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 4: The Right to Freedom of Expression

4.1 Introduction

Whereas 'freedom' is accepted as a cornerstone of western constitutional democracies, it is also one of the most debated concepts in society. In these more general debates, some scholars have tried to highlight the commonalities between different conceptions of freedom, such as negative freedom and positive freedom.[96] One of the most successful attempts to come to a generally acceptable conception of freedom is the definition of freedom as a triadic relationship by MacCallum.[97] He took the position that all discussions about the meaning of freedom could be captured by a common conception of freedom of *something* (an actor; X), *from* something (a preventing condition; Y), *to* do, not do, become or not become something (an action, or condition of circumstance or character; Z).[98] In his seminal paper, which received general recognition by political philosophers,[99] MacCallum clarifies that different conceptions of freedom correspond to differences about the actors, what counts as relevant preventing conditions or what are the actions or conditions of circumstance or character that should be taken into account.

MacCallum's definition of the concept of freedom will serve as a background framework to discuss the implications of the right to freedom of expression in this study for the actors in the public information environment. If this concept of freedom is taken to the legal field, in particular to the field of fundamental and constitutional rights to freedom of expression, an additional 'actor' arises, namely the state and all other actors invested with public authority. Constitutional and fundamental liberties such as the right to freedom of expression then can be seen as ordering mechanisms, guaranteeing fundamental liberties in terms of legal relations, vertically between public authorities and private actors, and to some extent horizontally, to be discussed below, between private actors themselves.

When asking the question about the implications of the fundamental right to freedom of expression for the governance of search engines and government involvement with search engines in particular, a number of questions naturally arise. First, what does *freedom of expression* entail or imply in general? Second, what is *the proper role of government* under freedom of expression? Third, since we are interested in the proper role of government with regard to a specific medium under freedom of expression doctrine, what is this proper role *with regard to different media*? Fourth, does this role *depend on the means of communication and its context and on which grounds*? And fifth, *with regard to what actions and which conflicts* should we evaluate the proper role of government under freedom of expression in the context of search engines? Before considering these general questions (section 4.4), the legal provisions guaranteeing freedom of expression in their respective contexts that will provide the basis of the analysis will be discussed (section 4.3), as well as the dominant theories providing a rationale for the fundamental right to freedom of expression (section 4.2).

[96] For a general discussion of positive and negative liberty, see Berlin 2002.
[97] MacCallum 1967.
[98] MacCallum 1967, p. 314.
[99] For a discussion see Blokland 1995, p. 126.

4.2 Freedom of expression theories

An important aspect of freedom of expression doctrine is the underlying theoretical justification for having freedom of expression in the first place. The theoretical arguments underlying freedom of expression are often invoked by legislatures and justices and have helped to give the right to freedom of expression its current meaning. Without reference to the underlying justifications, some of the specific directions freedom of expression doctrine have taken cannot be fully understood, since they typically serve to delineate the right's scope or to assess the gravity of a particular interference and its societal effects. For this reason the three dominant justifications for a right to freedom of expression are presented here for later reference. To be sure, there are other, sometimes more specific theoretical justifications that have been given for freedom of expression.[100] However, the three dominant justifications are the argument from democracy, the argument from truth and the argument from autonomy or self-fulfillment. Whereas these arguments could be used as independent justifications, in practice one often finds a mixture of these theories.

The starting point of a theoretical justification of freedom expression is to single out a class of acts that is privileged on the grounds of the right to freedom of expression, in the sense that these acts are subject to different, less restrictive - thus more favorable - legal treatment than acts that are not part of that class.[101] More specifically, to make sense as a separate principle, freedom of expression has to entail the protection of acts that would justify the imposition of sanctions absent a right to freedom of expression. One could for instance read the consideration of the European Court that freedom of expression is applicable not only to information or ideas that cause no harm, but also to those that "*offend, shock or disturb the State or any sector of the population*" in this light.[102]

4.2.1. Democracy

The argument which bases the right to freedom of expression on democracy considers freedom of expression as a prerequisite for democratic self-governance. The sovereignty of the people is guaranteed by the freedom to express and receive information and ideas. Freedom of expression underlies public deliberation and ensures the accountability of government. Also, in a representative democracy, freedom of expression makes it possible for the elected to know the opinions of the people. Thus, the right to impart information can be seen as a prerequisite for citizens to be able to participate in public debate, and the right to receive information can be seen in light of the need of the public to inform itself and form an opinion about matters of public concern. The argument from democracy, defended most powerfully by the American philosopher Alexander Meiklejohn, tends to emphasize the free circulation of information and ideas of political and societal relevance. [103] The theory about democracy has sometimes been used to argue that information and ideas unrelated to politics,

[100] For a systematic analysis of the justifications underlying freedom of expression, see Schauer 1983. See also Stone et al 2008; Scanlon, 1972; Barendt 2005, pp. 1-38.
[101] Scanlon 1972, p. 1.
[102] ECtHR 7 December 1976, *Handyside v. the United Kingdom*, § 49.
[103] See Meiklejohn 1948; Meiklejohn 1961.

government or public affairs, such as the information about private individuals have a less protected status.[104]

The argument from democracy has found its way into several of the judgments of the European Court of Justice and the United States Supreme Court. The explicit reference to 'democratic society' in the restriction clause of Article 10 ECHR strongly links the argument from democracy to the right to freedom of expression. Restrictions of the right have to respect fundamental principles of a constitutional democracy. In one of its early judgments on Article 10 ECHR, *Handyside v. The United Kingdom*, arising from a complaint by British publisher Handyside over the seizure of "The Little Red Schoolbook," which advised schoolchildren about controversial subjects such as sex, drugs and school politics, the Court made a strong connection between democracy and the right to freedom of expression. It stated that

> *"[t]he Court's supervisory functions oblige it to pay the utmost attention to the principles characterising a "democratic society". Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man."*[105]

Similarly, references to the principle of democratic government can be found in First Amendment doctrine. In *Terminiello*, for instance, the Supreme Court stated that

> "*it is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected."*[106]

As will become apparent in the next chapters in more detail, there are several specific elements of freedom of expression doctrine that have been linked to the argument from democracy. The right of every person to receive information freely, for instance, has frequently been stated in terms of democratic self-governance. And the idea that the press and the media have a particular societal role in providing a forum for deliberation and a way for the public to inform itself has been clearly linked to the democratic rationale for the right to freedom of expression.

4.2.2 The 'marketplace of ideas' or the 'truth theory'

A related but different argument for freedom of expression is the argument from truth. This argument, which goes back to the work of John Milton[107] and John Stuart Mill[108], states that freedom of expression and information is the best way to ensure the discovery of truth. It is related to the argument from democracy in the sense that the discovery of political wisdom and truth with regard to public affairs

[104] For a critique of this view, see Chafee 1948.

[105] ECtHR 7 December 1976, *Handyside v. The United Kingdom*, § 49.

[106] *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) "*The vitality of civil and political institutions in our society depends on free discussion. [...] it is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected. The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes.*" See also Section 5.3.1.

[107] See Milton 1999.

[108] See Mill 1863.

enhances self-governance. The argument from truth was defended in its purest form by Mill. In *On Liberty*, Mill expressed his famous view that

> "*[…] the peculiar evil of silencing an opinion is, that it is robbing the human race; […]; those who dissent from the opinion still more that those who hold it. If the opinion is right they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier expression of truth produced by its collision with error*."[109]

Closely related to the discovery of truth rationale is the 'marketplace of ideas' theory, which was introduced by Supreme Court Justice Holmes in his dissenting opinion in *Abrams*. Holmes concludes that underlying the First Amendment was the idea that

> "*the best test of truth is the power of the thought to get itself accepted in the competition of the market.*"[110]

This rationale embraces the argument from truth by comparing the search for truth to the economic theory of the invisible hand of the marketplace. Both Mill and Holmes conclude that the suppression of opinions and information for the reason that they are perceived as untrue or otherwise unwanted by government is the wrong approach, because it would stand in the way of testing their truth or value.

Although some scholars have done so, the argument from truth does not have to be taken literally.[111] As a metaphor, it simply stresses the need for the exchange and valuation of ideas and information free of state interference. Some have criticized the argument from truth as being too optimistic with regard to the human capacity to discover truth since the theory provides no evidence that the truth will actually arise as a result of free expression and inquiry. In fact, there is ample empirical evidence that there are structural biases in the functioning of free discourse in groups and society that stand in the way of the discovery of truth.[112] As a result, some have argued in favor of improving the marketplace of ideas, mostly basing their argument on the argument from democracy.[113] Maybe, however, the result of free discourse will simply be a different mix of consensus and disagreement, and not necessarily truth. A more pessimistic version of the marketplace of ideas argument answers this empirical objection by stating that the free market place of ideas is simply better than other options.[114]

4.2.3. Individual dignity, self-fulfillment and autonomy

While both the argument from truth and the argument from democracy value individual freedom, their emphasis lies on a public or common good. The last argument presented here is different in that sense. It derives from autonomy and self-development and places the emphasis on the fundamental value of

[109] Id.
[110] *Abrams v. United States*, 250 U.S. 616, 629 (1919).
[111] Nieuwenhuis 1991, pp. 31-35.
[112] See e.g. Sunstein 2006. See also Baker 2002.
[113] See e.g. Sunstein 1993; Fiss 1996. See also Lippmann 1922; Lippmann 1920.
[114] See Schauer 1983, pp. 33-34.

freedom of the individual itself, and in particular on the ability of the individual to develop her full capacities to obtain knowledge and to express herself.[115] This theory takes human liberty, freedom of choice, and the value of and respect for diversity as the starting point.

The Handyside judgment, cited above, contains a reference to the self-fulfillment of every man in society:

> "*[f]reedom of expression constitutes […] one of the basic conditions for […] the development of every man.*"[116]

The stress on the value of diversity and variety in information and media and the freedom of choice has been of particular interest for European information and media policy. Variety and diversity of ideas and information enhances the autonomy of listeners, because it enhances their ability to reflect and make well-informed choices.

The protection of a right to freedom of expression of organizations and corporate entities is more difficult to reconcile with a theory of freedom of expression that relies on individual autonomy and human dignity.[117] From the perspective of this rationale, such rights should only be granted insofar they can be derived from the rights of actual people. In practice, both under the ECHR and in the United States, the rights of private legal persons and corporations are protected under the right to freedom of expression. The ECtHR reaffirmed in *Autronic* that Article 10 applies not only to natural persons, but also to profit making corporations: "*[n]either Autronic AG's legal status as a limited company nor the fact that its activities were commercial nor the intrinsic nature of freedom of expression can deprive Autronic AG of the protection of Article 10 […]. The Article […] applies to "everyone", whether natural or legal persons*."[118] In the United States, the Supreme Court concluded in *Bellotti,* that "*[t]here is no support […] for the proposition that such speech loses the protection otherwise afforded it by the First Amendment simply because its source is a corporation that cannot prove, to a court's satisfaction, a material effect on its business*."[119]

4.3 Freedom of expression provisions

4.3.1. The right to freedom of expression in international human rights treaties

[115] Id., pp. 47-49. See also Baker 1989.

[116] ECtHR 7 December 1976, *Handyside v. The United Kingdom*, § 49.

[117] See e.g Benkler 2001, p. 23. See also Redish 2001.

[118] ECtHR 22 May 1990, *Autronic v. Switzerland*, § 47.

[119] *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 804-05 (1978). More recently, *Citizens United v. Federal Election Commission*, 558 U.S. 8 (2010). See Justice White's dissent in *Bellotti* for a unambiguous acknowledgement of the inconsistency of this conclusion with the argument from autonomy and self-development: "*[i]ndeed, what some have considered to be the principal function of the First Amendment, the use of communication as a means of self-expression, self-realization, and self-fulfillment, is not at all furthered by corporate speech. It is clear that the communications of profitmaking corporations are not 'an integral part of the development of ideas, of mental exploration and of the affirmation of self'. They do not represent a manifestation of individual freedom or choice.*"

On the global level, freedom of expression is protected in two United Nations treaties. Article 19 of the United Nations Universal Declaration of Human Rights provides that:

> Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers. [120]

And article 19(2) of the United Nations International Covenant on Civil and Political Rights provides that

> Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. [121]

Because this study mostly takes a European perspective, we will not study these international provisions on freedom of expression. They do provide additional guidance on the governance of global communications and the legality under international law of the repression of search engines in countries like China,[122] but from a European perspective they are of little extra value and in the transatlantic debates about the right to freedom of expression they tend to play a more limited role as well.

One aspect of Article 19 of the UN Declaration and Article 19(2) of the ICCPR is worth discussing shortly here though, namely its explicit reference to the *freedom to seek* information and ideas, regardless of frontiers and through any media. When one looks at the reason for this reference, which is absent in the ECHR and the EU Charter, one finds evidence that this freedom to seek is an implicit reference to a right to gather information, which was included in the Universal Declaration as a result of efforts by the news industry.[123] Recent international human rights documents tend to refer to this right to seek information and ideas as a (limited) right to seek and gain access to government held information or, in short, 'a right to information'.[124] Although of possible relevance in specific areas of search engine activity, such as a search engine's right to crawl government information, this right to gather information – related to freedom of information laws such as Freedom of Information Act in the United States or the *Wet openbaarheid van bestuur* in the Netherlands – is of limited relevance for this study. Above and beyond, a similar right to (state-held) information was also recognized by the ECtHR in a recent judgment concerning a freedom of information request by a Hungarian non-governmental organization.[125] There is no reason to believe that the specific reference to the right to seek information and ideas in the UN context adds substantive value to an implicitly guaranteed right in the European context.

4.3.2. Article 10 ECHR and the EU Charter

[120] United Nations Universal Declaration of Human Rights, adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948.

[121] The United Nations International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966.

[122] For a discussion of Internet filtering under the international human rights framework, see e.g Rundle & Birdling 2008.

[123] Hamelink 1994, p. 155. See also Schiller 1976, pp. 31-32.

[124] See e.g. UN Commission on Human Rights 1998.

[125] ECtHR 14 April 2009, *Társaság a Szabadságjogokért v. Hungary*. See also Section 5.5.1.

Article 10 of the European Convention on Human Rights provides as follows:

> Article 10 - Freedom of expression
>
> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary. [126]

The ECHR is at the heart of the protection of fundamental rights in Europe. The members to the convention are the 47 Member States of the Council of Europe, including all the members of the European Union. The European Court of Human Rights oversees the enforcement of the Convention. The Committee of Ministers and the Parliamentary Assembly provide additional guidance with regard to the obligations under the Convention by adopting recommendations and resolutions. Notably, the Court has concluded time and again that the Convention is "*a living instrument which must be interpreted in the light of present-day conditions*".[127]

Formally, the ECHR is a regional international treaty between the sovereign Member States of the Council of Europe, whereas the Member States, by creating the European Communities and later the European Union, introduced a supranational legal order, which limits the sovereignty of the Member States in particular areas of law.[128] For members of the Council of Europe, the ECHR is the most important of international fundamental rights treaty, because of the possibility for individuals to complain about an infringement of their rights and receive a binding judgment. For Dutch law and legal scholarship, the Convention is particularly significant because of the combination of primacy and direct effect granted to international rights and obligations such as Article 10 ECHR by the Dutch Constitution (Articles 93 and 94) on the one hand, and the absence of (judicial) constitutional review of primary Dutch legislation on the basis of constitutional rights provided for in the Dutch Constitution (Article 120).

The relation of the European Union to the Council of Europe and the ECHR is still relatively complex. The European Union has not acceded to the ECHR (yet),[129] but the ECHR is still understood to be binding on the European Union indirectly, because of what was provided for in Article 6 (2) of the European Union

[126] Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, Europ. T.S. No. 5.

[127] See e.g. ECtHR 25 April 1978, *Tyrer v the United Kingdom*, § 31.

[128] See ECJ 5 February 1963, *Van Gend & Loos v. Netherlands*, C-26-62; ECJ 15 July 1964, *Flaminio Costa v. E.N.E.L.*, C-6/64.

[129] In the ECJ's view, the European Community failed the requirements to accession to the ECHR. See ECJ, *Opinion 2/94* [1996] ECR I-1759. The EU Constitutional Treaty and later the Lisbon Treaty makes future accession possible.

Treaty.[130] More generally, the adherence of the European Union to the Convention is illustrated by the fact that to be eligible for membership to the European Union, candidates must be members of the Council of Europe and have to ratify the Convention.

Since the Lisbon Treaty came into force on December 1st 2009, Article 6 of the EU Treaty contains a stronger reference to the EU's own fundamental rights instrument, namely the European Charter on Fundamental Rights,[131]next to a recognition of the rights, freedoms, and principles in the European Convention on Human Rights. The Article also contains an obligation on the EU to accede to the Convention.

> Article 6 Treaty on European Union (ex Article 6 TEU)
>
> 1. The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000 [...] which shall have the same legal value as the Treaties.
>
> The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.
>
> The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.
>
> 2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.
>
> 3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.[132]

The legal significance of both the Convention and EU law for the legal order of the Member States results in a rather complex triangular relationship of national law, international fundamental rights law and supranational European Union law. This triangular relationship is of particular importance for law and policy fields such as information law, in which the protection of fundamental rights is a dominant concern. As a result, European Union secondary law in the field of information law and policy also regularly refers to the Member States' obligations under the Convention, and the various Council of Europe institutions tend to take note of legal developments in the European Union.

Article 52 (3) of the EU Charter on Fundamental Rights provides that the meaning and scope of the rights in the Charter which correspond to rights in the ECHR shall be the same as those laid down by the Convention. But, it also clarifies that this is not to prevent EU law to provide more extensive protection.

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[130] For the old Article 6 TEU, see Consolidated version of the Treaty on European Union, Official Journal C 325, 24 December 2002.

[131] Charter on Fundamental rights of the European Union, 18.12.2000, OJ 2000/C 364/01.

[132] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, Official Journal C 83, 30 March 2010.

At the judicial level, the European Court of Justice regularly refers to Article 10 ECHR or other provisions in its judgments and allows for challenges on the basis of the rights and freedoms guaranteed by the Convention.[133] More recently, the Court and its Advocate Generals are increasingly arguing cases on the basis of the rights and freedoms as provided for in the Charter.

The relevant provision in the Charter on Fundamental Rights of the European Union on 'freedom of expression and information' is Article 11:

> Article 11 Freedom of Expression and Information
>
> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.
>
> 2. The freedom and pluralism of the media shall be respected.

It is only logical that the relative importance of the Charter's provisions in comparison with the Convention will rise in the European Union legal context, since the right has become officially recognized by the EU Treaty. Currently, however, Article 11 of the Charter is only of relatively limited additional substantive value to an analysis of the right to freedom of expression at the European level. We will therefore mostly restrict our discussion of the right to freedom of expression in Europe to Article 10 ECHR based on the case law of the ECtHR.

ECHR limitation clause

Except for the freedom from torture in Article 3 ECHR, all rights and liberties in the ECHR contain specific limitation clauses.[134] The relevant rights and freedoms for the field of information law, including Article 8 and 10 ECHR, all have a similar structure, delineating the scope of the right in the first paragraph and the possibility for limitations in the second paragraph. The Court has interpreted this limitation clause in its case law throughout the years and developed a set of criteria to test the permissibility of interferences. Interferences must be 'prescribed by law', have a 'legitimate aim' corresponding to one or more of the explicitly and exhaustively listed legitimate ground for interference, and be 'necessary in a democratic society'.[135]

The standard that interferences need to be 'prescribed by law' or, in different words, be 'in accordance with the law', contains both a formal and a substantive element. It means that an interfering measure must have some legal basis in national law, reflecting the principle of legality.[136] But it also relates to the 'quality of law'. The law must be both accessible and foreseeable.[137] In the ECtHR's case law, this test is

[133] See e.g. ECJ 6 March 2001, *Connolly v. Commission*, C-274/99P. See generally Lawson 1994, pp. 219-252.
[134] A general limitation clause for Article 11 EU Charter can be found in Article 52, first paragraph.
[135] For a general overview, see Van Dijk et al 2006, pp. 334-350.
[136] ECtHR 25 March 1983, *Silver and others v. the United Kingdom,* § 86.
[137] ECtHR 25 September 2001*, P.G. and J.H v. the United Kingd*om, § 44.

linked to the overarching principles of the rule of law that one has to be able to know one's rights and obligations and arbitrariness is prohibited.[138]

The 'legitimate aim' test is the least substantive in practice. The list of legitimate aims that are mentioned in Article 10, second paragraph – national security, territorial integrity or public safety, the prevention of disorder and crime, the protection of health and morals, the protection of the rights of others, the prevention of the disclosure of information received in confidence, the maintenance of the authority and impartiality of the judiciary – covers most restrictions and the Court tends to scrutinize the weight that can be attached to the aim of a particular restriction in view of the third standard, whether the interference is 'necessary in a democratic society'.

The emphasis in the Court's case law on the permissibility of interference tends to be placed on the standard that an interfering measure must be 'necessary in a democratic society'. The application of this standard involves a balancing on the basis of proportionality between the aims and effects on the one hand, and the weight and character of the interference on the other hand. In this context, the Court has clarified that "*the adjective 'necessary' is not synonymous with 'indispensable', neither has it the flexibility of such expressions as 'admissible', 'ordinary', 'useful', 'reasonable' or 'desirable'*".[139] The test implies the existence of a 'pressing social need', and the measure must be 'relevant and sufficient'.[140]

Importantly, in its assessment of the necessity of interferences in a democratic society, the Court leaves a 'margin of appreciation' to the Member States "*to make the initial assessment of the reality of the pressing social need implied by the notion of "necessity" in this context*".[141] The margin of appreciation that is granted to the Member States varies. In some contexts, such as prior restraints on publications about current events, or in cases in which the Court concludes there is relative consensus about the weight that should be attached to the rights and interests in questions, the Court deploys a limited margin of appreciation, whereas in other contexts, the margin of appreciation can be wider.[142]

Finally, in the context of the right to freedom of expression the Court also takes into account the possible deterrent effects of restricting measures on the exercise of the right to freedom of expression in society more generally. This deterrent effect, which can be unintended, is called the 'chilling effect' doctrine. [143]

4.3.3 The First Amendment

[138] Van Dijk et al 2006, pp. 336-337.

[139] ECtHR 25 March 1983, *Silver and others v. the United Kingdom,* § 97.

[140] ECtHR 7 December 1976, *Handyside v. the United Kingdom*, § 50.

[141] ECtHR 7 December 1976, *Handyside v. the United Kingdom*, § 48.

[142] For a wide margin of appreciation, see e.g. ECtHR 20 November 1989, *Markt Intern Verlag v. Germany*. For an example of a limited margin of appreciation, see e.g. ECtHR 26 November 1991, *Observer and Guardian v. the United Kingdom*.

[143] See most recently, ECtHR 10 May 2011, *Mosley v the United Kingdom*, § 125-132 (rejecting the idea of a pre-notification requirement for privacy interfering publications with reference to the chilling effect a similar requirement would give rise to). See also ECtHR 27 March 1996, *Goodwin v. United Kingdom*, § 39 (addressing the deterrent effect of a legal obligation for journalists to reveal the source of their information).

The relevant part of the First Amendment of the United States Bill of Rights[144] provides as follows:

> Congress shall make no law [...] abridging the freedom of speech, or of the press [...][145]

The Bill of Rights is a part of the United States Constitution[146] and subject to judicial review by the United States Supreme Court. A discussion of the particularities of U.S. constitutional law and constitutional review of state and federal laws is beyond the scope of this study.[147] Important issues will be mentioned when necessary. First Amendment case law is known for its complexity and inconsistencies. But the aim here is not to deliver an authoritative interpretation of the First Amendment. Instead, we are mostly interested in learning from First Amendment doctrine without taking an independent position on the precise meaning of the U.S. Constitution. The analysis in the next chapters will also draw important elements from the richness of the debates about the implications of the First Amendment, present some of the relevant leading cases and opinions, and discuss the different arguments that have been put forward to argue in favor and against particular interpretations.

The First Amendment: limitations and level of scrutiny

Notably, the First Amendment lacks a provision legitimizing interferences as one finds in Article 10 of the Convention. This has made the First Amendment powerful but judicial review complex. The free speech absolutists have argued that the provision should be taken literally, in the sense that speech and in particular the press cannot be the legitimate object of government restrictions at all.[148] Others have claimed, on historical grounds, that the First Amendment does nothing more than forbidding press licensing and abolishing the doctrine of seditious libel.[149] The Supreme Court has accepted neither of these positions. Over time, it has developed a complex set of criteria determining the scope of the right to free speech and conditions under which different types of government interference can be legitimate.

Two distinctions as regards the legitimacy of restrictions of free speech in U.S. constitutional law are of general importance in the Court's case law, namely the distinction between protected and unprotected

[144] United States Constitution, Bill of Rights, Adopted 1791.

[145] The First Amendment also establishes freedom of assembly, religious freedom, and the right to petition government.

[146] United States Constitution, Adopted 1787.

[147] The Fourteenth Amendment, Section 1, is of special importance for the United States federal system of constitutional review. It was adopted in 1868, just after the Civil War. The Fourteenth Amendment contains the so-called 'due process clause': "[…] *nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws*." The definition of liberty under the due process clause of the Fourteenth Amendment includes the First Amendment. See *Gitlow v. People*, 268 U.S. 652, 666 (1925) ("*Assumed, for the purposes of the case, that freedom of speech and of the press are among the personal rights and liberties protected by the due process clause of the Fourteenth Amendment from impairment by the States*"), *Stromberg v. California*, 283 U.S. 359, 368 (1931) ("*The principles to be applied have been clearly set forth in our former decisions. It has been determined that the conception of liberty under the due process clause of the Fourteenth Amendment embraces the right of free speech*.").

[148] Justice Black is known for defending this position in a number of dissenting opinions and his legal scholarship. See e.g. *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (Black: "*In my view, it is unfortunate that some of my Brethren are apparently willing to hold that the publication of news may sometimes be enjoined. Such a holding would make a shambles of the First Amendment*."). See also *Smith v. California*, 361 U.S. 147, 157 (1959) (Black, J. Concurring). See also Black 1960.

[149] Stone et al 2008, pp. 3-8 and cited references. See also Levy 1985, pp. 3-15.

speech and the distinction between content-based and content-neutral (time place and manner) restrictions on speech.[150] The distinction between protected and unprotected speech, i.e. the so-called two-level theory of speech, was adopted by the Supreme Court in *Chaplinsky*. In this judgment, involving the constitutionality of a prosecution for the utterance of offensive language by a Jehovah's witness against a police officer, the Supreme Court clarified that some categories of expression and information are not (or hardly) protected and can thus be the legitimate subject of government interference.[151]

The distinction between content-neutral (or time place or manner) and content-based restrictions is relevant for the level of scrutiny by the Court. If the Court considers a restriction to be content-based, it applies strict scrutiny. Specific examples of strict scrutiny include the doctrines relating to overbreadth and vagueness, and the Court's case law relating to prior restraints. A content-based restriction of protected speech can only be legitimate if it is narrowly targeted and if it furthers a compelling state interest.[152] Content-neutral restrictions are subject to a lower standard of constitutional review, i.e. intermediate scrutiny, than content-based restriction. A content-neutral restriction must further an important governmental interest, unrelated to the suppression of speech and whose incidental restriction of protected speech is not greater than is necessary to further that interest.[153] The review of content-neutral restrictions thereby involves a mode of balancing, whereas the scrutiny of content-based restrictions of protected speech involves a presumption that restrictions are not legitimate.

As explained in the introduction, First Amendment doctrine will be prominently addressed as a comparative element in this study. Because of the differences between the structure and substance of freedom of expression doctrine in the United States and Europe, the choice to prominently address the First Amendment deserves some further explanation here. After all, the First Amendment is widely portrayed as unique and exceptional.[154]This would imply that any attempt to draw from First Amendment doctrine for the European legal context would be hopeless. However, considering the purpose and legal context of this study, this point of view has to be rejected.

First, the structural differences between Article 10 ECHR and the First Amendment can make direct comparison much harder, but both provisions are really about the same (contested) concept, the special constitutional status of a set of communicative freedoms. One striking difference has been already discussed above, namely the difference in the way in which the possibility of restrictions of the right to freedom of expression are dealt with. Another difference between the protection of fundamental freedoms between the U.S. and Europe is commonly attached to the level of protection of the freedom

[150] For a discussion on the proper First Amendment level of scrutiny in the context of the application of private laws of general applicability, see Solove & Richards 2009. See also O' Neil 2001.

[151] *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942). "*There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words – those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality*." For a discussion, see Kalven 1960.

[152] See e.g. *New York v. Ferber* 458 U.S. 747 (1982).

[153] See *Turner Broadcasting System, Inc. v. FCC*, 512 U. S. 622, 662 (1994).

[154] For an overview of this debate, see Schauer 2005a.

of speech. United States law is widely considered to be exceptional because of the high value the U.S. Constitution attributes to expressive liberties.[155] But throughout the following chapters it will become apparent that there are many similarities as well. Most importantly however, it is not the purpose of this study to debate or understand the differences between First Amendment and European freedom of expression doctrine as a goal in itself. But, First Amendment doctrine will be used to establish a better understanding of what is at stake, as well as the way in which freedom of expression can be understood to be implicated in the context of search engine governance.

Maybe one of the best explanations for the structural differences in ECHR and U.S. doctrine on freedom of expression is, like Frederick Schauer has argued, the fact that the First Amendment has existed for more than two hundred years and has led to intense judicial engagement at the level of the United States Supreme Court since the year 1919. The ECtHR's case law on freedom of expression only dates back to the second half on the 1970s.[156] This means that it made a late and a fresh start on some of the most pressing legal and societal questions arising in the freedom of expression context. It is much rarer for the United States Supreme Court to touch upon a fundamental question relating to the right to freedom of expression that it has not already dealt with in the past in some manner. The implied richness of U.S. free speech doctrine, however, is precisely a reason to study it and draw from it.

Moreover, in the field of the governance of Internet communications, the United States has had a decisive impact on global and European law and policy. This influence can be found in specific instances of law making, such as the concept of safe harbors to regulate intermediary liability, which will be discussed in more detail in Chapters 6, 8 and 10. But its influence extends more generally. Although the Internet and its governance were privatized in the 1990s, the United States never really gave up its sovereign stake in this network of networks that was predominantly developed since the 1960s in the United States.[157] Optimistically speaking, a transatlantic dialogue on Internet governance and Internet regulation in general is important for both the United States and for Europe. The question about the implications of the right to freedom of expression for Internet governance and regulation will and should of course be part of this dialogue. It is this dialogue to which this study aims to make a contribution also.

And finally, in the context of Web search engines, all Web search services dominant in Europe have their headquarters on United States soil. Obviously, this reality has implications for the regulatory and legal debate. First, not only the industry but also the legal debate about search engine governance seems more mature in the United States.[158] This does not necessarily mean that it came up with the best answers, but it has been more intense and generally better informed. Second, there is an obvious incentive for United States-based online services to design their policies in view of their local law and subsequently raise these policies, as much as possible, to a global level. This influence of U.S. legal solutions can take different forms, such as through standard contractual agreements and choice of law,

[155] See e.g. Schauer 2005a; Gardbaum 2008. See also, critically, Blanchard 1992.

[156] See Schauer 2005b, pp. 49-69.

[157] See e.g. Mueller 2002, pp. 154-162.

[158] See in particular Grimmelmann 2010b; Grimmelmann 2007a; Bracha & Pasquale 2008; Goldman 2006; Gasser 2006; Elkin-Koren 2001.

or through engagement with European policy makers on different levels. Thus, search engine governance in Europe, is, and will probably remain, heavily influenced by United States search industry and United States law and policy. If Europe is to develop its own views, laws and policies about the implications of the right to freedom of expression for the governance of search, it is essential to understand and valuable to learn from the American debate about this pressing question and put the possibly different answers in perspective.

4.4 Freedom of expression doctrine: further clarifications

4.4.1 The proper role of government under freedom of expression

The question about the proper role of the state and the different branches of government under freedom of expression doctrine lies at the root of most debates about the implications of the right to freedom of expression. There are two main lines of thought which in simplified terms map relatively well to the current legal mainstream in the United States and Europe respectively. The first is that freedom of expression is a negative right, to be invoked against government interference: government may not restrict the free circulation of information and ideas. Freedom of expression, like other classic fundamental rights is about creating a sphere free of state influence or the exercise of state power. This view is popular in America.

A different conception of freedom of expression with regard to the role of the State sees, apart from the right to freedom of expression as a negative right, protecting against undue government interference, also a positive role and under some circumstances even a positive obligation for government under the right to freedom of expression. In this view, the State should promote the free exercise of the right to freedom of expression and provide for the societal conditions in which this free exercise can prosper.

At the heart of this debate lies a difference in opinion about the character of rights and liberties and the role of the State in that regard. In continental Europe, the constitutional rights framework developed further since the Second World War and incorporates social welfare rights, positive obligations with regard to the exercise of classic fundamental rights such as freedom of expression,[159] the protection of private life,[160] and horizontal obligations or *Drittwirkung* in Germany.[161] The United States constitutional mainstream, with some notable exceptions,[162] remains strongly attached to a negative rights interpretation of the First Amendment and other fundamental rights.

The way in which the character of relationship between different parties is constitutive for the implications of the right to freedom of expression for the legal governance of these relationships can be illustrated with a quadrant with two interdependent axes: vertical and horizontal relations on one axis and a negative or positive role of government on the other axis.

[159] In particular the positive obligation as regards pluralism in the context of the media. See Section 5.5.1, 10.2.2.

[160] Recently, ECtHR 2 December 2008, *K.U. v. Finland*.

[161] For an overview, see Van Dijk et al 2006, pp. 28-32 and cited references.

[162] See e.g. *Marsh v. Alabama*, 326 U.S. 501 (1946). In *Marsh* the Supreme Court finds state action of a corporate town.

First, different implications arise in the context of vertical relations, meaning relations between public authorities and private parties, and of horizontal relations, meaning relations between private parties amongst each other. For instance, the prohibition of censorship is a typical example of the way in which the right to freedom of expression serves as a constraint on the role of government in vertical relations, whereas defamation law tends to deal, either directly or indirectly, with the implications of the right to freedom of expression in horizontal relations.

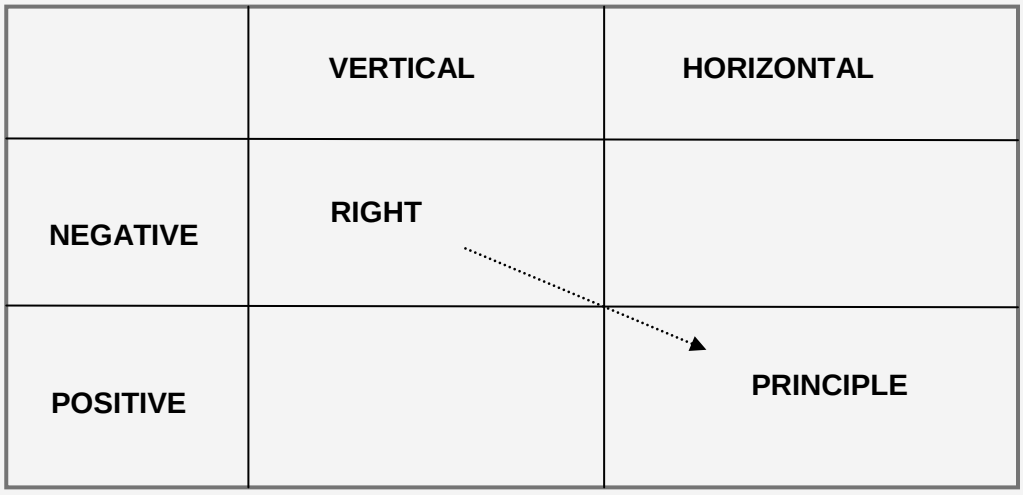

Figure 4.1: The right to freedom of expression and the role of government

As is directly apparent from the formulation of Article 10 ECHR as well as of the First Amendment, the right to freedom of expression is first and foremost concerned with restricting government action in vertical relations between public authorities and private parties. However, due to various developments at the European level, as well as the level of some of the Member States, it has become accepted that fundamental rights can have implications for the legal governance of horizontal relations. This theory of horizontal effect of fundamental rights is called 'third party effect' or is denoted by its German name, *Drittwirkung*.[163] The doctrine of horizontal effect is complex and the subject of extensive legal debate. [164]

The horizontal effect of fundamental rights can be either indirect or direct. Direct horizontal effect means that the fundamental right would directly function in relations between private parties in a way that allows a private party to enforce the right against the other private party directly. This type of horizontal effect is generally rare and is absent at the level of the ECHR. The right not to be discriminated against by other members of society on grounds such as race or sexual orientation could be seen as an example of a fundamental right with direct effect, namely the fundamental right to equal

[163] The third party effect of basic rights and freedoms in the German Basic Law was an implication of the *Lueth* ruling of the German Constitutional Court in 1958, which declared that the Basic Law contained a objective system of values, which "*must apply as a constitutional axiom throughout the whole legal system*", BVerfGE 7, 198 (Lueth). For a discussion see Kommers 1997, p. 48-49; Prueb 2005, pp. 23-32.

[164] For a general overview, see Van Dijk et al 2006, pp. 28-32, and cited references. See also Sajó & Uitz 2005.

treatment. But, typically, one would still rely on specific anti-discrimination legislation to effectuate this right. A better example of direct effect is found in Irish law, where the Irish Supreme Court has interpreted the Irish Constitution to create an independent action for breach of constitutionally protected rights against persons other than the State and its officials.[165] The ECHR only provides for the possibility to complain about the violation of the rights set forth in the Convention by one of the state parties (Article 34 ECHR), which excludes the possibility of direct horizontal effect of the Convention.

Indirect horizontal effect entails the interpretation of the law governing private relations in light of the existence of fundamental rights. At the national level, this indirect effect is often effectuated in the context of adjudication through the filling-in of open norms, such as general duties of care, fault requirements, equity and fairness, or of the interpretation of other norms in light of constitutional guarantees. In the context of the ECHR, indirect horizontal effect is typically effectuated through the recognition of positive obligations on the State to protect the enjoyment of fundamental rights in the sphere of relations between individuals or in cases in which a complaint relates to a conflict between private parties in which competing fundamental rights are at stake. In the latter situation, ECHR doctrine calls for a balancing between the right to freedom of expression versus a counterbalancing right or interest on the other side, such as the right to private life[166] or the right to property and economic freedom more generally. [167]

The ECtHR's case law relating to Article 8 ECHR contains strong positive obligations to protect the right to private life between individuals. But also in the context of Article 10 ECHR, the Court has recognized positive obligations with regard to the legal governance of horizontal relations. This has come from the recognition of the demands of the 'effective exercise' of the right to freedom of expression, for instance with the following consideration in *Özgür Gündem v. Turkey*:

> "*Genuine, effective exercise of [the right to freedom of expression] does not depend merely on the State's duty not to interfere, but may require positive measures of protection, even in the sphere of relations between individuals […].*"[168]

The most important example of a positive obligation in the European context of freedom of expression is the obligation to promote pluralism, which will be discussed in more detail later in this thesis. This positive obligation is rather general and leaves a lot of room for Member States' interpretations. It can thereby hardly be used to effectuate specific rights in particular contexts. Generally speaking, the Court has stressed in its case law relating to the possible existence of positive obligations that:

> *"In determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which is inherent throughout the Convention. The scope of this obligation will inevitably vary, having regard to the diversity of situations obtaining in*

[165] See Gardbaum 2003, p. 396.
[166] See e.g. ECtHR 24 June 2004, *Von Hannover v. Germany*.
[167] See e.g. ECtHR 6 May 2003, *Appleby and Others v. the United Kingdom*.
[168] ECtHR 16 March 2000, *Özgür Gündem v. Turkey*, § 43.

Contracting States, the difficulties involved in policing modern societies and the choices which must be made in terms of priorities and resources. Nor must such an obligation be interpreted in such a way as to impose an impossible or disproportionate burden on the authorities […].”[169]

A specific or strictly delineated positive obligation is absent in the context of Article 10 ECHR. It may therefore be more appropriate in the context of positive obligations under Article 10 ECHR to speak of a fundamental legal principle than a legal obligation. The doctrine of positive obligations to safeguard the effective exercise of the rights and freedoms under the ECHR thereby also implies that in general the ECHR can be seen as a set of fundamental legislative principles for the national legislatures. In contrast, the ECtHR's case law on the right to private life as enshrined in Article 8 ECHR does contain more strict positive obligations with regard to horizontal relations. In its recent judgment in *K.U. v. Finland*, for instance, the Court came to the conclusion that a positive obligation existed to facilitate effective criminal procedure against the infringement of Article 8 – in the relation between private parties – that had given rise to the complaint.[170] More generally, data privacy regulations in the EU, harmonized in the Privacy Directive (95/46/EC), are sometimes seen as an example of the State fulfilling its positive obligations under Article 8 ECHR to ensure the protection of constitutional guarantees in vertical *and* horizontal relations.[171]

As mentioned above, the horizontal effect of fundamental rights under the ECHR can be translated back to a vertical relationship. It is the State which is ultimately held responsible for the way in which the application of the 'normal' national law to relations between private parties could interfere with the genuine and effective exercise of the fundamental rights of any of the parties involved.[172] In other words, the question is whether the application of national laws, not directly related to the right to freedom of expression - such as laws giving effect to privacy or property - must be seen as a State act which requires justification.

In other words, both the question about horizontal effect and the question about the possible existence of positive obligations can be seen as an answer to the question in what way public authorities need to be implicated to trigger the protection of fundamental rights and constitutional norms.[173] The United States answer to this question is the State Action Doctrine. This doctrine, which is of similar complexity as the doctrine of positive obligations and horizontal effect in Europe, holds that U.S. constitutional rights, in the standard view, do not have direct or indirect horizontal effect. Still, there are certain exceptions to this general view and United States constitutional law does contain some elements that imply indirect horizontal effect of constitutional guarantees. In *Shelley v. Kraemer*, for instance, the U.S. Supreme Court held that the State court had to be considered a State actor and that an injunction to enforce an contractual agreement not to sell property to African Americans would violate the Equal Protection Clause of the Constitution. The holding is controversial precisely because of its logical

[169] Id.
[170] ECtHR 2 December 2008, *K.U. v. Finland*.
[171] See Recital 10 and 11, Directive 95/46/EC, OJ L 281, 23/11/1995.
[172] See Tushnet 2003.
[173] Id., p. 79-80.

implications of indirect horizontal effect; constitutionalism in private law runs counter to the American commitment to the functioning of the free market in the broad sense. [174]

The debate about the role of the State in light of the right to freedom of expression can also be framed as a debate about formal expressive liberty and equality on the one hand and substantive expressive liberty and equality on the other hand.[175] If one adopts a negative rights conception, substantive differences in expressive liberty, for instance as a result of inequalities of financial means or education, are irrelevant. Both Rupert Murdoch and a homeless person in Paris have similar rights to freedom of expression: If they do publish their views or attempt to access information, public authorities are not allowed to interfere, absent specific exceptional circumstances. If one defends a substantive notion of expressive liberty, pre-existing differences in the ability of parties to enjoy their rights and liberties effectively do matter, to some debatable extent, and should, to that extent, be considered when legally sanctioning conflicts about information flows.

In the rich debates about access to the modern means of communication, many have precisely argued in terms of a more substantive conception of expressive liberty.[176] The ownership of the means of communications in the hands of a few can be seen as a threat to democracy and the effective exercise of the fundamental rights of the great majority of human individuals. The privileged few will be able to control and access such means effectively, while others will not. The negative rights conception tends to largely ignore these aspects of the actual state of affairs in society, the baseline allocation, in the context of constitutional review, or takes them as a given. One could argue that this is exactly what should happen, because of the State's obligation to treat everyone equally before the law. However, the State could at the same time be said to be responsible for the substantive material and immaterial inequalities in society because of the assignment and enforcement of other legal entitlements such as property rights and its educational policy. It is the State itself that helps to create, further develops and enforces the baseline allocation in society through its general laws and policies.[177]

The question about the proper role of government under freedom of expression will either explicitly or implicitly involve an answer to this fundamental debate about the character of the right to freedom of expression. Hence in the chapters that follow, the discussion about the implications of the right to freedom of expression, will be tied to these differences from time to time.[178] In particular, the analysis will not be restricted to freedom of expression as a negative right but will also consider arguments that point to a possible or even necessary positive role of government.

The reasons for this are threefold. First, the law itself does go beyond freedom of expression as a negative right, in particular in the European context. Second, the predominantly private law context of

[174] Id., p. 81.

[175] For a discussion, see Balkin 1990.

[176] See e.g. Barron 1967.

[177] See e.g. Tushnet 2008, p. 101. In U.S. legal theory, this line of reasoning goes back to legal realist Hale. See Hale 1923.

[178] There is another reason why the question about the attribution and scrutiny of the baseline allocation is of particular relevance in the context of search engines. This reason is that search engine law mostly takes place through the application of the general applicable laws which are typically associated with baseline conditions, thereby obscuring the possible restrictive impact on communicative liberties.

the Internet raises the question about substantive expressive liberties and a possible positive, facilitative role of government and the need to recognize the importance of a sphere free of undue state interference. Finally, a more substantive view of expressive rights and liberties does take these rights and liberties more seriously and does not seek to do justice by declaring the proper context in which the relevant actors operate irrelevant.

4.4.2 The role of government under freedom of expression and different 'means of communication'

Rather than studying the implications of freedom of expression in isolated instances of speech and communication more generally, the analysis that follows will focus on the role of certain providers of communications and information services in the public information environment. Central to this focus is the conceptualization of this public information environment as consisting of a range of communicative processes between speakers and audiences. These communicative processes are mediated through various communication infrastructures and the entities that provide or control them. For instance, print technology gave rise to publishers and newspapers, and distributing entities like the postal services, libraries or book sellers. The Internet and the World Wide Web gave rise to a range of new intermediaries, such as Internet access providers, message board operators, hosting providers, social networks and search engines.

By studying and analyzing freedom of expression doctrine for traditional or more established means of communication, the foundation for an answer about the implications of freedom of expression for the governance of search engines will be laid down. Hence, the following chapters will study the implications of freedom of expression for the communicative processes in the context of three distinct speech carrying intermediaries, namely the press, the Internet access provider, and the library. The reasons for this selection will be discussed below. In each instance, the answers to the following questions will be addressed: In what ways and on what grounds is the governance and government involvement with regard to these entities informed by the right to freedom of expression? What are the typical actions or issues that have called for an evaluation of the proper role of government under freedom of expression doctrine? And what is the position of information providers/speakers and end-users/listeners/readers if the entity is conceptualized as a speech intermediating institution?

4.4.3 What actions and which issues are (still) relevant under freedom of expression

If one looks at the history of freedom of expression doctrine, it has developed from a normative theory about specific types of restrictive state actions such as licensing and censorship to a more general theory about the right to express, impart, receive information and ideas and about the governance of information flows in society.[179] As such, the right to freedom of expression does not only inform the legitimacy of certain legal restrictions on speakers and publishers, but also the rights of audiences and distributors and the rights and obligations between non-government entities. The analysis of the typical implications of freedom of expression for the press, Internet access providers and libraries, and of the primary stakeholders in these contexts will help to reveal to what extent certain actions and related

[179] For historic background of the ECHR, see e.g. Matscher & Petzold 1988. For the U.S., see Stone et al 2008, pp. 3-8.

conflicts are relevant from the perspective of freedom of expression and how the different freedom of expression interests of the parties involved have shaped this answer.

In a linguistic sense, Article 10 ECHR delineates quite literally the type of actions which are protected, namely the freedom to receive and impart information and ideas. Freedom of expression and information in the broad sense protects all kinds of communicative actions, including the right to transmit information freely. The same is true for the First Amendment.[180] This focus on the freedom to communicate in different ways and capacities means that one could simply zoom in on the various communications that are taking place, identify the typical restrictions on these communications and discuss their legal legitimacy. But such an endeavor would be too limited for a number of reasons.

First, not all kinds of communications are protected by the right to freedom of expression, and certainly not protected in the same way. Freedom of expression tends to protect the actions which have become to be seen as legally meaningful from the perspective of freedom of expression theory.[181] Typical examples of such actions which are considered to be of particular importance are the right of citizens to speak about matters of public concern, the editorial freedom of newspapers to decide which articles to print on the front page, the right to publish information without asking the authorities for permission, or the right of the citizen to read and inform himself. Thus, to conceptualize the scope of freedom of expression in the context of search engine governance, it will be most fruitful to try to get to a characterization of the 'typical' scope of what is actually protected under the right to freedom of expression.

Second, not only communicative actions but also actions that are indirectly linked to communication can be protected under the right to freedom of expression. For instance, the right to freedom of expression also protects the freedom to decide how to use the means to communicate. For example, a restriction on the freedom to decide to whom a theatre can be rented for public performances can be an infringement.[182] As we will see in Chapter 5, it can also protect media against special restrictive legal treatment, such as discriminatory taxation.[183] In other words, the scope of freedom of expression includes actions that are only indirectly related to communication but facilitate its exercise or are a necessary part for various actors to exercise it.

Third, what ends up being protected under the right to freedom of expression will in many ways be connected to the normative theories underlying the right to freedom of expression. The end-user's freedom to receive information and ideas freely and become an informed citizen is considered to be worth protecting because of the importance of informed citizens in a democratic society and their autonomy as human beings. Similarly, as the analysis of press freedom, ISP freedom and library freedom in Chapters 5 to 7 will show, the protection of these entities under Article 10 ECHR strongly takes into

[180] For a discussion of *Griswold*, see also Section 5.5.1.

[181] See e.g. Schauer 2004.

[182] Interestingly, the legal protection of the substance of theatre performances under the right to freedom of expression in the Netherlands is only a relatively recent phenomenon. Before 1977, the municipal authorities could censor theatre performances. See De Meij 1996, pp. 26-27.

[183] See Section 5.2.

account their 'societal role'. For instance, the function of the press as public watchdog and as platform for debate about matters of public concern implies strong protection for the press: producing and selecting the conversations that are to be part of the public debate, in a manner that is 'uninhibited, robust and wide-open' as formulated by the U.S. Supreme Court in *Sullivan*.[184] In the case of ISPs, freedom of expression theory stresses the protection of the interests of end-users and information providers precisely because of the relatively passive intermediary role of ISPs. In sum, the right to freedom of expression helps to protect the 'public freedom of expression interest' in the free dissemination of information and ideas. To the extent that new institutions and players, such as search engines, act according to a societal interest in their functioning relating to the underlying ideals of freedom of expression theory, they should receive proper protection. The question is how this public freedom of expression interest in the context of search engines should be conceptualized.

When answering the question about such public interest, it should also be kept in mind that it would be wrong to make freedom of expression fully instrumental to a particular conception of the public interest in the free circulation of information, knowledge and ideas. There is no agreement between legal theorists, or others for that matter, as to the definition of such a conception. The law, in turn, has referred to different public interests, derived from the theories discussed above, underlying freedom of expression, but it has also protected the right to freedom of expression independently. To state it differently, freedom of expression can be seen as having both a public interest component, which takes the fundamental right as a societal ordering principle in view of high order public interests such as the functioning of democracy, and a state-free sphere for the individual perspective, in which individuals and other private actors should to some debatable extent be allowed to exercise their rights freely, without reference to a public good.

4.4.4 Selection of the press, Internet access providers and libraries

There are a number of traditional regulatory models and relating theories of freedom of expression for different media and modes of communications. These include, for instance, the model for the press, the model for common carriers such as post and telephony communications and the model for broadcasting. Freedom of expression has played an important role in the development of these regulatory models. As we will see in more detail below, the distinction in particular between distributors and publishers has important consequences for freedom of expression.

Of special importance in media and telecommunications policy research is the traditional layered mode, consisting of infrastructure, transmission/distribution and content. As discussed in Chapter 3, these layers have also served as a conceptual regulatory model in the context of the Internet and the World Wide Web. If one looks at the role of Web search engines in the communicative process, they are information services themselves, providing information *about information*, so they can be studied from the perspective of regulatory models in the content layer. But because they are meta-media and a functional prerequisite for effective navigation online, they intimately relate to the transport layer as well. The principal value of search engines is that they mediate effectively between searchers and

[184] *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

information providers, making up for the lack of navigational structure in the hyperlinked environment that is the Web.

By selecting the press and Internet access providers both perspectives are taken into account: transport and content. Since from the perspective of information flows search engines seem to have characteristics of distributors as well as of publishers or editors, both a publishing intermediary as well as a distributing and transport related intermediary have been selected for further analysis. The press and press freedom serves as the subject for studying the implications of freedom of expression for publishers. Internet access providers and the discussion about their role with regard to the regulation of content flows and the question of filtering have been selected as the subject for studying the implications of freedom of expression for distributors and common carriers.

The study of the implications of the right to freedom of expression for Internet access providers is also used to provide insight into the regulatory model for media and communications on the Internet more generally. For the same reason, some of the recent developments with regard to the press and libraries that are related to the particular dynamics of the Internet and digitization will be addressed in Chapter 5 and 7. Although the emergence of new communication technologies does not necessarily imply that fundamental starting points of media and telecommunications law and policy have to be changed, the Internet has been the cause of a number of shifts and particular regulatory and conceptual problems. Convergence, self-publishing opportunities and the exponential growth of publicly accessible material, new applications like peer-to-peer, automation and governance through technology, and the absence of effective points of control for traditional modes of content regulation, are amongst those issues that call for a reassessment of existing starting points. These developments have left governments and others in search for new ideas about and effective modes of fulfilling their proper role.[185]

The implications of the right to freedom of expression for the legal governance of public libraries is also studied because of a different reason. They have been a dominant institution in making accessible the existing knowledge products in our society. In fact, it is in the context of the library and library science in the broad sense that most of the ideas about the ordering and cataloguing of knowledge have been developed. Web search engines are newcomers in this field. They provide extremely successful services in a field where the library has held a relatively dominant societal position for a long time.

The strong degree of government involvement in the establishment, functioning and governance of public libraries makes it interesting to contrast with the situation of Web search services. The public library is a public organization, publicly funded for reasons that suggest a strong role of government in providing access to ideas and information and educating the public. By studying the governance of libraries, the freedom of expression implications that relate to a government funded information institution can be revealed. These are mostly absent when looking at the press and Internet access providers, because their provision does not depend on the State and has been left to the market.

[185] Independent of the governmental regulatory reorientation relating to the arrival of the global networked information facilitated by the Internet, the role of government as a regulator and policy maker has shifted more generally over the last two decades through privatization, and globalization and a strong focus on market ordering.