



UvA-DARE (Digital Academic Repository)

Search engine freedom: on the implications of the right to freedom of expression for the legal governance of Web search engines

van Hoboken, J.V.J.

Publication date
2012

[Link to publication](#)

Citation for published version (APA):

van Hoboken, J. V. J. (2012). *Search engine freedom: on the implications of the right to freedom of expression for the legal governance of Web search engines*.

General rights

It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

Disclaimer/Complaints regulations

If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: <https://uba.uva.nl/en/contact>, or a letter to: Library of the University of Amsterdam, Secretariat, Singel 425, 1012 WP Amsterdam, The Netherlands. You will be contacted as soon as possible.

Table of Contents

CHAPTER 1: INTRODUCTION	11
1.1 GENERAL INTRODUCTION	12
1.2 SEARCH ENGINE GOVERNANCE AND FREEDOM OF EXPRESSION	13
1.3 GENERAL RESEARCH QUESTION AND SCOPE OF THE STUDY.....	15
1.4 STRUCTURE AND METHODOLOGY	17

PART I

CHAPTER 2: A SHORT HISTORY OF SEARCH ENGINES AND RELATED MARKET DEVELOPMENTS	22
2.1 THE INTERNET, THE WEB AND THE RISE OF NAVIGATIONAL MEDIA	23
2.1.1. <i>Early visions of navigation in digitized information environments</i>	23
2.1.2 <i>The Internet: connecting the nodes</i>	24
2.1.3 <i>The World Wide Web: Browsers, hyperlinks and spiders</i>	27
2.2 THE WEB SEARCH ENGINE	29
2.2.1. <i>Web search engines: the birth of an industry: 1993-1998</i>	29
2.2.2 <i>The birth of Google</i>	31
2.2.3 <i>Consolidation of the Web search industry: 2000-2011</i>	34
2.2.4 <i>The Web search industry in Europe</i>	35
2.2.5 <i>Alternatives and the future of Web search services</i>	36
CHAPTER 3: WEB SEARCH ENGINES IN THE PUBLIC NETWORKED INFORMATION ENVIRONMENT	40
3.1 WEB SEARCH ENGINES: BASICS.....	41
3.1.1 <i>Definition</i>	41
3.1.2 <i>Basic information flows</i>	41
3.2.3. <i>Basic Architecture</i>	42
3.2 SEARCH ENGINES IN THEIR CONTEXT	44
3.2.1. <i>Search engines and the layered model for the networked communications environment</i>	44
3.2.2. <i>Search engines in the Internet communications ‘chain’</i>	46
3.3 WEB SEARCH ENGINES: A FUNCTIONAL PERSPECTIVE	49
3.3.1 <i>End-users: Information, Navigation and Transaction</i>	49
3.3.2 <i>Search engines as forums for information providers and marketing platforms</i>	53
3.4 CONCLUSION	54

PART II

CHAPTER 4: THE RIGHT TO FREEDOM OF EXPRESSION.....	57
4.1 INTRODUCTION	58
4.2 FREEDOM OF EXPRESSION THEORIES	59
4.2.1. <i>Democracy</i>	59
4.2.2 <i>The ‘marketplace of ideas’ or the ‘truth theory’</i>	60
4.2.3. <i>Individual dignity, self-fulfillment and autonomy</i>	61

4.3 FREEDOM OF EXPRESSION PROVISIONS.....	62
4.3.1. <i>The right to freedom of expression in international human rights treaties</i>	62
4.3.2. <i>Article 10 ECHR and the EU Charter</i>	63
4.3.3 <i>The First Amendment</i>	67
4.4 FREEDOM OF EXPRESSION DOCTRINE: FURTHER CLARIFICATIONS.....	71
4.4.1 <i>The proper role of government under freedom of expression</i>	71
4.4.2 <i>The role of government under freedom of expression and different ‘means of communication’</i>	76
4.4.3 <i>What actions and which issues are (still) relevant under freedom of expression</i>	76
4.4.4 <i>Selection of the press, Internet access providers and libraries</i>	78
CHAPTER 5: PRESS FREEDOM.....	80
5.1 INTRODUCTION.....	81
5.2 THE REGULATORY FRAMEWORK FOR THE PRESS.....	83
5.3 FREEDOM OF EXPRESSION AND THE PRESS.....	85
5.3.1 <i>Status of the press under the right to freedom of expression</i>	86
5.3.2. <i>Article 10 ECHR and the press’ role in serving the interests of speakers and readers</i>	90
5.3.3 <i>Press freedom and the duties and responsibilities under Article 10</i>	93
5.3.4 <i>Press freedom and the permissibility of prior restraints</i>	96
5.4 THE PRESS AS GATEKEEPER: EDITORIAL FREEDOM AND ACCESS TO THE PRESS.....	97
5.4.1. <i>Background to the debate about access to the press</i>	97
5.4.2 <i>Access regulation and editorial freedom</i>	99
5.5 THE PRESS AND ITS AUDIENCE: THE RIGHT TO BE INFORMED, THE ROLE OF ADVERTISING AND THE READER’S PRIVACY.....	101
5.5.1 <i>Press freedom and the right to be informed</i>	101
5.5.3 <i>Press freedom and commercial communications</i>	105
5.5.4 <i>Press freedom and the reader’s privacy</i>	107
5.6 CONCLUSION.....	109
CHAPTER 6: ISP FREEDOM.....	111
6.1 INTRODUCTION.....	111
6.2 REGULATION OF COMMUNICATIONS NETWORK PROVIDERS AND FREEDOM OF EXPRESSION.....	113
6.2.1. <i>Background</i>	113
6.2.2. REGULATION: RATIONALES, UNIVERSAL SERVICE AND COMMON CARRIAGE.....	114
6.3 FREEDOM OF EXPRESSION AND INTERNET ACCESS PROVIDERS.....	116
6.3.1 <i>Status of Internet access providers under the right to freedom of expression</i>	116
6.3.2. <i>Access regulation and the right to freedom of expression</i>	117
6.3.2 <i>First Amendment</i>	119
6.4 ISP INTERMEDIARY LIABILITY AND THE RIGHT TO FREEDOM OF EXPRESSION.....	121
6.4.1 <i>Background</i>	121
6.4.2 <i>Intermediary liability: EU and the U.S</i>	122
6.4.3 <i>The DMCA safe harbors and the First Amendment</i>	124
6.4.4 <i>Communications Decency Act 230 and the First Amendment</i>	126
6.4.5 <i>EU Directive on Electronic Commerce and freedom of expression</i>	131
6.4.6 <i>Self-regulatory paradigm for ISPs in the EU and the right to freedom of expression</i>	132
6.5 INTERNET FILTERING BY ACCESS PROVIDERS.....	134
6.5.1 <i>Background</i>	134
6.5.2 <i>Internet filters and the right to freedom of expression</i>	135

6.5.3 Mandatory filtering and the interests of information providers	138
6.5.4 Voluntary filtering by access providers and the interests of information providers	139
6.5.5 Internet filters and the interests of end-users.....	140
6.5 CONCLUSION	142
CHAPTER 7: LIBRARY FREEDOM	147
7.1 INTRODUCTION	148
7.2 THE LIBRARY: HISTORY AND RECENT DEVELOPMENTS.....	148
7.3 LIBRARY GOVERNANCE, MISSION AND NORMATIVE PRINCIPLES.....	150
7.3.1 Regulatory models for the public library.....	150
7.3.2 The task and mission of the public library.....	152
7.4 SPECIFIC FREEDOM OF EXPRESSION ISSUES IN THE CONTEXT OF LIBRARIES	155
7.4.1 The library and freedom of expression.....	155
7.4.2 Public funding of libraries and freedom of expression	156
7.4.3 Collection management and access to materials	157
7.4.4 The library and its relation to the library user.....	158
7.4.5 Censorship in the context of libraries.....	160
7.4.6 Libraries as access points to the Internet.....	163
7.4.7 Unmonitored Access	165
7.5 CONCLUSION	166
CHAPTER 8: SEARCH ENGINE FREEDOM	168
8.1 INTRODUCTION	169
8.2 SEARCH ENGINE GOVERNANCE: STARTING POINTS	171
8.2.1 Introduction	171
8.2.2 The search engine market and its business model.....	172
8.2.3 Public and private nature of Web search communications	173
8.2.4 A legal and regulatory framework in its infancy.....	174
8.2.5 Search engine governance, a global Internet and jurisdiction.....	175
8.3 BETWEEN ACCESS AND QUALITY: THE SOCIETAL ROLE OF SEARCH MEDIA.....	176
8.3.1 The role of search engines in the networked information environment: a comparison	176
8.3.2 Search engine governance: between access and quality	178
8.4 SEARCH ENGINE PROVIDERS AND THE RIGHT TO FREEDOM OF EXPRESSION.....	182
8.4.1 Introduction	182
8.4.2 The freedom to publish referencing information and the freedom to crawl	182
8.4.3 Search engine freedom: selection and ranking	186
8.4.4 Search engines: editorial control, freedom, duties and responsibilities.....	194
8.5 SEARCH ENGINE FREEDOM AND THE INTERESTS OF INFORMATION PROVIDERS	200
8.5.1 Introduction	200
8.5.2 Search engine freedom and the ideal of unmediated mediation.....	200
8.5.3 Information providers' control over search engine governance	201
8.5.4 Restricting lawful information from entering the search engine index	202
8.6 SEARCH ENGINES AND THE FREEDOM OF END-USERS	204
8.6.1 Introduction	204
8.6.2 Search engines and the end-user's interests: access and quality as conflicting perspectives.....	204
8.6.3 The end-user: consumer or citizen?.....	206

8.6.4 End-user Privacy.....	208
8.7 CONCLUSION	209

PART III

CHAPTER 9: SEARCH ENGINE ACCESS: CONTENT REGULATION AND INTERMEDIARY LIABILITY 215

9.1 INTRODUCTION	216
9.2 SEARCH ENGINES AND CONTENT REGULATION: CENSORSHIP OR SELF-REGULATION?	217
9.2.1 Search engine censorship in China	217
9.2.2 Self-regulatory removal of references: the German FSM framework	219
9.2.3 Proactive keyword blocking	224
9.3 INTERMEDIARY LIABILITY AND SEARCH ENGINES.....	227
9.3.1 Discussion of intermediary liability regulation for search engines.....	227
9.3.2 Intermediary liability of search engines and the Directive on Electronic Commerce	228
9.3.3 Intermediary liability of search engines in the United States.....	230
9.3.4 Search engine intermediary liability in Europe at the national level.....	233
9.3.5 Developments at the EU level and the ECJ	236
9.4 INTERMEDIARY LIABILITY REGULATION OF SEARCH ENGINES AND FREEDOM OF EXPRESSION	240
9.4.1 Introduction	240
9.4.2 Search engine liability, freedom of expression and copyright infringing material.....	242
9.4.3 Search engine liability, freedom of expression and the protection of private life and reputation	244
9.4.4 The future of search engine intermediary liability in the EU: a recommendation	250
9.5 CONCLUSION	254

CHAPTER 10: SEARCH ENGINE QUALITY: PLURALISM, BIAS, TRANSPARENCY AND USER SURVEILLANCE 257

10.1 INTRODUCTION	258
10.2 SEARCH ENGINE QUALITY: PLURALISM, DIVERSITY AND BIAS	260
10.2.1 The impact of search engines on pluralism and diversity: a short overview	260
10.2.2 Pluralism and diversity in the context of search: legal and regulatory background	265
10.2.3 Market concentration	269
10.2.4 Diversity in the context of particular search services	272
10.3 SEARCH ENGINE QUALITY, TRANSPARENCY AND MARKETING	279
10.3.1. Search engine marketing: the labeling of sponsored results	280
10.3.2. Search engine advertising, quality and transparency	286
10.4 SEARCH ENGINE QUALITY AND USER DATA: PRIVACY, PERSONALIZATION AND INTELLECTUAL FREEDOM	291
10.4.1 Search engine user data processing: background.....	291
10.4.2 Intellectual freedom and search engine user surveillance	294
10.4.3 Accountability for user data processing.....	300
10.5 CONCLUSION	305

CHAPTER 11: SUMMARY, ANALYSIS AND CONCLUSIONS 309

11.1 INTRODUCTION	310
11.2 SEARCH ENGINES IN THE PUBLIC NETWORKED INFORMATION ENVIRONMENT.....	311
11.3 FREEDOM OF EXPRESSION IMPLICATIONS FOR MEDIA AND COMMUNICATIONS SERVICES.....	314
11.3.1 Press freedom	314

11.3.2 <i>ISP freedom</i>	316
11.3.3 <i>Library freedom</i>	319
11.4 FREEDOM OF EXPRESSION AND SEARCH ENGINE GOVERNANCE	320
11.4.1 <i>The societal role of search engines</i>	320
11.4.2 <i>Whose free speech?</i>	322
11.5 THE ROLE OF GOVERNMENT: REASONS FOR RESTRAINT AND ROOM FOR ACTION	326
11.5.1 <i>Search engine intermediary liability and content co-regulation</i>	328
11.5.2 <i>Search engine quality: diversity, transparency and accountability towards end-users</i>	329
11.6 <i>Conclusion</i>	332
CHAPTER 12: SAMENVATTING EN CONCLUSIES (NEDERLANDSE VERTALING)	309
REFERENCES.....	357