

Regulating Search – abstract

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With the digital revolution and the internet age have come not just material and resources unimaginable fifty years ago, but also an overwhelming onslaught of information. Search engines have become the crucial intermediary in this online world, ameliorating the “information overload” and serving as the gateway to the Internet. The academic literature on search engine law and regulation is in its early stages, but it reflects the centrality of search engines in today’s world and emphasizes the importance of the legal response. Commentators have addressed not just specific doctrinal issues that have arisen, but the “structure of search engine law” and the appropriate institutions for regulation. Thus far, the suggestions have clustered at the ends of the spectrum: market regulation versus agency regulation.

In this paper, I suggest that a middle ground is available. Between the patchwork of the current legal approach and the prospect of agency regulation, the development of federal common law, along with the already existing federal statutory structure, may allow for a more coherent approach to search engine regulation. Drawing on some of the early literature on the regulation of cyberspace, I propose a federal common law approach primarily for its incremental nature. The incrementalism of the common law allows for flexibility and thus greater adaptability to changing circumstances. In addition, a common law approach may ultimately provide some predictability without locking-in technology or standards or otherwise inhibiting innovation.