A CONSTITUTIONAL RIGHT TO DECEIVE?: THE FIRST AMENDMENT IMPLICATIONS OF REGULATING PAY PER CLICK

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INTRODUCTION

Mainstream search engines derive their principal source of revenue from advertising. [1] Pay Per Click Advertising (hereinafter "Paid Placement") is one of the most widely utilized advertising practices, offering content providers the opportunity to create short textual advertisements hyperlinked to their website. [2] Providers bid on keywords associated with their advertisement, [3] and when a user incorporates these keywords into his or her query, the provider's textual advertisement will appear along with the engine's organic results. [4] Generally speaking, mainstream search engines segregate these results, and refer to them as "Sponsored Links," "Sponsored Matches," or "Sponsored Results" [5] (hereinafter collectively referred to as "Sponsored Results"). These results most often appear in a separate column or are arranged directly above the search engine's organic results. [6]

Despite Paid Placement's utility from a marketing perspective, the practice has been sharply criticized. [7] Some authors argue that a search engine's failure to clearly segregate Sponsored Results leads many users to believe they are delivered based on relevancy alone. [8] These authors argue that this misconception can only be corrected by incorporating uniform regulations for presenting Sponsored Results. [9]
Although these regulations are well-intentioned, requiring a normative framework for arranging Sponsored Results may come at a price. The right to freedom of speech necessarily includes the right not to speak. [10] Imposing a regulatory framework for presenting Sponsored Results would be akin to forcing a search engine to speak. [11] Whether this amounts to a First Amendment violation raises two questions: First, does the act of providing search results constitute a protected form of expression? Second, if so, what level of protection should this expression be accorded? [12]

This Note examines the constitutionality of regulating Paid Placement under the First Amendment's freedom of speech guarantee. Part I of this Note provides an overview of how mainstream search engines operate and describes the controversy surrounding Paid Placement. Part II argues that the act of providing search results constitutes an expressive activity that falls within the ambit of the First Amendment. Part III examines whether regulating Paid Placement warrants exacting review; or, in the alternative, the commercial speech doctrine's more deferential brand of scrutiny. Part IV argues that even if Paid Placement constitutes commercial speech, imposing a uniform set of regulations in this context does not materially advance the governmental interest in promoting informed online decision-making. Finally, Part V provides suggestions on structuring regulations in the event governmental intervention becomes a reality.

I. BACKGROUND

Search engines play a vital role in facilitating our access to the vast content available over the Internet. [13] They analyze a universe of data in order to deliver

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information sought by the user. [14] Although search engines exist in many forms, [15] this Note is concerned with mainstream, keyword-based search engines such as Google, Yahoo!, and Microsoft's Bing. [16] Understanding the issues raised by this Note requires a basic familiarity with the technical aspects of a search engine.

A. *The Search Process*

The search process begins with an engine's index. [17] Before providing a user with relevant results, an engine must discover for itself what exists in cyberspace. [18] To accomplish this goal, search engines utilize specialized automated programs called spiders, robots, or crawlers. [19] These programs are designed to comb the Internet, discover content, and send it back for indexing. [20] During the indexing process, a search engine examines content, generates lists of keywords and tags, [21] and associates these lists with its content. [22] Since an index allows for efficient data retrieval, most search engines pre-process their indices in the manner described above. [23]

Although vital to the overall process, indexing represents only one facet of the search process. [24] Delivering results requires a query, that is, the user's attempt to convey for what he or she is looking. [25] Most mainstream search engines utilize keyword queries. [26] Despite the utility of keyword-based searches, the complexity of language makes deciphering a user's intent a difficult task. [27] For example, the term “Safari” may refer to a number of things including the Safari Web browser, the Safari brand of motor homes, or an African hunting excursion. [28] If a user intends to locate information in reference to the Safari Web browser, he or she would hardly benefit from a list of every page containing the word “Safari.” [29] In light of this, a search engine must also interpret a user's query conceptually in order to present relevant content. [30]

In order to work through these challenges, engines utilize a proprietary methodology involving relevancy search algorithms. [31] These closely guarded trade secrets represent an engine's mind reading capability. [32] Some search algorithms are simple and merely analyze the language of the query. [33] Mainstream search engines, however, utilize more complex algorithms. [34] These algorithms regularly go beyond analyzing the language of a user's query and engage in a “query-independent” analysis of indexed content. [35] Google, for instance, evaluates more than one hundred independent factors when examining Internet content, including a site's popularity. [36] While a “query-independent” analysis may be useful in categorizing content, such analysis says nothing about relevancy. [37] Relevancy is determined by a “query-dependent” analysis. [38] This analysis includes, for example, examining pages for a user's keyword terms and their synonyms. [39] Search engines integrate both of these techniques in order to deliver the most relevant results. [40] Because users rarely click beyond the first page of results, providing the most relevant information immediately is vital to an engine's reputation. [41] Accordingly, search engineers take algorithmic decisions very seriously. [42]

B. *The Business of Search*

Because mainstream search engines are free to the public, [43] advertising is a primary source of revenue. [44] Indeed, search engine advertising has become

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extraordinarily lucrative. [45] By some accounts, it will blossom into an 11 billion-dollar-a-year industry by 2010. [46]

Paid Placement is one of the most predominant advertising models employed by Search Engines. [47] Generally speaking, Paid Placement offers content providers the opportunity to create short textual advertisements hyperlinked to their website. [48] Typically, these advertisements contain a title and two lines of description, with each line containing between twenty-five and forty-five characters. [49] Once this text is created, providers bid on keywords associated with their advertisement. [50] When a user incorporates these keywords into his or her query, the provider's textual advertisement will appear along with the engine's organic results. [51] How prominently the ad appears in relation to other ads will depend on the amount b*id.* [52] Generally speaking, the higher the provider bids the more prominent the placement. [53] A search engine then collects the bid amount each time a user clicks on a content provider's advertisement. [54] A user's clicks are often referred to as “clickthroughs.” [55] Clickthroughs are used to calculate the “clickthrough rate,” which represents the advertisement's effectiveness at drawing users to the provider's website. [56]

Unlike traditional advertising, Paid Placement has the advantage of presenting contextual advertisements to an audience that, based on its keyword search, is more likely to be receptive towards the content of the advertisement. [57] While many of these results are advertisements, they are still considered search results since the search engine delivers them in response to a user's query. [58]

Presently, search engines segregate these Sponsored Results in a column offset from those based on relevancy alone. [59] Most often they are labeled as “Sponsored Links,” “Sponsored Matches,” or “Sponsored Results.” [60] As this Note explains, the orientation of Sponsored Results on a search engine's results page has caused quite a bit of controversy.

C. *Controversy*

Since its inception, in the late 1990's, Paid Placement has been the subject of a great deal of criticism. [61] Most notable is the 2001 complaint the Federal Trade Commission (FTC) received from the consumer advocacy group, Commercial Alert. [62] Commercial Alert requested, among other things, an investigation into whether a search engine's undisclosed practice of Paid Placement violates Section 5 of the Federal Trade Commission Act. [63] The Act grants the FTC the authority to regulate unfair or deceptive acts or practices in or affecting commerce. [64] Consumer Advocacy argued that failing to disclose the economic interests associated with Sponsored Results could negatively affect decisions made online. [65]

Although the FTC declined to investigate, [66] it suggested to the search engines listed in the complaint that Sponsored Results should be “distinguished from [organic] results with clear and conspicuous disclosures.” [67] While this suggestion was non-binding, the FTC left open the possibility of revisiting the issue in the future. [68] To date, however, the FTC has not initiated a formal action against any search engine company. [69]

Still, some authors maintain that the issue remains a problem. [70] For example, Andrew Sinclair argues that the FTC's actions do little to prevent deception. [71] Many

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users are still unaware that Sponsored Results are tied to an economic interest. [72] According to Sinclair, knowledge of this economic interest is essential to making informed decisions online. [73] In order to prevent deception, he proposes a normative framework for presenting Sponsored Results. [74]

Elizabeth Chandler expresses similar concerns. [75] She argues that a user's ignorance of the economic interest embodied in Sponsored Results may undermine “the communication of information between speakers and listeners online.” [76] While the solution may not be to stop this advertising practice altogether, Chandler argues for “significant” efforts to clearly demarcate these results. [77]

As these arguments suggest, the marketplace functions best when consumers have, at the very least, a minimally-informed basis for decision-making. [78] Arguably, this interest in informed decision-making is equally applicable to transactions conducted in cyberspace. [79] After all, decisions made online quite often have a tangible impact in the physical world. [80] Perhaps the interest is even greater in this context since consumers are without the benefit of interacting with the online merchant face-to-face. [81]

Nevertheless, regulations for presenting Sponsored Results would do little to contribute toward this end. [82] Although search engines consider advertising revenue or “cash” with regard to a Sponsored Result's placement, [83] these results are still delivered by virtue of a relevancy algorithm. [84] In addition, a failure to clearly demarcate Sponsored Results does not carry with it the same concerns associated with, for example, a failure to disclose prescription drug side effects. [85] Sponsored Results provide little information regarding what the content provider has to offer. [86] Instead, they serve as starting points, [87] with transactions being entered into based on what lies behind the hyperlink. [88] It is at this time, when a user begins to interact with the advertiser, that this interest comes into play. [89] Therefore, enacting a regulatory framework for presenting Sponsored Results would not only screen out potentially relevant information, it would amount to a paternalistic assumption that users cannot effectively handle their online affairs. [90]

Additionally, there is another, more fundamental concern that comes into play when considering whether these regulations should be enacted: the First Amendment. The right to freedom of speech necessarily includes the right not to speak. [91] Thrusting these regulations upon a search engine--essentially mandating how it presents its search results--is akin to compelling it to speak. [92] Whether this amounts to a First Amendment violation is an issue that has only been tangentially analyzed in the few articles discussing these regulations. [93] As this Note explains, however, the First Amendment is central to this controversy, and its implications are worthy of in-depth discussion.

II. First Amendment Implications

Not all compelled speech violates the First Amendment. [94] There are many contexts in which the government is allowed to require speech without raising First Amendment concerns. [95] In order to determine the constitutionality of regulations for presenting Sponsored Results, then, one must address two analytically distinct questions:

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First, does the act of providing search results constitute a protected form of expression? Second, if so, what level of protection should be afforded? [96]

A. *Search Results as Speech*

Every free speech analysis begins with the question of coverage. [97] This question asks whether the expression at issue falls within the scope of the First Amendment. [98] If not, the First Amendment will not ordinarily preclude regulation. [99] When addressing the question of coverage, the burden is on the party seeking protection to prove that his or her expression constitutes "speech" for the First Amendment's purposes. [100]

A search engine's "speech" is embodied in its act of delivering search results. When a search engine delivers results, it provides the user with an expression of relevancy. [101] Relevancy is defined as a search engine's algorithmic determination of where a result should rank in relation to a user's keyword query. [102] An expression of relevancy embodies a subjective opinion of what the search engine company believes the user wants when he or she submits a search query. [103] A search engine arrives at this opinion by virtue of a complex search algorithm designed to consider a myriad of different factors. [104] The choice of which factors to consider, and how to weigh them, represents a subjective editorial judgment of what makes content valuable. [105] As one court explains, "every algorithm ... is different, and will produce a different representation of the relative significance of a particular web site depending on the various factors, and the weight of the factors, used to determine whether a web site corresponds to a search query." [106] The fact that an engine's method of conveying this information involves the utilization of mathematical formulae does not lessen the role human judgment plays in the search process. [107] Thus, at their core, search results are less a product of an automated process and more the culmination of human ingenuity. [108]

Having identified the expression at issue, one must establish whether the act of providing search results falls within the ambit of the First Amendment. [109] This is not always an easy task. It is clear that the First Amendment is not limited to written or spoken words. [110] In addition, a "narrow, succinctly articulable message" is not a requirement for constitutional protection. [111] In fact, lower courts consistently extend protection to expression arising in the digital realm. For example, computer source code, [112] video games, [113] and even search results [114] have all been afforded protection. Still, the precise boundaries of the First Amendment are far from clear. [115] Suffice it to say, normative theories regarding the boundaries of the First Amendment are too numerous to survey here.

Perhaps the best way to approach the question of coverage in this context is to explore a search engine's role in cyberspace. The Internet is described as a vast marketplace of ideas. [116] By facilitating access to this forum, search engines promote First Amendment values. [117] They encourage users to actively seek information, thereby advancing the search for truth, autonomy, and self-governance. [118]

Indeed, a search engine's expression is not merely performative. [119] Providing search results constitutes a form of social interaction. [120] A user continually interacts with a search engine, analyzing results and refining his or her query, until he or she

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locates the desired content. [121] This process represents an ongoing dialogue between the search engine and user. [122] Any form of social interaction that realizes First Amendment values should warrant First Amendment protection. [123]

The fact that a search engine uses a computer algorithm to deliver its expression should be of no legal consequence. Admittedly, the Framers were not thinking about search engines when they drafted the First Amendment. Yet, neither were they contemplating "radio, television, or movies." [124] If the Supreme Court is willing to extend protection to the "painting of Jackson Pollock, music of Arnold Schöenberg, or Jabberwocky verse of Lewis Carroll," then surely a search engine's expression can be viewed as having a degree of First Amendment value. [125]

B. *Standard of Review*

Merely triggering the First Amendment does not end the inquiry. [126] It is also necessary to examine the scope of protection the expression enjoys. [127] As previously discussed, regulations in the context of search results require a search engine to speak in a manner it had not originally intended. This alters the content of the search engine's message, and thereby constitutes a content-based restriction of speech. [128] Content-based restrictions are normally subject to exacting review, justified only by a compelling governmental interest for which the law at issue is narrowly tailored. [129]

Although content-based restrictions normally justify strict scrutiny review, [130] First Amendment jurisprudence recognizes "the 'commonsense' distinction between speech proposing a commercial transaction ... and other varieties of [protected] speech." [131] According to the Supreme Court, the former "occupies a subordinate position in the scale of First Amendment values and is subject to modes of regulation that might be impermissible in the realm of noncommercial expression." [132] In this regard, strict scrutiny may be displaced by a standard less protective of free speech where the expression constitutes "commercial speech." [133] Whether Paid Placement deserves this more deferential standard of review is an issue critical to analyzing the constitutionality of regulations for presenting Sponsored Results. [134]

C. *The Commercial Speech Doctrine*

The constitutionality of regulation aimed at commercial speech is determined by a four-part test articulated in *Central Hudson Gas & Electric Corporation v. Public Service Commission*. [135] Central Hudson involved a regulation prohibiting electric utilities from distributing advertisements promoting electricity consumption. [136] The regulation's purported purpose was energy conservation. [137] In striking down the regulation, the Court articulated a framework that, with some fine-tuning, now represents the standard for determining the constitutionality of regulations in the commercial context:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the

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governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest. [138]

Central Hudson's final criterion has been refined. In *State Board of Trustees of State University of New York v. Fox*, the Court observed that a strict reading of "more extensive than is necessary" would essentially require the regulation to effectuate the governmental interest by the least restrictive means available. [139] According to the Court, this reading would be inconsistent with the notion that commercial speech is a lesser-protected form of speech. [140] Instead, there need only be a reasonable fit between the regulation and the purported governmental interest. [141] While this presents a more deferential standard, it is not tantamount to rational basis review. [142] Whether "numerous and obviously less-burdensome alternatives" are available will factor into determining if a regulation can be considered a reasonable "fit." [143]

D. *Problems With Applying Central Hudson to the Practice of Paid Placement.*

Although Central Hudson provides a workable standard for analyzing the constitutionality of commercial speech regulations, the doctrine's scope remains unclear. [144] Given the nearly infinite variety of contexts in which expression can arise, it is extremely difficult to create two mutually distinct hemispheres in which to classify commercial and non-commercial speech. [145] As a result, the Court has hesitated to offer a clear definition of the doctrine's contours, [146] opting instead for a number of different approaches in order to aid in its classification. [147]

One of the Court's earliest characterizations describes commercial speech as expression that "explicitly or implicitly 'propose[s] a commercial transaction.'" [148] Commercial speech is also described as "expression related solely to the economic interests of the speaker and its audience." [149] The Court has even gone so far as to identify three characteristics of commercial speech in order to aid in its classification: 1) it is an advertisement; 2) it references a specific product; and 3) the speaker has an economic motivation for speaking. [150] Although these characterizations do not represent an exhaustive list, they provide a helpful starting point for discussing why a search engine's expression is commonly assumed to be commercial speech. [151]

By way of example, a recent Google search using the keywords "running shoe" yielded, as one of its top Sponsored Results: "Buy Adidas® Running Shoes & Apparel at the Official Site!" [152] There is a powerful argument that the content of this Sponsored Result--conveying Adidas' advertisement [153]-- constitutes commercial speech. Combining the first two formulations previously discussed, one could argue that this result does nothing more than propose a commercial transaction, which relates solely to the interests of both Adidas and the user. Likewise, arguing under the Court's factor-based approach, one can conclude that this result: 1) constitutes an advertisement, 2) references a specific product, and 3) the speaker, Adidas, has an economic motivation for speaking. Hence, under either of these formulations, this advertisement can be characterized as commercial speech.

However, merely assuming Adidas' advertisement constitutes commercial speech is not dispositive. As discussed *infra*, the result embodies Google's expression of relevancy as well. Specifically, in response to the query "running shoe," Google's

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algorithm determined whether the result should even appear in response to these keywords. Additionally, Google determined where it should rank in relation to other results on its list. [154]

Moreover, Google expressed a determination of "orientation." Orientation refers to the editorial discretion Google exercised when deciding how this advertisement would appear on its results page. [155] In this particular instance, Google chose to label the advertisement as a "Sponsored link," and place it to the right of its organic results. [156] This is not much unlike decisions made in print advertising. [157] For example, both mediums seek to disseminate a third party's message to the widest possible audience. [158] In addition, both exercise editorial discretion in the presentation of their content. [159] Unlike print media, however, Paid Placement has the benefit of a search engine's proprietary algorithm. [160] Thus, content providers are able to target an audience that is more likely to be receptive towards their message. [161] A newspaper, on the other hand, must live with the fact that its message may reach a large number of people who simply do not care. [162]

In essence, a search engine's expression exists apart from the advertisements it chooses to deliver. However, those who maintain that Paid Placement constitutes commercial speech look solely to the content of the Sponsored Results in order to justify applying this doctrine. [163] The regulations have nothing to do with whether the content of Adidas' advertisement is truthful and not misleading. Instead, proposed regulations seek to influence how a search engine presents the advertisement. [164] The mere fact a search engine has an economic interest in delivering a Sponsored Result is not sufficient to render its expression commercial. [165] The content provider's speech should not be used as a vehicle to attain a lower level of scrutiny with regard to a search engine's expression.

Even assuming a content provider's advertisement could "commercialize" a search engine's expression, proponents of these regulations face an additional First Amendment hurdle: not every Sponsored Result proposes a commercial transaction. [166] Instead, these results exist along a continuum. [167] On one end are Sponsored Results that propose pure commercial transactions. [168] On the other are those embodying no commercial interest at all. [169] In terms of the latter, the content provider may have no economic interest in ensuring its result receives prominent placement. For example, a political candidate may wish to purchase keywords associated with his or her website in order to gain Internet exposure. [170] Neither the content of the result (arguably pure political speech) nor the act of providing it (a search engine's expression of relevancy and orientation) proposes a commercial transaction. The user, the very individual the doctrine seeks to protect, encounters no proposal for a commercial transaction whatsoever. An ancillary exchange of money between the search engine and this political candidate is insufficient to "commercialize" a search engine's speech. [171]
Assuming this proposition is correct, it follows that problems will arise when addressing those results falling towards the middle of the continuum, i.e., the "grey area." In the grey area, results may not constitute pure commercial speech, but at the same time, may fail to fit within the contours of traditionally protected speech. Consider, for example, the following Sponsored Result: "Indianapolis Photographer Our photography has no limitation. Visit us & see our experts at work." [172] Whether this constitutes commercial speech is a tough call. It does not seem to fit squarely within any of the

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characterizations previously discussed. [173] Additionally, while this content provider may propose a commercial transaction on its own website, the issue here concerns only what is said in the few lines of this Sponsored Result.

Essentially, the challenge the continuum presents is differentiating between results warranting full First Amendment protection and those deserving a more deferential standard of review. Though the distinction may be obvious at the extremes, it is much more subtle at the margin. Piecemeal decisions as to which results would warrant full First Amendment protection would be burdensome and inhibit the free flow of information over the Internet. [174]

In addition, regulations could potentially chill valuable expression. Users are increasingly speculative of Sponsored Results. [175] In a recent study, participants were shown multiple search results, some of which were labeled as advertisements. [176] Although the results were similar in substance, users rated the labeled results as less relevant to their search. [177] As Goldman observes, "[t]he 'advertising' label is a powerful disclosure; it can single-handedly cause consumers to overlook content they would have otherwise found meritorious." [178] Thus, while a certain amount of demarcation may be desirable, regulations calling for uniform demarcation may, over time, lead consumers to discount those results that may quite possibly be relevant to their search. [179] This could be damaging to fully protected expression, which finds itself inadvertently caught up within a broad regulatory net. [180] Consequently, some speakers may turn away from Paid Placement altogether. After all, a political candidate or religious organization that aims to earn the public's trust has no incentive to deliver their message over a medium met with suspicion.

III. Paid Placement as Commercial Speech

Infra, this Note discusses why regulations for presenting Sponsored Results warrant exacting review. But, an examination of this issue would not be complete without a discussion of Central Hudson's applicability to Paid Placement. At the threshold, Central Hudson asks whether the expression at issue either advocates illegal conduct, or is misleading. [181] Since there is no evidence to indicate illegal activity in this context, this Note will address Central Hudson's first criterion by addressing whether the practice of Paid Placement can be considered misleading. [182]

A. *Misleading Commercial Speech*

Central Hudson is clear that misleading commercial speech will not be accorded First Amendment protection. [183] This holding finds support in the idea that the First Amendment should not bar the government from "insuring that the stream of commercial information flow cleanly as well as freely." [184] Commercial speech will be found misleading if it is more "likely to deceive the public rather than inform it." [185]

While it is not hard to argue that a content provider's blatantly false or misleading advertisement could be regulated without question, [186] the problem is more tangled in the context of Paid Placement. Here, the focus is not on the content of the advertisement. Instead, authors such as Sinclair maintain that the orientation of a Sponsored Result on a search engine's results page renders it deceptive. [187] This approach is troubling. While

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a user may not understand that a search engine has an economic interest in delivering a Sponsored Result, the result may still be perfectly relevant to his or her search objectives. [188] For example, a user may desire to visit Nike's homepage. He or she may access Google and enter "Nike" into the query bar. In most cases, Nike's Sponsored Results will appear directly above Google's organic results. [189] The mere fact the user was unaware of the search engine's economic interest in delivering this result does not detract from its relevance to his or her search. [190] Branding this result as misleading would, in effect, punish Nike (and Google) for attempting to utilize a novel advertising medium. Instead, a proper analysis under Central Hudson should assess whether the Sponsored Results as a whole, is rendered misleading because of its orientation on a search engine's results page. [191]

A Sponsored Result generally consists of a title and two lines of description. [192] Regardless of the page on which it is found, the content provider's simple advertisement will appear the same. [193] While the user may believe a prominent result is particularly relevant to his or her search, prominent placement is only a starting point. [194] The user will not know whether a given search result is truly relevant until it is clicked. [195] While prominent placement may induce the user to click, commercial transactions are entered into based on what lies behind the hyperlink. [196] This is out of a search engine's control. Implicit in the nature of the search process is the idea that a user is the architect of his or her experience. [197] Absent a search engine's assertion that its results are objectively verifiable, it is difficult to argue that failing to clearly demarcate Sponsored Results is more likely to "deceive the public rather than inform it." [198]

B. *Central Hudson's Second and Third Inquires*

Provided speech is not proven to be misleading, the next step in Central Hudson's analysis asks whether there is a substantial governmental interest that would warrant regulating the practice of Paid Placement. [199] At this stage, the government bears the burden of demonstrating that its interest is "substantial" enough to justify regulation. [200] Here, the government could argue that it has a substantial interest in ensuring that consumers are not harmed by a lack of information with regard to decisions made online. This Note concedes that an interest, so framed, would most likely prove substantial enough to surmount Central Hudson's second criterion.

Nevertheless, this interest does not exist in the abstract. [201] In order for the regulation to surmount Central Hudson's third criterion, it must "directly and materially advanc[e] the asserted government interest." [202] A regulation will not be upheld if it provides "only ineffective or remote support for the government's purpose." [203]

The first problem with satisfying this criterion is the lack of harm caused by a supposed failure to clearly demarcate Sponsored Results. To date, there have been no verifiable instances of harm proximately caused by a search engine's arrangement of Sponsored Results. [204] Even assuming some consumers operate under a misapprehension with regard to a search engine's arrangement of these results, there is no evidence to suggest that it is to his or her detriment. [205]

The ultimate determination of relevancy is left to the user. [206] This determination cannot be made based solely on the content provider's advertisement. [207] After all, Sponsored Results contain little information with regard to what the content

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provider actually has to offer. [208] Instead, studies indicate that a user will accord little weight to these results (perhaps using them more as navigational points) and determine relevancy based on what lies behind the hyperlink. [209] While a user may be enticed to click on a Sponsored Result, the criteria for visiting a website differs from the considerations he or she takes into account when entering into commercial transactions. [210]

If a user in this context can claim any harm, it is in the form of needless clicks to irrelevant websites. The cost to the user in this situation is best described as trivial. [211] “The [user] need only hit the back button, type a new web address into the address bar, or select a new bookmark. Any of these steps requires just a moment or two of the [user's] time.” [212] These regulations would do little to advance an interest in preventing harm due to a lack of factual information. At most, they would amount to the paternalistic assumption that users cannot independently handle their online affairs.

Moreover, there is no reason to suspect that search engines will deviate from their current practice of demarcating Sponsored Results. [213] According to Goldman, the ever-evolving nature of the Internet, coupled with a low marketplace barrier of entry, is sufficient to ensure that search engine companies keep the interests of their users in mind. [214] According to Goldman, “[s]earch engines that disappoint ... are accountable to fickle searchers. There are multiple search engines available to searchers, and few barriers to switching between them.” [215] When a search engine fails to put the interests of its users first, “another ... will arise to entice users ... [and] allow[] the market to fix the problem.” [216] Indeed, as one study notes, failing to recognize the importance of relevancy with regard to Sponsored Results can be detrimental to the search engine advertising industry. [217] An increase in irrelevant Sponsored Results will cause users to turn away from those search engines altogether. [218] Thus, if search engines cease the practice of demarcating Sponsored Results, or, if too many Sponsored Results are deemed irrelevant, users will simply turn to another engine. [219]

This market analysis applies to the behavior of content providers as well. Regulation of Paid Placement rests on the false assumption that Sponsored Results are inherently unreliable. [220] While a content provider could theoretically bid on keywords having no relevance to his or her website, this is not likely. Paid Placement's entire advertising model is premised on the fact that a search engine will be paid each time a user clicks on the content provider's result. [221] If the content provider over-estimates the value of its chosen keywords, there is a good chance it will pay for a number of clicks that never materialize into actual sales. [222] In light of this, content providers are forced to carefully assess the keywords they choose to purchase, and this introduces a market force powerful enough to preserve the integrity of the search process. [223]

If Goldman is correct, the market force has ensured and will continue to ensure that search engines continue to keep the interests of their users in mind. This, coupled with the scant evidence of harm in this context, indicates that regulations for presenting Sponsored Results would fail to advance the government's interest in any meaningful way. Even with the best of intentions, the government “may not substitute its judgment as to how best to speak for that of speakers and listeners.” [224]

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C. *Alternatives Should Be Explored First*

In light of the foregoing, it would be prudent to employ more conservative measures before affirmatively regulating in this context. [225] An important first step involves recognizing that the root of the problem may lie with the users themselves. [226] Battelle describes users as “incredibly lazy.” [227] “More than 95 percent ... never use the advanced search features most engines include ....” [228] Instead, users often include no more than two keywords in their query, [229] and expect a search engine to return “perfect results.” [230]

If Battelle is correct, the solution could simply be education. Proper searches could narrow the universe of results and possibly by-pass unwanted listings. [231] By way of example, the FTC could include information about the nature of the search process on its Consumer Protection page. [232] It could alert users to the practice of Paid Placement, and provide tips on how to construct effective search queries. Even if this is not the most efficient way to combat the problem, an interest in efficiency will not overshadow the First Amendment. [233] “If the First Amendment means anything, it means that regulating speech must be a last-not first-resort.” [234]

IV. Proposed Regulations

Provided the government proves a substantial interest that is materially advanced by regulations for presenting Sponsored Results, the regulations must represent a reasonable fit between the means chosen and the government's ends. [235] This section will discuss how regulations should be structured should governmental intervention become a reality. It will propose a regulatory framework with reference to a framework articulated by Sinclair. [236]

A. *Sinclair's Regulatory Framework and its Problems*

Sinclair's Note is the first scholarly piece to propose a regulatory framework for presenting Sponsored Results. Sinclair's framework consists of three elements. First, Sponsored Results should be accompanied by an identifying phrase such as “Paid Listing.” [237] Second, Sponsored Results should be both spatially and colorfully separated from organic results. [238] Third, a search engine should incorporate at least one other identifiable characteristic with regard to its Sponsored Results. [239] According to Sinclair, the aim of this third element is to “provide some room for search engine creativity.” [240]

In designing his framework, Sinclair overlooks two considerations that must be taken into account. First, those charged with devising regulations should be cognizant of the fact that users are largely unaware of how a search engine operates. [241] Therefore, regulations should be designed with an eye toward education. [242]

Second, regulations should endeavor to balance the interests of search engine companies with that of their users. As previously mentioned, studies indicate that users are increasingly speculative of Sponsored Results. [243] While a certain amount of demarcation may be desirable, drawing too much attention to Sponsored Results may cause users to discount their relevancy altogether. [244] Thus, regulations in this context

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should strike a balance between preserving a search engine's editorial discretion, and protecting users from potential confusion.

B. *An Alternative to Sinclair's Framework*

As an alternative to Sinclair's framework, regulations should be designed in the following manner. First, a search engine should be required to spatially demarcate Sponsored Results (such as including them within an offset column). It should not, however, be required to colorfully separate them as well. Instead, search engines should only be required to design a clear and conspicuous border between the two types of results. [245] In addition, these results should be accompanied by an identifying phrase alerting the user to the fact that they are advertisements. [246]

While this may adequately inform a user that a Sponsored Result is an advertisement, it does not solve the problem of education. Thus, second, within every list of demarcated results, search engines should include a hyperlink tracking the following language: “What are Sponsored Results?” This phrase should be hyperlinked to a webpage designed to inform the user of the search process. Although the exact content of these pages should be left to the discretion of each individual search engine, it should include, at a minimum, a basic overview of search engine advertising practices, as well as a description of how a relevancy algorithm delivers results. [247] This should be sufficient to educate users while still preserving a search engine's autonomy. [248]

CONCLUSION

Often underappreciated are the First Amendment interests at stake when regulating Paid Placement. Although well intentioned, these regulations do nothing to advance an interest in informed online decision-making. There is scant evidence to conclude any user harm by the current practice of arranging Sponsored Results, and government intervention cannot be justified on pure speculation and conjecture.

Department Store pioneer, John Wannemaker once said: “half the money I spend on advertising is wasted; the trouble is I don't know which half.” [249] Paid Placement alleviates this problem by allowing advertisers to target an audience that is more likely receptive towards their message. Simply put, Paid Placement represents a significant advancement for the communication between speakers and listeners online. Greater sensitivity to constitutional values will ensure the Internet continues to be the greatest marketplace of ideas mankind has ever seen.

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The author thanks Charles and Anne Tschanz for their continued love and support.

[1]. *See* JOHN BATTELLE, THE SEARCH: HOW GOOGLE AND ITS RIVALS REWROTE THE RULES OF BUSINESS AND TRANSFORMED OUR CULTURE 33-36 (2005).

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[2]. *See* Ashish Agarwal et al., *Location, Location, Location: An Analysis of Profitability of Position in Online Advertising Markets* 6-7 (Working Paper) *available at* http://ssrn.com/abstract=1151537.

[3]. *Id.*

[4]. *Id.* Organic results refer to search results delivered based on relevancy alone.

[5]. *See* Agarwal et al., *supra* note 2, at 6-7.

[6]. *Id.*

[7]. *See, e.g.*, Jennifer A. Chandler, *A Right To Reach An Audience*, 35 HOFSTRA L. REV. 1095, 1114-15 (2007); Andrew Sinclair, Note, *Regulation of Paid Listings in Internet Search Engines: A Proposal for FTC Action*, 10 B.U. J. SCI. & TECH. L. 353, 356-57 (2004).

[8]. *See, e.g.*, Sinclair, *supra* note 7, at 356-57 (explaining that paid-for results have "the potential for serious harm in the form of consumer confusion.").

[9]. *Id.* at 364-66. This Note does not discuss which governmental body is best situated to enact these proposed regulations.

[10]. *See* Wooley v. Maynard, 430 U.S. 705, 714 (1977).

[11]. Compelled speech has been recognized in a number of contexts. *See, e.g.*, Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1, 39 (1986) (holding that a requirement that a utility company carry messages in its bills constitutes compelled speech); *Wooley*, 430 U.S. at 714 (requiring a citizen to display the logo "Live Free or Die" on a license plate constitutes compelled speech).

[12]. *See* Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1769-74 (2004).

[13]. *See* James Grimmelmann, *The Structure of Search Engine Law*, 93 IOWA L. REV. 1, 3 (2007) (describing search engines as "librarians, who bring order to the chaotic online accumulation of information.").

[14]. *See* Niva Elkin-Koren, *Let the Crawlers Crawl: On Virtual Gatekeepers and the Right to Exclude Indexing*, 26 U. DAYTON L. REV. 179, 185 (2001).

[15]. *See* Grimmelmann, *supra* note 13, at 6-7 (describing the various forms of search engines).

[16]. *See generally* http://www.google.com; http://www.yahoo.com; http://www.bing.com. For some alternatives to mainstream search engines see Michael

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Tonsing, Interesting Alternatives to a Plain Vanilla Search Engine, 55DEC Fed. Law. 10 (2008).

[17]. *See* Battelle, *supra* note 1, at 20-21; Grimmelmann, *supra* note 13, at 7-8 (describing the indexing process).

[18]. *See id.*

[19]. *See id.* (describing the process of how a search engine's index is compiled); *see* also Grimmelmann, *supra* note 13, at 7-8; Thomas A. Powell, Web Design: The Complete Reference, *available at* http:// www.webdesignref.com/chapters/09/ch9-02.htm.

[20]. *See* Battelle, *supra* note 1, at 20-21.

[21]. Search engines often "tag" content in order to further describe its nature. For instance, the popular website MySpace may be tagged as a "social networking" website. *See* Battelle, *supra* note 1, at 23.

[22]. Grimmelmann, *supra* note 13, at 10 (noting that "at one time, web search engines simply scanned the text of web pages to determine which topics the pages discussed. They then augmented this technique by analyzing additional information about pages (called 'metadata'), such as their age, the number of links they contain, or the keywords used by their authors to describe them.").

[23]. *Id.* at 10.

[24]. Grimmelmann, *supra* note 13, at 6-7 (describing the various components of the search process).

[25]. *Id.* at 8-9 (describing the query process).

[26]. *Id.* at 8 ("Most search engines use queries made up of a few keywords or short phrases. Some non-textual search engines allow users to issue queries in more exotic forms, such as hummed tunes or pictures."); *see* also Battelle, *supra* note 1, at 20.

[27]. *See* Eric Goldman, *Deregulating Relevancy in Trademark Law*, 54 EMORY L.J. 507, 527 (2005) (describing the difficulty of ascertaining a user's intent through keyword queries).

[28]. James Grimmelmann uses a similar analogy noting that a search for the term "apple" could indicate that the user intended to find, among other things, the homepage for Apple computers, information about the fruit, or information regarding the purchase of an "Apple" Macbook. *See* Grimmelmann, *supra* note 13, at 9.

[29]. Of course, the desired information may fortuitously appear at the top of the list. Yet the problem would still exist for someone searching "Safari" in a different context.

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[30]. *See* Battelle, *supra* note 1, at 21.

[31]. *See* Goldman, *supra* note 27, at 534 ("Search engines determine the order of search results using a proprietary methodology called a 'relevancy algorithm.'").

[32]. *Id.* at 535 (noting that an algorithm's "importance to the Internet search process cannot be overstated. As a practical matter, relevancy algorithms determine the results that searchers see and investigate.").

[33]. *Id.* at 534.

[34]. *Id.*

[35]. *See* Grimmelmann, *supra* note 13, at 10-11.

[36]. *See id.* at 10.

[37]. *Id.*

[38]. *Id.*

[39]. *Id.*

[40]. *Id.*

[41]. *See* Frank Pasquale, *Rankings, Reductionism, and Responsibility*, 54 CLEV. ST. L. REV. 115, 118 (2006); Goldman, *supra* note 27, at 535.

[42]. *See* James Grimmelmann, *supra* note 13, at 10.

[43]. *See* Christopher R. Perry, Note, *Trademarks as Commodities: The "Famous" Roadblock to Applying Trademark Dilution Law in Cyberspace*, 32 CONN. L. REV. 1127, 1144 (2000) (noting that most search engines are free to the public).

[44]. *Id.* ("Most search engines operate using an advertising-based revenue model.").

[45]. Animesh Animesh, et al., *Competing "Creatively" in Online Markets: Evidence from Sponsored Search* 5 (Working Paper No. RHS-06-059, 2007) *available at* http://ssrn.com/abstract=1032199 (noting that "sponsored search is the dominant and the fastest growing of all online advertising formats including display advertising, search advertising, sponsorship, referral, email, rich media, slotting, email, and classifieds.").

[46]. *Id.*

[47]. *See* Grimmelmann, *supra* note 13, at 12.

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[48]. *See* Agarwal et al., *supra* note 2, at 6-7.

[49]. Animesh, *supra* note 45, at 6.

[50]. *Id.*

[51]. Google, for example, explains its Paid Placement program in the following manner: "You create ads and choose keywords, which are words or phrases related to your business ... When people search on Google using one of your keywords, your ad may appear next to the search results. Now you're advertising to an audience that's already interested in you." *See* http:// www.google.com/ads/ads_3.html (follow "Google Adwords" hyperlink). Likewise, Yahoo! explains: "You choose keywords related to the products or services your business sells .... You write a text ad to promote your business in search results .... When a searcher types one of your keywords into a Yahoo! search box, your ad [may appear]." *See* http://searchmarketing.yahoo.com/as/ (follow "Search Marketing" hyperlink).

[52]. *See* Agarwal et al., *supra* note 2, at 6-7.

[53]. *Id.*

[54]. *See id.*

[55]. Animesh, *supra* note 45, at 6.

[56]. *Id.* ("The clickthrough rate***is defined as the total number of clicks received by an ad divided by the total number of times the ad was shown ....").

[57]. *Id.* at 5-6.

[58]. Grimmelmann, *supra* note 13, at 11.

[59]. *See* Frank Pasquale, *Asterisk Revisited: Debating a Right of Reply on Search Results*, 3 J. BUS. & TECH. L. 61, 74 (2008) (noting that mainstream search engines have made attempts to delineate paid-for results).

[60]. Pasquale, *supra* note 59, at 74.

[61]. *See, e.g.*, Sinclair, *supra* note 7; Chandler, *supra* note 7, at 1106-07.

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

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[63]. *Id.* The letter did not target Pay Per Click Advertising exclusively, but was aimed at advertising practices generally. The letter also addressed the practice of Paid Inclusion, which is not discussed in this Note.

[64]. 15 U.S.C. §§ 41-58 (2005).

[65]. *See* Letter from Gary Ruskin, *supra* note 62.

[66]. Letter from Heather Hippsley, Acting Assoc. Dir., Div. of Adver. Practices, Fed. Trade Comm'n, (June 27, 2002) *available at* http:// www.ftc.gov/os/closings/staff/commercialalertattatch.shtm.

[67]. *Id.*

[68]. *Id.* ("[Our decision to forego an investigation] should not be construed as a determination by either the Bureau of Consumer Protection or the Commission as to whether or not the practices described in the complaint violate the FTC Act or any other statute enforced by the Commission.").

[69]. Sinclair, *supra* note 7, at 360-61 (noting the government has yet to take action with regard to this issue).

[70]. *See, e.g.*, Sinclair, *supra* note 7, at 364-66; Chandler, *supra* note 7, at 1114-15; Oren Bracha & Frank Pasquale, *Federal Search Commission? Access, Fairness and Accountability in the Law of Search*, 93 CORNELL L. REV. 1149, 1151 (2008).

[71]. Sinclair, *supra* note 7, at 365.

[72]. *Id.* at 357.

[73]. *Id.* at 366.

[74]. *Id.* at 369-73.

[75]. Chandler, *supra* note 7, at 1115.

[76]. *Id.*

[77]. *Id.* at 1117.

[78]. *See* R. George Wright, *Free Speech and the Mandated Disclosure of Information*, 25 U. RICH. L. REV. 475, 498 (1991) ("There is an important public interest in ensuring that collective and individual decision-making in a democracy is conducted on at least a minimally well-informed basis.").

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[79]. *See* Leslie Marable, *False Oracles: Consumer Reaction to Learning the Truth About How Search Engines Work* 8 *available at* http:// www.consumerwebwatch.org/pdfs/false-oracles.pdf (describing an Internet user's need for factual information with regard to his or her online decisions).

[80]. *Id.* (describing some of the tangible risks associated with a lack of factual information).

[81]. *See* Michael Froomkin, *The Essential Role of Trusted Third Parties in Electronic Commerce*, 75 ORG. L. REV. 49, 68-70 (noting various concerns that arise when transacting in cyberspace).

[82]. *See infra* Part III. A-B.

[83]. *See* Goldman, *supra* note 27, at 534.

[84]. Grimmelmann, *supra* note 13, at 11.

[85]. *See infra* Part III. A-B.

[86]. *See infra* Part III. A-B.

[87]. *See infra* Part III. A-B.

[88]. *See infra* Part III. A-B.

[89]. *See infra* Part III. A-B.

[90]. *See infra* Part III. A-B.

[91]. *See Wooley*, 430 U.S. at 714.

[92]. *See supra* note 11.

[93]. *See, e.g.*, Sinclair, *supra* note 7, at 363-64 (touching briefly on whether the First Amendment would bar regulation); Pasquale, *supra* note 59, at 73-76 (arguing briefly that Google would likely raise a First Amendment challenge in response to an attempt to regulate its search results).

[94]. *See generally* R. George Wright, *Your Mileage May Vary: A General Theory of Legal Disclaimers*, 7 PIERCE L. REV. 85 (2008).

[95]. *See, e.g.*, 9 C.F.R. 317.300 (1995) (mandating disclosure of nutritional content); Pub. L. No. 98-474, 98 Stat. 2200 (1984) (mandating disclosures on cigarette packaging); 27 U.S.C. § 205(e) (2000) (mandating disclosures on alcohol labels).

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[96]. *See* Schauer, *supra* note 12, at 1769-74.

[97]. *Id.* (distinguishing between "coverage" and "protection" under the First Amendment).

[98]. *Id.*

[99]. *But see* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (noting that content-based and viewpoint-based discrimination will raise free speech concerns even when the expression, as a class, falls outside the ambit of the First Amendment).

[100]. *See* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 294 n.5 (1984) (stating "[I]t is the obligation of the person desiring to engage in assertedly expressive conduct to demonstrate that the First Amendment even applies.").

[101]. *See supra* text accompanying notes 24-42.

[102]. *See supra* text accompanying notes 24-42.

[103]. *See* Goldman, *supra* note 27, at 532. This is true regardless of whether the result is a Sponsored Result. *Id.* at 534; Grimmelmann, *supra* note 13, at 11.

[104]. *See supra* notes 31-42.

[105]. *See* Eric Goldman, *Search Engine Bias and the Demise of Search Engine Utopianism*, 8 YALE J. LAW & TECH. 188, 188-89 (2006).

[106]. *See* Search King, Inc. v. Google, 2003 WL 21464568,10 (W. D. Okla. 2003); *see* also Brookfield Commc'ns, Inc. v. West Coast Entm't Corp., 174 F.3d 1036, 1045 (9th Cir. 1999) ("Each search engine uses its own algorithm to arrange indexed materials in sequence, so the list of web sites that any particular set of keywords will bring up may differ depending on the search engine used.").

[107]. *See* Goldman, *supra* note 105, at 188-189; Sinclair, *supra* note 7, at 364-66 ("The search engine results page can ... be considered a subjective expression of what the search engine programmers consider 'relevant.'"); Chandler, *supra* note 7, at 1097-98 ("Search engines find information, but equally importantly, they offer some assessment of what is most useful.").

[108]. *See id.* (explaining that search engine results are the product of "numerous editorial judgments about what data to collect and how to present that data.").

[109]. *See* Schauer, *supra* note 12, at 1769-74.

[110]. Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 569 (1995).

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[111]. Id; cf. Texas v. Johnson, 491 U.S. 397 (1989).

[112]. Universal Studios, Inc., v. Corley, 273 F.3d 429 (2d Cir. 2001).

[113]. Int'l Digital Software v. St. Louis County, 329 F.3d 954 (8th Cir. 2003).

[114]. *See, e.g.*, *Search King*, 2003 WL 21464568,10; Langdon v. Google, 474 F.Supp.2d 622, 629-30 (D. Del. 2007).

[115]. *See* Schauer, *supra* note 12, at 1769-74.

[116]. Chandler, *supra* note 7, at 1097-98 (quoting Reno v. Am. Civil Liberties Union, 521 U.S. 844, 868, 885 (1997)).

[117]. *See* James Grimmelmann, *Don't Censor Search*, 117 YALE L.J. POCKET PART 48, 50 (2007) *available at* http:// thepocketpart.org/2007/09/08/grimmelmann.html.

[118]. *Id.*

[119]. *See id.* at 9-11.

[120]. *Id.*

[121]. *Id.* at 9 (describing the search process as "iterative").

[122]. Grimmermann, *supra* note 13, at 9. ("As the user inspects a set of search results, she may choose to refine her query, choosing slightly different keywords in an attempt to better convey her intention to the search engine. The engine, in turn, will supply her a different set of results."); Goldman, *supra* note 27, at 532 ("Evaluating and investigating search results causes searchers to refine their thinking and become more precise in their objectives.")

[123]. Robert Post offers an influential approach to addressing the issue of coverage. Post argues that coverage is warranted when expression takes on a form of social interaction that realizes First Amendment values. The flexibility of this approach makes it particularly useful for addressing whether a search engine's expression falls within the ambit of the First Amendment. Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1254 (1995).

[124]. *Corley*, 273 F.3d at 434.

[125]. *Hurley*, 515 U.S. at 569.

[126]. *See* Schauer, *supra* note 12, at 1769-74.

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[127]. *Id.*

[128]. *See* Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781,796 (1988) (stating "Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech. We therefore consider [this] a content-based regulation of speech.").

[129]. *See* Sable Commc'ns of Cal., Inc. v. Fed. Commc'n Comm'n, 492 U.S. 115, 126 (1989).

[130]. *Id.*

[131]. Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 562 (1980) (quoting Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455-56 (1978).

[132]. State Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469 (1989) (quoting Ohralik, 436 U.S. at 456).

[133]. *See Central Hudson*, 447 U.S. at 563.

[134]. Regulations rarely survive under strict scrutiny review. *See, e.g.*, Steve Keane, Note, *The Case Against Blanket First Amendment Protection of Scientific Research: Articulating a more limited Scope of Protection*, 55 STAN. L. REV. 505, 534 (2006).

[135]. *Central Hudson*, 447 U.S. at 567.

[136]. *Central Hudson*, 447 U.S. at 559-60.

[137]. *Id.*

[138]. *Central Hudson*, 447 U.S. at 563.

[139]. *Fox*, 492 U.S. at 476-77.

[140]. *Id.* at 477 ("[C]ommercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values ....") (quoting Ohralik, 436 U.S. at 456).

[141]. *Id.* at 480.

[142]. Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 418 n.13 (1993).

[143]. *Id.*

[144]. *See* Tom Bennigson, *Nike Revisited: Can Commercial Corporations Engage in Non-Commercial Speech?*, 39 CONN. L. REV. 379, 381 (2006) ("In the thirty years since

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the Supreme Court controversially decided that commercial advertising is protected by the First Amendment ... the scope of commercial speech has remained uncertain.”).

[145]. *Discovery Network*, 507 U.S. at 419 (noting the “difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category.”).

[146]. *See* William Warner Eldridge IV, Note, *Just Do It: Kasky v. Nike, Inc. Illustrates That It Is Time to Abandon the Commercial Speech Doctrine*, 12 GEO. MASON L. REV. 179, 183 (2003) (noting that “the Court has not articulated a clear definition of commercial speech.”).

[147]. For an overview of the various definitions of commercial speech, see generally Nat Stern, *In Defense of an Imprecise Definition of Commercial Speech*, 58 MD. L. REV. 55 (1999).

[148]. Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 761 (1976)).

[149]. *Central Hudson*, 447 U.S. at 561.

[150]. *See* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66-67 (1983). Although the court made clear in footnote 14 that “we [do not] mean to suggest that each of the characteristics present in this case must necessarily be present in order for speech to be commercial.” *Id.* at 66-67 n.14.

[151]. Sinclair, *supra* note 7, at 363-64 (recognizing First Amendment implications while assuming the commercial speech doctrine applies in this context); Pasquale, *supra* note 59, at 73-76 (assuming that Sponsored Results constitute commercial speech).

[152]. Google search for “Running Shoe” performed on September 15, 2010 (appearing second from the top, highlighted and separated from Google's organic results under the heading “Sponsored links”).

[153]. The American Heritage Dictionary defines an advertisement as: “A notice, such as a poster or a paid announcement in the ... electronic media, designed to attract public attention or patronage.” *See* The American Heritage Dictionary of the English Language (4th ed. 2000).

[154]. *See* Google search, *supra* note 152.

[155]. *Id.*

[156]. *Id.*

[157]. *See Langdon*, 474 F.Supp.2d at 629-30 (finding that Google's expression is analogous to newspaper's); *see also Technology & Marketing Law Blog*,

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http://blog.ericgoldman.org/ (Aug. 11, 2007, 14:46) (comparing search engines with newspapers).

[158]. *See* Battelle, *supra* note 1, at 23.

[159]. Compare Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 256 (1974) (recognizing a newspaper's exercise of editorial discretion with regards to its content), with Greg Lastowka, *Google's Law*, 73 BROOKLYN L. R. 1327, 1341-48 (2008) (describing Google's placement of Sponsored Results on its results page).

[160]. *See* Grimmelmann, *supra* note 13, at 9-11.

[161]. *See* Battelle, *supra* note 1, at 36.

[162]. *Id.*

[163]. *See, e.g.*, Sinclair, *supra* note 7, at 364; Pasquale, *supra* note 59, at 73.

[164]. *Id.*

[165]. *Bolger*, 463 U.S. at 66-67.

[166]. For example, political candidates commonly employ Paid Placement to disseminate a message.

[167]. *See* Elizabeth R. Rindskopf & Marshall L. Brown, Jr., *Scientific and Technological Information and the Exigencies of Our Period*, 26 WM. &. MARY L. REV. 909, 914-15 (1984-85) (describing speech as moving along a continuum).

[168]. For example, Adidas' result.

[169]. For example, a political candidate may choose to utilize Paid Placement to gain Internet exposure. *See, e.g.*, Byron Acohido, *Sponsored-link ads on Internet play Campaign Role*, USA TODAY, Sep. 4, 2008 *available at* http://www.usatoday.com/money/2008-09-04-paid-search-political-ads_N.htm.
Arguably, the content of these results would constitute pure political speech.

[170]. *Id.*

[171]. *See supra* notes 154-62 and accompanying text.

[172]. A query for "Top Photographer" on Google.com delivered this Sponsored Result on March 1, 2009.

[173]. *See supra* text accompanying notes 155-62.

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[174]. An issue also arises with regard to who will be charged with making these decisions.

[175]. Bernard J. Jansen & Marc Resnick, *Examining Searcher Perceptions of and Interactions with Sponsored Results*, *available at* http:// ist.psu.edu/faculty_pages/jjansen/academic/pubs/jansen_ecommerce_workshop.pdf ("Web searchers have a bias for organic results and against sponsored results.").

[176]. *Id.*

[177]. *Id.*

[178]. Eric Goldman, *Stealth Risks of Regulating Stealth Marketing: A Comment on Ellen Goodman's Stealth Marketing and Editorial Integrity*, 13 Santa Clara Univ. Legal Studies Research Paper No. 07-24 *available at* http:// ssrn.com/abstract=963219.

[179]. *Id.* at 14.

[180]. *See Central Hudson*, 447 U.S. at 579 (Stevens, J. concurring) ("Because 'commercial speech' is afforded less constitutional protection than other forms of speech, it is important that the commercial speech concept not be defined too broadly lest speech deserving of greater constitutional protection be inadvertently suppressed.).

[181]. *Central Hudson*, 447 U.S. at 563.

[182]. Whether Paid Placement advocates unlawful activity has yet to be seen, and is beyond the scope of this Note.

[183]. *Central Hudson*, 447 U.S. at 563 (stating "For commercial speech to come within that provision [the First Amendment], it at least must concern lawful activity and not be misleading.").

[184]. Friedman v. Rogers, 440 U.S. 1, 10 (1979).

[185]. *Central Hudson*, 447 U.S. at 563-64 (holding that "government may ban forms of communication that are likely to deceive the public rather than inform it.").

[186]. *Id.* at 563.

[187]. Sinclair, *supra* note 7, at 366. (characterizing Sponsored Results as deceptive without discussing the possibility of their relevance to a user's query).

[188]. *See* Jansen & Resnick, *supra* note 175 (demonstrating that some users will discount the relevancy of a Sponsored Result labeled as an advertisement although still possibly relevant).

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[189]. As of February 21, 2009, Nike's Sponsored Results appeared prominently above Google's organic results with the query "Nike."

[190]. Whether the user knew the URL off the top of his or her head, or gained access to a webpage via a Sponsored Result, the outcome is the same.

[191]. *Cf. Riley*, 487 U.S. 781 (recognizing the problems associated with parceling out component parts of mixed speech). Put differently, one should ask whether a Search Engine's expression of relevancy alters the content provider's message in some manner.

[192]. Animesh, *supra* note 45, at 6.

[193]. This is precisely because the content provider chooses what the text of a Sponsored Result will be.

[194]. *See* Agarwal, *supra* note 2, at 9 (stating "[S]ponsored search advertisements reveal only limited information and the [content] can be evaluated only after clicking the ads and visiting the advertiser's website.").

[195]. *Id.*

[196]. *Id.* at 9 (stating "[Content] can be evaluated only after clicking the ads and visiting the advertiser's website.").

[197]. Cf. Goldman, *supra* note 27, at 519-21 (discussing the ways in which a user controls the search process).

[198]. *Central Hudson*, 447 U.S. at 563-64.

[199]. *Id.* at 563.

[200]. *See* Edenfield v. Fane, 507 U.S. 761, 768 (1993).

[201]. *Edenfield*, 507 U.S. at 770 (noting that a substantial interest in the abstract will not be justified if the regulation would not directly advance that interest).

[202]. *Central Hudson*, 447 U.S. at 555.

[203]. *Id.* at 564.

[204]. *See, e.g.*, Marable, *supra* note 79, at 38-40 (noting that some users are unaware that a search engine has an economic interest in delivering Sponsored Results, but failing to document verifiable instances of harm caused by this misapprehension).

[205]. *Id.*

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[206]. *See* Goldman, *supra* note 27, at 520.

[207]. Agarwal, *supra* note 2, at 9.

[208]. *Id.*

[209]. *Id.* at 9 (“Previous studies show that consumers tend to de-emphasize the prescreening information in their search process.”)

[210]. *Id.* (noting that “criteria used for selecting an ad to click may not have an effect on the final [determination of relevancy] as compared to the information obtained after visiting the associated website.”).

[211]. *See* Goldman, *supra* note 27, at 520 (“In all cases--even when the searcher has been “tricked” into viewing a website through unscrupulous practices--a searcher's costs to change an Internet search is trivial.”).

[212]. *See id.* at 520.

[213]. *See* generally *id.* (arguing that market forces will ensure that search engine companies keep their users' interests in mind).

[214]. *Id.* at 188-89 (stating that “[M]arket forces limit the scope of search engine bias.”).

[215]. *Id.*

[216]. Lastowka, *supra* note 159, at 1357-58.

[217]. Animesh, et al., *supra* note 45, at 30 (“Search engine intermediaries need to ... ensure that the sellers at the top of the listing are [relevant to a user's query]. Else, in the long run ... consumers may stop using the sponsored search results.”)

[218]. *Id.*

[219]. *See* Goldman, *supra* note 105, 188-89 (2006).

[220]. *See* Goldman, *supra* note 27, at 534.

[221]. *See supra* notes 32-35.

[222]. *See* Goldman, *supra* note 27, at 534.

[223]. *See id.*

[224]. *Riley*, 487 U.S. 781, 791 (1988).

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[225]. *See* Thompson v. Western States Med. Ctr., 535 U.S. 357, 373 (2002) (noting that the government should explore alternatives before affirmatively regulating).

[226]. *See* Goldman, *supra* note 27, at 516 (describing how many searchers are not conversant with the overall process of properly selecting keywords).

[227]. *See* Battelle, *supra* note 1, at 24-25.

[228]. *See id.*; *see also* Goldman, *supra* note 27, at 516 ("searchers almost never use advanced search methodologies like Boolean logic or advanced searching functionality offered by search providers.").

[229]. *See* Battelle, *supra* note 1, at 24-25

[230]. *Id.*

[231]. *Cf.* Marable, *supra* note 79, at 40-43 (providing tips for conducting proper searches).

[232]. The FTC includes a number of articles on its Consumer Protection webpage aimed at consumer education. *See* http://www.ftc.gov/bcp/consumer.shtm.

[233]. *Riley*, 487 U.S. at 795 (stating "[T]he First Amendment does not permit the State to sacrifice speech for efficiency.").

[234]. *Western States Med. Ctr.*, 535 U.S. at 373.

[235]. *Central Hudson*, 447 U.S. at 563.

[236]. Sinclair, *supra* note 7, at 353.

[237]. *Id.* at 356-57.

[238]. *Id.*

[239]. *Id.*

[240]. *Id.* at 356-57.

[241]. *See generally* Marable, *supra* note 79.

[242]. *See, e.g., id.* at 43 (noting that "[s]ites should provide consumers with basic explanations of how ranking and prioritizing technologies work (i.e., Web indexing, spidering, crawling, human-compiled directory, etc.). For instance, what criteria are used to determine keyword relevancy, or, how advertiser-paid results are fed into the results page.").

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[243]. Jansen & Resnick, *supra* note 175, at 6.

[244]. *See* Goldman, *supra* note 105 at 13 (noting that the advertising label will cause users to discount the relevancy of a Sponsored Result).

[245]. Note, however, that mainstream search engines engage in this practice already. *See supra* text accompanying note 60.

[246]. Again, all mainstream search engines currently include an identifying phrase. *Id.*

[247]. For similar recommendations, see Marable, *supra* note 79, at 43-44.

[248]. Search engines could also be encouraged to use this page in order to point out flaws in their competitors' business models. This would fuel competition and encourage search engines to deliver the most relevant and user-friendly search results.

[249]. *See* http://www.quotationspage.com/quote/1992.html.

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