

# AGAINST JAWBONING

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## I. INTRODUCTION

The government of Lower Saxony, a state in Germany, wanted Twitter to ban the account of Besserer Hannover, a neo-Nazi group.<sup>1</sup> The Anti-Defamation League and government of Israel pressed Facebook to remove a page calling for Palestinians to launch an intifada, or uprising.<sup>2</sup> Politicians and media figures in the United States called on Amazon to cease hosting the whistleblower site WikiLeaks on its EC2 cloud computing platform.<sup>3</sup> In each case, these informal pressures worked: the Internet firms censored content that appeared on their platforms. But should they have done so?

Private Internet platforms, from Google to Twitter to broadband access providers, are beset on all sides. Movie studios and record labels press them to purge material that infringes intellectual property rights. Feminists want them to cull revenge porn. Civil rights groups push platforms to remove hate speech. The list goes on.

Similarly, governments push platforms to block or delete content to which they object. Increasingly, this pressure comes framed as voluntary efforts by providers, or public-private partnerships, or industry codes of conduct.<sup>4</sup> In reality, though, this is jawboning: states try to convince or compel private entities to limit access to information in ways that those governments are unable or unwilling to achieve through public law.

This Article takes up the difficult problem of private censors on Internet platforms. It seeks to establish a typology of censorship by private

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<sup>1</sup> Ben Brumfield & Laura Smith-Spark, *Twitter blocks content of German neo-Nazi group*, CNN (Oct. 18, 2012), <http://www.cnn.com/2012/10/18/tech/twitter-censorship/>.

<sup>2</sup> Lance Whitney, *Facebook takes down Palestinian intifada page*, CNET (Mar. 29, 2011), <http://www.cnet.com/news/facebook-takes-down-palestinian-intifada-page/>.

<sup>3</sup> Derek E. Bambauer, *Orwell's Armchair*, 79 U. CHI. L. REV. 863, 891-93 (2012); Yochai Benkler, *A Free Irresponsible Press: Wikileaks and the Battle Over the Soul of the Networked Fourth Estate*, 46 HARV. C.R.-C.L. L. REV. 311, 329-47 (2011).

<sup>4</sup> See, e.g., Ryan W. Neal, *War On Porn In The UK: Does David Cameron's Plan To Battle Child Pornography Go Too Far?*, INT'L BUS. TIMES (July 22, 2013), <http://www.ibtimes.com/war-porn-uk-does-david-camersons-plan-battle-child-pornography-go-too-far-video-1355279> (describing efforts by U.K. Prime Minister David Cameron to pressure ISPs into censoring Internet content).

platforms in response to jawboning – informal requests or demands, rather than formal legal processes or decisions. It then assesses the normative legitimacy of various types of jawboning. The article offers concrete – though necessarily limited – suggestions on how illegitimate jawboning might be cabined. Finally, it suggests that the shadow of the First Amendment has important consequences for this issue, and suggests that copyright doctrine has much to teach constitutional law here.

## II. A TYPOLOGY OF JAWBONING

The firms that run Internet platforms – sites or applications that enable user-generated expression – continually make decisions to exclude information on them. These choices can be usefully divided into three categories based on the impetus for that decision. In some cases, platforms will remove information entirely of their own accord, as when Google drops search results that include a person’s financial information or Social Security Number<sup>5</sup>, or when it alters a site’s Page Rank to effectively remove it from the search engine’s results<sup>6</sup>. In others, firms act out of response to pressure from other private actors, including YouTube’s decision to use its ContentID system to block uploading of putatively infringing content<sup>7</sup>. Finally, companies may act because of the application of informal state pressures, which I have discussed as soft censorship<sup>8</sup> and which Jack Balkin calls “new school” speech regulation<sup>9</sup>. This Article argues that the third category is the most problematic. At present, the first two categories of decisionmaking are regulated lightly, if at all, by government in the United States; this current balance is largely correct as a normative matter.

The first two types of decisions inevitably conflict: platforms will make decisions to which other private actors object, and which they would like to alter. A platform will want to make available information that other private actors oppose, such as when a video service hosts content that an IP owner claims to be infringing.<sup>10</sup> Or, the platform won’t carry information

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<sup>5</sup> Google, *Removal Policies*, <https://support.google.com/websearch/answer/2744324>.

<sup>6</sup> See *Search King v. Google Tech.*, 2003 U.S. Dist. LEXIS 27193 (2003) (finding Google’s search results were constitutionally protected speech and dismissing tortious interference with contractual relations claim by company whose Page Rank was reduced).

<sup>7</sup> Google, *How Content ID Works*,

<https://support.google.com/youtube/answer/2797370?hl=en>; see Erik Kain, *YouTube Responds To Content ID Crackdown, Plot Thickens*, FORBES (Dec. 17, 2013), <http://www.forbes.com/sites/erikkain/2013/12/17/youtube-responds-to-content-id-crackdown-plot-thickens/>.

<sup>8</sup> Derek E. Bambauer, *Orwell’s Armchair*, 79 U. CHI. L. REV. 863, 867-68 (2012).

<sup>9</sup> Jack M. Balkin, *Old School/New School Speech Regulation*, HARV. L. REV. (forthcoming 2014).

<sup>10</sup> See, e.g., *Viacom Int’l v. YouTube*, No. 1:07-cv-02103 (S.D.N.Y. 2013); *UMG Recordings v. Shelter Capital Partners*, 718 F.3d 1006 (9<sup>th</sup> Cir. 2013).

that some users favor, as when Verizon Wireless refused to carry an abortion-related message from the pro-choice group NARAL.<sup>11</sup> Where government has attempted to regulate such decisions, both statutory law<sup>12</sup> and constitutional precedent<sup>13</sup> have tended to favor Internet platforms as decisionmakers, although there are colorable arguments on both sides. For example, broadband providers have resisted network neutrality regulations by claiming (among other arguments) that such rules would impinge upon their First Amendment rights to select among the speech flowing over their wires and radio waves.<sup>14</sup> In counterattack, net neutrality proponents have argued that there are *no* speech interests at stake – network operators are mere common carriers with no editorial stake in the traffic they pass.<sup>15</sup> There is a prominent wave of scholarship<sup>16</sup> arguing for enhanced regulation of platform provider decisions on a variety of grounds, from antitrust worries<sup>17</sup> to concerns about undesirable content such as hate speech<sup>18</sup>. Even if the status quo largely validates platform operator choices, perhaps that balance ought to shift.

I argue that the current balance is largely correct. There are important reasons to favor safeguarding platform provider's authority to make decisions about speech on their systems, and to be skeptical about attempts to intervene. First, dominance fades fast in the ecosystem of Internet speech. Twenty years ago, scholars and regulators worried deeply about the day's most important platform for reaching digital speech: the Windows 95 desktop.<sup>19</sup> Fifteen years ago, AOL was the target of scrutiny, and had to agree to restrictions on content discrimination for its merger with

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<sup>11</sup> Adam Liptak, *Verizon Blocks Messages of Abortion Rights Group*, N.Y. TIMES, Sept. 27, 2007, at A1.

<sup>12</sup> See 47 U.S.C. § 230(c)(2) (immunizing good faith decisions by interactive computer services to limit access to objectionable content).

<sup>13</sup> See, e.g., *Zhang v. Baidu.com*, No. 1:11-cv-03388-JMF (S.D.N.Y. 2014) (granting summary judgment for China-based search engine against claims regarding company's censorship practices).

<sup>14</sup> See, e.g., Joint Brief for Verizon and MetroPCS 42-48, *Verizon v. FCC*, available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-317120A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-317120A1.pdf).

<sup>15</sup> See, e.g., Marvin Ammori, *Net Neutrality and the 21<sup>st</sup> Century First Amendment*, BALKINIZATION (Dec. 10, 2009), <http://balkin.blogspot.com/2009/12/net-neutrality-and-21st-century-first.html>.

<sup>16</sup> See, e.g., Oren Bracha, *The Folklore of Informationalism: The Case of Search Engine Speech*, 82 FORDHAM L. REV. 1629 (2014).

<sup>17</sup> See, e.g., Frank A. Pasquale III & Oren Bracha, *Federal Search Commission? Access, Fairness, and Accountability in the Law of Search*, 93 CORNELL L. REV. 1149 (2008); Danielle Citron, *Law In a Networked World: Open Code Governance*, 2008 U. CHI. LEGAL F. 355.

<sup>18</sup> See, e.g., Ari Ezra Waldman, *Durkheim's Internet: Social and Political Theory in Online Society*, 7 NYU J.L. & LIBERTY 345, 415-30 (2013).

<sup>19</sup> See Herbert Hovenkamp, *The Obama Administration and Section 2 of the Sherman Act*, 90 B.U. L. REV. 1611, 1641 (2010).

TimeWarner to be approved by the Department of Justice.<sup>20</sup> Ten years ago, MySpace was dominant. (Indeed, in 2007, the Guardian wrote an article fearing the effects of the company's dominance of social media<sup>21</sup>, following in the footsteps of The Economist<sup>22</sup> and various technology publications<sup>23</sup>.) Google took its turn as the center of suspicion in the mid-2000s, only to be displaced by Facebook. Given these rapid shifts in dominance, regulatory intervention must either become pervasive – where any platform above a certain market share becomes subject to restrictions – or irrelevant.

Second, constraints on platform decisions must undertake a difficult calculus, weighing three sets of free expression rights: those of the platform, those of the objecting user or group, and those of third-party readers or listeners. Storage may be nearly infinite in the cloud, but attention and discoverability are not. If Google must move one set of listings up in its results, another set moves down. Current scholarship that advocates for greater intervention has simply failed to adduce a convincing normative account of how to engage in this balancing. Descriptively, though, the First Amendment sets the default: intervention requires a convincing account by the government of why one speaker must yield to another. It is for this reason that scholarship in areas such as privacy and Internet law often aims to define data gathering, algorithms, and search results as non-speech: it relieves them of a descriptive and normative burden they may not be able to carry.<sup>24</sup>

Third, most Internet platforms are highly dynamic and subject to network effects.<sup>25</sup> There are virtues – to users and platforms alike – to size. Bigger usually is better. Restrictions on how platforms make decisions about information may operate as a disincentive to grow. It is not plain why an information ecosystem where users must navigate multiple smaller platforms for a particular function (search, microblogging, or social media) is preferable to one where they have a single home for that role.

Finally, it is not yet clear that there is a problem sufficient to warrant remediation by public law. Proponents of curtailing platform providers' decisional capabilities have anecdotes but not data. Any human system

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<sup>20</sup> See Daniel L. Rubinfeld & Hal J. Singer, *Open Access to Broadband Networks: A Case Study of the AOL/Time Warner Merger*, 16 BERKELEY TECH. L.J. 631 (2001).

<sup>21</sup> Victor Keegan, *Will MySpace Ever Lose Its Monopoly?*, THE GUARDIAN (Feb. 7, 2007), <http://www.theguardian.com/technology/2007/feb/08/business.comment>.

<sup>22</sup> *Forbidden Fruit*, THE ECONOMIST (July 27, 2006), <http://www.economist.com/node/7233972>.

<sup>23</sup> See, e.g., John Barrett, *MySpace Is a Natural Monopoly*, TECHNEWSWORLD (Jan. 17, 2007), <http://www.technewsworld.com/story/55185.html>.

<sup>24</sup> See, e.g., Bracha, *supra* note 16; Neil M. Richards, *Why Data Privacy Law Is (Mostly) Constitutional*, WM. & MARY L. REV. (forthcoming 2014); see generally Jane R. Bambauer, *Is Data Speech?*, 66 STAN. L. REV. 57 (2014).

<sup>25</sup> See generally TIM WU, THE MASTER SWITCH (2010).

creates error. There has been no convincing argument for why errors under government intervention would be less than under forbearance. Regulation is not costless, either in its implementation or in its outcomes. Some speakers will benefit under a given scheme, and some will be burdened. Altering the defaults for information choices requires a convincing case for why the outcome is better after the intervention – a case not yet made.

In short, disputes between non-government actors over the speech permitted or banned from Internet platforms should generally remain the stuff of rhetoric and market pressures, rather than being determined through regulation.<sup>26</sup>

### III. STATE POWER THROUGH SPEECH

The final category of information decisionmaking – where firms alter their behavior in response to informal government pressures, or jawboning – is the most normatively troubling. This Article argues that jawboning is illegitimate as a mechanism for governmental action. While it is difficult to translate this disapprobation into legal constraints, the suasive power of the conclusion by itself does useful work.

Governmental jawboning has power beyond rhetoric and logic. Private actors can deploy a range of methods designed to alter speech decisions on platforms: they can appeal to ethical precepts, shift their custom to competitors, and threaten boycotts of advertisers and supporters, among other tactics. Those pressures may have real consequences: woe betide the hyperlocal Web site that features investigative journalism about its advertisers.<sup>27</sup> However, private pressures are dwarfed by those government can deploy. Even financially, there is little comparison. The federal government alone purchases over \$500 billion annually in goods and services.<sup>28</sup> And government can threaten to deploy law, or to make law, in a way that forces the target to comply. When Internet service providers resisted requests by the Department of Justice to archive data for law enforcement purposes, the Bush administration introduced legislation that would compel that outcome.<sup>29</sup> After State Department legal advisor Harold Koh penned a letter opining that Wikileaks violated the Espionage Act,

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<sup>26</sup> Descriptively, the current Supreme Court has tended towards skepticism of speech regulations. *See generally* Derek E. Bambauer, *Exposed*, 98 MINN. L. REV. 101, 163-64 (2014) (tracing recent cases); Ronald K.L. Collins, *Exceptional Freedom—The Roberts Court, The First Amendment, and the New Absolutism*, 76 ALB. L. REV. 409 (2013).

<sup>27</sup> *See, e.g., FTC Says Car-Dealer Group's Boycott Broke Antitrust Laws*, SEATTLE TIMES (Aug. 1, 1995), <http://community.seattletimes.nwsourc.com/archive/?date=19950801&slug=2134455>.

<sup>28</sup> Derek E. Bambauer, *Ghost in the Network*, 162 U. PA. L. REV. (forthcoming 2014) (draft at p.47).

<sup>29</sup> Bambauer, *supra* note 3, at 896.

payment providers stopped processing donations.<sup>30</sup> And, the Obama administration pushed ISPs to discipline users who violate intellectual property law, reportedly under threat of facing adverse new legislation.<sup>31</sup> Private actors must rely on their own resources; government has access to our collective resources. Thus, jawboning by government can become problematic when the state uses tactics that would be legitimate for private entities to employ.

Jawboning is public action guised as private discretion. It allows government to bypass both the formal checks and public pressure of the political process as limited by judicial review. Intermediaries have asymmetric incentives regarding censorship: as Seth Kreimer<sup>32</sup> and Jack Balkin<sup>33</sup> have documented, defending speech rights is rarely worth the cost to platforms, particularly where those speakers may be minority voices or marginalized perspectives. Moreover, governments may be able to achieve more through jawboning than they could attain via formal rulemaking, since uncertainty and costs lead platform operators to accede on terms generous to the state. There are a number of cogent examples in recent history: the adoption of a “six strikes” system for copyright infringement by U.S. ISPs under pressure from the Obama administration<sup>34</sup>; the decision by British ISPs to filter pornography as a default measure under prodding from the Cameron government<sup>35</sup>; warrantless wiretapping through semi-voluntary measures by network operators under the Bush administration<sup>36</sup>; and the campaign against WikiLeaks by a variety of American politicians after that site released sensitive government communications<sup>37</sup>. In each case, the government won accession to its demands without using formal powers. Indeed, it is likely that in the American examples, at least, that the government would have been unable to reach the relevant activity through law. The Digital Millennium Copyright Act shields platforms for liability if they comply with its safe harbor provisions.<sup>38</sup> The sections of the Espionage

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<sup>30</sup> Benkler, *supra* note 3, at 341-42.

<sup>31</sup> Bambauer, *supra* note 3, at 896.

<sup>32</sup> Seth F. Kreimer, *Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link*, 155 U. PA. L. REV. 11 (2006).

<sup>33</sup> Balkin, *supra* note 9.

<sup>34</sup> Bambauer, *supra* note 3, at 896.

<sup>35</sup> Neal, *supra* note 4.

<sup>36</sup> James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES (Dec. 16, 2005),

<http://www.nytimes.com/2005/12/16/politics/16program.html?pagewanted=all>; see David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condone Unlawful Disclosures of Information*, 127 HARV. L. REV. 512, 597-605 (2013).

<sup>37</sup> Benkler, *supra* note 3, at 329-47.

<sup>38</sup> 17 U.S.C. § 512.

Act quoted against WikiLeaks may be unconstitutional.<sup>39</sup> And there are well-defined statutory procedures within which the government must operate to engage in surveillance for both law enforcement and national security purposes.<sup>40</sup> Jawboning lets the government evade strictures designed to prevent abuses in precisely the area where such abuses are most worrisome: communication and expression.

Limiting jawboning is hard. First, governments face strong incentives to engage in the practice. They can shift blame for censorship to private actors, evading accountability.<sup>41</sup> The state does not bear the full cost of implementing these restrictions. And it need not trifle with countervailing considerations such as access to information or the expression of dissent. Jawboning is addictive.

Second, platforms will rarely resist. Nonetheless, they merit strong support when they do, such as when Google contests gag orders<sup>42</sup> or goes to court to resist a questionable copyright take-down for the film “Innocence of Muslims,”<sup>43</sup> or when the small ISP Calyx challenges a National Security Letter<sup>44</sup>. Examples can serve as role models.

Finally, the legal mechanisms to cabin jawboning are limited. Since it operates, in a sense, extralegally, it is hard to contain via law. The First Amendment protects the government’s right to speak, and to express its views about content. The case or controversy requirement of Article III, and the narrowing of standing under recent Supreme Court cases for users of communication networks, makes it difficult to launch a declaratory judgment action against such activity. Limits on state resources make private ordering attractive, and limits on platform provider resources make settlement appealing.

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<sup>39</sup> See *Bartnicki v. Vopper*, 532 U.S. 514 (2001); see generally Harold Edgar & Benno C. Schmidt, Jr., *The Espionage Statutes and Publication of Defense Information*, 73 COLUM. L. REV. 929 (1973); but see Derigan A. Silver, *National Security and the Press: The Government’s Ability to Prosecute Journalists for the Possession or Publication of National Security Information*, 13 COMM. L. & POL’Y 447 (2008) (arguing courts would not interpret First Amendment as preventing prosecution).

<sup>40</sup> 18 U.S.C. § 2518 (procedure for warrant application under Wiretap Act); 50 U.S.C. § 1804 (procedure for application under Foreign Intelligence Surveillance Act).

<sup>41</sup> Kreimer, *supra* note 32, at 41–46.

<sup>42</sup> Craig Timberg & Cecilia Kang, *Google challenges U.S. gag order, citing First Amendment*, WASH. POST (Jun 18, 2013), [http://www.washingtonpost.com/business/technology/google-challenges-us-gag-order-citing-first-amendment/2013/06/18/96835c72-d832-11e2-a9f2-42ee3912ae0e\\_story.html](http://www.washingtonpost.com/business/technology/google-challenges-us-gag-order-citing-first-amendment/2013/06/18/96835c72-d832-11e2-a9f2-42ee3912ae0e_story.html).

<sup>43</sup> Google Inc. and YouTube, LLC’s Brief in Response to Suggestion of Rehearing En Banc, *Garcia v. Google*, No. 12-57302 (9<sup>th</sup> Cir. 2014), available at <http://pdfserver.amlaw.com/nlj/usca9-google-response.pdf>.

<sup>44</sup> Jennifer Valentino-Devries, *What It’s Like to Fight a National Security Letter*, WALL ST. J. (July 17, 2012), <http://blogs.wsj.com/digits/2012/07/17/what-its-like-to-fight-a-national-security-letter/>.

This Article offers two responses to this pessimistic (but accurate) view. First, normative labeling has power. This is why it matters whether one describes Edward Snowden or Bradley Manning as a leaker, a whistleblower, or a traitor, and whether one portrays the goal of domain name seizures as censorship or as protecting property rights. Framing matters. If jawboning becomes viewed as illegitimate, both platforms and governments will be more reluctant to engage in the practice.

Second, transparency also has effect. Private firms are under no duty to disclose bargains with governments, but shareholder activism may in some cases bring these deals to light. AT&T, for example, endured significant criticism for its robust willingness to aid government surveillance outside statutory bounds. And while states try to keep these arrangements secret, whistleblowing and freedom of information laws can act as checks, even if only weakly. Finally, geeks have a role to play. Where private platforms are implementing censorship, technologically skilled users can detect the existence and extent of these limits. Hackers outed Comcast for throttling BitTorrent traffic, and academic consortia such as the OpenNet Initiative specialize in documenting the configuration of censorship regimes worldwide.

There may be ways to make jawboning more legitimate, such as by ensuring that all stakeholder interests are represented in decisionmaking, as with the representation of public interest groups on the six strikes board of directors, and by utilizing the technique where there are fewer concerns about the interdicted content, such as with child pornography. Yet, these are also the zones where public lawmaking is likely to operate best, and most effectively. As I argue in prior work, overt censorship through formal law is more likely to be open, transparent, narrowly targeted, and accountable – the hallmarks of a defensible regime. The strong default presumption should be that government pressure on private platforms to censor is illegitimate.

#### IV. THE FIRST AMENDMENT'S COPYRIGHT<sup>45</sup>

Jawboning takes place outside the constraints of the First Amendment: its limits do not apply to private actors except in rare cases, and when the government seeks to persuade, its rhetorical force normally falls short of the compulsion necessary for state action to occur. Yet First Amendment doctrine and scholarship remain relevant for jawboning. Constitutional law tends to frame normative discussion: our views on limits on speech derive in large measure from First Amendment precedent. And, as jawboning by public actors begins to incorporate threats of legislative or executive action, the law's restrictions on governmental censorship begin to

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<sup>45</sup> With apologies to Larry Lessig. Lawrence Lessig, *Copyright's First Amendment*, 48 *UCLA L. REV.* 1057 (2001).



have grip. I argue that the debate over what constitutes speech – that is, expression protected by the First Amendment – can draw upon copyright law for guidance. Copyright scholars spend considerable effort mulling the Amendment’s implications for their work; free speech scholars should return the favor.<sup>46</sup>

There is a vibrant debate over whether firms generally, and Internet platforms specifically, deserve inclusion in the pantheon of speakers protected by the First Amendment. The Supreme Court’s landmark decision in *Citizens United v. Federal Election Commission* placed this question at the center of free speech policy debates.<sup>47</sup> The Court’s decision struck down limits on election-related expenditures and communications by juridical entities such as corporations and unions.<sup>48</sup> Groups of speakers – such as private firms and non-profit organizations – enjoy the same protection against governmental regulation of expression as individuals do. *Citizens United* has been roundly attacked by scholars and activists.<sup>49</sup>

Issues around regulation of search engines and similar on-line platforms have launched similar debates. Tim Wu argues courts do not protect actors that perform functional roles regarding speech, such as to transport it or to collate it.<sup>50</sup> Oren Bracha goes further, contending that search engine results are descriptively and deservedly unprotected by the First Amendment.<sup>51</sup> Jane Bambauer presses the case that data must receive First Amendment protection (though at varying levels of scrutiny) to prevent governments from interfering in knowledge regulation.<sup>52</sup> Eugene Volokh and Donald Falk also see search engines as speakers, particularly given their editorial judgment in constructing results.<sup>53</sup> James Grimmelman, by contrast, seeks to chart a middle course: search engines

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<sup>46</sup> See Alan E. Garfield, *The Case for First Amendment Limits on Copyright Law*, 35 HOFSTRA L. REV. 1169, 1169n2 (cataloguing scholarly articles).

<sup>47</sup> 558 U.S. \_\_\_ (2010). Corporations, though, had been treated as persons for purposes of the Fourteenth Amendment for over a century at the time of *Citizens United*. See *Pembina Consolidated Silver Mining Co. v. Pennsylvania*, 125 U.S. 181 (1888).

<sup>48</sup> *Id.*

<sup>49</sup> See, e.g., Lawrence Lessig, *Democracy After Citizens United*, BOSTON REVIEW (Sept. / Oct. 2010), <http://new.bostonreview.net/BR35.5/lessig.php>.

<sup>50</sup> Tim Wu, *Machine Speech*, 161 U. PA. L. REV. 1495, 1496-98 (2013).

<sup>51</sup> Oren Bracha, *The Folklore of Informationalism: The Case of Search Engine Speech*, 82 FORDHAM L. REV. 1629 (2014).

<sup>52</sup> Jane R. Bambauer, *Is Data Speech?*, 66 STAN. L. REV. 57 (2014). Obvious disclosure: she and the author are married.

<sup>53</sup> Eugene Volokh & Donald M. Falk, *First Amendment Protection for Search Engine Search Results* (Apr. 20, 2012), <http://www.volokh.com/wp-content/uploads/2012/05/SearchEngineFirstAmendment.pdf>. The paper was commissioned by Google.

deserve protection in their role as advisors, but should face liability if they deliberately mislead their users about their calculations.<sup>54</sup>

And, these arguments have immediate policy salience. Internet network providers have deployed First Amendment claims to bolster their attacks on network neutrality regulation. Courts have wielded constitutional doctrine to reject attacks by those filtered by Chinese search engines on that censorship. Antitrust claims, efforts to fight spam<sup>55</sup>, and activists recording police enforcement<sup>56</sup> have all been forced to confront the scope of free speech protections for technological platforms.

I propose a new argument: everything copyrightable is speech.

This of course is an overstatement. Yet even the few exceptions prove the rule. For example, one can obtain copyright in an obscene film – at least in some circuits – but obscenity lies beyond the First Amendment’s protection.<sup>57</sup> But: software code is copyrightable, and speech.<sup>58</sup> Photographs are copyrightable, and speech.<sup>59</sup> Nude dancing is copyrightable, if fixed, and is speech.<sup>60</sup> Copyright scholars have grown used to considering the (declining) effects of the First Amendment on the doctrine and theory in their field. It is time for First Amendment scholars to begin to think about how copyright affects their work. This Article argues that copyrightable expression is protected by the First Amendment, save for a few narrow areas.

This shift in thinking has at least two important implications. First, it makes speech by non-human entities unexceptional. Juridical persons such as corporations and non-profit organizations are frequently treated as authors under copyright law.<sup>61</sup> While they speak through their agents, it is the entities that hold copyright, particularly under the work for hire doctrine.<sup>62</sup> At one level, vesting ownership in a motion picture studio or similar non-human author is a technical trick intended to reduce transaction costs and avoid copyright-specific problems such as termination of

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<sup>54</sup> James Grimmelmann, *Speech Engines*, 98 MINN. L. REV. 868 (2014).

<sup>55</sup> See, e.g., *Holomaxx v. Microsoft*, 2011 WL 3740813 (N.D. Cal. 2011); see generally 47 U.S.C. § 230(c)(2).

<sup>56</sup> See, e.g., *Glik v. Cunniffe*, 655 F.3d 78 (1<sup>st</sup> Cir. 2011); *ACLU v. Alvarez*, No. 11-1286 (7<sup>th</sup> Cir. 2012).

<sup>57</sup> *Mitchell Bros. Film Group v. Cinema Adult Theater*, 603 F.2d 852 (5<sup>th</sup> Cir. 1979); *Miller v. California*, 413 U.S. 15 (1973).

<sup>58</sup> *Computer Assoc. v. Altai*, 982 F.2d 693 (2d Cir. 1992); cf. 17 U.S.C. § 109(b)(1)(A) (describing exception to first sale doctrine for computer programs).

<sup>59</sup> *Burrow-Giles Lithographic v. Sarony*, 111 U.S. 53 (1884).

<sup>60</sup> *Erie v. Pap’s A.M.*, 529 U.S. 277 (2000); 17 U.S.C. § 102(4) (protecting pantomimes and choreographic works under copyright law).

<sup>61</sup> See, e.g., *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77 (2d Cir. 1995).

<sup>62</sup> See generally *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989).

transfers.<sup>63</sup> However, the law treats human and non-human authors alike, in the same way it treats human and non-human speakers alike.<sup>64</sup>

Second, it provides a new angle on somewhat vexed First Amendment debates. Scholars contest whether Google's rankings, or its underlying Page Rank algorithm, count as speech. After all, skeptics say, who is the speaker? Yet it would be exceptional to claim that rankings, or the algorithm, could not qualify for copyright. Copyright binds itself in knots over the speaker rather than the speech at times, such as when questions of joint authorship appear<sup>65</sup>, but it principally focuses on evaluating whether the expression at issue shows the minimal modicum of creativity necessary to qualify<sup>66</sup>. Movies, plays, and photographs all qualify as copyrightable speech even when the author is uncertain or contested. This serves as an effective check on government regulation. If the expression can be copyrighted, *someone* is the speaker, and government must account for its attempts to muzzle whomever that may be.

The parallels and reciprocal influence between copyright and the First Amendment make sense: both doctrines operate to encourage the production and distribution of information. Copyright is perhaps more agnostic about its ends than the First Amendment, but it contains an even more potent incentive: the opportunity to charge monopoly rents should one's expression prove attractive in the market. The two interact with less conflict than is popularly believed. The First Amendment allows regulation of copyrighted material in all sorts of ways: advertisements can be sanctioned if they are false or defamatory, for example.<sup>67</sup> And copyright denies its protection to expression that is at the heart of the First Amendment, such as ideas.<sup>68</sup> Yet, the interplay between these fields strongly suggests that anything copyrightable should be presumed to enjoy First Amendment protection (though at varying levels) until shown otherwise.

Jawboning does not directly implicate the First Amendment, but the scope of constitutional protection has important rhetorical and normative consequences for censorship on private platforms. Copyright law offers a

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<sup>63</sup> 17 U.S.C. § 203.

<sup>64</sup> There are a few exceptions, which attempt rough harmonization between human and non-human authors. For example, human authors enjoy copyrights which last for their lives plus another seventy years. Non-human authors do not have natural lives, so they enjoy fixed terms. 17 U.S.C. 302(a), (c).

<sup>65</sup> See, e.g., *Thomson v. Larson*, 147 F.3d 195 (2d Cir. 1998).

<sup>66</sup> See *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903).

<sup>67</sup> See, e.g., *In re Pom Wonderful LLC*, No. 9344 (Fed. Trade Comm'n, Jan. 20, 2013), available at

<http://www.ftc.gov/sites/default/files/documents/cases/2013/01/130116pomopinion.pdf>.

<sup>68</sup> 17 U.S.C. § 102(b).

new angle on the much-debated question of what digital expression constitutes protected speech.

#### V. CONCLUSION

Censorship via jawboning is most worrisome when it flows from informal government pressures. While there is uncertainty in some aspects of First Amendment doctrine, the trend descriptively is to prefer platform provider decisions about information control to claims by their users for mandatory voice and to claims by third parties about the desirability of content. And, while there are relatively few legal checks on the practice, informal government pressure on platforms through jawboning is normatively undesirable and ought to be resisted.

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