

**An Invitation to Search Engine Law
James Grimmelmann**

**Regulating Search?
Yale Law School
December 3, 2005**

*This work is available under the Creative Commons Attribution 2.5 License.
See <http://creativecommons.org/licenses/by/2.5/>*

Thank you, Jack. When we first started discussing this conference a year ago, I didn't expect something this exciting and with such a distinguished set of speakers. I should have, based on past ISP events. Thank you and the rest of the ISP for putting this together so well. I'll speak briefly so that we can get started quickly. I don't want to delay the fun.

By way of throat-clearing, let me also note that I speak only for myself, that nothing I say reflects the views of my present employer, and that if I should say something controversial, it will have been unintentional.

I first started paying serious attention to search engine law about three years ago, while blogging about search-related lawsuits. It occurred to me that search engines are the bellwether of Internet law. As they go, so goes the Net. I think it safe to say that the legal battles over search technology will profoundly affect what sort of an Internet we have five, ten, and a hundred years from now. That's the case both because search has become so important and because the law governing search is so open to debate.

A few initial examples may be helpful. ISPs, by nature of their role as conduits, are generally treated as immune from certain kinds of liability for content they pass along at the direction of others. In what ways do or should these immunities extend to search engines? Reasonable people differ. We also have a set of secondary copyright liability doctrines being worked out by the courts for dealing with file-sharing networks. Again, in what ways do and should these liabilities apply to search engines? Reasonable people differ. We have privacy rules for databases containing certain kinds of sensitive information. Once more, in what ways do and should these rules apply to search engines? Reasonable people differ. These are not trivial legal questions.

These examples illustrate how two related trends are complicating the legal status of search. The first trend is what I'd call "technological convergence." It's not easy to say what's a search engine and what isn't. The activities of a search engine -- looking at lots of content, organizing it, and responding interactively to queries -- are hardly unique to search engines. Lots of other systems do them as well. At the boundaries, search engines blend into peer-to-peer systems, databases, operating systems, ISPs, web sites, virtual worlds, and routers, to name just a few. Indeed, I'd say that any significant application on the Internet today is a search engine, contains a search engine, or needs a search engine. Technological convergence means that the rules developed for one class of technologies keep spilling over to others.

The second trend I like to call "doctrinal convergence." It is simply unclear what body of law will be most salient in saying what search engines can and cannot do. Offhand, I can see how any one of

copyright, trademark, patent, trade secret, defamation, privacy, free speech, criminal procedure, antitrust, consumer protection, or telecommunications law could significantly reshape our experience of search. As soon as you've pinned down one piece of doctrine, along comes some other body of law, threatening to upend what seemed like settled legal relations. We can expect these different kinds of law to jostle and fight over which of them has the last word on search.

Both kinds of convergence create pressures to treat like things alike. But there are strong countervailing pressures, too. On the technical side, software is a profoundly flexible medium; the cutting edge of search is using that medium in some enormously diverse ways. It's by no means clear that all of them demand the same legal treatment. On the legal side of matters, we commonly speak of "the policies" of one body of law or another. Copyright cares about creativity; privacy cares about dignity; antitrust cares about healthy competition; and so on. Convergence threatens this diversity of values. To the extent that we throw up our hands and pick one body of law to regulate search, the risk is that the values of other relevant bodies of law may be shunted aside.

Today, therefore, is in part a conversation about values and about the value of search. What are the values that we bring to the table when we talk about search engines, when we develop search engines, and when we make laws about search engines? There are representatives here from the search industry, from government, from civil society, from academia, from the creative professions, and from the practicing bar. All of these groups have something to contribute to the conversation. Each is uniquely attuned to particular values at stake in the great search debates.

I say "debates" because the questions of the legal status of search cannot be boiled down to a single resolution to be conducted in the Oxford style, affirmative or negative. There are a lot of balls in the air, and more are on the way. Today's conference is not about producing an answer; it's not even about having a nice knock-down drag-out argument. (I think there was one of those a few weeks ago.) Our hope is only to start a conversation on the future of search, law, and policy, to start mapping out the possibilities.

Let me therefore discuss what I see as some of the more useful distinctions one might make in thinking about search engines and law. First, there are some important meta-issues. Before even getting into the question of how search should be regarded by the law, it seems only appropriate to have some working idea of what we mean when we say "search." A decade ago, comparatively few people were saying that search would be so critical today. Even now, the term "search" encompasses an enormous range of algorithms, systems, datasets, and business models. Any legal regimes that respond only to how search functions today may be inappropriate for the search landscape a decade hence. There are also deep issues of the extent to which search is one coherent phenomenon, as opposed to separate kinds of activities that the law should evaluate independently. Indeed, one could even ask whether the law of search is the law of the horse; perhaps "search engine" is itself an inappropriate or incoherent category for purposes of legal analysis. These are the sorts of questions most appropriately approached asking what search is and where it may be going. Not coincidentally, that's the terrain that the first panel today will explore.

Second, if we're going to talk about the applicability of legal regulation to search engines, it makes sense to devote some attention to the people writing the laws and enforcing the regulations. We should talk about what the "public interest" might mean when we ask government to act in the public interest respecting search. We should talk at length about the different heads of regulatory jurisdiction that might apply to search and how search looks to people steeped in the habits of thought of these

different bureaucracies. Also lurking in the public regulation discussion is the related question of who gets to do the regulating. Which agencies and institutions are most competent to deal with search? Indeed, which _governments_ should have a say here? The federalist and international dimensions of the search conversation are only going to grow in importance. Questions of jurisdiction familiar from other cyberlaw debates also apply to search. That's a lot for an hour and a half, I know, but that just means the speakers on the second panel will be operating in a target-rich environment.

Third, any consideration of law and information technology pretty much has to deal extensively with questions of intellectual property. I say "questions," again with an emphasis on the plural. Intellectual property interacts with the activities of search engines in so many different ways that it's easy to get lost in the day's pressing arguments and forget about a few of the others. My own personal taxonomy goes something like this. Search engines themselves use various forms of IP, as part of their basic operating strategy -- the secret sauce at the heart of every search engine is itself proper IP subject matter, as are the search engine brand and the search engine interface. The content that search engines index is also obviously protected by IP; here, copyright looms largest, although it hardly stands alone. In this regard, the content's supplier, the search engine, and third parties may all be asserting relevant IP rights. Finally, there may be IP rights implicated by the interaction between the search engine and its users -- trademark rights in search keywords come to mind, although again other IP regimes are also plausible contenders. This whole area is potentially enormous, and to date, only quite sketchily charted. Hence, an IP panel with many guides.

Last but not least, we need to think about users. What can search engines do for individuals; what can search engines do to individuals? It's not at all obvious how standard free speech and privacy talking points translate into search engine policy. Search technology can facilitate surveillance (either by searchers or by search engines); it can also be used to protect anonymity by searchers and speakers. Search engines can help provide access to online speech that would otherwise be hard to find; that could be good or bad, depending on how you feel about that speech. Search engines themselves, through their ranking decisions, are in a sense speaking, or perhaps amplifying or silencing the speech of others. Again, that could be good or bad, depending on all sorts of complicated matters. Search policy is privacy policy; search policy is media policy. And that's where the fourth panel comes in.

Search engines, government, society, and users. This is by no means the only way to break the problem of search engines and law down into constituent clusters. But it's a start, and even this tentative breakdown hints at just how much work lies ahead.

There's an awful lot at stake in the coming search wars. They may well determine how we think of the Internet both technologically and doctrinally. The future is open. Perhaps worryingly so. Especially recently, tempers have been running pretty high when it comes to search. It may in part be fear of the unknown. Because the technological and doctrinal futures of search are so wide open and so uncertain, the set of possibilities includes almost everyone's personal nightmare. People are afraid that creativity, or privacy, or innovation, or freedom could be the loser in the search wars. Part of that fear comes from not really knowing what the other participants in the search space are doing or what they want. We can hope that today will provide a free-flowing exchange of ideas, that we'll all walk away with a better understanding of what might actually happen, that it will be easier to see where others are coming from, and that maybe even some people here will find a little common ground.

In the information society, search cannot help but raise the big questions. Here are a few:

Where is search technology going? What shifts in the way we organize and relate to information are just over the horizon? Who has a stake in search, and what do they care about? What can search do to help or to harm society? What institutions are best suited to deal with the legal problems search engines raise? What are those legal problems? What are the closest analogies to search that the law has had to deal with? How well has it dealt with them? What legal paradigms offer themselves up as applicable to search? What would be the consequences of choosing one or another? Ultimately, what do we as a society want our search engines to be?

I don't have answers to these questions. Perhaps you do. Think of them as some search queries for the day.