-72 (1942); *see also* United States v. Stevens, 559 U.S. 460 (2010).

society has a strong interest in regulating. Examples of such exceptions include obscenity, "fighting words," threats, and (until fairly recently) libel.[7] The Court finds support for excluding these categories from First Amendment protection both in in the historical context of the Constitution as well as its own assessment of costs and benefits of the conduct from the perspective of First Amendment principles.[8]

It is well-established that price-fixing and other types of "contract[s], combination[s] . . . , or conspirac[ies], in restraint of trade or commerce"[9] are treated as unprotected speech.[10] Cartelists certainly fix prices by exchanging information aloud or in writing. And any resulting prosecution will inevitably punish the cartelists, at least in part, for the content of their communications, which must yield a meeting of the minds to violate antitrust laws.[11] Yet price-fixing is so clearly outside the purview of the First Amendment that it serves as the Supreme Court's paradigmatic example of why one cannot take seriously the expressive characteristics of communications that cause competitive or other harm that society has seen fit to condemn as unlawful. For example, when declining to extend First Amendment protection to an economic boycott, the Supreme Court noted that "[t]he most blatant, naked price-fixing agreement is a product of communication, but that is surely not a reason for viewing it with special solicitude."[12]

The reasons why price-fixing falls so clearly outside the protective scope of the First Amendment are instructive. Arguably, such conduct falls within several classes of unprotected speech. First, "[o]ffers to engage in illegal transactions are categorically excluded from First Amendment protection."[13] As a result, the "long established criminal proscriptions" against conspiracy and solicitation pass Constitutional muster because the speech involved has no social value whether or not it is part of a commercial exchange.[14] In the antitrust arena, communications that amount to (or solicit) price-fixing seek to establish an illegal regime of illegally coordinated prices, and thus can be proscribed without further judicial scrutiny.

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7 *See Stevens*, 559 U.S. at 468-69.

8 *Stevens*, 559 U.S. at 469-72.

9 15 U.S.C. § 1 (Sherman Act § 1).

10 *See, e.g.,* Sorrell v. IMS Health, Inc., 131 S. Ct. 2653, 2665 (2011) (citing Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949)).

11 *See, e.g.,* In re Processed Egg Products Antitrust Litig., 902 F. Supp. 2d 704, 710 (E.D. Pa. 2012).

12 FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 431 (1990).

13 *See e.g.,* United States v. Williams, 553 U.S. 285, 297 (2008) (citations omitted).

14 *Id.* at 298.

Second, price fixing could be framed as an incitement to "imminent lawless action."[15] Communications giving rise to an anticompetitive agreement go beyond "the abstract advocacy of illegality,"[16] and are instead intended to or in fact do produce illegal restraints on competition. As is the case with conspiracy and solicitation, the social value of such incitement can be understood as being clearly outweighed by society's interest in preventing illegal anticompetitive restraints.

Third, price fixing could fall under the exception for "speech or writing used as an integral part of conduct" in violation of a valid statute.[17] The precise contours of this category are unclear and perhaps analytically unsatisfying.[18] Nevertheless, the Court frequently alludes to this principle when the First Amendment and the antitrust laws intersect.[19] The overarching lesson is that speech in furtherance of—or that comprises a necessary link in establishing—anticompetitive conduct merits little or no First Amendment protection.[20]

Other First Amendment principles operate, in some circumstances, to shield from liability certain forms of expressive conduct that would otherwise violate the antitrust laws but that might be thought outside the scope of the First Amendment under the principles set out above.[21] Three

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15 *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (discussing the exception for incitement to "imminent lawless action"). "Incitement" may be a subset of "offers to engage in illegal transactions." *See Williams*, 553 U.S. at 297.

16 *See Williams*, 553 U.S. at 298-99 (citations omitted) (discussing the difference between a proposal or request to engage in illegal activity and the abstract advocacy of illegal activity).

17 Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949); *see also Stevens*, 559 U.S. at 467-68.

18 *See* Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1314-1326 (2005).

19 *See, e.g.*, *Superior Court Trial Lawyers Ass'n*, 493 U.S. at 428 n.12 (citing *Giboney*); NAACP v. Claiborne Hardware Co., 458 U.S. 886, 912 (1982) (same); *Nat'l Soc. of Prof'l Engineers v. United States*, 435 U.S. 679, 697 (1978) (same); *Giboney*, 336 U.S. at 501-02.

20 One commentator suggests that the communication of prices should be analyzed under the Court's "commercial speech" precedents. *See* Stephen G. Thompson, *Antitrust, the First Amendment, and the Communication of Price Information*, 56 TEMPLE L.Q. 939 (1983). It is clear, however, that the regulation of price *fixing* would not still run afoul of the relevant test, which protects only speech that "concern[s] lawful activity." *See id.* at 974-75.

21 There is immense doctrinal complexity in the application of the First Amendment to conduct having both a propensity to cause societal harm and some social value related to free expression. For example, reasonable and content-neutral "restrictions on the time, place, or manner of

examples chart the scope of First Amendment protection for conduct that causes, or leads indirectly to, potential competitive harm. First, in *NAACP v. Claiborne Hardware Co.*,[22] the Supreme Court held that boycotts motivated by political principles, rather than by parochial economic interests, enjoy a constitutional shield against the antitrust laws even if they cause economic harm. The conduct at issue was a nonviolent boycott organized to protest racial discrimination, which the Court deemed "essential political speech lying at the core of the First Amendment."[23] The Court subsequently narrowed the potential reach of its holding in in *FTC v. Superior Court Trial Lawyers Ass'n*,[24] where it withheld First Amendment protection from a boycott of new indigent criminal defense appointments by trial lawyers, reasoning that the boycott sought a fee increase for those same lawyers, and thus was economically motivated. [25]

Second, the *Noerr-Pennington* doctrine[26] protects genuine attempts to seek governmental action.[27] One foundation for that doctrine is the canon of Constitutional avoidance, under which the Court interprets federal laws on the assumption that Congress did not intend to create a potential conflict with the First Amendment right of petition.[28] Under the doctrine, genuine attempts to petition the government for redress are immune from antitrust liability, even if the petitioning activity seeks an anticompetitive outcome or itself causes incidental anticompetitive

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protected speech" are upheld under certain circumstances even when they may limit the speaker's practical opportunities to communicate. *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

[22] 458 U.S. 886 (1982).

[23] *Id.* (quoting Henry v. First Nat. Bank of Clarksdale, 595 F.2d 291, 303 (5th Cir. 1979)).

[24] 493 U.S. 411 (1990).

[25] *Id.* at 426. The Court has suggested that the distinction between political and economic boycotts derives from the test for regulations of expressive conduct articulated in *United States v. O'Brien*, 391 U.S. 367 (1968). *See Superior Court Trial Lawyers Ass'n*, 493 U.S. at 429-31; *Claiborne Hardware Co.*, 458 U.S. at 911-13.

[26] Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961); United Mine Workers v. Pennington, 381 U.S. 657 (1965).

[27] Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 56-57 (1993).

[28] David McGowan and Mark A. Lemley, *Antitrust Immunity: State Action and Federalism, Petitioning and the First Amendment*, 17 HARV. J.L. & PUB. POL'Y 293, 298 (1994).

harm. *Noerr* itself concerned lobbying for anticompetitive legislation, and the doctrine has been extended to cover efforts to seek relief from courts and administrative agencies as well.[29]

The doctrine does not, however, protect petitioning activity that is a "mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor."[30] Stated another way, if the objective is only to cause harm to the marketplace by virtue of the petitioner's own conduct, rather than through the government action ostensibly being sought, *Noerr-Pennington* is not a shield to liability. In the litigation context, the "sham" exception denies immunity only to lawsuits that are both "objectively baseless" and subjectively intended to wield "the governmental *process*" as an anticompetitive weapon.[31]

The United States Supreme Court has also recognized the possibility in the *Noerr-Pennington* context of an exception for "fraud or other misrepresentations" before adjudicatory bodies.[32] This is important because there is a related, third doctrine relevant to the interface between antitrust liability and expressive conduct that has particular application in the field of patent enforcement, namely the *Walker Process* doctrine. In *Walker Process Equipment, Inc. v. Food Machinery and Chemical Corp.*, [33] the case that spawned the doctrine, the defendant in a patent infringement suit filed an antitrust counterclaim asserting that the patent holder had obtained its patent by fraud. The Supreme Court held that proof of fraud on the Patent and Trademark Office (PTO) would strip the patent holder of its limited "exemption from the antitrust laws."[34] Similarly, an "assignee who maintains and enforces the patent with knowledge of the patent's infirmity" could also be liable.[35] The Court remanded the case for the alleged infringer to clarify the asserted antitrust violation and establish the required elements.[36]

Although both the acquisition and the enforcement of a patent are forms of "petitioning," *Walker Process* did not mention *Noerr-Pennington* immunity at all, and the resulting doctrine has

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29 *Prof'l Real Estate Investors*, 508 U.S. at 56-57 (citing California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972)).

30 *Noerr Motor Freight*, 365 U.S. at 144.

31 *Prof'l Real Estate Investors*, 508 U.S. at 60-61.

32 *Id.* at 61 n.6.

33 382 U.S. 172 (1965).

34 *Id.* at 176-77.

35 *Id.* at 172 n.5.

36 *Id.* at 177-78.

survived and flourished despite the explicit expansion of *Noerr* immunity to the adjudicative setting. Indeed, the United States Court of Appeals for the Federal Circuit has interpreted *Walker Process* as carving out an exception to *Noerr-Pennington* when a patent owner seeks to enforce a patent that was procured by fraud on the PTO.[37] And the Supreme Court in turn has not foreclosed the possibility that this exception could be read broadly as a prohibition on "unethical conduct" before adjudicatory bodies notwithstanding *Noerr*.[38]

These and other contexts in which courts consider—implicitly or explicitly—the limits on antitrust enforcement posed by the First Amendment are subjects that could be discussed at length.[39] In the balance of this article, we explore whether the First Amendment is properly viewed as limiting the ability of the antitrust agencies or courts to restrict a patent holder's ability to seek injunctive relief that—absent some extrinsic course of conduct implicating antitrust principles—would be available under the patent laws. As we have foreshadowed in our discussion above, we conclude that, depending on the nature of the underlying antitrust claim, First Amendment jurisprudence need not bar courts or antitrust agencies from prohibiting the seeking of injunctive relief.

II. THE FIRST AMENDMENT AND THE ENFORCEMENT OF STANDARDS-ESSENTIAL PATENTS

As laid out in the introduction, the *Noerr-Pennington* doctrine has been invoked in recent decisions of the Federal Trade Commission concerning the enforcement of standards-essential patents ("SEPs").[40] Before turning to our analysis, a bit of background is in order.

SEPs are patents on technologies that have been incorporated into an industry standard. Even if there may be multiple competing technologies capable of meeting a particular need, once an industry standard embeds a single patented technology, and the standard gains substantial traction in the marketplace, industry participants may have little practical choice but to use that technology.

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[37] *See, e.g.*, In re Indep. Serv. Organizations Antitrust Litig., 203 F.3d 1322, 1326-28 (Fed. Cir. 2000).

[38] *Prof'l Real Estate Investors*, 508 U.S. at 61 n.6.

[39] The *Noerr-Pennington* doctrine itself has been the subject of extensive commentary and debate. *See, e.g.*, McGowan, *supra* note 28.

[40] Glenn G. Lammi, *FTC's Standards-Essential Patent Settlement: The Real "Elephant" in the Room?*, FORBES: WASHINGTON LEGAL FOUNDATION (Jan. 8, 2013), http://www.forbes.com/sites/wlf/2013/01/08/ftcs-standards-essential-patent-settlement-the-real-elephant-in-the-room/ (last visited Sept. 21, 2013).

These industry participants thus can be "held up" by the patent holder who has through the standard-setting process acquired market power.[41]

Standard-setting organizations ("SSOs") often have rules designed to address the problem of patent hold-up involving SEPs, including rules requiring participants in the standard-setting process to disclose their relevant patents or to commit that they will license their patent to all users if their technology wins inclusion in the standard.[42] A common formulation of these rules involves the patent owner's commitment to license the SEP on terms that are "reasonable and nondiscriminatory" ("RAND") or "fair, reasonable, and nondiscriminatory" ("FRAND").[43]

In January 2013, the FTC and Google reached a settlement regarding SEPs that Google had acquired through its purchase of Motorola Mobility.[44] Motorola had made commitments to SSOs to license its SEPs on FRAND terms, but, according to the FTC, Motorola later refused to grant licenses to its rivals and sought injunctions against their infringing products.[45] The FTC concluded that Google's continued pursuit of injunctions against willing licensees violated Section 5 of the FTC Act.[46]

Commissioner Maureen Ohlhausen dissented from the decision to impose antitrust liability on Google, arguing among other things that "the *Noerr-Pennington* doctrine precludes Section 5 liability for conduct grounded in the legitimate pursuit of an injunction."[47] In response, the other commissioners noted that Motorola had willingly given up the right to seek injunctive relief when it made its FRAND commitments.[48] These opposing views mirrored those expressed in a prior FTC

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[41] Daryl Lim, *Misconduct in Standard Setting: The Case for Patent Misuse*, 51 IDEA 559, 559, 561-64 (2011); Janice M. Mueller, *Patent Misuse Through the Capture of Industry Standards*, 17 BERKELEY TECH. L.J. 623, 623, 631-35 (2002).

[42] Mueller, *supra* note 41, at 635-36; Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 313 (3d Cir. 2007).

[43] Mueller, *supra* note 41, at 635-36.

[44] Lammi, *supra* note 40.

[45] Steve Lohr, *On Google, F.T.C. Sets Rules of War Over Patents*, N.Y. TIMES (Jan. 4, 2013), http://www.nytimes.com/2013/01/05/technology/in-google-patent-case-ftc-set-rules-of-engagement-for-battles.html?_r=0 (last visited Sept. 21, 2013).

[46] *Id.*; Lammi, *supra* note 40.

[47] *Google* dissent, *supra*, at 3.

[48] *Google* decision, *supra*, at 4-5.

settlement that forbade Robert Bosch GmbH from seeking injunctions to enforce its FRAND-encumbered patents.[49]

This debate within the FTC spans only a few pages of text, but it raises potentially difficult questions. A SEP owner who seeks to enjoin the sale of infringing products is certainly "petitioning" the courts within the meaning of the *Noerr-Pennington* doctrine—it is asking the court to issue an order that would in turn affect marketplace competition. And although *Noerr-Pennington* immunity arose in the context of Sherman Act liability, there is no doubt that the FTC Act is similarly constrained by the doctrine.[50] But there is a deeper question—akin to that raised in the price-fixing context—whether the application of the FTC Act to prohibit an injunctive suit is punishing (or regulating) the petitioning or instead merely seeking redress for some underlying misconduct that threatens harm to competition. That is the question we explore below.

The first section that follows will examine whether the FTC could identify a source of antitrust liability, independent of the SEP owner's lawsuit, in order to avoid infringing upon the right of petition and ultimately on the First Amendment itself. Second, we will consider whether the SEP owner's FRAND commitment operates as a waiver of its First Amendment rights, obviating the need for *Noerr-Pennington* analysis or for any other First Amendment concern. The third section investigates whether established exceptions to the *Noerr-Pennington* doctrine might apply to allow the antitrust laws to reach the attempted enforcement of FRAND-encumbered patents. Finally, we consider, against the backdrop of our discussion of general principles involving antitrust and the First Amendment, whether there is even greater latitude for application of limitations on expressive conduct and/or petitioning in the context of remedying antitrust violations than there is for imposing liability in the first place.

A. What Is the Antitrust Theory?

We first consider whether the FTC's enforcement actions sought to impose antitrust liability on the owners of FRAND-encumbered patents *because* they have petitioned the courts for relief or instead on some basis other than petitioning.[51] We conclude that, assuming the correctness of the factual and legal premises behind the FTC's theory in these cases, the FTC's case is much less about seeking from a court an order enforcing a patent, and much more about the pattern of conduct that preceded that effort.

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[49] *Bosch* dissent, *supra*, at 1-2; *Bosch* decision, *supra*, at 2-3.

[50] Indeed, the *Noerr-Pennington* doctrine's First Amendment roots have been cited as a basis for applying the doctrine in numerous contexts other than antitrust law. *See* In re Innovatio IP Ventures, LLC Patent Litig., 921 F. Supp. 2d 903, 912-13 (N.D. Ill. 2013) (collecting cases).

[51] In its *Google* decision, the FTC identified Google's continued pursuit of injunctions as one element of its "unfair" conduct under Section 5 of the FTC Act. *See Google* decision, *supra*, at 1. This section does not explore that aspect of the decision.

The apparent premise of the FTC's theory is that an SEP owner can violate the antitrust laws when it procures market power through a standard-setting process in which it either (a) acts improperly or (b) accepts limitations on the enforcement of its patent in exchange for obtaining the inclusion of its technology in the standard and then subsequently releases itself from those limitations. In either circumstance, the basis of liability would appear to have no more to do with the SEP owner's subsequent exercise of its patent rights in court than would a price-fixer's liability stem from its efforts to enforce the agreed upon prices in a judicial or other forum. To be sure, the SEP owner must go to court in order to exercise its power to exclude competitors, and this exercise of power may constitute petitioning, but liability arguably attaches not from that petitioning activity but from the SEP owner's prior acts that gave it market power.[52] The SEP owner's attempt to enforce its patent may well provide evidence of its prior antitrust violation, and be a necessary step in creating the injury arising from the violation, but these features do not constitute the violation itself that would trigger the application of the *Noerr-Pennington* doctrine.[53] We examine this point further as it relates to each of the FTC's two apparent theories of liability.

Deceptive Conduct in the SSO Process. Consider first the case where the SEP owner gets its patent included in the standard through some form of alleged misconduct in the standard-setting process. This in essence was the theory in one of the leading antitrust cases in this field: *Rambus Inc. v. FTC.*[54] In *Rambus*, the SEP owner allegedly deceived the SSO, by failing to disclose its patents before the SSO incorporated the patented technologies into industry standards. The United States Court of Appeals for the D.C. Circuit held that the FTC had failed to demonstrate a violation of Section 2 of the Sherman Act, reasoning that the SEP owner had not inflicted "anticompetitive harm" because the FTC failed to adduce evidence that the SSO would have selected an alternative technology absent the alleged deception. Had such a showing been made, however, there is no reason to think that the *Noerr-Pennington* doctrine or any other aspect of First Amendment

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52 Although the *Noerr-Pennington* doctrine immunizes deceptive practices before legislative bodies, it does not tolerate the deception of administrative agencies or courts, and it certainly does not apply to *private* organizations such as SSOs. *See* Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 501 (1988); Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 308 (3d Cir. 2007).

53 *Cf. Prof'l Real Estate Investors*, 508 U.S. at 75 (Stevens, J., concurring in the judgment) (citing cases for the proposition that "a manufacturer's successful action enforcing resale price maintenance agreements, restrictive provisions in a license to use a patent or a trademark, or an equipment lease, may evidence, or even constitute, violations of the antitrust laws").

54 522 F.3d 456 (D.C. Cir. 2008).

jurisprudence would have precluded liability for efforts to distort the actions of a private SSO[55] just as those doctrines would not preclude liability for price fixing.[56]

Failure to Live Up to RAND/FRAND Commitments. A different situation is presented by cases involving no misconduct by the SEP owner during the standard-setting process, but instead involving subsequent actions by the SEP owner that are alleged to be inconsistent with the RAND or FRAND commitments that it or its predecessor made in the course of the process. In *Broadcom Corp. v. Qualcomm, Inc.*, the Third Circuit held that "(1) in a consensus-oriented private standard-setting environment, (2) a patent holder's intentionally false promise to license essential proprietary technology on FRAND terms, (3) coupled with an S[S]O's reliance on that promise when including the technology in a standard, and (4) the patent holder's subsequent breach of that promise, is actionable anticompetitive conduct."[57]

Some variant of this basic thesis, minus any allegation that the RAND promise was "intentionally false" when made, appears to undergird much of the FTC's recent enforcement activity in this area. The core of the concern appears to be that the patent was included in the standard only because of the promise, that the promise acts as a limitation on the exercise of market power—perhaps substituting for the constraint posed by real competition—and that the SEP owner's removal of that constraint is wrongful and enhances the owner's effective market power. In any such case, there may be difficult questions relating to the proper interpretation of the RAND or FRAND commitment, including whether it should be interpreted as a promise only about royalty rate levels or also as a commitment never to seek an injunction (such as when the potential licensee believes the SEP owner's demand for royalties exceeds a RAND or FRAND level). But whatever the proper interpretation in a given case, there would seem a credible position that antitrust liability is predicated on the alleged *breach of the prior commitment*—which on this theory operates to remove a constraint on the exercise of market power—rather than the exercise of First Amendment rights. Accordingly, as with price fixing itself, the First Amendment would impose no limitation if the FTC's theory of liability in this field were to be viewed through such a lens.

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55 *See Allied Tube*, 486 U.S. at 501; *Broadcom*, 501 F.3d at 308.

56 Indeed, deceptive conduct has been perceived as being outside the protection of the First Amendment, at least where economically related matters are involved. *See* United States v. Alvarez, 132 S. Ct. 2537, 2547-48 (2012) (plurality op.); *id.* at 2554-55 (Breyer, J., concurring, joined by Kagan, J.).

57 *Broadcom*, 501 F.3d at 314. In *Broadcomm*, the alleged violation was that the SEP owner breached its commitment by licensing its technology on non-FRAND terms, rather than by seeking injunctions against willing licensees. The case thus did not explicitly raise any "petitioning" issue, though *Noerr* cases were discussed as part of the *Broadcomm* court's reasoning behind this holding. *See id.* at 308, 313.

B. Is There Waiver of the Right To Petition?

To the extent that the operative theory of potential antitrust liability is that a RAND or FRAND commitment embodies a promise not to seek an injunction, no matter what royalty levels a potential licensee was willing to accept, antitrust enforcement would tread closer to imposing liability directly upon petitioning conduct.[58] But in this circumstance there is a different obstacle to the application of the First Amendment that was not directly discussed previously, namely waiver.

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[58] There may be significant room for disagreement on whether a RAND commitment in fact constitutes a promise not to seek an injunction if the licensee refuses to pay a royalty that the SEP owner succeeds in showing to be consistent with RAND terms. Imagine an SEP owner that extends identical FRAND terms to all potential licensees of its patent. A potential licensee might practice the patented technology but reject the SEP owner's price, proposing instead a lower price that the owner is not willing to accept. When there is a dispute over the terms of a potential license, the propriety of seeking an injunction depends on how one interprets the FRAND commitment. A permissive interpretation would simply require the SEP owner to *offer* licenses on FRAND terms to all who wish to use the patented technology. If a potential licensee rejects the terms of the license and nevertheless uses the technology, the owner can seek an injunction without violating its FRAND commitment. A more restrictive reading of the FRAND commitment, however, would suggest that the SEP owner promises not to seek injunctions so long as the infringer offers to pay a royalty that is arguably FRAND. Under this view, the infringer would be deemed a willing licensee, and the SEP owner's only recourse would be to sue for royalties so that a court may determine the appropriate terms for a license.

Two of the cases cited by the FTC majority in *Bosch* appear to favor the latter interpretation. In *Microsoft Corp. v. Motorola, Inc.*, 696 F.3d 872 (9th Cir. 2012), the United States Court of Appeals for the Ninth Circuit discussed the scope of an SEP owner's RAND commitment in the course of upholding a preliminary injunction against the enforcement of a patent injunction that the SEP owner had obtained in German court. It suggested that "[w]hatever the appropriate method of determining the RAND licensing rate, it could well be that retrospective payment at the rate ultimately determined and a determination of the future rate, not an injunction banning sales while that rate is determined, is the only remedy consistent with the contractual commitment to license users of ITU standard-essential patents." *Id.* at 885. When sitting by designation in *Apple, Inc. v. Motorola, Inc.*, 869 F. Supp. 2d 901 (N.D. Ill. 2012), Judge Posner took an even more forceful position:

> Motorola counters that Apple's refusal to negotiate with it after rejecting its initial offer of a 2.25 percent royalty warrants injunctive relief; by opting not to take a license ex ante, it argues, Apple should lose the FRAND safe harbor. But Apple's refusal to negotiate for a license (if it did refuse—the parties offer competing accounts, unnecessary for me to resolve, of why negotiations broke down) was not a defense to a claim by Motorola for a FRAND royalty. If Apple said no to 2.25 percent, it ran the risk of being ordered by a court to pay an equal or even higher

In *Google/Motorola* and *Bosch*, the commissioners in the FTC majority argued that the SEP owners could not assert *Noerr-Pennington* immunity because they had voluntarily given up their right to seek injunctions when they made their FRAND commitments.[59] There appears to be a sound basis for this view. Certain constitutional rights can be waived if the waiver was voluntary, knowing, and intelligent,[60] and it appears that the First Amendment right of petition is one of them.[61] To the extent that a FRAND commitment is properly interpreted to preclude the seeking of an injunction,

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> royalty rate, but that is not the same thing as Motorola's being excused from no longer having to comply with its FRAND obligations. Motorola agreed to license its standards-essential patents on FRAND terms as a *quid pro quo* for their being declared essential to the standard. FTC Statement on the Public Interest, *supra,* at 2. It does not claim to have conditioned agreement on prospective licensees' making counteroffers in license negotiations.

Id. at 914. The FTC's citation to these cases indicates that it interprets the FRAND commitment as a promise not merely to offer licenses on FRAND terms, but also to forego injunctive relief entirely. In essence, the FRAND commitment itself is a license, with the FRAND terms to be determined later through negotiation or litigation. *Cf.* Mark A. Lemley, *Intellectual Property Rights and Standard-Setting Organizations*, 90 CAL. L. REV. 1889, 1924-25 (2002) (discussing the possibility of treating a FRAND commitment as the grant of an "implied license"). Of course, if one views the FRAND commitment as an implied license, and as a result the SEP owner has no hope of obtaining an injunction, then there would seem to be no danger that the SEP owner will acquire market power.

59 *Google* decision, *supra*, at 4-5; *Bosch* decision, *supra*, at 2-3.

60 *See* Overmyer Co. v. Frick Co.*,* 405 U.S. 174, 185-86 (1972) (discussing constitutional due process rights as well as criminally related constitutional rights).

61 *See, e.g.,* Leonard v. Clark, 12 F.3d 885, 889-90 (9th Cir. 1993) (citing *Overmeyer*, 405 U.S. at 185-86); *cf.* Cohen v. Cowles Media Co., 501 U.S. 663, 665, 669 (1991) (Court found that promissory estoppel action based on promise made to keep source confidential does not violate First Amendment based on cases, including those involving antitrust, that hold media is not exempt from generally applicable laws). In *Leonard*, the Portland firefighters' union sought the invalidation of a provision of its collective bargaining agreement with the city. The union claimed that the provision, which shifted any increased payroll costs resulting from union-endorsed legislation back onto the union, violated its First Amendment right of petition. Avoiding the issue of whether the provision actually infringed upon the union's petitioning rights, the Ninth Circuit held that the union had waived any such rights when it signed the collective bargaining agreement. The fact that the union was advised by counsel and had explicitly objected to the provision during negotiations with the city reinforced the court's conclusion that the waiver was knowing, voluntary, and intelligent. *See Leonard*, 12 F.3d at 889-90.

a sophisticated, well-lawyered patent owner in negotiations with an SSO should recognize the limitations to which it has agreed, making waiver a powerful argument in this context.[62]

The *Google/Motorola* case presents a slight twist that may complicate this analysis. Although Motorola may have waived its right of petition when it entered its RAND commitment, arguably Google's only action was its acquisition of Motorola along with its SEPs. But as Google was Motorola's successor and thus charged with knowledge that its SEPs were encumbered by a FRAND commitment, this step likely was sufficient to waive any First Amendment rights that Google had with respect to the enforcement of those patents.[63]

C. Potential Application of Exceptions to *Noerr-Pennington* Immunity

If the SEP owner has preserved its First Amendment rights, and the theory of the antitrust violation is the SEP owner's attempt to seek an injunction rather than some previous misconduct, antitrust regulators may avoid the *Noerr-Pennington* doctrine only if the SEP owner's petitioning activity falls within one of the doctrine's exceptions. Two exceptions are relevant here: (1) the exception for "sham" litigation articulated in *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*,[64] and (2) the "fraud" exception, which has its origins in *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*[65]

The "sham" exception is the only one explicitly recognized by the Supreme Court. For litigation to be a "sham," it must be both "objectively meritless" and subjectively intended as a means of wielding "the governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon."[66] The enforcement of FRAND-encumbered patents would not meet

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[62] *Cf.* Apple, Inc. v. Motorola Mobility, Inc., 886 F. Supp. 2d 1061, 1078 (W.D. Wis. 2012) (holding that *Noerr-Pennington* immunity did not bar a breach of contract claim against a patent holder in part because the patent holder had "waived some of its petitioning rights through contract"). However, the court in *Apple* did not consider whether the patent holder's declaration to SSOs that it would license SEPs on FRAND terms waived its *Noerr-Pennington* immunity with respect to the antitrust claims. As the case concerned essentially the same facts as the FTC's *Google* investigation, Commissioner Ohlhausen cited it in her dissent. *See Google* dissent, *supra,* at 1.

[63] *See* 6 AM. JUR. 2D *Assignments* § 128 (2001) ("Assumption of the liabilities may be implied from the acceptance of the benefits under the contract. For example, when an assignee takes over a going business, his or her intention to assume the obligations of the contract relating to the business may be found from his or her acquiescence in the terms of the contract.").

[64] 508 U.S. 49 (1993).

[65] 382 U.S. 172 (1965).

[66] *Prof'l Real Estate Investors*, 508 U.S. at 60-61.

these criteria where there is a reasonable basis to dispute the applicability of the FRAND commitment, perhaps in many circumstances including the situation where a potential licensee refuses the SEP owner's terms.[67] Moreover, typically one would think that the SEP owner is not merely attempting to burden its rivals through the litigation "process"—but instead is genuinely seeking a favorable judicial "outcome." Only if the court issues an injunction can the SEP owner exclude its rivals.

The Supreme Court has, however, left open the possibility of other exceptions to *Noerr-Pennington* immunity. In its decision articulating the two-part test for "sham" litigation, the Court noted that "unethical conduct in the setting of the adjudicatory process often results in sanctions" but concluded that it "need not decide here whether and, if so, to what extent *Noerr* permits the imposition of antitrust liability for a litigant's fraud or other misrepresentations."[68] Significantly, the Court cited *Walker Process*, which establishes the principle that patents obtained by fraud are unenforceable in court.[69]

Even a broad "fraud" exception, however, may not apply to efforts to enforce FRAND-encumbered patents. What is the fraud? If the patent was procured properly, *Walker Process* itself does not apply. And the court is certainly not being defrauded: its injunction will presumably not issue until after the licensee seeks to avoid an injunction by invoking the FRAND encumbrance. In some cases there may be facts suggesting that the SEP owner who allegedly breaches its FRAND commitment misled the SSO, but it has not misled the PTO or the court from which it seeks an injunction.

Even if one extended *Walker Process* to apply to conduct directed at the SSO—perhaps on the theory that the market power being exercised was procured improperly—it is not obvious that the SEP owner has deceived the SSO in a manner that amounts to fraud, at least in the circumstance where there is no allegation that the patent holder lied about the existence of its patent. Every contracting party leads its counterparty to believe that it will perform, but a breach of contract is not

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67 In addition, one recent district court decision held that because the question of how to resolve RAND licensing disputes is "muddled," the owner of a RAND-encumbered patent could maintain plausible infringement claims and therefore was not subject to antitrust liability under the "sham" exception to *Noerr-Pennington*. *See* In re Innovatio IP Ventures, LLC Patent Litig., 921 F. Supp. 2d 903, 914-17 (N.D. Ill. 2013). The court recognized, however, that RAND commitments have been held to preclude injunctive relief; consequently, its determination that the "sham" exception did not apply relied heavily on the fact that the SEP owner could plausibly sue for damages (*i.e.*, a RAND royalty). *Id.* at 916-17. For this reason, if an SEP owner sues for injunctive relief, it is more likely that a court will find that the suit satisfies the objective prong of the "sham" exception.

68 *Prof'l Real Estate Investors*, 508 U.S. at 61 n.6.

69 *Id.*

normally treated as fraudulent. Thus, if a contract is interpreted as a promise to perform or pay damages, neither party is deceived as to the possibility of non-performance. A party's failure to perform generally amounts to fraud only where a party enters a contract *with no intention* of performing, and a plaintiff alleging fraud must prove that state of mind.[70]

D. First Amendment Limits in the Remedial Context

The First Amendment has implications for antitrust remedies as well as antitrust liability. A court order enjoining the SEP owner from enforcing its FRAND-encumbered patents at least superficially resembles a prior restraint on the right of petition. Nevertheless, in this context, the First Amendment is likely to impose only minimal (if any) restrictions on the expansive powers of courts (and agencies) to remedy antitrust violations.

In *Nat'l Soc. of Prof'l Engineers v. United States*,[71] the Supreme Court addressed a district court order that prohibited a trade association of civil engineers from "adopting any official opinion, policy statement, or guideline stating or implying that competitive bidding is unethical."[72] The society claimed that the order was a prior restraint on speech and association and thereby violated its First Amendment rights.[73] The Court disagreed, concluding that the injunction could legitimately curtail rights that would otherwise have been constitutionally protected in order to remedy the antitrust violations.[74] If the engineering society feared that the injunction covered "legitimate paths of expression," it had the burden of bringing its claims to the district court's attention and moving to modify the decree.[75]

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70 37 AM. JUR. 2D *Fraud and Deceit* § 90 (2001).

71 435 U.S. 679 (1978).

72 *Id.* at 696-97.

73 *Id.* at 697 & n.25. The engineering society also argued that the injunction barred lobbying activities in violation of the *Noerr-Pennington* doctrine, but the Court found that the injunction did not prohibit such activity. *Id.* at 699 n.27.

74 *Id.* at 697-98. Although the Court's language suggests that an antitrust remedy could impinge on otherwise valid First Amendment rights, it cites an example (price fixing) and a case (*Giboney*) that concern categories of speech unprotected by the First Amendment.

75 *Id.* at 698-99.

It is well-established that, in the course of remedying proven antitrust violations, courts may enter orders prohibiting conduct that would not violate the antitrust laws.[76] When market power is acquired through improper means, a court would typically act within its remedial powers if it sought to excise the ill-gotten power entirely. If that power arises from an industry standard, and the inclusion of the SEP in the standard is a bell that cannot readily be unrung, one conceivable remedial option would be to prohibit *any* enforcement of the patent in question. If that would be a permissible remedy—an issue on which we express no opinion—the less draconian approach of regulating how the patent may be enforced (i.e., via a request for injunction as opposed to only money damages) would appear to be unobjectionable. Not surprisingly, perhaps, courts have upheld consent orders that require SEP owners to cease and desist from efforts to enforce FRAND-encumbered patents.[77]

III. CONCLUSION

Although the *Noerr-Pennington* doctrine—and First Amendment principles more broadly—can be a powerful shield against antitrust liability for petitioning or other expressive conduct, the proper application of the antitrust laws typically will turn on proof of anticompetitive harm to competition, not solely on the defendant's constitutionally protected conduct. Determining whether a particular application of the law nonetheless threatens to infringe protected speech or petitioning requires a rigorous assessment of the antitrust theory and the nature of the expressive conduct in question.

[76] *See, e.g., Nat'l Soc. of Prof'l Engineers*, 435 U.S. at 697-98; United States v. Paramount Pictures, 334 U.S. 131, 148 (1948); *see also* New York v. Microsoft, 224 F. Supp. 2d 76, 108, 110 (D.D.C. 2002) (agreeing with this principle based on a discussion of Supreme Court cases but interpreting these cases as requiring that the conduct in question must be closely related to, or be the same class or type as, the anti-competitive conduct in question).

[77] *Broadcom Corp.*, 501 F.3d at 311.

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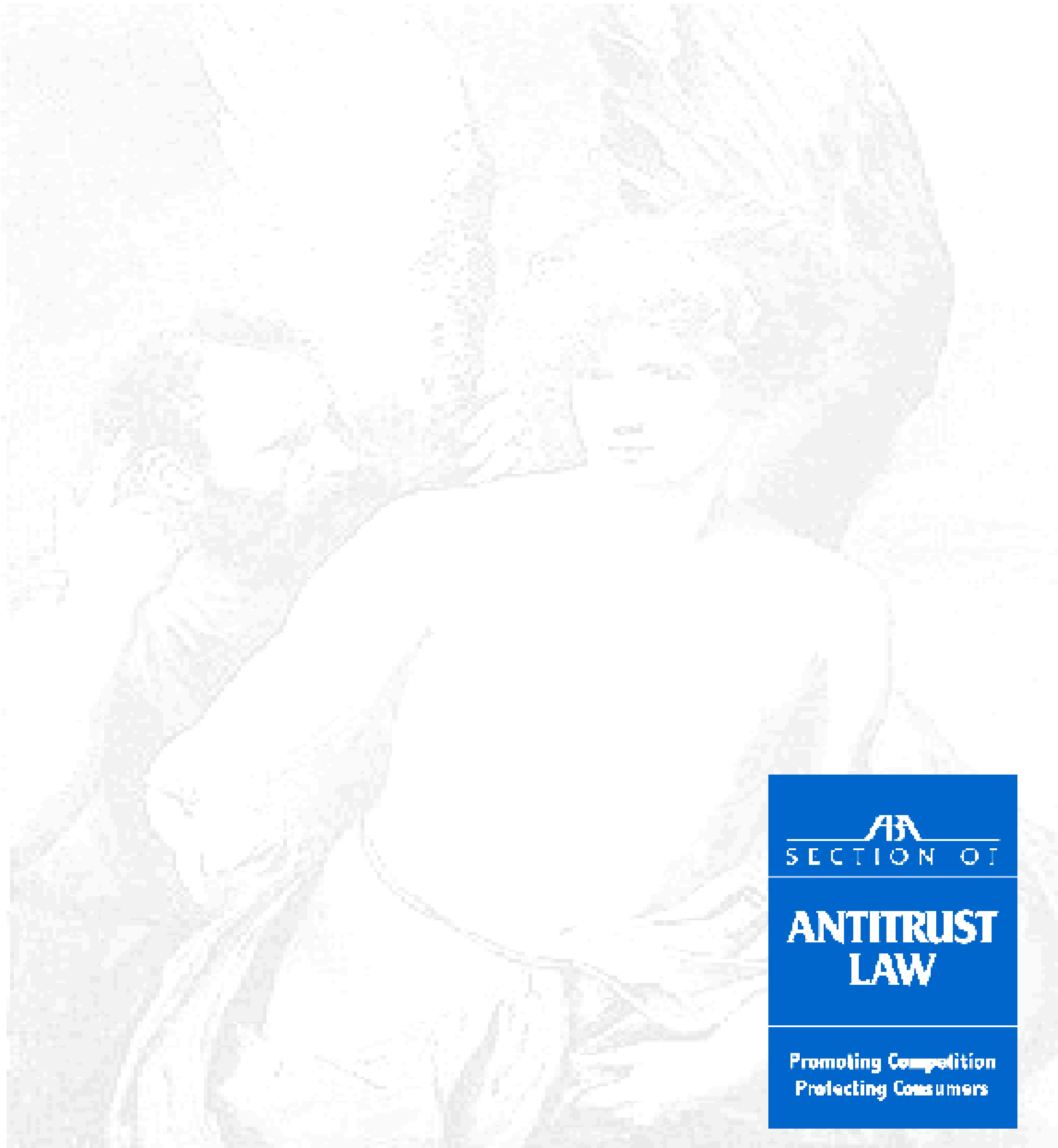
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