

**YOU'RE NOT FROM  
AROUND HERE, ARE YOU?  
FIGHTING DECEPTIVE MARKETING  
IN THE TWENTY-FIRST CENTURY**

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*Deceptive marketing has hurt consumers and business owners since the birth of promotional advertising. As the Internet increasingly inspires and dictates our consumption choices, even sophisticated business acumen and technological savvy are not enough to withstand the harmful consequences. While lawmakers and courts have fashioned remedies applicable to some misleading practices, sly marketers with deep pockets frequently find new ways to trick unsuspecting shoppers and seize market share. This Note therefore provides a novel interpretation of prior scholarship to recommend a solution to a particularly misleading marketing practice—deceptive search engine optimization—in order to bolster currently available, yet independently inadequate, alternatives. Although some of the problems associated with deceptive search engine optimization have caught the media's eye as of late, a much-needed solution is heretofore unexplored in law review literature.*

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## INTRODUCTION

Picture for a moment that it is Monday morning and that you are about to leave for a crucial meeting across town. Per Murphy’s Law,<sup>1</sup> however, you inadvertently lock your keys in your car. Naturally perturbed, you instinctively reach for your smart phone and google<sup>2</sup> “emergency locksmith.” A second later you discover “24/7 Emergency Locksmith”—the top search result—evidently located only a few blocks away. Or so you are led to believe by 24/7’s top placement on Google’s search engine results page (“SERP”). In reality, 24/7 has misappropriated the nearby address of a wholly unaffiliated mom-and-pop store, unbeknownst to the latter, in an attempt to market locksmith services to a wider consumer base by appearing to be a local establishment. When you dial 24/7, beginning with a local area code, your call is in fact rerouted to a phone bank in a different city, in a different state altogether. The phone bank eventually sends a locksmith to your location, but he does shoddy work and charges you three times the price quoted over the phone. To make matters worse, you just missed your crucial meeting.

Meanwhile, actually a few blocks away, Bob Locksmith is staring at his phone and reminiscing of times gone by. Before the advent of the Internet and search engines,<sup>3</sup> Bob, a third-generation local locksmith, had no problems generating business. Nowadays, however, “Bob’s Lock & Key” does not show up in Google’s SERPs until the third page, a place most people in the above

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1. Murphy’s Law is commonly stated as “[w]hatever can go wrong will.” James W. Bowers, *Whither What Hits the Fan?: Murphy’s Law, Bankruptcy Theory, and the Elementary Economics of Loss Distribution*, 26 GA. L. REV. 27, 28 (1991) (internal quotation marks omitted).

2. To “google” means to search for information on the Internet, typically using the Google search engine. *Google Definition*, OXFORD DICTIONARIES, <http://oxforddictionaries.com/definition/google?region=us&q=google> (last visited Aug. 22, 2012).

3. Search engines, as we recognize them today, were first introduced in 1993. JERRI L. LEDFORD, *SEARCH ENGINE OPTIMIZATION BIBLE 4* (2d ed. 2009).

hypothetical situation would never bother to visit.<sup>4</sup> When Bob tries to hire a Web Consultant to attract more customers, he is told it would be a waste of time and money because 24/7 and similar companies expend many more resources on online marketing than Bob could possibly spare.<sup>5</sup> In the end, while both you and Bob have foregone opportunities neither of you could afford, the owners of 24/7 seem to be the only ones winning.<sup>6</sup>

Search engines provide a means for their users to search a database of online content for information.<sup>7</sup> In response to queries, search engines use a complex algorithm to display results based on relevancy.<sup>8</sup> In the introductory hypothetical, 24/7 employed search engine optimization (“SEO”) to “charm and hoodwink Google’s algorithm.”<sup>9</sup> In other words, 24/7 used certain methods to game their relevancy ranking, which resulted in their top placement in the SERPs, and thereby increased their exposure to potential consumers.

Although SEO can improve public access to information and dramatically increase revenue for its users,<sup>10</sup> *deceptive* SEO frequently hurts consumers and the marketplace, as the introductory hypothetical illustrates. Consumers suffer when they receive less relevant search results and by implication miss more relevant and higher-quality results.<sup>11</sup> The negative impact is exacerbated if businesses reallocate increased marketing costs to its customers. On their end, businesses that lack the know-how or the budget to utilize SEO agonize over unfair or even impossible

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4. Research consistently demonstrates that “[w]hile there are slight differences based on age and education level, . . . individuals rarely visit a second result page.” Laura Granka et al., *Eye Monitoring in Online Search*, in *PASSIVE EYE MONITORING: ALGORITHMS, APPLICATIONS AND EXPERIMENTS* 345, 360 (Riad I. Hammoud ed., 2008).

5. David Segal, *Picking the Lock of Google’s Search*, N.Y. TIMES, July 10, 2011, at BU6 (explaining that in one instance, a search engine expert told a Seattle locksmith that hiring a Web Consultant would be a waste of money because there are hundreds of websites that spend extraordinary amounts of money gaming Google).

6. This story is meant to illustrate how both consumers and businesses are hurt by misleading search engine optimization, for which this Note proposes a complementary remedy. The story is based on recent news reports and articles describing how the locksmith industry is especially plagued by this deceptive practice. *See, e.g., id.*; Sally Showman, *KOIN Prompts Ore. Investigation into Alleged Portland Locksmith Scam*, KOINLOCAL6.COM (Sept. 23, 2011, 6:06 PM), <http://www.koinlocal6.com/mostpopular/story/KOIN-prompts-Ore-investigation-into-alleged/0Oqb4Inul0y72W9JYafABw.csp>.

7. Eric Goldman, *Deregulating Relevancy in Internet Trademark Law*, 54 EMORY L.J. 507, 511 (2005).

8. *Id.* at 534.

9. Segal, *supra* note 5.

10. *See* Karen E. Klein, *How SEO Upped the Revenues*, BLOOMBERG BUSINESSWEEK (July 5, 2006), <http://www.businessweek.com/stories/2006-07-05/how-seo-upped-the-revenues>.

11. *See* Segal, *supra* note 5. Google defines low-quality websites as those that add little value for users; they may only provide content copied from other websites or they are simply purposeless. Amit Singhal & Matt Cutts, *Finding More High-Quality Sites in Search*, OFFICIAL GOOGLE BLOG (Feb. 24, 2011), <http://googleblog.blogspot.com/2011/02/finding-more-high-quality-sites-in.html>. In contrast, high-quality sites provide original content and information, such as in-depth research findings. *Id.*

competition.<sup>12</sup> These issues are by no means exclusive to the locksmith industry.<sup>13</sup> Considering that more than 17.5 billion online searches were conducted in May 2012 alone,<sup>14</sup> one can begin to envision the magnitude of the problem that this Note attempts to resolve.<sup>15</sup> The critical concern becomes how we may prevent, or at least minimize, harms resulting from deceptive SEO, while retaining beneficial SEO.

This Note proceeds in four parts. Part I briefly describes the interrelationship between search engines, marketing, and SEO, followed by examples of deceptive SEO and its negative consequences. Part II outlines currently available remedies to deceptive SEO and explains why they are ultimately inadequate. Part III proposes and evaluates a complementary solution, namely a federal framework for regulating SEO. Part IV scrutinizes alternatives to the solution offered in the preceding Part, and concludes that they are relatively inferior or undesirable. In the end, this Note argues that implementing the suggested framework would at least be a step in the right direction toward preventing harms associated with misleading SEO.

## I. SEARCH ENGINE OPTIMIZATION AND DECEPTIVE MARKETING

Search engines help users locate content on the Internet.<sup>16</sup> Behind the scenes, search engines use computer programs known as crawlers, spiders, or robots to locate and archive information about online content, such as keywords on a website.<sup>17</sup> On the front end, a search engine user enters a word or phrase, and as he or she engages the search, the software retrieves links to archived content that appear relevant to the search.<sup>18</sup> Google, for example, processes searches through a

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12. See Segal, *supra* note 5.

13. *The New York Times* portrays deceptive SEO as a nationwide problem affecting multiple service-based industries, including, for example, roofing and carpeting. *Id.*; see also Larry Bodine, *ALERT: Your Law Firm Could be a Victim of a Lead-Generation Scam*, LAWMARKETING BLOG (July 11, 2011), <http://blog.larrybodine.com/2011/07/articles/current-affairs/alert-your-law-firm-could-be-a-victim-of-a-leadgeneration-scam/> (“You need to know this because one of the scammers may be using your law firm name and address as their location in Google . . .”).

14. Press Release, comScore, comScore Releases May 2012 U.S. Search Engine Rankings (June 13, 2012), available at <http://ir.comscore.com/releasedetail.cfm?ReleaseID=682913> (“17.5 billion explicit core searches were conducted in May (up 2 percent [since April 2012]), with Google Sites ranking first with 11.7 billion (up 3 percent [since April 2012]).”).

15. An illustrative example comes from Missouri, where the Attorney General sued a Florida locksmith company for locally advertising one business under at least 16 different names and with addresses of vacant lots and homes belonging to individuals unassociated with the business. *Attorney General Koster Sues Unscrupulous Locksmith Company*, MISSOURI ATTORNEY GENERAL (April 2, 2009), [http://ago.mo.gov/newsreleases/2009/AG\\_Koster\\_warns\\_consumers\\_of\\_Dependable\\_Locks/](http://ago.mo.gov/newsreleases/2009/AG_Koster_warns_consumers_of_Dependable_Locks/).

16. James Grimmelmann, *The Structure of Search Engine Law*, 93 IOWA L. REV. 1, 6 (2007).

17. LEDFORD, *supra* note 3, at 5.

18. *Id.*

complex algorithm before displaying the results, which are ordered according to how closely they seem to match actual and related terms.<sup>19</sup>

Marketing, in the context of this Note, means everything that a business does to attract customers.<sup>20</sup> For instance, when a company creates a website to promote their services to the public, they are marketing. Deceptive marketing should in turn be understood as unfair or misleading practices in or affecting commerce that are likely to cause confusion, mistake, or otherwise misrepresent the true nature of the good or service.<sup>21</sup>

SEO is an increasingly popular marketing activity,<sup>22</sup> and may be defined as “the business of redesigning [online] content (or creating it) to attract search engines and convince them to rank content highly.”<sup>23</sup> Research has shown that the top result on Google gets roughly 34% of all traffic, almost as much as the second through fifth results combined.<sup>24</sup> Because only one link can appear first, there is an intense demand for top placement.<sup>25</sup> With billions of searches made every week,<sup>26</sup> it is no wonder that companies are projected to spend nearly \$9 billion on SEO in 2012.<sup>27</sup>

Unlike related authorship on this topic, this Note does not discuss deceptive marketing in relation to paid search advertising, such as the purchase of the right to use a competitor’s trademark to game one’s SERP rank.<sup>28</sup> Rather, this Note focuses exclusively on SEO in the organic or natural search environment, i.e., search results that are not paid for.<sup>29</sup> The organic search environment is more

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19. Google, *How Search Works*, YOUTUBE (Mar. 4, 2010), <http://www.youtube.com/watch?v=BNHR6IQJGZs>. Google is frequently used as an example in this Note because it is by far the most-used search engine. See Press Release, *supra* note 14.

20. *Marketing Definition*, INVESTOPEDIA, <http://www.investopedia.com/terms/m/marketing.asp#axzz1YZJx7Xcl> (last visited Aug. 22, 2012).

21. See 15 U.S.C. § 45(a) (2012); 15 U.S.C. § 1125(a) (2012); see also Linda J. Demaine, *Seeing is Deceiving: The Tacit Deregulation of Deceptive Advertising*, 54 ARIZ. L. REV. 719, 746 (2012) (“The FTC and courts recognize that not all deceptions are of equal magnitude. They consider deceptions ‘material,’ and therefore actionable as injurious to the public, if they are likely to affect the reasonable consumer’s decision to purchase a product or service.”).

22. Patricia R. Olsen, *A Future in Directing Online Traffic*, N.Y. TIMES, Jan. 11, 2009, at BU10 (“The [SEO] field has grown exponentially [since 2001].”).

23. Grimmelmann, *supra* note 16, at 13.

24. Chitika Insights, *The Value of Google Positioning*, CHITIKA (May 25, 2010), <http://insights.chitika.com/2010/the-value-of-google-result-positioning/>.

25. Grimmelmann, *supra* note 16, at 31 (“Prominent search-result placements carry immense value. Users are more likely to click on the first result than the second, the second than the third, and so on. If you don’t appear on the first few pages of results, you may as well not exist.”).

26. See *supra* note 14 and accompanying text.

27. Olsen, *supra* note 22.

28. See, e.g., Lisa DeJaco, *Internet Advertising: Two Competitors, One Trademark*, FED. LAW., May 2011, at 12.

29. *What Are Natural Search Engine Results?*, SLEEPLESS MEDIA BLOG (July 7, 2011, 9:58 AM), <http://www.sleeplessmedia.com/blog/2011/07/what-are-natural-search-engine-results>.

worthy of examination because paid content is ordinarily indicated as such<sup>30</sup> and is therefore less likely to deceive search engine users or hurt businesses that are not competing for paid links.<sup>31</sup>

Despite the problems associated with SEO, not all optimization is negative.<sup>32</sup> Some SEO, known colloquially as “white-hat” SEO, is generally desirable because it makes information more accessible to the public.<sup>33</sup> Common examples of accepted SEO for a business involve using keywords directly related to their products and creating relevant reciprocal links from other websites to theirs.<sup>34</sup> On the other hand, misappropriating an unaffiliated entity’s local address in an attempt to climb the search results is clearly deceptive and should be considered a type of “black-hat” SEO.<sup>35</sup> Although some distinctions between white-hat and black-hat SEO are clear-cut, others are rather gray. What makes deceptive SEO difficult to define at the margins is that search engines and their users may well consider one SEO technique acceptable today but unacceptable tomorrow.<sup>36</sup>

The following examples demonstrate prevalent SEO practices that should be considered deceptive. Imagine that you are interested in purchasing new bed sheets. You are not quite sure where to look, though you begin your search by

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30. *Advertise on Google*, GOOGLE ADS, <http://www.google.com/ads/new/> (last visited Aug. 18, 2012) (“Your ads will appear alongside or above Google search results, in sections marked ‘Sponsored links . . .’”).

31. Studies show that an estimated 77% of search engine users choose organic over paid listings; they are also “up to six times more likely to click on the first few organic results than they are to choose any of the paid results, [and] 50% of users begin their search by scanning the top organic results.” Rob Young, *Why Toilet Paper is More Important to Big Brands than SEO*, MEDIAPOST BLOGS (May 21, 2008, 7:00 AM), <http://www.mediapost.com/publications/article/82975/why-toilet-paper-is-more-important-to-big-brands-t.html>. More recent research conducted and published by GroupM Search concluded that the ratio of organic to paid clicks by online consumers is approximately 85 to 15. CHRIS COPELAND, FROM INTENT TO IN-STORE: SEARCH’S ROLE IN THE NEW RETAIL SHOPPER PROFILE 4 (2011), available at [http://www.wpp.com/NR/tonlyres/36352EBF-A62A-43AF-8943-FB7B8D54BD3A/0\\_search\\_retail\\_shopper\\_oct11.pdf](http://www.wpp.com/NR/tonlyres/36352EBF-A62A-43AF-8943-FB7B8D54BD3A/0_search_retail_shopper_oct11.pdf). But see Greg Lastowka, *Google’s Law*, 73 BROOK. L. REV. 1327, 1345 (2008) (“[T]he average Google user does not distinguish between the two types of links. According to [a 2005] study, five out of six search engine users cannot tell the difference between sponsored links and organic results, and roughly half are unaware that a difference between the two exists.”).

32. “SEO can be enormously useful. SEO can also be abused and it can be overdone.” Matt Cutts, *Does Google Consider SEO to be Spam?*, YOUTUBE (Aug. 5, 2011), [http://www.youtube.com/watch?feature=player\\_embedded&v=BS75vhGO-kk](http://www.youtube.com/watch?feature=player_embedded&v=BS75vhGO-kk).

33. Grimmelmann, *supra* note 16, at 13.

34. LEDFORD, *supra* note 3, at 19.

35. See Segal, *supra* note 5 (“Some basically hijack the local addresses of other entities in or near the middle of town. A business called 24 Hour Speedy Emergency Service, for instance, uses the same address as the King County Administration Building.”).

36. *Id.* at 309; see also Grimmelmann, *supra* note 16, at 13–14 (“Search engines and black-hat SEOs are locked in a technical arms race that pits increasingly sophisticated algorithms that distinguish fraudulent from authentic content against increasingly subtle forms of mimicry. . . . [T]he line between black- and white-hat techniques is both unclear and contested.”).

googling “bedding” and likely expect Bed Bath & Beyond, Pottery Barn, or maybe Macy’s to show up first in the SERPs. Perhaps you are looking for new jeans. There are several likely contenders for the top search result, such as Levi’s, True Religion, or maybe a Wikipedia article on jeans. What about a new area rug? One could reasonably predict Crate & Barrel, Wal-Mart, Pier 1, and Amazon to occupy the first page.<sup>37</sup> However, during a recent Christmas season—when online shopping tends to peak—and for a few months before and after, one company showed up on top of all the aforementioned companies in every search: J. C. Penney.<sup>38</sup> Even the manufacturers of J. C. Penney’s merchandise saw themselves beat in the search results for dozens of search terms.<sup>39</sup>

Although J. C. Penney denied any involvement in what some deem the “most ambitious attempt to game Google’s search results [to date],”<sup>40</sup> the more interesting question is how the responsible party pulled it off. Whereas deceptive locksmiths misrepresent their physical addresses to reach the top, J. C. Penney’s success stems instead from other websites linking to products on JCPenney.com.<sup>41</sup> In order to understand why this worked, one must first grasp a basic operational fact about Google. Although Google usually keeps its algorithm variables confidential,<sup>42</sup> one of more than 200 factors used to determine relevancy is PageRank: a measure of the quantity and quality of links from one website to another.<sup>43</sup>

If you own a Web site, for instance, about Chinese cooking, your site’s Google ranking will improve as other sites link to it. The more links to your site, especially those from other Chinese cooking-related sites, the higher your ranking. In a way, what Google is measuring is your site’s popularity by polling the best-informed online fans of Chinese cooking and counting their links to your site as votes of approval. But even links that have nothing to do with Chinese cooking can bolster your profile if your site is barnacled with enough of them. And here’s where the strategy that aided Penney comes in. Someone paid to have thousands of links placed on hundreds of sites scattered around the Web, all of which lead directly to JCPenney.com.<sup>44</sup>

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37. These suggestions are based on the Author’s Google searches conducted on October 23, 2011. *The New York Times* conducted a substantially similar keyword search experiment in relation to an article about SEO. See David Segal, *The Dirty Little Secrets of Search*, N.Y. TIMES, Feb. 13, 2011, at BU1.

38. *Id.*

39. For example, JCPenney.com placed ahead of Samsonite.com in response to Google queries for “Samsonite carry on luggage.” *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. Marziah Karch, *What Is PageRank and How Do I Use It?*, ABOUT.COM, <http://google.about.com/od/searchengineoptimization/a/pagerankexplain.htm> (last visited Aug. 18, 2012). For a brief overview of how websites are connected via linking, see Jo Dale Carothers, Note, *Protection of Intellectual Property on the World Wide Web: Is the Digital Millennium Copyright Act Sufficient?*, 41 ARIZ. L. REV. 937, 942–43 (1999).

44. Segal, *supra* note 37.

In J. C. Penney's case, some links to JCPenney.com did appear on websites related to clothing, but the majority were found on completely unrelated websites about dogs, cameras, cars, online games, diamond drills, hotel furniture, and so on.<sup>45</sup>

What makes the SEO in this example deceptive is not that a major American retailer showed up in the first SERP, or even as the top result, for one of these products.<sup>46</sup> Rather, it is that J. C. Penney appeared as the most popular and relevant merchant for such a wide variety of products—not because it launched an effective advertising campaign—but because it used extensive link-buying.<sup>47</sup> In other words, J. C. Penney achieved its success in the search results through a misleading act in commerce, which likely confused shoppers for the involved products.<sup>48</sup>

A few months later, just before Mother's Day, *The New York Times* reported on another link-buying incident (the same type of deceptive SEO that J. C. Penney used)—this time involving the biggest flower merchants in the country: Teleflora, FTD, 1800Flowers.com, and ProFlowers.<sup>49</sup> The pattern should look familiar. Americans were expected to spend \$1.9 billion on Mother's Day flowers.<sup>50</sup> Research indicated that, as a result of link-buying, one of the companies managed to climb from number seven to number four in Google's search results with an estimated 40–75% increase in daily visitors.<sup>51</sup> All companies denied wrongdoing, despite evidence of roughly 6,000 new links on mostly irrelevant websites redirecting to the above-mentioned flower companies' websites.<sup>52</sup> Once again, deceptive SEO practices likely confused customers and unfairly hurt businesses that otherwise would have appeared ahead of these companies in organic searches.

While buying links is clearly a deceptive SEO practice, there is an infamous case of organic link-building<sup>53</sup> that also misled consumers. The owner of an online eyewear store intentionally threatened and harassed his customers to generate negative reviews about his business on other websites, which in turn

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45. *Id.*

46. *Id.*

47. *Id.*

48. In February 2011, “dresses”—one of the search terms in the J. C. Penney case—was searched for on Google about 11.1 million times a month. *Id.* It is unclear exactly how much sales increased for J. C. Penney during their top placement for “dresses,” but prior to *The New York Times* story a company spokeswoman wrote, “Internet sales . . . posted a strong growth in December, with significant increases in traffic and orders for the key holiday shopping periods . . .” *Id.*

49. David Segal, *Using a Little Internet Trickery to Sell Flowers for Mother's Day*, N.Y. TIMES, May 7, 2011, at A1.

50. *Id.*

51. *Id.*

52. *Id.*

53. When someone links from their website, blog, or social media account to another website without being asked to do so, they have created an organic link. *What is Organic Link Building?*, WEB PAGE MISTAKES, <http://www.webpagemistakes.ca/what-is-organic-link-building/> (last modified Dec. 2, 2011, 4:50 PM).



elevated him to the top of Google's search results.<sup>54</sup> Essentially, as upset customers posted furious comments on blogs and review websites across the Internet, more and more links to the eyewear store were created. This drew the attention of Google's crawlers, which led to higher placement in the SERPs, and eventually resulted in new orders from unsuspecting customers searching for designer eyeglasses.<sup>55</sup> Although the owner did not pay to implement this deceptive practice, his actions seem to qualify as an unfair act in commerce that likely caused confusion among consumers.

Another misleading SEO practice is cloaking, which involves presenting different content to search engine crawlers than what is presented to the public.<sup>56</sup> The crawler sees and indexes a long list of keywords that are not actually contained on the version of the website that the consumer views, which thereby misinterprets the website's relevancy.<sup>57</sup> For example, in 2006, BMW's German website showcased professional photographs of the carmaker's latest models to all visitors while the pages that Google indexed contained only keyword-heavy text—the purpose being to attract Google's crawlers and thereby redirect traffic to BMW's website.<sup>58</sup> This was misleading because Google intends to rank the displayed search results based on how the public views the website, which then should be the same as what the crawlers see.<sup>59</sup>

As discussed, a wide variety of businesses utilize many forms of SEO to market their products and services. Even reputable, award-winning publications<sup>60</sup> have used SEO to attract a wider readership.<sup>61</sup> The day before the 2011 Super Bowl, *The Huffington Post* published an article online titled *What Time Does the Superbowl Start?*<sup>62</sup> The first three paragraphs read in their entirety:

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54. David Segal, *A Bully Finds a Pulpit on the Web*, N.Y. TIMES, Nov. 28, 2010, at BU1. The owner himself wrote, "I just wanted to let you guys know that the more replies you people post, the more business and the more hits and sales I get. My goal is NEGATIVE advertisement." *Id.*; see also Danny Sullivan, *Google's "Gold Standard" Search Results Take Big Hit in New York Times Story*, SEARCH ENGINE LAND (Nov. 28, 2010, 5:08 PM), <http://searchengineland.com/googles-gold-standard-results-take-hit-new-york-times-57081>.

55. See *Man Accused of SEO Scam, Inspires Law & Order Writers*, WIX.COM BLOG (Mar. 22, 2011), <http://www.wix.com/blog/2011/03/man-accused-scamming-google-inspires-law-order-episode/>.

56. *Cloaking, Sneaky Javascript Redirects, and Doorway Pages*, GOOGLE WEBMASTER TOOLS, <http://www.google.com/support/webmasters/bin/answer.py?answer=66355> (last updated May 22, 2012).

57. *Id.*

58. Segal, *supra* note 37; Matt Cutts, *Ramping up on International Webspam*, MATT CUTTS: GADGETS, GOOGLE, AND SEO (Feb. 4, 2006), <http://www.mattcutts.com/blog/ramping-up-on-international-webspam/>.

59. *Cloaking, Sneaky Javascript Redirects, and Doorway Pages, supra* note 56.

60. Michael Calderone, *Huffington Post Awarded Pulitzer Prize*, HUFFINGTON POST (Apr. 16, 2012, 3:05 PM), [http://www.huffingtonpost.com/2012/04/16/post-pulitzer-prize-2012\\_n\\_1429169.html](http://www.huffingtonpost.com/2012/04/16/post-pulitzer-prize-2012_n_1429169.html).

61. See Jack Shafer, *SEO Speedwagon*, SLATE (Feb. 7, 2011, 1:30 PM), [http://www.slate.com/articles/news\\_and\\_politics/press\\_box/2011/02/seo\\_speedwagon.html](http://www.slate.com/articles/news_and_politics/press_box/2011/02/seo_speedwagon.html).

62. *Id.*

[1] Are you wondering, “what time does the Superbowl start?” [2] It’s a common search query, as is “what time is the super bowl 2011,” “superbowl time” and “superbowl kickoff time 2011,” according to Google Trends the evening before the Super Bowl. [3] It’s easily answered too. Super Bowl 2011 will take place on Sunday, Feb. 6, 2011, at 6:30 p.m. Eastern Time and 3:30 p.m. Pacific Time.<sup>63</sup>

Although the mindless and repetitive paragraphs triggered the article to appear first in search results for multiple related searches,<sup>64</sup> the SEO could be considered less misleading than the previous examples as it actually presented relevant information to those who searched for it. Still, it is plausible to believe that the article unfairly increased traffic to unrelated *The Huffington Post* articles, at the expense of other relevant and competing websites.

The SEO examples in this Part demonstrate only a few of the many methods that search engine optimizers put into practice.<sup>65</sup> The examples are included to familiarize the reader with the basic concept and widespread usage of SEO, as well as to illustrate that some SEO causes serious problems in need of real solutions. While this Note does not attempt to precisely classify which practices constitute black-hat SEO, it argues that *some* SEO is indeed negative and should be confronted sooner rather than later. A few remedies already exist and will be scrutinized in the following Part. The subsequent Parts then explore and critique alternative solutions.

## II. CURRENTLY AVAILABLE REMEDIES AND THEIR INADEQUACIES

Presumably, it is difficult for most search engine users to distinguish every deceptively produced search result from organically produced results.<sup>66</sup> When you searched for a locksmith in the introductory hypothetical, you were most likely ignorant of the fact that 24/7 operates through independent contractors via an out-of-state phone bank. With the above assumption in mind, this Part evaluates currently available ways to fight deceptive SEO practices, including those described in the preceding Part.

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63. *Id.* Due to harsh criticism, *The Huffington Post* subsequently edited this article and it is no longer available as originally published. See *infra* note 107 and accompanying text.

64. Clif, *SEO Pays Bigtime for Huffington Post*, LORD CREATIVE (Feb. 8, 2011), <http://www.lordcreative.com/web/seo-pays-bigtime-for-huffington-post>.

65. For a more comprehensive list of “SEO Spam,” see LEDFORD, *supra* note 3, at 310–13.

66. Frank Pasquale, *Beyond Innovation and Competition: The Need for Qualified Transparency in Internet Intermediaries*, 104 NW. U. L. REV. 105, 156 (2010) (“[F]orms of manipulation could slip into . . . ranking algorithms. In many, if not most cases, consumers lack both the incentive and the ability to detect such manipulation.”); see also Marla Pleyte, *Online Undercover Marketing: A Reminder of the FTC’s Unique Position to Combat Deceptive Practices*, 6 U.C. DAVIS BUS. L.J. 14, 14 (2006) (“[E]ven the most astute consumer has little ability to avoid the deceptive practices of advertisers posing as normal Internet participants.”).

### A. Self-Policing Search Engines

Search engines, at least theoretically, have every incentive to police against abusive SEO that hurts their users. Google and many other search engines generate most of their revenue by offering advertisers measurable, cost-effective, and highly relevant advertising.<sup>67</sup> This revenue source depends on Google's relative attractiveness to search engine users vis-à-vis alternative search engines.<sup>68</sup> The more people that use Google instead of other search engines, the more businesses should be drawn to advertising with Google.<sup>69</sup> The corollary is that search engines that leave relevant search results buried below less relevant results, for example as a result of deceptive SEO, run the risk that searchers will unhesitatingly switch to a different search engine in the time it takes to type in a new web address.<sup>70</sup> Being less appealing to users could thus translate into a decrease in a search engine's main revenue source.<sup>71</sup> This business concern is reflected in Google's mission statement, "to organize the world's information and make it universally accessible and useful,"<sup>72</sup> i.e., to attract as many users as possible.

Fully aware of these competitive pressures, search engines have promulgated standards for what online content publishers may and may not do if they wish to appear in their SERPs.<sup>73</sup> Google's guidelines contain both general principles and specific rules. The general principles include:

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67. *Frequently Asked Questions*, GOOGLE INVESTOR RELATIONS, <http://investor.google.com/corporate/faq.html#toc-money> (last visited Aug. 18, 2012); *see also* Urs Gasser, *Regulating Search Engines: Taking Stock and Looking Ahead*, 8 YALE J. L. & TECH. 201, 207 (2006) ("[A]dvertisement is the main revenue source of many search engines . . .").

68. Grimmelman, *supra* note 16, at 48.

69. Advertising made up 96% of Google's total revenue in the first three quarters of 2011, or roughly \$26.3 million, though these figures include advertising on all Google websites and Network Member websites. GOOGLE INC., QUARTERLY REPORT (FORM 10-Q), at 27–28 (Oct. 26, 2011), <http://www.sec.gov/Archives/edgar/data/1288776/000119312511282/d228523d10q.htm> [hereinafter GOOGLE QUARTERLY REPORT]. Google attributes the success of their advertising programs to "[t]he relevance, objectivity, and quality of our search results and the relevance and quality of ads displayed with each search results page." *Id.* at 25. In March 2011, Google's Chief Economist Hal Varian estimated that Google was worth \$54 billion to advertisers and publishers. Anthony Ha, *What's Google's Economic Impact? Google Economist Says \$119B+*, VENTUREBEAT (Mar. 29, 2011, 5:16 PM), <http://venturebeat.com/2011/03/29/economic-impact-hal-varian/>.

70. Eric Goldman, *Search Engine Bias and the Demise of Search Engine Utopianism*, 8 YALE J.L. & TECH. 188, 196–97 (2006).

71. Lastowka, *supra* note 31, at 1348 ("Google's interest in the distinction between advertising results and organic results should be understood as an interest not so much based on avoiding 'evil,' but primarily on securing profit."); Viva R. Moffat, *Regulating Search*, 22 HARV. J.L. & TECH. 475, 491 (2009) ("[P]eople will not use search engines that do not return useful results, and advertisers will not pay for placement on search engines that people do not use.").

72. *About Google*, GOOGLE, <http://www.google.com/intl/en/about> (last visited June 18, 2012).

73. *See, e.g., Webmaster Guidelines*, GOOGLE WEBMASTER TOOLS, <http://support.google.com/bin/answer.py?hl=en&answer=35769> (last updated Feb. 8, 2012); *Guidelines*

Make pages primarily for users, not for search engines. Don't deceive your users or present different content to search engines than you display to users . . . .

Avoid tricks intended to improve search engine rankings. . . . [A]sk, "[d]oes this help my users? Would I do this if search engines didn't exist?"

Don't participate in link schemes designed to increase your site's ranking or PageRank. . . .

Don't use unauthorized computer programs to submit pages, check rankings, etc.<sup>74</sup>

Google's specific rules explicitly define, explain, and proscribe the misleading SEO practices described in Part I, such as using cloaking, hidden links, and irrelevant keywords.<sup>75</sup>

In addition to intermittently updating these principles and guidelines, Google frequently revises its algorithm to improve search-result relevancy.<sup>76</sup> Some modifications are made in direct response to deceptive SEO; for instance, the algorithm was amended to take bad customer reviews into account after the harassing eyewear storeowner was uncovered.<sup>77</sup> More recently, the algorithm was tweaked to decrease the prominent placement of so-called content farms, which are sites that publish senseless articles based on popular search terms to the frustration of Google's users.<sup>78</sup> The search engine claimed that the latter revision would positively affect 12% of all search queries.<sup>79</sup>

Google has at times also resorted to directly punishing isolated incidents of misleading SEO. In the J. C. Penney case, Google began demoting the company's search results after the deceptive link scheme was exposed.<sup>80</sup> Thus, on February 1—prior to the *The New York Times* article disclosing the anti-competitive and harmful SEO—J. C. Penney's average SERP position across 59 search terms was 1.3; by February 10 it was 52.<sup>81</sup> Google punished BMW even

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for *Successful Indexing*, BING, <http://onlinehelp.microsoft.com/en-us/bing/hh204434.aspx> (last visited June 18, 2012).

74. *Webmaster Guidelines*, *supra* note 73.

75. *Id.*

76. Claire Cain Miller, *Seeking to Weed Out Drivel, Google Adjusts Search Engine*, N.Y. TIMES, Feb. 26, 2011, at A1 ("Google makes about 500 changes a year to the algorithm, or formula, that runs its search engine, most of them minor."); *see also* Steven Levy, *Exclusive: How Google's Algorithm Rules the Web*, WIRED (Feb. 22, 2010, 12:00 PM), [http://www.wired.com/magazine/2010/02/ff\\_google\\_algorithm/](http://www.wired.com/magazine/2010/02/ff_google_algorithm/) ("The decisions made at [Google's] weekly Search Quality Launch Meeting[s] will wind up affecting the results you get when you use Google's search engine to look for anything . . . .").

77. David Segal, *Google Acts to Demote Distasteful Web Sellers*, N.Y. TIMES, Dec. 2, 2010, at B1; Amit Singhal, *Being Bad to Your Customers is Bad for Business*, OFFICIAL GOOGLE BLOG (Dec. 1, 2010), <http://googleblog.blogspot.com/2010/12/being-bad-to-your-customers-is-bad-for.html>.

78. Miller, *supra* note 76.

79. *Id.*

80. Segal, *supra* note 37.

81. *Id.*

more harshly for its black-hat cloaking<sup>82</sup> by removing the German website entirely from its search index (albeit only temporarily).<sup>83</sup>

Finally, search engine users can help themselves, and Google, reduce the negative impact from deceptive SEO. For instance, one can report problematic results directly to Google as they become apparent.<sup>84</sup> Moreover, any user can initiate updates to search results for businesses that contain, for example, incorrect addresses.<sup>85</sup> Additionally, individual users can block specific websites from appearing in their future search results<sup>86</sup> and may also alter personal SERP preferences to take into account their physical location.<sup>87</sup>

Search engines are unquestionably in a powerful position to fight deceptive SEO, and the head of Google's Web Spam Team, Matt Cutts, believes that Google is making progress.<sup>88</sup> Nevertheless, three primary reasons prevent search engines from adequately tackling deceptive SEO on their own. First, as Mr. Cutts has aptly remarked, "Spammers never stop."<sup>89</sup> With more than 200 million domain names online and only 24,000 employees,<sup>90</sup> Google's fight against misleading SEO appears to be—without outside help—a never-ending battle.<sup>91</sup> Amit Singhal, a Google Fellow focusing on information retrieval,<sup>92</sup> echoed this sentiment on Google's official blog:

We can't say for sure that no one will ever find a loophole in our ranking algorithms in the future. We know that people will keep

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82. Cutts, *supra* note 58. BBC News analogized Google's actions against BMW.de to the death penalty. *BMW Given Google 'Death Penalty,'* BBC NEWS, <http://news.bbc.co.uk/2/hi/4685750.stm> (last updated Feb. 6, 2006, 3:31 PM).

83. Segal, *supra* note 37.

84. *Paid Links*, GOOGLE WEBMASTER TOOLS, <http://support.google.com/webmasters/bin/answer.py?hl=en&answer=66736> (last updated Oct. 3, 2011) ("Google works hard to ensure that it fully discounts links intended to manipulate search engine results . . . . If you see a site that is buying or selling links that pass PageRank, let us know. We'll use your information to improve our algorithmic detection of such links.").

85. Lior Ron, *Faster Updates to Local Business Listings*, GOOGLE SMALL BUSINESS BLOG (Oct. 13, 2011, 3:02 PM), <http://googlesmb.blogspot.com/2011/10/faster-updates-to-local-business.html>; Rob D. Young, *Google Places Now Get Automatic Updates from Users, Crawls*, SEARCH ENGINE WATCH (Oct. 17, 2011), <http://searchenginewatch.com/2117767/Google-Places-Now-Get-Automatic-Updates-from-Users-Crawls>.

86. *Blocked Sites*, GOOGLE INSIDE SEARCH, <http://www.google.com/support/bin/answer.py?hl=en&answer=1210386&ctx=cb&src=cb&cbid=-14fsryjph1s69&cbrank=2> (last visited Aug. 22, 2012).

87. *Search Settings*, GOOGLE INSIDE SEARCH, <http://support.google.com/websearch/bin/answer.py?hl=en&answer=35892&rd=1> (last visited Aug. 22, 2012).

88. Segal, *supra* note 37.

89. *Id.*

90. *Id.*

91. *But see* Ken Krogue, *The Death of SEO: The Rise of Social, PR, and Real Content*, FORBES (July 20, 2012, 11:48 AM), <http://www.forbes.com/sites/kenkrogue/2012/07/20/the-death-of-seo-the-rise-of-social-pr-and-real-content/> ("Google is in the process of making the SEO industry obsolete, SEO will be dead in two years." (quoting Adam Torkildson, one of the top SEO consultants in the country)).

92. Profile of Amit Singhal, RES. GOOGLE, <http://research.google.com/author/1461.html> (last visited June 18, 2012).

trying: attempts to game Google's ranking . . . go on 24 hours a day, every single day. That's why we cannot reveal the details of our solution—the underlying signals, data sources, and how we combined them to improve our rankings—beyond what we've already said. We can say with reasonable confidence that being bad to customers is bad for business on Google. And we will continue to work hard towards a better search.<sup>93</sup>

Notwithstanding Google's persistent laboring to improve search-result quality, its efforts fail to produce lasting results because SEO practitioners continuously respond to avoid revenue losses.<sup>94</sup> In essence, as long as there is a financial incentive to appear at the top of the SERPs,<sup>95</sup> businesses with an online presence will continue to demand SEO practices<sup>96</sup>—some of which will be deceptive.<sup>97</sup>

Second, some have suggested that when a company substantially contributes to Google's revenue by purchasing advertisements, those purchases consequently reduce Google's incentive to police how that same company achieves its organic search results.<sup>98</sup> The clearest support for this assertion involves J. C. Penney's deceptive SEO described in Part I. In June 2010, J. C. Penney spent \$2.46 million on paid advertising with Google.<sup>99</sup> A few months later, J. C. Penney initiated a widespread link-buying campaign that continued through the holiday season and into the following year before Google reacted.<sup>100</sup> This led *The New York Times* to question whether "Google was willing to countenance an extensive black-hat campaign because it helped one of its larger advertisers[.]"<sup>101</sup> Although Google categorically denied that it would sacrifice

93. Singhal, *supra* note 77.

94. See David Goldman, *Websites to Google: 'You're Killing Our Business!'*, CNNMONEY (Feb 25, 2011, 4:40 PM), [http://money.cnn.com/2011/02/25/technology/\\_google/](http://money.cnn.com/2011/02/25/technology/_google/) ("Content originators make money, and Google makes money . . . Their interests will always be in conflict, and as long as there is greed, people will try to game [the] system." (quoting Whit Andrews, analyst for Gartner)). For example, a company in "an extremely competitive industry" paid \$6,000 a month for SEO, which in turn generated approximately \$319,000 in organic search traffic per month. Mark Jackson, *SEO Pricing Models: How Much Should You Charge?*, SEARCH ENGINE WATCH (Oct. 9, 2011), <http://searchenginewatch.com/article/2115703/SEO-Pricing-Models-How-Much-Should-You-Charge>.

95. "It's critical for websites to appear on Page 1 of Google, especially in one of the top three organic positions, as [a recent study found that] these spots receive 58.4 percent of all clicks from users . . ." Danny Goodwin, *Top Google Result Gets 36.4% of Clicks [Study]*, SEARCH ENGINE WATCH (Apr. 21, 2011), <http://searchenginewatch.com/article/Google-Result-Gets-36.4-of-Clicks-Study>. The same study concluded that "moving up to the top spot in Google from second or third could triple visits to your website." *Id.* Conversely, "ranking beyond Page 2 . . . has almost no business value." *Id.*

96. Olsen, *supra* note 22.

97. See *supra* Part I.

98. Segal, *supra* note 37.

99. *Id.*; Michael Learmonth, *What Big Brands Are Spending on Google*, ADVERTISING AGE (Sept. 6, 2010), <http://adage.com/article/digital/big-brands-spending-google/145720/>.

100. Segal, *supra* note 37.

101. *Id.*

long-term user reliance for short-term profits, antitrust complaints have prompted investigations in both Europe and the United States over how Google determines its organic search results.<sup>102</sup> Without delving into the merits of those complaints, their existence suggests that search engines may have reason to be less than diligent in fighting every case of deceptive SEO.

Third, allowing individual search engine users to update incorrect addresses could reduce the negative consequences that businesses, such as 24/7 from the introductory hypothetical, create when they hijack local addresses to appear higher in SERPs. Considering the relative ease of creating a new website, however, businesses can still maneuver around even the most conscientious consumers and continue to operate under deceptively appropriated addresses. Likewise, empowering searchers to block specific websites and alter their personal search preferences may cure part of the problem, but only on the individual level. If you block an irrelevant website from returning in your personal search results, it will not block that specific website from appearing in anyone else's results.<sup>103</sup> In light of the assumption that it is difficult for search engine users to distinguish between deceptively produced search results and purely organic results,<sup>104</sup> it should be apparent that the remedies in this paragraph are insufficient on a grand scale.

Given the significant relationship to advertising revenue, search engines like Google have at least a financial incentive to answer search queries with relevant results that are as free as possible from deceptive SEO. While fighting a never-ending battle is surely a nuisance, search engines have too much at stake not to remain at war.<sup>105</sup> The problem is that without external help, their efforts will simply remain inadequate to stop all misleading SEO.

### ***B. Market Discipline***

Search engines constantly adjust their operations to fight deceptive SEO, in large part because of market pressures.<sup>106</sup> Additionally, businesses and industries with an online presence have responded to SEO-related market pressures in their own ways. Returning to the *The Huffington Post* example from Part I, the Internet newspaper eventually reacted to harsh criticism over its Super Bowl article by "edit[ing it] for greater clarity," which meant removing content that was likely included only to improve placement in the SERPs.<sup>107</sup> This shows how the

102. See generally Geoffrey A. Manne & Joshua D. Wright, *Google and the Limits of Antitrust: The Case Against the Case Against Google*, 34 HARV. J.L. & PUB. POL'Y 171 (2011); Steve Lohr & Claire Cain Miller, *Scrutinizing Google's Reign*, N.Y. TIMES, Sept. 19, 2011, at B1; Segal, *supra* note 37.

103. *Blocked Sites*, *supra* note 86.

104. Pasquale, *supra* note 66, at 156.

105. Again, approximately 96% or \$26.3 million of Google's revenue in the first three quarters of 2011 came from advertising, which is a function of providing relevant search results. GOOGLE QUARTERLY REPORT, *supra* note 69, at 27–28.

106. See *supra* Part II.A.

107. Julianne Pepitone, *HuffPo Edits "SEO Whoring" Piece After CNNMoney Article*, CNNMONEY TECH (Feb. 28, 2011), <http://cnmoneytech.tumblr.com/post/35701733>

market can and does intervene to discipline those who engage in undesirable SEO practices, though the results may not be enduring.

The particularly plagued locksmith industry has also found a way to approach misleading SEO: a nationwide dispatch service that consumers can contact in order to be rerouted to a legitimate local locksmith.<sup>108</sup> The service prescreens professional locksmiths who pay for a geographical territory and thereafter allows their businesses to use “1-800-UNLOCKS” to redirect calls for locksmiths within their area.<sup>109</sup> If the service determines that a locksmith is operating below certain standards, they reserve the right to revoke their membership.<sup>110</sup>

Consumers are also fighting deceptive SEO by reporting dishonest practices to consumer protection organizations such as the Better Business Bureau (“BBB”).<sup>111</sup> Although the BBB lacks legal authority and policing powers, it has the ability to quickly provide the public with information about marketplace scams.<sup>112</sup> The BBB also regularly cooperates with law enforcement agencies and is frequently the first to alert authorities to potential fraud.<sup>113</sup> This helps consumers make more informed decisions and puts pressure on businesses to behave ethically.

However, as with the other existing remedies outlined in this Part, market discipline alone is not a sufficiently comprehensive remedy to misleading SEO.

In a world of perfect information and rational actors, market discipline is all that is needed to ensure that consumers are able to make optimal, utility-maximizing purchasing decisions. In such a world, because consumers could readily determine the veracity of claims and compare these claims to those of competing products, deceptive practices would accomplish nothing. In fact, deceptive practices would actually backfire on advertisers because consumers would distrust and punish companies that acted

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32/huffpo-edits-seo-whoring-piece-after-cnnmoney-article (noting that the first two paragraphs of the article, see *supra* quotation accompanying note 63, were removed).

108. See *About*, 1800UNLOCKS, <http://www.1800unlocks.com/about> (last visited June 18, 2012); Tom Lynch, *The Society of Professional Locksmiths Dispell [sic] Myth of 1-800-UNLOCKS*, DISPATCH TECH., LLC BLOG (Mar. 31, 2011), <http://unlocksblog.wordpress.com/2011/03/31/the-society-of-professional-locksmiths-dispell-myth-of-1-800-unlocks/>.

109. Lynch, *supra* note 108.

110. *Id.*

111. See, e.g., *Con Artists Take Advantage of Samoa Tsunami*, BBB (Oct. 5, 2009), <http://alaskaoregonwesternwashington.bbb.org/article/con-artists-take-advantage-of-samoa-tsunami-12831> (“Rogue anti-virus scammers used Twitter trend topics and search engine optimization techniques to ensure that their Web sites were among Google’s top results for searches about the Samoa tsunami—Hawaii’s BBB found malicious links in the first 10 search results.”); Jane Driggs, *Locksmith Scam—\$180 for Five Minutes?*, BBB (Aug. 5, 2011), <http://www.bbb.org/blog/2011/08/locksmith-scam-180-for-five-minutes>.

112. *Frequently Asked Questions: What Can BBB Do to Stop Rip-offs and Scams?*, BBB, <http://alaskaoregonwesternwashington.bbb.org/SitePage.aspx?site=114&=29d8847a-9da3-44c6-9ffc-7d8dd20877b4#scam> (last visited June 18, 2012).

113. *Id.*



deceptively. This world, however, diverges from reality in several key respects.

First, consumers do not have perfect information . . . .

Second, consumers do not always act rationally and intelligently.<sup>114</sup>

Although commendable, the BBB's efforts hardly prevent fraud from occurring because consumers are not perfectly informed, rational actors. Furthermore, it is highly unlikely that all affected industries could find ways to fight deceptive SEO. Even if there is a way, it may be prohibitively expensive or inefficient. Presumably, consumers will not use 1-800-UNLOCKS to the same extent as googling a locksmith—at least not without significant advertising efforts. As long as there is a financial incentive to employ SEO practices, the problems are likely to persist unless a complementary solution is introduced.

### C. The Federal Trade Commission Act

Google directs its users to file complaints with the Federal Trade Commission (“FTC”) in response to deceptive SEO.<sup>115</sup> The FTC Act prohibits businesses from engaging in unfair methods of competition and unfair or deceptive acts or practices in interstate commerce.<sup>116</sup> The FTC “will find deception if there is a representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer’s detriment.”<sup>117</sup> Furthermore, the Commission may find an act or practice unfair if it causes substantial injury to consumers that they could not reasonably have avoided themselves and as long as countervailing benefits do not outweigh the injury.<sup>118</sup>

By applying the above standard, one finds strong support for arguing that the FTC could effectively tackle deceptive SEO. Returning to the introductory hypothetical, 24/7’s use of SEO undoubtedly misled you—as the consumer—to believe that it was the nearest located locksmith. This in turn reasonably induced you to pay for its services, but to your detriment as the independent contractor arrived late and overcharged for shoddy work.<sup>119</sup> The company’s SEO practices were not only deceptive, but also unfair, because you could not have avoided harm

114. Pleyte, *supra* note 66, at 14 (footnotes omitted).

115. *Search Engine Optimization (SEO)*, GOOGLE WEBMASTER TOOLS, <http://www.google.com/support/webmasters/bin/answer.py?answer=35291> (last updated Mar. 15, 2012) (“If you feel that you were deceived by an SEO in some way, you may want to report it. In the United States, the Federal Trade Commission (FTC) handles complaints about deceptive or unfair business practices.”).

116. 15 U.S.C. § 45(a) (2012).

117. FEDERAL TRADE COMMISSION, FTC POLICY STATEMENT ON DECEPTION (1983), reprinted in *In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110 app. at 174, 176 (1984), available at [http://www.ftc.gov/os/decisions/docs/vol103/FTC\\_VOLUME\\_DECISION\\_103\\_%28JANUARY\\_-\\_JUNE\\_1984%29PAGES\\_103-203.pdf](http://www.ftc.gov/os/decisions/docs/vol103/FTC_VOLUME_DECISION_103_%28JANUARY_-_JUNE_1984%29PAGES_103-203.pdf).

118. 15 U.S.C. § 45(n).

119. The FTC has in fact published a consumer alert about precisely this type of situation. FTC CONSUMER ALERT: THE KEYS TO HIRING A REPUTABLE LOCKSMITH (2008), available at <http://www.ftc.gov/bcp/edu/pubs/consumer/alerts/alt032.pdf>.

unless you somehow knew that no locksmith existed at the listed address. In that scenario, there are few, if any, countervailing benefits to other consumers or competing business operations.

Despite the foregoing assertions and the prevalence of misleading SEO, not a single case has been brought under the FTC Act involving deceptive SEO in the organic-search-results context.<sup>120</sup> To date, the only action that the FTC has taken with respect to search engine manipulation has been sending a letter to search engines recommending that they clearly distinguish paid placements from organic search results in the SERPs.<sup>121</sup>

Three reasons could explain the Commission's absence in this area. First, the FTC does not intervene in private disputes, which means that it will not resolve isolated incidents where deceptive SEO has hurt an individual or a business.<sup>122</sup> Second, even if a complaint alleges more than a private dispute, it is still difficult to determine when SEO practices cross into black-hat territory.<sup>123</sup> In addition to the challenging task of defining deceptive SEO, a related question is whether the FTC is an appropriate authority to answer that challenge. Third, even if the dispute was not private and an instance of clearly misleading SEO, it could be that the FTC has simply not been able to prioritize fighting this form of deceptive marketing. More likely, however, the Commission has not devoted resources to battling negative SEO because the harm often arises in private disputes and it is unclear when the cause of that harm becomes illegal.<sup>124</sup> The bottom line is that the FTC, thus far, has failed to provide a solution to deceptive SEO.

#### *D. The Lanham Act*

The Lanham Act provides another federal cause of action for damages from certain deceptive or harmful marketing practices.<sup>125</sup> Section 1125(a) imposes liability on:

(1) Any person who . . . uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—

(A) is likely to cause confusion, or to cause mistake . . . or

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120. This assertion is based on searches the Author conducted on Westlaw and LexisNexis on February 2, 2012.

121. Oren Bracha & Frank Pasquale, *Federal Search Commission? Access, Fairness, and Accountability in the Law of Search*, 93 CORNELL L. REV. 1149, 1176 (2008).

122. FEDERAL TRADE COMMISSION, FACTS FOR CONSUMERS: HOW TO RIGHT A WRONG (2003), available at [www.ftc.gov/bcp/edu/pubs/consumer/general/gen06.pdf](http://www.ftc.gov/bcp/edu/pubs/consumer/general/gen06.pdf) (“Although the FTC does not intervene in individual disputes, the information you provide may indicate a pattern of possible law violations requiring action by the Commission.”).

123. See *supra* note 36 and accompanying text.

124. See Pleyte, *supra* note 66, at 14 n.112 (“It’s troubling, but whether [undercover online advertising] rises to the level of being illegal is not clear. At a minimum, it’s not clear that there’s enough harm done to make it a priority for the FTC.” (quoting Mary Engle, the assistant director of the FTC’s advertising practices division)).

125. 15 U.S.C. § 1125(a) (2012).

(B) in a commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities . . . .<sup>126</sup>

Unlike the FTC Act, however, the Lanham Act has actually been used to address SEO in the organic-search-results context.

The initial Lanham Act actions involving SEO centered on the use of keyword meta tags.<sup>127</sup> Earlier versions of Google's algorithm paid attention to keyword meta tags and ranked pages higher that claimed to be about popular search terms, regardless of whether the websites were actually relevant to those keyword tags.<sup>128</sup> As this tactic allowed SEO practitioners to easily deceive search engine users, most search algorithms have now progressed to ignore meta tags.<sup>129</sup> Today, courts are split on whether *purchasing* a competitor's meta tags as part of search engine advertising constitutes trademark infringement,<sup>130</sup> though, as previously mentioned, this Note focuses solely on abusive SEO within organic search results.

Two recent cases are worth mentioning to demonstrate how courts have applied the Lanham Act to newer misleading SEO practices. In *LimoStars, Inc. v. New Jersey Car & Limo, Inc.*, the District Court of Arizona found that the defendant ground transportation company violated the plaintiff ground transportation company's trademark rights when the former operated a website with a domain name that was confusingly similar to the plaintiff's trademark.<sup>131</sup> The defendant's website ranked highly in Google's search results due to offering the same services in the same markets under a substantially similar name and thereby caused potential customers to be rerouted from the plaintiff's website.<sup>132</sup> As a result, the plaintiff not only lost revenue, but also suffered a loss of goodwill

126. *Id.*

127. Lastowka, *supra* note 31, at 1371–72, 1390. A meta tag provides information about a website's content to search engine crawlers, though the meta tag itself is not visible to the viewer. *Id.* at 1372. They are “used by Web page authors to identify terms they believe are relevant to their Web pages.” *Id.*

128. For example, while websites were still ranked based in part on their meta tags, their owners could take advantage of that factor by including high-traffic terms “such as ‘mp3’ or ‘Princess Diana’ . . . in their keyword tags, despite the fact that their sites contained no information relevant to either term. This tactic . . . could drive traffic to the meta tag manipulator, but confounded search engine users looking for information about Princess Diana.” *Id.*

129. *Id.*

130. Grimmelmann, *supra* note 16, at 31.

131. No. CV-10-2179-PHX-LOA, 2011 WL 3471092, at \*15 (D. Ariz. Aug. 8, 2011). Plaintiff owned the trademark “LIMOSTARS” and operated “www.limostars.com,” while the directly competing defendant operated “www.nylimostars.com” without authorization or affiliation to the plaintiff. *Id.* at \*6, \*8.

132. *Id.* at \*8, \*10 (“[T]he mere existence of the www.nylimostars.com website likely adversely impacted Plaintiff's ranking of www.limostars.com in the listings of Google and other popular online search engines. In other words, customers who were not misdirected directly to www.nylimostars.com were less likely to find www.limostars.com . . .”).

from misdirected and mistaken customers who thought they were doing business with the plaintiff.<sup>133</sup>

By contrast, in *Ascentive, LLC v. Opinion Corp.*, the District Court for the Eastern District of New York stated that even though a company likely used SEO practices “intended to make its webpages seem more relevant to search engines than they actually are . . . , the remedy for this conduct is not trademark law but instead with the search engines themselves.”<sup>134</sup> There, the familiar deceptive SEO practices consisted of generating links on irrelevant websites and creating Twitter accounts solely to post links; excessively using brand names in website text, addresses, and website code; and reposting old content as new on multiple websites.<sup>135</sup>

Despite the recent willingness of at least one court to analyze deceptive SEO under the Lanham Act, the law fails to offer a comprehensive remedy to the problem for one chief reason: In most cases brought under the Act, courts have held that only competitors have standing to sue.<sup>136</sup> Given that only competing businesses are afforded standing, the Lanham Act fails to provide sufficient redress for consumers,<sup>137</sup> who at present are left to rely on the other inadequate remedies outlined in this Part. Even if a business brings a successful claim for deceptive SEO under the Lanham Act, non-party consumers are not guaranteed to see any benefit.<sup>138</sup>

### *E. Applicable State Laws*

In addition to the available measures mentioned above, affected parties may pursue remedies under various state laws. For instance, a wronged party could attempt to rescind an agreement or seek specific performance under contract law theories or claim damages on a tort cause of action such as fraud.<sup>139</sup> However, as effective as they may be in other circumstances, contract and tort law are not well suited to adequately address deceptive SEO. Because damages are generally limited to what the complainant can show she actually suffered,<sup>140</sup> many misleading SEO practitioners will escape unscathed with little incentive to avoid committing future harm. Furthermore, consumers and competing businesses are

133. *Id.* at \*10.

134. No. 10 CIV. 4433(ILG)(SMG), 2011 WL 6181452, at \*13 (E.D.N.Y. Dec. 13, 2011).

135. *Id.* at \*2.

136. *See, e.g.*, Elizabeth Williams, Annotation, *Standing to Bring False Advertising Claim or Unfair Competition Claim under § 43(a)(1) of Lanham Act (15 U.S.C.A. § 1125(a)(1))*, 124 A.L.R. FED. 189 (1995) (“[C]ourts in most cases brought under [Section 1125(a)] have held that the ‘any person’ language, despite its breadth, does not embrace consumers.”).

137. Pleyte, *supra* note 66, at 14 (“Under the Lanham Act, a competitor may seek compensatory damages or a permanent injunction enjoining the practices at issue.”).

138. *See id.* (“It is unclear . . . that competitor use of the Lanham Act will sufficiently protect consumers from practices that are difficult to identify and prove . . . .”).

139. *See id.* (discussing contract and tort law remedies in relation to online undercover marketing).

140. *Id.*

unlikely to have the technology or resources necessary to prove the existence and extent of their harm in court.<sup>141</sup>

Even businesses and consumers who are aware that deceptive SEO is harming them may opt not to pursue contract or tort litigation because of the time, expense, and uncertainty that it entails.<sup>142</sup> A possible solution could be to bring a class action lawsuit to achieve greater efficiency, but this would still fail to properly address harms caused by deceptive SEO. Proving these cases would be difficult because SEO comes in many forms with varying and vague definitions; “[i]nquiries relating to reliance, reasonableness, causation, and harms are unlikely to be similar enough to allow these types of cases to be proven together.”<sup>143</sup> Moreover, successful class members often end up only partially compensated for their actual harm.<sup>144</sup>

Many states have also enacted consumer protection laws, or so-called Little FTC Acts, that “came into existence because traditional contract and tort causes of action were not effectively addressing consumer harms.”<sup>145</sup> Several are modeled after the FTC Act, whereas others diverge significantly from the Act.<sup>146</sup> While the concept of states as laboratories “has traditionally been considered a positive aspect of our judicial system, variation in regulation of deceptive practices with national reach makes less sense.”<sup>147</sup> These state laws could indeed provide supplemental relief for deceptive SEO sufferers, but at the end of the day, they are inadequate to ensure consistent and effective legal development in this area. Without further guidance, states will continue to haphazardly invent and apply their own solutions, benefitting consumers and businesses in some states while leaving others far behind.

In sum, self-policing by search engines, market discipline, the FTC Act, the Lanham Act, and applicable state laws fail to provide a comprehensive or permanent remedy. A complementary solution is therefore fundamental to halting deceptive SEO practices.

### III. HOW TO FIGHT DECEPTIVE SEARCH ENGINE OPTIMIZATION

In 1997, President Clinton and Vice President Gore advocated for government regulation of the Internet in a way that resonates well with this Note.

In order to realize the commercial and cultural potential of the Internet, consumers must have confidence that the goods and services offered are fairly represented, that they will get what they

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141. *See id.*

142. *See id.*

143. *See id.*

144. *See id.*

145. *Id.*

146. *Id.* (“Some state laws provide only for Attorney General or state agency enforcement while others also provide private causes of action . . .”).

147. *Id.* (citation omitted).

pay for, and that recourse or redress will be available if they do not. This is an area where government action is appropriate.<sup>148</sup>

Fifteen years after their proposition, this Part proposes a framework for how to adequately reduce and prevent misleading SEO practices—or at least how to take a step in the right direction—while remaining fully cognizant that significant obstacles need to be overcome to achieve such a feat.

One logical starting point is to recognize who should be in favor of regulating SEO. The focus thus far has been on how deceptive SEO harms consumers and businesses with an online presence. Therefore, to the extent these two groups are aware that they are being hurt, they should be interested in finding a remedy to abusive SEO. Search engine providers should also be interested in ways to reduce or remove damaging SEO, primarily because of the direct relationship between providing relevant search results and potential financial gain. In addition, because SEO practitioners' own revenue stream depends on the general popularity of search engines as a means to locate information, this group ought to be supportive of implementing SEO standards. Some SEO practitioners have in fact already advocated for regulation to improve their industry's reputation, out of fear that unregulated and potentially deceptive SEO will eventually reduce the demand for their services.<sup>149</sup>

On the opposing side are those who stand to gain from deceptive SEO, along with those who are persuaded that current remedies, including market discipline, are adequate despite their shortcomings. Without meaningful statistics on the breakdown between proponents and opponents to SEO regulation, any statement about which side constitutes a majority would be speculative.<sup>150</sup> Regardless, misleading SEO practices are objectively harmful and “[h]istory has demonstrated that few industries . . . are able to self-regulate in a way that offers sufficient protections for consumers.”<sup>151</sup> A reasonable question, then, is whether it would be better to attempt to resolve the problems associated with deceptive SEO rather than to allow them to get worse. In other words, is it not better to try to

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148. WILLIAM J. CLINTON & ALBERT GORE, JR., A FRAMEWORK FOR GLOBAL ELECTRONIC COMMERCE § III(8) (1997), available at <http://www.w3.org/TR/NOTE-framework-970706#content>.

149. Judith Lewis, *Can and Should the SEO Industry Be Regulated?*, BEYOND (May 30, 2011), <http://bynd.com/2011/05/30/can-and-should-the-seo-industry-be-regulated>. (“Let’s come together and do something positive for the [SEO] industry. Let’s bring it together and create a set of guidelines – the bare bones of a structure. Let’s come together and let’s do something for ourselves before it is thrust on us by force.”).

150. As it turns out, a 2011 survey found that 77% of adults in America oppose “government regulation of the way that search engines select the recommendations they provide.” Pamela Parker, *Survey: 77% of Americans Oppose Search Engine Regulation*, SEARCH ENGINE LAND (Jan. 10, 2011, 2:42 PM), <http://searchengineland.com/survey-americans-oppose-search-engine-regulation-60811>. However, the survey only polled 740 adults and did not account for their knowledge on search engine manipulation. *Id.* Incidentally, the same survey found that 70% think search engines return too many irrelevant results. *Id.*

151. Nadia N. Sawicki, *Patient Protection and Decision-Aid Quality: Regulatory and Tort Law Approaches*, 54 ARIZ. L. REV. 621, 643 (2012) (“In the vast majority of cases the government has stepped in to take control.”).

reduce the negative consequences, even if such efforts fail, as opposed to not trying at all?

After identifying what the new solution ideally should achieve, and who should support it, the final concern is which form it should take. This concern can be divided into two questions: first, whether the solution should be introduced on a state or federal level; and second, how the appropriate authority should implement that solution. Because online content is available to anyone in the United States with Internet access, federal regulation is preferable because it enables the creation of a consistent standard for those engaged in SEO practices.<sup>152</sup>

The Internet . . . requires a cohesive national scheme of regulation so that users are reasonably able to determine their obligations. Regulation on a local [l]evel, by contrast, will leave users lost in a welter of inconsistent laws, imposed by different states with different priorities.<sup>153</sup>

Considering the global nature of search engines and the desirability of uniformity in this area of the law, federal regulation is also preferable because the executive and judicial branches already possess extensive expertise in addressing deceptive marketing practices.<sup>154</sup> It is worth noting that introducing federal regulation in this instance would not be the first time that the government has acted to control the availability of online content.<sup>155</sup>

Previous proposals for search engine regulation may in turn be applied here to answer how Congress should regulate SEO practitioners' use of search engines to market goods and services.<sup>156</sup> An initial step toward regulating SEO could be to create a Federal Search Commission, an agency similar to the FTC and the FCC that is specifically charged with regulating online searches.<sup>157</sup> This new agency should be granted the power to issue guidelines for SEO practitioners and also to reprimand them for transgressions. The agency would work closely with SEO experts and related stakeholders to ensure that regulatory and enforcement

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152. See, e.g., Pleyte, *supra* note 66, at 14 (“A clear national standard would provide marketers with a consistent standard and would ensure that consumers throughout the country are treated similarly and fairly.”); John Rothchild, *Protecting the Digital Consumer: The Limits of Cyberspace Utopianism*, 74 *IND. L.J.* 893, 934 n.154 (1999) (“The Attorney General of Florida has issued an advisory opinion expressing the view that . . . Internet technology makes enforcement of [a Florida law regulating online gambling] very difficult, and regulation of the Internet is better left to the federal government than a patchwork of individual states.”).

153. *Am. Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 182 (S.D.N.Y. 1997).

154. Pleyte, *supra* note 66, at 14.

155. See, e.g., FCC CONSUMER GUIDE: CHILDREN'S INTERNET PROTECTION ACT (CIPA) 1 (2012), available at <http://transition.fcc.gov/consumerfacts/cipa.pdf> (“The Children's Internet Protection Act (CIPA) was enacted by Congress in 2000 to address concerns about children's access to obscene or harmful content over the Internet.”).

156. See Bracha & Pasquale, *supra* note 121; Moffat, *supra* note 71.

157. See Moffat, *supra* note 71, at 488–89 (“[S]earch engines should be regulated similarly to telecommunications firms or airlines, and their services should be available on a nondiscriminatory basis. Such regulation may or may not be accomplished by an administrative agency . . . .”) (footnote omitted).

actions reflect the concerns of diverse interest groups. For example, in promulgating rules and guidelines, the agency should consult with SEO practitioners to institute best practices on a national level that the industry has already begun to develop for itself to a lesser extent.<sup>158</sup>

An additional, or alternative, step toward regulating SEO could be for Congress to establish a specialized forum organized under the federal judiciary that focuses exclusively on online search disputes.<sup>159</sup> Taking such a step would create an opportunity for common law to develop in response to grievances brought against harmful SEO practices.<sup>160</sup> This sort of focused tribunal would have two major advantages relative to creating a Federal Search Commission: It would be cheaper to establish and maintain, and it would be more responsive to advancements in online search technology.<sup>161</sup> However, this type of forum could also greatly complement a new agency, where the two of them would work in tandem to produce higher quality search results for everyone.

The above-suggested framework for fighting deceptive SEO is not free from drawbacks, and it would not be easy to implement. It would entail monitoring and enforcement expenses to keep up with ever-evolving search technology (though perhaps search engines might be persuaded to fund part of this endeavor if the benefits could be shown to outweigh the costs). From the outset, there might also be political unwillingness and inability to prioritize, coupled with opposition from laissez-faire advocates and those who disapprove of government control over the Internet.<sup>162</sup> Jurisdictional concerns may arise where SEO practitioners operate entirely from foreign countries. Furthermore, arguments supporting SEO regulation reflect the normative view that searchers only want results displayed in an order that is not deceptively achieved.<sup>163</sup> In that sense, “regulatory solutions become a vehicle for normative views about what searchers should see—or should *want* to see. How should we select among these normative views? What makes one bias better than the other?”<sup>164</sup>

In the end, deceptive SEO is a serious problem requiring immediate attention. Under present conditions, the optimal solution would be to create a

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158. See, e.g., *SEO Code of Conduct*, BRUCE CLAY INC., <http://www.bruceclay.com/ethics/codeofconduct.htm> (last visited Aug. 18, 2012).

159. See Moffat, *supra* note 71, at 508–12 (“In addition to providing an opportunity for a comprehensive evaluation of search engine disputes, a federal forum is likely to bring a somewhat greater degree of consistency and predictability to the law than the current patchwork of legal interventions.”).

160. See *id.* (“Although there is no guarantee that judges will resolve questions in the same way or that a uniform body of search engine law will develop, if the disputes are resolved in a single [federal] forum there is a greater chance of this occurring.”).

161. See *id.* at 510–11.

162. Mass protests over proposed legislation intending to combat Internet piracy led the government to reject further debate on two controversial bills, the SOPA and PIPA. See, e.g., Jesse Saivar, *No SOPA for You! Lessons from the Fight over SOPA and PIPA*, FORBES (Feb. 3, 2012, 6:01 PM), <http://www.forbes.com/sites/ciocentral/2012/02/03/no-sopa-for-you-lessons-from-the-fight-over-sopa-and-pipa/>.

163. See Goldman, *supra* note 70, at 196–97.

164. *Id.* at 197 (emphasis in original) (footnote omitted).



framework under federal law specifically structured to resolve harms related to misleading SEO practices. Regrettably, our current economic and political climate poses challenges to implementing such a framework and the suggested framework would admittedly have flaws of its own. However, the solution proposed in this Part would at least complement the currently available, and inadequate, alternatives outlined in Part II.

#### IV. ALTERNATIVE SOLUTIONS AND THEIR SHORTCOMINGS

This Note would be incomplete without comparing the solution suggested in the preceding Part to potential alternatives. This Part therefore critiques the strengths of three other possible solutions and explains why they are all less desirable.

One alternative to the proposed framework is to encourage more litigation under existing laws that offer remedies for harms associated with misleading SEO. Legal scholarship has previously called on the FTC to take on deceptive marketing practices.<sup>165</sup>

Although the FTC has an arsenal of tools at its disposal to challenge online undercover marketing as a deceptive practice, it has declined to employ them. While this inattention may be the result of a lack of agency resources or a paucity of documented harm, it is clear that these practices warrant scrutiny given their inherent ability to deceive the general public. . . . [T]he FTC is in a unique position to influence the development of the law in this area and to ensure that consumer trust and confidence in the online marketplace is not needlessly impaired.<sup>166</sup>

The FTC has the power to “expand its focus to keep pace with the evolution of the marketplace and to develop new enforcement priorities as times change.”<sup>167</sup> It is unclear what more is needed for the FTC to prioritize prosecution of misleading SEO practices, though as the problems worsen—and they will with the Internet’s growing prominence—the government will hopefully allocate more resources to resolving them. Still, it is possible that voicing concern and spreading awareness about deceptive SEO now could spur favorable outcomes in litigation sooner rather than later. Similarly, as more cases are successfully brought under the Lanham Act and applicable state laws, litigation on behalf of affected parties will probably increase.

Nevertheless, creating a new agency or establishing a specialized forum is preferable to encouraging more litigation under existing laws. Litigation is generally an ineffective and costly remedy to deceptive SEO. It is an *ex post* solution to a problem that is better served by an *ex ante* solution like the one suggested in Part III. SEO can be harmful in numerous ways and attempting to set

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165. See, e.g., Pleyte, *supra* note 66, at 14; Brooke E. Crescenti, Note, *Undercover Marketing: If Omission Is the Mission, Where Is the Federal Trade Commission?*, 13 J.L. & POL’Y 699, 739 (2005).

166. Pleyte, *supra* note 66, at 14.

167. Crescenti, *supra* note 165, at 739.

new precedent and remedy every harm under current laws would be both expensive and time-consuming. Distinguishing which SEO practices are deceptive and warrant legal recourse from those that do not can be nearly impossible in a court without the germane expertise. Unlike an attentive new agency or an attuned new tribunal, drawn-out litigation under existing laws is a less efficient way to prevent sly marketers with deep pockets from conjuring up new ways to game search engines. A small risk of repercussions for deceptive practices, coupled with a potentially high upside to continue implementing them, makes it unlikely that SEO practitioners would be deterred by increased litigation.

Another alternative measure for fighting deceptive SEO could be for an appropriate authority to impose a bright-line ban on *all* SEO. This option would level the playing field for every business with an online presence. Hypothetically, consumers would enjoy organic search results displayed in an untainted manner. However, this is a worse solution than the framework proposed in Part III because some SEO is quite beneficial. In fact, Google itself acknowledges the positive impact SEO can have on public access to information<sup>168</sup> and businesses that use white-hat SEO potentially achieve significant revenue increases.<sup>169</sup> Moreover, the obstacles to implementing specific SEO regulation would be found under this alternative as well, including monitoring and enforcement costs, political unwillingness, and jurisdictional concerns.

A final alternative for regulating SEO could be to regulate search engines directly. Whether search engines should be regulated is a hotly debated topic, though the ongoing discussion has centered on Google's domination of the search engine market rather than SEO practices.<sup>170</sup> Even so, regulating search engines could solve at least some problems associated with deceptive SEO. In particular, regulation could require search engines to disclose the algorithm or method by which they rank search results.<sup>171</sup> Such transparency would also level the playing field for every business wishing to appear in the SERPs, at least in terms of knowledge.<sup>172</sup> Because SEO practitioners could no longer claim to know more about how Google operates, the barriers to entering the SEO field would be lowered. Correspondingly, SEO would become cheaper, in turn allowing more businesses access to its potential benefits. Forcing transparency in SEO could thus mitigate some harm associated with deceptive SEO, though the results may not be immediately apparent.

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168. Cutts, *supra* note 32.

169. Klein, *supra* note 10.

170. See, e.g., Lastowka, *supra* note 31; Manne & Wright, *supra* note 102; Frank Pasquale, *Internet Nondiscrimination Principles: Commercial Ethics for Carriers and Search Engines*, 2008 U. CHI. LEGAL F. 263; Lohr & Miller, *supra* note 102; Rob D. Young, *SEMPO Tells Government: Don't Censor Search Engines*, SEARCH ENGINE WATCH (Nov. 16, 2011), <http://searchenginewatch.com/article/2125550/SEMPO-Tells-Government-Dont-Censor-Search-Engines>.

171. *The Time Has Come to Regulate Search Engine Marketing and SEO*, TECHCRUNCH (July 13, 2009), <http://techcrunch.com/2009/07/13/the-time-has-come-to-regulate-search-engine-marketing-and-seo/>.

172. *Id.*

Despite these potential benefits, regulating search engines themselves is less desirable than specifically targeting deceptive SEO practices. Although this Note is not arguing whether to regulate search engines directly, many arguments against this kind of regulation are relevant here to show why focusing on misleading SEO is a superior alternative. For one, if search engines were required to disclose their algorithms, misleading SEO could actually become more prevalent as more people would learn what it takes to game the rankings.<sup>173</sup> Furthermore, forcing search engines to disclose how they operate could stifle innovation among search engines to find better ways to present the most relevant answers to their users' queries.<sup>174</sup> As a prominent scholar on search engine technology and regulation remarked:

Objectively, we are blessed with historically unprecedented free search tools that help create enormous social value. It would be easy for regulators, even well-intentioned ones, to inadvertently eliminate some of this value through misregulation. That outcome is worth fighting against.<sup>175</sup>

Search engine providers are not the main culprits to the harms associated with deceptive SEO. Rather, the actual people engaged in deceptive SEO should face scrutiny and possibly punishment for their actions. The time to act is now.

### CONCLUSION

As the Internet increasingly inspires and dictates our consumption choices, even sophisticated business acumen and technological savvy are not enough to prevent the harmful consequences associated with deceptive SEO. Consumers suffer when they receive irrelevant or low-quality search results and by implication miss what they are looking for, such as a locksmith after locking themselves out of their car.<sup>176</sup> The negative impact is compounded if increased marketing costs are reallocated to customers in the form of higher prices. Meanwhile, businesses that lack the necessary resources to utilize SEO run into tough or even impossible competition.

This Note recommends a novel solution to deceptive SEO. While a number of remedies currently exist—self-policing by search engines, market discipline, the FTC Act, the Lanham Act, and applicable state laws—they all fail to provide a sufficiently comprehensive or permanent remedy. A complementary solution is therefore fundamental to halting future abusive SEO. Under these circumstances, Congress is the appropriate authority to initiate regulation of SEO practitioners who use search engines to deceptively market goods and services.

173. Marissa Mayer, *Do Not Neutralise the Web's Endless Search*, FIN. TIMES (July 14, 2010, 11:19 PM), <http://www.ft.com/cms/s/0/0458b1a4-8f78-11df-8df0-00144feab49a.html>.

174. *Id.*

175. Eric Goldman, *Revisiting Search Engine Bias*, 38 WM. MITCHELL L. REV. 96, 109–10 (2011) (footnote omitted).

176. Showman, *supra* note 6 (explaining that when a woman called the first locksmith company listed on Google, she reached an out-of-state dispatch service that charged her \$100 more than the amount she was quoted).

The federal government already possesses extensive expertise in Internet regulation and deceptive marketing practices, and has the capability to institute a coherent legal standard in an area of law where national consistency is preferable.

By either forming a Federal Search Commission—an agency specifically charged with regulating online search—or by establishing a judicial forum focused exclusively on online search, or by doing both, there is an opportunity to implement a framework that would prevent, or at least minimize, harms resulting from deceptive SEO while retaining beneficial SEO. The new agency could easily work together with the SEO industry to introduce binding guidelines that SEO practitioners have already begun to develop.<sup>177</sup> Such an agency would also have the power to enforce those guidelines by reprimanding contraventions. A specialized judicial forum would provide a setting for common law to develop in response to grievances brought against harmful SEO.<sup>178</sup> This type of tribunal would be cheaper to establish and maintain than a new agency, and would likely be more responsive to technological advancement.<sup>179</sup> However, such a forum could also greatly complement a new agency, where the two would work in tandem to produce higher quality search results for all of us. This proposal should enjoy broad support from affected consumers, businesses with an online presence, and profit-seeking search engines, as well as from SEO practitioners—whose collective livelihoods depend on the general popularity of search engines as a means to find information.<sup>180</sup>

In contrast, three potential alternatives appear less desirable. Pursuing more litigation fails to provide an effective *ex ante* solution. Opting for a bright-line ban on all SEO ignores the benefits associated with many white-hat SEO practices and still fails to overcome the same drawbacks that the proposed solution would face, including, for example, monitoring and enforcement expenses, political unwillingness, and jurisdictional concerns. Finally, regulating search engines themselves risks eliminating the social value that they provide and misses the mark on who should be held accountable for abusing that value.

The framework proposed herein for fighting deceptive SEO is not flawless and would need to overcome difficult challenges posed by today's economic and political climate. Regardless, deceptive SEO is a serious problem for both consumers and businesses. Implementing the suggested solution would at least be a step in the right direction toward remedying and preventing related harms. Whether you ultimately agree that SEO should be regulated, the next time you google a locksmith or other product or service, please ask yourself if the first search result really belongs where you find it.<sup>181</sup>

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177. See *supra* note 158 and accompanying text.

178. See *supra* notes 159–60 and accompanying text.

179. See *supra* note 161 and accompanying text.

180. See *supra* Part III.

181. For advice on how to find a reputable locksmith the next time you need one, see FTC CONSUMER ALERT: THE KEYS TO HIRING A REPUTABLE LOCKSMITH, *supra* note 119.