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

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Chapter 1: Introduction

1.1 General Introduction

Over the last two decades a new type of medium, the Web search engine, has established itself as an essential intermediary of the public networked information environment. The World Wide Web, its sheer abundance of available material and its inherent lack of organization, created the need for this new kind of service, which provides an ordered index to what is available, in terms of its usefulness, quality, and attractiveness for different users. Internet users have flocked to search media, thereby turning them into a locus of online marketing activities as well as important platforms to reach an audience for information providers.

In other words, search media can be seen as primary contributors to the ‘opening up’ of the Web, understood as the process of connecting information and ideas online to their societal use. Not surprisingly, the centrality of search engines for the Web and the effectiveness of search engines in this process of opening up information and ideas online, have spurred public debate, litigation and regulatory activity with regard to the proper legal limitations on the provision of search engine services.

China’s interference with Google is probably the most popular example of a government’s interference with the deployment of search engine technology on the Internet. To be able to run its search engine service in China, *google.cn* has had to obtain a license and censor its search results to prevent references to a variety of topics, including sensitive political speech. The severe limitation on search services in China is not restricted to Google and is part of a much broader, sophisticated repressive Internet policy.

China, however, is not the only country where search engine operations are the subject of government pressure or legal restrictions that impact their ability to open up the Web more generally. This happens in constitutional democracies as well. Search engines in Germany, for instance, block results categorized by public authorities as hate speech, such as the right extremist web forum *stormfront.org*.¹ All over the world, including in the United States and Europe, search engines have been ordered and incentivized to remove references to illegal or unlawful content. Sometimes, search engines have had to prevent certain searches from taking place, for instance in Argentina for the search query [Maradonna].² Some specialized search engines have been judged to be illegal altogether, for instance the Dutch search engine *Zoekmp3*, which specialized in finding mp3 music files published on websites.³ And perhaps most strikingly, there are legal developments in Spain where a court, at the request of a public data protection authority, is considering ordering the removal of lawful information from Google, including newspaper articles and official public documents, due to their alleged impact on the privacy of individuals.⁴

Inevitably, a study about search engines is, also, a study about Google, culturally and commercially the most successful general purpose search engine in the United States, Europe and most other parts of the

¹ See Section 9.2.1.

² See Soghoian & Valle 2008. See also Van Hoboken 2009c.

³ Gerechtshof [Court of Appeals] Amsterdam, 15 June 2006 (*Zoekmp3.nl*). See also Section 9.4.2.

⁴ See Halliday 2011b.

world. The dominance of Google, and the consolidation of the market for general purpose search engines, has led to a new set of regulatory concerns related to search engine governance. It has been remarked that by operating its service, Google helps to establish the winners and losers in the networked information environment. In doing so, it could harm the fundamental communicative interests of certain end-users and information providers. In view of those interests and the political, cultural and economic power that a search engine like Google has, it is argued that legal restrictions on operating its service may be warranted.⁵ For example, some commentators argue in favor of treating dominant search engines as essential facilities or common carriers. This treatment would aim to bring search engine governance back in line with the communicative interests of information providers and end-users.

Information providers on the Web continue to try to hold Google legally responsible for damages as a result of lowered rankings. Interest groups as well as public authorities continue to complain about the lack of responsibility on the part of search engines to deal with questionable and harmful content, such as the anti-semitic website *Jewwatch.com*. And at the time of writing – and only 13 years after its launch – Google is caught up in a number of lengthy anti-trust investigations related to its core product: i.e. search. Many have started to compare these investigations with the start of similar battles of antitrust authorities against Microsoft or AT&T. Notably, some of the complaints which have led to the investigation go to the core of the search engine’s operations, namely Google’s decisions about the selection and ranking of relevant search results for end-users’ queries.

1.2 Search engine governance and freedom of expression

In each of the cases referred to above, search engine operators are or could be limited in their freedom to provide a service that makes online information more readily accessible to Internet users. China’s Internet information policy is clearly problematic from a constitutional democratic perspective and is an interference with the right to freedom of expression. But how far can constitutional democracies go, when restricting search engines operations? Or more specifically, to what extent could search engines claim protection under the right to freedom of expression in cases of government regulation or with respect to the application of existing law.

Clearly search engines deserve credit for their contribution to the accessibility to information and ideas online. In Europe, the well-known ‘Paperboy’ ruling by the German *Bundesgerichtshof* contains one of the clearest references to the value of search media for end-users. The court stated the following:

“Without the use of search services and their application of hyperlinks (exactly in the form of deep links) the sensible use of the vast abundance of information on the World Wide Web would be practically impossible.”⁶

⁵ See e.g. Pasquale 2010a.

⁶ *Ohne die Inanspruchnahme von Suchdiensten und deren Einsatz von Hyperlinks (gerade in der Form von Deep-Links) wäre die sinnvolle Nutzung der unübersehbaren Informationsfülle im World Wide Web praktisch ausgeschlossen.* (Translation by the author), BGH [German High Court] 17 July 2003, I ZR 259/00 (*Paperboy*), § 54.

Here the German Supreme Court clearly recognizes that the availability of search engine services and their use of hyperlink technology, which was the actual point of litigation, help to establish the value of the World Wide Web as a source of information in society. Although in its argumentation the court does not explicitly refer to freedom of expression, its reference to the 'sensible use' of an information medium implicitly points to values underlying it.⁷ Surely the services that help to make the Web into a valuable source of information must be a positive thing from the perspective of freedom of expression? This would imply that legal restrictions on their operations should be assessed carefully.

Unfortunately, a proper assessment of the proportionality of a possible interference with the right to freedom of expression will not always take place. The examples of search engine case law mentioned above show each in their own way the potential significance of freedom of expression for the legal position of search engines. What they also tend to have in common is the vague manner in which the implications of the right to freedom of expression are qualified. In the Dutch *Zoekmp3* case, for instance, the Amsterdam Court of Appeals, after concluding that the provider was acting unlawfully, did acknowledge that the prohibition of *Zoekmp3* constituted an interference with article 10 ECHR. However, it did not explain in what manner a search engine is protected by article 10 ECHR. Neither did it elaborate on the interference's justification, which could at least be questioned. The same music files not only remained available for end-users regardless of the availability of the *Zoekmp3* search engine, but many could also be easily found with the intelligent use of other, general purpose search engines.

European legislatures have yet to properly respond to search engines as a new phenomenon. As will be discussed in this thesis, legislative action could for instance be directed at facilitating legal certainty and the space for search engines to operate their service and provide the value for Internet users mentioned above. In comparison with the United States, such legal space for search services to operate, from the perspective of their positive contributions to the free flow of information on the Internet, has not been firmly rooted in legislation.

All the examples of case law above involve the application of generally applicable legal provisions related to the lawfulness of the publication and dissemination of information and ideas or the operation of businesses more generally. In academia, there is a growing body of work about the law, as it relates to the operations of search engines, but the freedom of expression perspective on search engine governance is still far from understood. Considering the ever growing cultural, political and economic importance of the Internet and the World Wide Web in our societies, and the societal interests involved in the availability of effective search tools, this state of affairs by itself justifies further research. Web search is one of the most intensively used types of services online. Without effective search tools, the Internet would hardly be the valuable source of information it is today. Any speaker on the Internet relies on the help of search intermediaries to reach an audience. This implies that the way that search engines function determines to a large extent whether we effectively enjoy our freedom to receive and impart information and ideas on the Web. Thus, if any principle should be high up on the legal and regulatory agenda as it relates to search engine governance, freedom of expression is a good candidate.

⁷ In more recent judgements that follow the Paperboy judgement explicit reference is being made to the value of search engines for the freedom of expression and information. See OLG Hamburg [Court of Appeals Hamburg], 20 February 2007.

1.3 General research question and scope of the study

This thesis will try to bring clarification to the question of freedom of expression as it relates to search engines. It will do so by looking at the search engine medium as it emerged in the networked information environment and will address the regulatory debate about search engine governance from the perspective of freedom of expression. More specifically, this thesis' aim is to conceptualize the role of search engines in the public networked information environment, the proper boundaries for government involvement following from the right to freedom of expression and the instruments that have been or could be used by the state to promote the right to freedom of expression in the context of search.

As mentioned before, freedom of expression has scarcely been addressed in the context of search engines, while it is clear that the legal governance of web search engines has an impact on the right to freedom of expression, as well as on the effective exercise of this right by online speakers and end-users. The still open question of how the right to freedom of expression applies to the search engine context clearly needs to be addressed in the legal debate about search engine governance.

The ultimate goal of this thesis is to develop an understanding of how freedom of expression doctrine, as well as media and communications law and policy more generally, can successfully incorporate search media. Freedom of expression as a fundamental right, but also as a fundamental legal and normative principle, has been a leading theoretical concept shaping the relationship between legislators and media and telecommunications in constitutional democracies. Press freedom may be the clearest example of this. Freedom of expression limits a government's ability to proscribe certain information flows. It also informs the possible necessity, permissibility, or feasibility of government and legal action aimed at realizing freedom of expression in our societies.

In view of the foregoing, the general research question of this thesis can be formulated as follows:

What are the implications of the right to freedom of expression for search engine governance and government involvement with regards to search?

Of course there is much that is not the subject of this study. First of all, this is a work of legal scholarship in the field of information law. While the typical architecture and operations of search engines will be explained in Chapter 3, this thesis will not go into the technical details of search engines as an objective in itself. Search media are technically and operationally complex, and they are an active field of study in computer and information science, as well as in micro-economics. The results from these fields inform this thesis but are not within the scope of analysis. The same applies for the structure of the search engine market, i.e. the economics of search engines more generally. The business models of search engines, as well as the market developments in the search engine industry, have legal and policy relevance, but a detailed study of the economics of the search engine market is beyond the scope of this research. An overview of market developments will be part of this thesis, but this overview is meant to provide context rather than scientific substance.

This research is legal and encompasses theoretical, conceptual and explorative analyses. In line with the research question, the emphasis is placed on the formulation of a freedom of expression theory for the Web search medium, the ensuing legal relations between national governments and search media providers on the one hand, and the relations between search media, end-users and information providers on the other hand. Because of the current state of affairs of search engine law, such an endeavor inevitably has a conceptual and explorative character. There is no coherent body of search engine law in Europe,⁸ and neither will this thesis propose a general regulatory and legal framework in that direction. The legal status of search engines is quite generally unclear and case law at the higher Court levels remains rare or absent.

The fundamental right to freedom of expression is at the center of this study. This fundamental right is laid down in different fashions as a fundamental and constitutional right in international conventions and national constitutions. The legal perspective of this thesis is situated in the triangle of European media and communications law, the European fundamental rights framework of the European Convention of Human Rights, Article 10 ECHR in particular, and the legal developments in various Member States. Notably, these national legal developments will not be addressed in great detail and will mostly serve as examples.

An important restriction on the scope of this study is related to the ways in which search engine operations can be considered relevant from the perspective of copyright law and trademark law. Search engines may use or relate to third party content in ways restricted by copyright law. For instance, to provide their service search engines obviously have to copy large amounts of copyright protected works and store them in their index. This raises interesting questions about the implications of a conflict between the fundamental right to freedom of expression and the application of copyright law to search media, but these questions will not be addressed. There is a steady stream of case law about trademark infringement in search engine advertising in Europe as well as the United States, but the question whether search engines themselves may infringe trademarks with the selection and publication of their search results and advertisements will not be discussed. Competition law and patent law, which are arguably important areas of law for the governance of search engines and competition in the search engine market, are also excluded from the analysis.

Notably, the legal issues arising from trademark and copyright infringements in search results and underlying websites will be included in the analysis to the extent these issues result in a question of third party or *indirect* liability of search engines for third party content and communications. A large part of the available case law about the legal responsibility of search engine providers relates to this question, which does not require a detailed analysis of copyright law in the context of search engines.

This thesis makes a contribution to the legal and regulatory debate about search engines from a European perspective, while mostly focusing on the legal framework at the European level. To add a comparative element to this study and reflect on the European framework, United States First Amendment doctrine and relevant elements of United States law relating to search engine governance

⁸ See Van Eijk 2006, p. 7.

will be discussed . There are several reasons for including United States law as a comparative element in this study about search engine governance and freedom of expression. First, United States law has strongly influenced global practices in the context of the Internet. Second, the richness of First Amendment doctrine can help to explore the possible implications of the right to freedom of expression for the governance of search media, while often allowing for interesting conceptual comparisons due to the existing differences in approach. Third, almost all major search engines are United States companies, which has resulted in the situation that law and policy, as related to search, is more developed in the United States than elsewhere.

1.4 Structure and Methodology

This thesis is divided into three distinct parts. The first part discusses the functioning, background, and context of the search engine medium, thereby providing a foundation for the later legal analysis. The second part will discuss the right to freedom of expression, its role in the legal governance of other important entities in the public information environment, and its general implications in the context of search engine media. The third part discusses a number of more specific regulatory issues related to search engine governance from the perspective of the right to freedom of expression.

The first part of the thesis provides the necessary understanding of Web search and its context for the later parts of this thesis. It is mostly descriptive and divided into two chapters. Chapter 2 provides an overview of the history of the search engine, its emergence in the networked information environment created by the World Wide Web in the early 1990s and the various developments in the market for online search media that have shaped the current offering of search media. Chapter 3 gives a definition of the search medium and explains, in basic terms, the functioning of a typical search engine and the different elements that make it work in practice. In addition, the position and function of the search engine medium in the public networked information environment will be discussed, as well as its functional relationship to information providers and end-users.

The second part consists of five different chapters: a general chapter on freedom of expression (Chapter 4), three chapters with an analysis of the implications of the right to freedom of expression in the context of other entities in the public information environment (Chapter 5, 6, and 7), and building on these analyses, a final chapter on the implications of the right to freedom of expression in the context of search (Chapter 8).

Chapter 4 discusses the dominant rationales underlying the right to freedom of expression as well as the specific legal provisions that will be at the heart of the analysis in this thesis. These are the specific rights to freedom of expression as enshrined in Article 10 of the European Convention on Human Rights and the United States First Amendment. The relevant elements from the legal doctrine related to these legal provisions will be discussed in this chapter as well. Specifically, it includes a discussion of the general scope and the possibility of limitations of these provisions. And it addresses the role of government under the right to freedom of expression, the difference between negative and positive obligations and the possibility of horizontal effect.

Chapters 5, 6, and 7 analyze the implications of the right to freedom of expression for the governance of the press, Internet access and public libraries, respectively. The subject of these chapters is shortly denoted as press freedom, ISP freedom and library freedom. These three chapters will follow a similar structure and logic, while doing justice to the particular nature of these institutions. By studying the research question in these contexts and by focusing on the way in which the implications of the right to freedom of expression are related to the particularities and roles of these entities in the public information environment, these chapters lay the foundation to develop a similar theory of search engine freedom in Chapter 8.

In each instance, the answers to the following questions will be addressed: In what ways and on what grounds are legal governance and government involvement with regard to these entities informed by the right to freedom of expression? What is the role of these entities in the public information environment and how has that role informed freedom of expression doctrine? What are typical actions or issues that have called for an evaluation of the proper role of government under the right to freedom of expression? And what is the position of information providers or speakers on the one hand and end-users, listeners or readers on the other hand, if the entity is conceptualized as a speech intermediating institution?

There are a variety of reasons for the selection of the press, Internet access and public libraries to build an understanding about the ways in which the right to freedom of expression should apply to the context of search media. Most importantly, by selecting the press on the one hand, and Internet access on the other hand, two classic regulatory models for media and communications providers are captured, namely the model focusing on the press as well as the model commonly denoted as common carrier.⁹ Both these models are useful to conceptualize the role of search engines in the public information environment, since search engines may have to be placed somewhere on the axis between non-discriminatory conduit and active and selective communicator. Since the implications of the right to freedom of expression is informed by the role of a certain entity, a study of these models will also help to clarify the way in which freedom of expression should apply in the search engine context.

The analysis of library freedom is best justified by the comparable role that libraries play with regard to the world of information and ideas: to help their patrons to navigate and obtain access. The history of search engines is closely related to the library and early search engines and information retrieval were mostly developed in the context of library and information science. Of special interest is also the positive role of the state in the context of the public library in view of the ideals underlying the right to freedom of expression.

The selection of the press, Internet access and public libraries implies that this thesis will not analyze the constitutional model of broadcasting. Clearly, the broadcasting model could have provided additional insight into freedom of expression doctrine as it applies to different entities in the public information environment. In particular, the dual role of government under the right to freedom of expression in the

⁹ Notably, the analysis in chapter 6 will not presuppose that Internet access providers should be legally treated as common carriers. In the networked information environment, they are simply the entities that, from a functional and regulatory perspective, come closest to this traditional model.

broadcasting context, as possible infringer and as protector of the right to freedom of expression of the public would have been of interest. However, due to the need to limit the scope of analysis as well as a number of substantive reasons, broadcasting is not addressed in detail. The dual role, mentioned above, can also be found in the context of public libraries. And the public library is of additional interest due to the historical relation to the organization of information and ideas which is an important aspect of search engines. In addition, broadcasting does not play as an important role in the value chains in which search engines operate, compared to the (electronic) press and Internet access providers.

Chapter 8 will address the general question of the implications of the right to freedom of expression for the legal governance of Web search engines. And it will further conceptualize the role of search engines in the public information environment from a normative perspective, which is one of the main questions addressed in this thesis. It will do so by building on the conclusions in Chapters 2 and 3, and by comparing the role of search engines with the role of the press, Internet access providers and public libraries. Subsequently, the main conclusions from Chapter 5, 6, and 7, about the way in which the role of a communications provider informs its protection under the right to freedom of expression is used to address the question about the implications of the right to freedom of expression in the context of search engine governance. More specifically, Chapter 8 addresses the question of the proper scope of protection under the right to freedom of expression of the search engine provider, the end-users and the information providers. For which decisions and actions should search engines be able to claim protection and on which grounds? How does the active and selective role of search media compare to the editorial control and freedom in other media and what could be considered the duties and responsibilities of search media, which are tied to the exercise of the right to freedom of expression by Article 10 ECHR? And what role do information providers and end-users play in a theory of search engine freedom?

The final part of this thesis (Part III) builds on the conclusions in Chapter 8, while focusing on a number of specific and important regulatory issues in the context of search engine governance. The issues addressed in these final chapters of the thesis have been selected because their proper resolution could contribute from a proper understanding of the right to freedom of expression in the context of search engines. In other words, the final part of the thesis demonstrates the value and relevance of a theory of search engine freedom for the debate about the legal governance of search engines more generally. In addition, the results and conclusions of Chapter 8 are used to discuss the extent to which the right to freedom of expression has been properly taken into account in legal and regulatory practice.

Chapter 9 addresses regulatory issues related to the legal governance of 'access' in search media. More specifically, it focuses on the responsibility of search engines for opening up illegal and unlawful information and ideas and the proper implications of the right to freedom of expression in this context. In Europe in particular, the question of legal obligations for the removal of online material from search engines' indexes and the existing self-regulatory frameworks that result in removal of references remain important topics at the European and Member State level. Chapter 9 will address the question of proactive actions and possible duties of care on search engines to police their index in detail, as well as the existing framework of third party liability of search engines in the networked information environment.

Chapter 10 addresses three specific regulatory issues related to search engine quality and the ranking and selection of search results. First, the fundamental regulatory notions of diversity and pluralism will be discussed. To what extent do the current offerings of search media, and of particularly dominant search engines especially, impact on diversity and pluralism? What would be the main concerns if addressing search engines from this perspective and what is needed if legislators or regulatory agencies were to move forward from this perspective, which is after all a fundamental concern for them on the basis of Article 10 ECHR? Second, the regulatory issues relating to the lack of transparency about the ranking and selection of search results will be discussed, in particular the regulatory backgrounds of the separation between sponsored and organic results in search engine result pages. The section will discuss the value for end-users and the underlying assumptions of the labeling of sponsored search results in detail and address the question of how this practice relates and contributes to transparency and search engine quality more generally. Third and finally, the issue of search engine user privacy and user data processing will be addressed, focusing specifically on the instrumental nature of privacy and data protection laws with regard to the intellectual freedom and autonomy of end-users.

Chapter 11 provides a summary and brings together the main findings in this thesis. On this basis, it provides answers to the general research question and makes a number of recommendations with regard to the proper role of government with regard to search engine governance, the question of whether existing elements of the regulatory framework for search media can be improved as well as the question about directions for future legal and empirical research in this field. The research for this thesis was concluded in August 2011. After that only a small number of substantive additions and changes have been made.