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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 5: Press freedom

## 5.1 Introduction

In this chapter, the legal concept of press freedom – the implications of the right to freedom of expression for the governance of the press – will be discussed, as will as some of the elements of press freedom doctrine that are of particular interest for this study about the governance of Web search engines. The analysis is mostly focused on the press, understood as the newspaper industry, and the legal arrangements relating to the societal production and organization of a public debate about matters of public concern. Sometimes mass media more generally and broadcasting will be discussed in passing, but the particular regulatory model for broadcast media will not be addressed. The reason for this exclusion is partly found in the need to restrict the analysis, but also in the extraordinary constitutional position of broadcasting regulation and the application of the regulatory model for the press for online media.

This chapter will first address the following general questions relating to press freedom: What is the proper role of government with regard to the press given freedom of expression and on what grounds? And how is that proper role reflected in the regulatory framework of the press, which tends to rely on the professional ethics of journalism and self-regulation? The analysis will discuss these issues in relation to Article 10 ECHR and in relation to the First Amendment. In addition to the question about the position of the press under the right to freedom of expression and about the way in which press freedom has been (partly) construed as an instrumental freedom to serve citizens and potential speakers, section 5.3 will discuss the doctrine of prior restraints on the press and the duties and responsibilities of the media. In section 5.4, the debate about the possibility to grant access rights to the press for potential speakers will be discussed, as well as the concept and protection of the press' editorial freedom. Section 5.5 will discuss the relationship between the press and its readers by looking more closely at the public's right to inform itself, the protection of commercial publications and advertising in the media, and the issue of readers' privacy.

If there is any institution that is historically linked to the fundamental right to freedom of expression, it is the press. To a considerable extent, the right to freedom of expression in its current form is the result of centuries-long struggles about the legal governance of the press and about the evolved uses and societal practices of it with regard to the publication of information and ideas after the invention of print technology in the 15<sup>th</sup> Century.<sup>186</sup> The printing press helped to lower the barriers for the dissemination of information and ideas enormously and ultimately offered opportunities to much broader groups of people than just the clergy previously, to publish and distribute Bibles, books, pamphlets, posters, newspapers, journals and other printed materials.

In the context of press freedom, the focus is usually placed on the periodical press and newspapers in particular and to a lesser extent on the publications of books. As the platform for political debate about matters of public concern, the periodical press occupies a central political and cultural position in society, a position which has earned it the title 'the Fourth Estate'. And more than any other institution in the public information environment, the press contributed to freedom of expression doctrine. The

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<sup>186</sup> See Starr 2004; Eisenstein 1979; McLuhan 1962; De Sola Pool 1983; Barendt 2005; Nieuwenhuis 1991; Hemels 1969.

wide circulation of newspapers began after the inventions of offset printing around 1800. Large scale advertising arrived later in the 19<sup>th</sup> century. Advertising would provide significant additional income to the press beyond the revenues it previously received just from subscriptions and newsstand sales to readers. The industrialization of the press made newspapers into a mass medium and led to significant concentration of the market due to high entry barriers.

As the periodical press never functioned in isolation, the governance of other links in the chain of getting news from the press and its sources to its reader has always mattered a great deal to the functioning of the press. Historically, the postal services and the telegraph were of particular importance for the functioning of the press and newspapers. Postal services were used to distribute publications and the telegraph was a primary means for gathering news and making it possible to print in multiple locations. More recently the Internet has reshaped the news industry and continues to do so. The electronic publishing industry depends on being carried by Internet access providers and other online intermediaries such as search engines to reach an audience.

Over the last decade digitization and convergence of media on the Internet have had disruptive effects on the press and its business models. Notable developments include a decline in subscription based journalism online and offline, heavy competition for advertisements, and the rise of self-publishing, citizen journalism and blogging. Online newspapers now publish a continuously updated set of articles and include audiovisual material. They can personalize their offering according to the interests of particular readers, target the advertisements that are being placed next to their editorial content, facilitate interaction with and between readers, and make the material available not only on a website but also through other means such as email and RSS-feeds and mobile applications. Wikileaks is an important and widely debated example of a new journalistic phenomenon, in which non journalists in the strict sense aggressively publish secrets and which also presents a particularly interesting perspective on the attitude of the traditional news industry towards new journalistic models and practices that have arisen in the networked information environment.<sup>187</sup>

The traditional press' transition to the digital environment has not been a success for all. An oft heard concern, from the perspective of the quality of the news environment, is the mass lay-off of journalists by newspapers.<sup>188</sup> Convergence between different media means that traditionally separated markets for news are increasingly overlapping. The same news reports, be them in text, images, or audiovisual content, are published on online newspapers, websites of broadcasters and other online destinations, all of which compete for audiences as a result. New players have emerged in the value chain, including news aggregators and search engines, that both help electronic publishers to reach an audience but also compete with them – rather successfully – for advertising revenue. As a result of the decreased barriers to entry, access to worldwide publishing for information providers has probably never been as widespread as it is now. At the same time, some of the bottlenecks in communication have simply shifted to other places, because not everyone can communicate to everyone.

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<sup>187</sup> See Benkler 2011.

<sup>188</sup> See e.g. Baker 2009a; Baker 2009b.

## 5.2 The regulatory framework for the press

Compared to other media and means of communication, regulatory involvement with the press is now minimal.<sup>189</sup> This was not always the case. In fact, the concept of freedom of expression is intimately tied to historical instances of government involvement with the press and print media in general. Its progressive acknowledgement in national constitutions and international fundamental right instruments has come to shield the press against different types of involvement by public authorities. The motives for government involvement with the press include the interest to control public debate, the will to influence public opinion, the protection of general State interests such as State secrets, the protection against negative publicity, the protection of specific private interests, the protection of the impartiality of the judiciary, and the upholding of respect for the courts and public authority more generally, but also the support of the institutional structure for public debate in line with the ideal of democracy.

After the abolishment of the practice of press licensing and systematic censorship of the press, other measures such as the taxation of press related services have been used to influence the press. There are examples of tax exemption for publishers and the press and the regulation of tariffs for the necessary use of transport and distribution channels, which were often in the hands of state monopolies. Notably, the traditional state monopolies one used to find in radio and TV broadcasting throughout Europe, or for postal mail, telegraphy, and telephone services, are absent in the case of the press. An early example of special press taxation is the stamp tax introduced by the British Government in 1712. This tax on printed items was a replacement of the licensing scheme for printing presses and structured in such a way to be a heavy burden on the newspaper press.<sup>190</sup>

In the 19<sup>th</sup> Century the opposite became public policy in the United States. The United States exempted publishers and newspapers from certain taxes and the press' use of the postal system was subsidized.<sup>191</sup> Such positive state aid with regard to the press and media in general became commonplace in the 20<sup>th</sup> century. However, positive state involvement has to be carefully structured to be compatible with the demands of a free press. Subsidization of the press, for instance, is not in line with the freedom of the press if it subsidizes discriminatorily, in terms of viewpoints and content in particular.<sup>192</sup> The recent discussions about the government's role with regard to the failing newspaper industry have again brought the limitations on possible government involvement to the fore.<sup>193</sup>

In the second half of the 20<sup>th</sup> Century it became accepted that the state may have a role in preventing too much concentration in the press and media in general.<sup>194</sup> In the interest of pluralism, media, including print media, are usually not only subject to general competition law, as same as any other commercial undertaking, but also to special media concentration and cross-ownership rules and policies.<sup>195</sup> Concentration of media outlets in the hands of a few would undermine pluralism and

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<sup>189</sup> For an overview, see Nieuwenhuis 1991.

<sup>190</sup> See Starr 2004, pp. 38-39.

<sup>191</sup> See Starr 2004, pp. 125-126.

<sup>192</sup> See Nieuwenhuis 1991, pp. 157-161.

<sup>193</sup> For a discussion, in the context of the Netherlands, see Nieuwenhuis 2009.

<sup>194</sup> See Nieuwenhuis 1991.

<sup>195</sup> See Nieuwenhuis 1991. For a discussion of pluralism and diversity, see Valcke 2003; Nieuwenhuis 2007.

diversity, of which, according to the ECtHR, the State is the ultimate guarantor.<sup>196</sup> Therefore, a press and media policy aimed at preserving the conditions necessary for a pluralist press can be seen as a reflection of the right to freedom of expression and not as an interference with the press' constitutionally protected freedom.<sup>197</sup>

The current regulatory model for the press consists of a framework of generally applicable laws in combination with self-regulation. Important generally applicable laws for the press are defamation law, privacy law and copyright law. Sector-specific press laws are rare. Exceptions are anti-concentration regulation in view of preserving pluralism in the public information environment and, in some countries, right of reply statutes.<sup>198</sup>

The self-regulation of the press can be subdivided into a professional ethics component on the one hand and – in some countries – a formalized component on the other hand. In the journalistic profession and the governance of the press activities, the professional ethics of journalism have an important role. The responsibility for ethical treatment of sources, subjects, targets and the public are considered to be part of this.<sup>199</sup> In many countries, self-regulation through the professional ethics of journalism is complemented with a formalized self-regulatory structure for the press, sometimes in the form of codes of conduct, either for specific newspapers or industry wide. Self-regulation for the press can also include the establishment of a press council dealing with complaints about publications. Historically, press self-regulation in Europe was formalized in the first decades after World War II, mostly as a reaction to threats from governments that legislation would be passed otherwise.<sup>200</sup>

It is important to note that journalistic ethics are not carved in stone and have always been the subject of debate, because journalistic ethics vary across media and between individual journalists. Because of new and uncontrolled entry into the publishing market on the Internet, online publishers are a diverse crowd. This has put the existing self-regulatory structures under pressure and incidentally given rise to new self-regulatory initiatives such as a blogger code of conduct. Some new publishers are precisely motivated by a perceived failing in the functioning of the traditional press. Other newcomers seem to denounce journalistic ethics completely. As Yochai Benkler argues, after a detailed analysis of the media storm surrounding Wikileaks in 2010 and early 2011, “‘professionalism’ and ‘responsibility’ can be found on both sides of the divide, as can unprofessionalism and irresponsibility.”<sup>201</sup> Finally, it is important to note that some new online journalistic practices arise from completely different professional backgrounds. Platforms for collaborative filtering such as Reddit fulfill some of the filtering functions that used to be performed by journalists. The same may in some ways be said for the phenomenon of Web search engines. However, these services are staffed with engineers, writing and tweaking

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<sup>196</sup> ECtHR 24 November 1993, *Informationsverein Lentia v. Austria*, § 38. See also Section 5.5.1.

<sup>197</sup> See Nieuwenhuis 1991.

<sup>198</sup> For a discussion of right of reply statutes and their permissibility under the right to freedom of expression in the United States and Europe see paragraph 5.4.2.

<sup>199</sup> See Ward 2006. See also Verdoodt 2007.

<sup>200</sup> See Tambini et al 2008, pp. 64-89, and cited references.

<sup>201</sup> Benkler 2011.

algorithms to support their services instead of journalists chasing stories, and they act in very different professional traditions.

For these reasons, attempts to *legally* define who can or should be viewed as journalist on the basis of a certain set of professional standards are difficult and tend to be controversial, because of the freedom of expression and the need for free entry to journalistic practice.<sup>202</sup> In the context of Article 10 ECHR, the duties and responsibilities tied to the exercise of the right to freedom of expression are linked to journalistic ethics. The doctrine of duties and responsibilities will be discussed later in this chapter, as well as the question about a possible privileged position of the press and journalists under the right to freedom of expression.

The European Union's regulatory involvement with the press is minimal. EU media policy is mostly directed at audiovisual media through internal market regulations. Involvement in the field of the press is mostly limited to concerns over pluralism and diversity. Notably, the difficulties of continuing to make a defensible distinction between regulated services and unregulated services on the basis of traditional broadcasting regulation is starting to show in the European context of the audiovisual media services directive's treatment of online on-demand services.<sup>203</sup> Convergence between different types of media and the rapidly changed realities of audiovisual media production and consumption raise fundamental questions about the way in which the degree of legitimate regulatory involvement under the right to freedom of expression depends upon the type of media involved.

As mentioned, in the subject of media pluralism more generally some activity takes place in the European context which touches upon the press as well. The legal basis for EU activity in the field of media pluralism is found in the positive obligation of the state to guarantee media pluralism. Quite specifically, the European Parliament has repeatedly expressed its concern over media ownership and control in Italy. In addition, the European Commission recently launched an initiative regarding media pluralism in the Member States,<sup>204</sup> which has resulted in a study on indicators for media pluralism,<sup>205</sup> and the establishment of a High Level Group on Media Freedom and Pluralism.<sup>206</sup> The study on indicators for media pluralism will be discussed in more detail in Chapter 10, since it contains reference to the question of making Web search engines part of an analysis of media pluralism.<sup>207</sup>

### **5.3 Freedom of expression and the press**

The judgments of the ECtHR and the United States Supreme Court on the implications of the right to freedom of expression for the press are amongst their most famous. Whereas freedom of expression applies to natural persons, the press and others alike, the ECtHR has emphasized the protection of the

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<sup>202</sup> In the Netherlands, for instance, the recent delineation of the media exception in the context of the data protection laws by the Dutch Data Protection Authority and the delineation of the group of persons to be able to claim protection of confidentiality of sources led to such a debate. See Dutch Data Protection Authority 2007.

<sup>203</sup> See Valcke & Stevens 2007, pp. 285-302.

<sup>204</sup> European Commission 2007a.

<sup>205</sup> Valcke et al 2009.

<sup>206</sup> European Commission 2011.

<sup>207</sup> See Section 10.2 in particular.

press under Article 10, stressing the role of the press in a democratic society. In particular, the ECtHR has tied the protection of the press to its task of informing the public. The following section is a short overview of the case law of the ECtHR and the United States Supreme Court on press freedom. The questions that will be answered are: What is the scope of Article 10 ECHR and the First Amendment in the context of the press? Is there any special protection of the press and, if so, on what grounds is this extra protection afforded? More specifically, the way press freedom is informed by the freedom of expression interests of its readers and possible speakers will be addressed. There will also be a discussion of the doctrine of prior restraint on the press and on the duties and responsibilities tied to the exercise of the right to freedom of expression by Article 10, second paragraph.

### 5.3.1 Status of the press under the right to freedom of expression

In the context of Article 10 ECHR, the European Court of Human Rights has consistently tied the special status of the press not to a particular institutional delineation of the press or journalists, but to their role in society and their contributions to ideals underlying freedom of expression. The decisive factor for any special protection or status under Article 10 ECHR is that there is a contribution to the public debate on matters of general public interest.<sup>208</sup> Whereas a newspaper or a professional journalist might more easily claim to be making such a contribution because of its widely accepted role in society, there is no reason why ordinary citizens or other entities would not be entitled to claim a similar contribution, as long as they have contribute to the underlying goals of Article 10 ECHR. In line with this inclusive interpretation of press freedom as public debate freedom, the Court has applied the special standards it developed for the press to other parties such as “*small and informal campaign groups,*” or “*groups and individuals outside the mainstream.*”<sup>209</sup>

The special status of – but not restricted to – the press and journalists under Article 10 ECHR plays out in particular in the context of the admissibility of interferences. The level of judicial scrutiny will be high and the margin of appreciation of the Member States in the context of the press is limited.<sup>210</sup> Generally, when dealing with the press, the test of Article 10, second paragraph will be applied most restrictively by the Court:

*“The most careful scrutiny on the part of the Court is called for when, as in the present case, the measures taken or sanctions imposed by the national authority are capable of discouraging the participation of the press in debates over matters of legitimate public concern [...].”*<sup>211</sup>

This will be different in the case of interferences with publications of ideas and information which do not contribute to the public debate about matters of general public interest, such as communications of a commercial nature, or about the private life of individuals.<sup>212</sup>

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<sup>208</sup> For a discussion, see Voorhoof 2008a.

<sup>209</sup> ECtHR 15 February 2005, *Steel and Morris v. the United Kingdom*, § 89. See also ECtHR 14 April 2009, *Társaság a Szabadságjogokért v. Hungary*.

<sup>210</sup> See ECtHR 10 December 2007, *Stoll v. Switzerland*, § 105 (“Where freedom of the “press” is at stake, the authorities have only a limited margin of appreciation to decide whether a “pressing social need” exists”).

<sup>211</sup> See ECtHR 20 May 1999, *Bladet Tromsø and Stansaa v. Norway*, § 64.

It can be concluded from the Court's case law on the protection of publications under the right to freedom of expression that hardly anything is excluded from the scope of Article 10 ECHR, first paragraph. The actual legal protection under Article 10 ECHR will depend on the weight that is contributed to the protected matter or action, which will subsequently play out in the context of the permissibility of interferences under Article 10, second paragraph. As mentioned, restrictions of publications on matters of public concern result in stricter scrutiny by the Court as well as a very limited margin of appreciation. Notably, however, in many cases the right to freedom of expression will have to be balanced against a countervailing fundamental right, such as the right to private life of Article 8 ECHR.

Information, ideas, facts and value judgments are all protected under Article 10, as well as the form in and means by which they are being communicated. But in terms of their protection, the Court tends to make a distinction between facts and value judgments, because the latter cannot be proven right or wrong. This also implies that a legal requirement to prove an opinion can by itself be an infringement of Article 10.<sup>213</sup> Notwithstanding this general difference, value statements without some factual support for them can be excessive, in which case they may be legitimately restricted if called for.<sup>214</sup> The Court has acknowledged the difficulty of making a strict distinction.<sup>215</sup>

That Article 10 ECHR does provide additional protection of information and ideas in general can be seen in the ECtHR's judgment in *Sunday Times*. Here, the Court restated its conclusions from *Handyside* that freedom of expression constitutes one of the essential foundations of a democratic society and is applicable "not only to information or ideas that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population."<sup>216</sup> It went on to conclude that "[t]hese principles are of particular importance as far as the press is concerned."<sup>217</sup>

The reference to 'legitimate public concern' in the Court's case law, also denoted by 'public interest' or general interest', raises the question about the scope of this concept. The Court has addressed this question mostly parenthetically, without providing much substantive guidance. It has made distinctions between the substantive merits of types of speech, such as commercial speech and political speech, of which the latter carries more weight under the Convention. It has delineated the reporting about public officials from the reporting of details about private individuals, because in the former case the press exercises its vital role of "watchdog" whereas it does not do so in the latter. Notably, this sometimes necessitates a substantive judgment on the merits of particular publications, such as in the case *Von Hannover* about the balancing of privacy and speech interests. There the Court declared the publications about the Princess of Monaco were insufficient from its public interest perspective, which is strongly linked to democratic ideals:

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<sup>212</sup> For a discussion of the protection of commercial speech under Article 10 ECHR, see Randall 2006. See also Van Dijk et al 2006, pp. 800-801; Sakulin 2010, pp. 122-126, 144-151.

<sup>213</sup> See ECtHR 15 February 2005, *Steel and Morris v. United Kingdom*, § 87.

<sup>214</sup> *Id.*, § 87.

<sup>215</sup> See e.g. ECtHR 27 Mai 2004, *Vides Aizsardzibas Klubs v. Lettonie*, § 43.

<sup>216</sup> ECtHR 26 April 1979, *Sunday Times v. the United Kingdom*, § 65.

<sup>217</sup> *Id.*

*“the publication [...] in question, the sole purpose of which was to satisfy the curiosity of a particular readership regarding the details of the applicant’s private life, cannot be deemed to contribute to any debate of general interest to society despite the applicant being known to the public [...].”*<sup>218</sup>

The best suggestion for a general guiding principle underlying the general or public interest in the context of Article 10 ECHR, and the press more generally, is provided by the democratic theory discussed in Chapter 4. However, the notion of public interest or general interest under Article 10 ECHR remains relatively undefined.<sup>219</sup>

In contrast to Article 10 ECHR, the text of the First Amendment contains an explicit reference to the protection of the press, besides the more general freedom of speech. Some have read this as meaning that the organized press should receive special protection under the First Amendment.<sup>220</sup> The explicit reference to freedom of the press in the First Amendment would be redundant otherwise and the freedom of the press is argued to be a structural provision guaranteeing that the press as an institution, independent of government, would serve as an additional check on the three branches of government.<sup>221</sup>

The United States Supreme Court has never endorsed the view that the organized press holds special constitutional privileges and has construed the right to free speech and the freedom of the press in the First Amendment to exist irrespective of whether the circumstances concerned a member of the organized press or another organization or individual.<sup>222</sup> It decided most clearly against special constitutional privileges of the organized press in *Hayes*, in which it decided that there is no special guarantee for access to information for the organized press that is not available to the public generally.<sup>223</sup> The organized press also receives no special immunity from the application of general laws.<sup>224 225</sup>

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<sup>218</sup> ECtHR 24 June 2004, *Von Hannover v. Germany*, § 65.

<sup>219</sup> See e.g. Sanderson 2004.

<sup>220</sup> See Stewart 1975; Lange 1975; Nimmer 1975.

<sup>221</sup> Stewart 1975, pp. 633-34.

<sup>222</sup> The view was explicitly denounced by Justice Burger in his Concurring Opinion in *National Bank of Boston*. See *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 796 (1978).

<sup>223</sup> *Branzburg v. Hayes*, 408 U.S. 665 (1972). For a recent discussion of the journalist’s privilege under the First Amendment, see Papandrea 2007.

<sup>224</sup> *Associated Press v. NLRB*, 301 U.S. 103 (1937) (mentioning libel laws, contempt of court, anti-trust laws, taxation, and applying laws relating to organized labour.). See also *Cohen v. Cowles* 501 U.S. 663, 670 (1991).

<sup>225</sup> In particular, the First Amendment does not protect news agencies against an anti-trust action if they violate the Sherman Act by restricting the dissemination of news and reports by members and non-members. See *Associated Press v. United States*, 326 U.S. 1, 20 (1945). (“[The First] Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford nongovernmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all, and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests. The First Amendment affords not the slightest support for the contention that a

If we look at the Court's case law, some First Amendments standards for the press such as the 'Times-Gertz-standard' for defamation typically involve the highest scrutiny. But they do not necessarily require that the publication originates from the press, but that it involves matters of public concern.<sup>226</sup> The Supreme Court concluded that speech "*concerning public affairs is more than self-expression; it is the essence of self-government*" and occupies the "*highest rung of the hierarchy of First Amendment values.*"<sup>227</sup> Thus, insofar as the periodical press reports about public affairs it can claim the highest protection possible, which is comparable to the situation under Article 10 ECHR. As mentioned above, the organized press is in practice most likely to be able to claim protection under this standard.

One substantive difference between press freedom under the First Amendment and Article 10 ECHR is the priority of free speech under the American Constitution in comparison with other values. As a result, under certain conditions the First Amendment provides speakers, publishers and the press with significantly more protection, for instance against defamatory false statements of fact.<sup>228</sup> In *New York Times Co. v. Sullivan* a police chief sued the New York Times newspaper for false statements of fact in an editorial advertisement by an African-American civil rights group.<sup>229</sup> The police chief asserted that the advertisement contained several falsehoods regarding his role in civil rights protests. The Supreme Court concluded that the First Amendment required that there must be proof that a false statement relating to the conduct of a public official must be "*made with 'actual malice' – that is, with knowledge that it is false or with reckless disregard of whether it was false or not*" for it to be constitutionally permissible to punish its publication.<sup>230</sup> In its opinion, the Court relied on a variety of fundamental concerns underlying freedom of expression, and in particular referred to the dangers of chilling effects and self-censorship that would arise from a weaker standard for defamatory publications. It stated that "*debate on public issues should be uninhibited, robust, and wide-open.*"<sup>231</sup> It also concluded that "*[e]rroneous speech is inevitable, if the First Amendment freedoms are to have the breathing space they need to survive.*"<sup>232</sup> This willingness to err in favor of free speech, which is also implied by the chilling effect doctrine, is characteristic of First Amendment doctrine.<sup>233</sup>

The standard was later extended to speech about public figures.<sup>234</sup> In *Gertz* the Supreme Court clarified that the strict 'actual malice' standard for false statements of fact does not apply to statements about private parties. Such speech does not relate to matters of public concern, and for this reason the state's

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combination to restrain trade in news and views has any constitutional immunity."). See also *Citizen Publishing Co. v. United States*, 394 U.S. 131, 139-140 (1969).

<sup>226</sup> *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749 (1985) (Concluding that the Gertz standard does not apply to publications that are not of public concern, such as credit reporting about businesses).

<sup>227</sup> *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749, 759 (1985).

<sup>228</sup> See Anderson 1975.

<sup>229</sup> It is worth noting that the paid for nature of the publication was not of concern. See also Section 5.3.2 and Section 8.4.3.

<sup>230</sup> *New York Times v. Sullivan*, 376 U.S. 254, 265-292 (1964).

<sup>231</sup> *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

<sup>232</sup> *New York Times v. Sullivan*, 376 U.S. 254, 271 (1964).

<sup>233</sup> See also Schauer 1978.

<sup>234</sup> *Curtis Publishing Co. v. Butts, Associated Press v. Walker*, 388 U.S. 130 (1967).

interest to protect individuals against defamatory falsehood is greater.<sup>235</sup> Under the First Amendment there is no such thing as a false idea, but false statements of fact are low level speech.<sup>236</sup> The reason for the protection of false statements of fact against punishment under an actual malice standard is found in the importance of robust debate. Again, the possible chilling effects of legal interferences with unprotected or low-level speech can make them impermissible under the First Amendment.<sup>237</sup> Relying on *Sullivan*, the Supreme Court has concluded that speech concerning public figures and officials may be provocative and intended to cause emotional distress but cannot be punished absent ‘actual malice’.<sup>238</sup> For these reasons, parodies which involve false statements of facts that cannot reasonably be believed to involve the subject of parody, receive First Amendment protection, even if the speech is patently offensive and is intended to inflict emotional injury.<sup>239</sup>

The ‘Times-Gertz’ standard is a characteristic feature of United States free speech doctrine and much stronger than the protection afforded by Article 10 ECHR. Under Article 10 ECHR, it is permitted for national law to require that statements of fact must be substantiated and consistent emphasis is placed on ‘reliability’ in the context of the media’s duties and responsibilities. The notion of duties and responsibilities tied to the exercise of the right to freedom of expression, which will be discussed below, is completely absent in United States freedom of expression doctrine.

### **5.3.2. Article 10 ECHR and the press’ role in serving the interests of speakers and readers**

Although the press can be seen as the actual source of publicity, meaning that the press is of course a speaker itself, the press is at the same time a mediating institution between other possible speakers and readers. The question is to what extent press freedom takes into account the contribution of the press to the realization of the communicative interests of these other stakeholders. The answer is that it does so to a considerable extent both under Article 10 ECHR and also in the United States context.

Press doctrine under Article 10 ECHR refers to the communicative interests of all three primary stakeholders: the press itself, its readers, and to possible speakers which can find an audience through the press. First and foremost, the Court has tied the special status of the press under Article 10 ECHR to the interests of readers and the public in general. In addition, the Court has also stressed the importance of press freedom because of the press’ intermediary role in disseminating the statements

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<sup>235</sup> *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347-48 (1974) (“So long as states do not impose liability without fault, the states may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual and whose substance makes substantial danger to reputation apparent.”).

<sup>236</sup> See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-340 (1974) (Clarifying that “under the First Amendment, there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries, but on the competition of other ideas.” And “although the erroneous statement of fact is not worthy of constitutional protection, it is nevertheless inevitable in free debate.”).

<sup>237</sup> For a discussion of the proper boundaries of judicial review in these contexts, see Note 1969; Note 1970.

<sup>238</sup> *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988). (“The sort of robust political debate encouraged by the First Amendment is bound to produce speech that is critical of [public officials and public figures]. Such criticism, inevitably, will not always be reasoned or moderate; public figures as well as public officials will be subject to ‘vehement, caustic, and sometimes unpleasantly sharp attacks.’).

<sup>239</sup> *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

and ideas of others to an audience. Both lines of reasoning imply that press freedom under Article 10 ECHR serves the interests of others than the press. The protection of the press against government interference is construed around a particular idea of the press and its role in a constitutional democracy. This does not imply that the press is subordinate to the interests of readers if there may be a conflict of interest. The horizontal protection of readers and speakers under the right to freedom of expression *vis a vis* the press will be discussed in more detail in the next sections.

With regard to the interests of readers, the ECtHR concluded in *Sunday Times* that freedom of expression protects the press against government interferences in reporting about an ongoing judicial proceeding, because it is the press' task to inform the public about these matters of public interest:

*"[W]hilst the mass media must not overstep the bounds imposed in the interests of the proper administration of justice, it is incumbent on them to impart information and ideas concerning matters that come before the courts just as in other areas of public interest. Not only do the media have the task of imparting such information and ideas: the public also has a right to receive them [...]."*<sup>240</sup>

In this and other judgments, the Court has added that the press plays a "vital role of "public watchdog"<sup>241</sup> and that freedom of the press "affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders."<sup>242</sup> In *Guerra*, stated "that the public has a right to receive information as a corollary of the specific function of journalists, which is to impart information and ideas on matters of public interest."<sup>243</sup> Thus, the Court has time and again connected the special status of the press to its function and task of informing the public.

To a lesser extent, the Court has tied freedom of the press to its role in providing a forum to others. In its *Jersild* judgment, which dealt with the prosecution of a Danish journalist for including racist statements by a right-extremist in a television documentary, the Court restated that news reporting receives special protection under Article 10 ECHR and journalists should not be unduly restricted in reporting statements of others, which is one of their primary roles and tasks:

*"News reporting based on interviews, whether edited or not, constitutes one of the most important means whereby the press is able to play its vital role of "public watchdog" [...]. The punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of*

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<sup>240</sup> ECtHR 26 April 1979, *Sunday Times v. the United Kingdom*, § 65.

<sup>241</sup> ECtHR 26 November 1991, *Observer and Guardian v. The United Kingdom*, § 59. See also ECtHR 8 July 1986, *Lingens v. Austria*, § 44 ("a sanction such as this is liable to hamper the press in performing its task as purveyor of information and public watchdog"); ECtHR 25 March 1985, *Barthold v. Germany*, §58 ("a criterion such as this is liable to hamper the press in the performance of its task of purveyor of information and public watchdog.")

<sup>242</sup> ECtHR 8 July 1986, *Lingens v. Austria*, § 42.

<sup>243</sup> ECtHR 19 February 1998, *Guerra and others v. Italy*, § 53.

*matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so.*"<sup>244</sup>

One can find references tying the protection of the press under the First Amendment to the interests of possible speakers through the press and its readers, although more than the ECtHR does, the Supreme Court emphasizes the freedom of the press from government interference independent of a particular designated role. Even though First Amendment doctrine does contain references to an institutional democratic theory for press freedom, it places more emphasis on a free market for information and ideas, and in general entails a less instrumental notion of press freedom than press freedom under Article 10 ECHR.<sup>245</sup>

This does not mean that First Amendment case law does not contain ample references to the interests of an informed public, the interest of the public in self-governance and the interests of the speakers to reach an audience through the press.<sup>246</sup> The Supreme Court made its most famous reference to the interests of the receiving end of communications in the context of broadcast media. In *Red Lion*, the Court declared that "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. [...] It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here."<sup>247</sup> Of course, particularly in the broadcasting context, the interests of the audience serve as an argument to regulate media, restricting the freedom of broadcasters to act self-interestedly. First Amendment doctrine provides that, under certain conditions, government has a legitimate interest to restrict the dissemination of information in the interest of the 'captive audience' and uniquely pervasive media.<sup>248</sup>

In *Sullivan*, one can find a particularly strong reference to the interests of speakers to reach an audience through the press. Rebecca Tushnet has recently argued that *Sullivan* was precisely about First Amendment protection of the intermediary role of the press.<sup>249</sup> The idea is that the actual malice standard, discussed above, did not aim to protect the speech of the Times in this case as such, but the possibility of the press as an intermediary to publish third party material without extensive fact-checking. In addition, Tushnet shows that *Sullivan* can be interpreted as an endorsement of the newspaper business model on the grounds of First Amendment values relating to the press as an intermediary. The publication for which the New York Times was sued was an advertisement, and

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<sup>244</sup> ECtHR 23 September 1994, *Jersild v. Denmark*, §35.

<sup>245</sup> Strong references to a constitutionally established role of the press can be found in certain dissenting opinions. For references and a critical discussion, see Bevier 1980.

<sup>246</sup> See e.g. *Grosjean v. American Press Co., Inc.*, 297 U.S. 233, 250 (1936) ("*The predominant purpose of the grant of immunity [against special taxation of the press] was to preserve an untrammelled press as a vital source of public information.*"); *Zurcher v. Stanford Daily*, 436 U.S. 547, 572 (1972) (Stewart, J., dissenting); *Mills v. Alabama*, 384 U.S. 214, 218 (1966).

<sup>247</sup> *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) (deciding on the Constitutionality of the FCC's fairness doctrine for broadcasters. "*Differences in the characteristics of new media justify differences in the First Amendment standards applied to them[...]*." The Court acknowledges the scarcity of frequencies in the context of broadcasting as a legitimate ground for regulation. "*But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment.*").

<sup>248</sup> See Section 5.5.2.

<sup>249</sup> See Tushnet 2008, pp. 120-124.

commercial speech had been named as low level speech in *Chaplinsky*. The Supreme Court, however, dismissed any claim that the paid for nature of the publication should be of any concern, in particular because it would “*shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities – who wish to exercise their freedom of speech even though they are not members of the press.*”<sup>250</sup> Hence, the implication of *Sullivan* could be that when the business model of a certain entity that claims protection under the First Amendment is in line with the values underlying freedom of expression, there is no reason to separately scrutinize the commercial for-profit motives which are inherent in its operation.

### 5.3.3 Press freedom and the duties and responsibilities under Article 10

As mentioned above, the protection of the press under Article 10 of the Convention supposes certain commitments. Generally, the strong emphasis on the societal role of the press, which gives it extra status and protection under Article 10 ECHR, raises the question whether a conception of this role is also used to confine its freedom. If the press were to function in a way not in accordance with its perceived role in a democratic society envisaged by the ECtHR, there would be less reason to protect it against interferences.

This question leads to a discussion of the duties and responsibilities which are inherent in the exercise of the right to freedom of expression as enshrined in Article 10.<sup>251</sup> By exercising one’s right to freedom of expression one undertakes specific duties and responsibilities depending on context, profession, impact and the technical means used for communicating. In *Hachette Filipacchi*, the Court formulated this as follows:

*“[W]hoever exercises his freedom of expression undertakes “duties and responsibilities” the scope of which depends on his situation and the technical means he uses. The potential impact of those means must be taken into account when considering the proportionality of the interference. The safeguard afforded by Article 10 to journalists is subject, because of those very “duties and responsibilities”, to the proviso that they provide reliable information in accordance with the ethics of journalism [...].”*<sup>252</sup>

Thus, the protection of the press under Article 10 ECHR could be called a double-edged sword. It implies the application of stricter scrutiny with regard to interferences on the one hand, but involves special duties and responsibilities tied to the profession and the medium on the other hand.<sup>253</sup> More specifically, the protection under Article 10 ECHR of the press’ statement of facts and opinions is colored by the ethics of journalism.

The Court has rejected overly strict requirements on the press, for instance the “*general requirement for journalists systematically and formally to distance themselves from the content of a quotation that*

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<sup>250</sup> *New York Times v. Sullivan*, 376 U.S. 254, 266 (1964).

<sup>251</sup> See ECtHR 20 May 1999, *Bladet Tromsø and Stansås v. Norway*, § 65; ECtHR 29 July 2008, *Flux v. Moldavia* (No. 6), § 22.

<sup>252</sup> ECtHR 14 June 2007, *Hachette Filipacchi Associees v. France*, § 42.

<sup>253</sup> See also Council of Europe, Parliamentary Assembly, Resolution 1003 (1993) on the ethics of journalism.

*might insult or provoke others or damage their reputation.*<sup>254</sup> The Court has concluded on a number of occasions that this requirement is not reconcilable with the press's role of providing information on current events, opinions and ideas.<sup>255</sup> But the double-sided nature of freedom of expression under Article 10 ECHR remains. Whereas the press and journalists are allowed to provoke and exaggerate,<sup>256</sup> they also have to be careful, accurate and acting in good faith, as the Court recently concluded in *Stoll*:

*"[T]he safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the proviso that they are acting in good faith and on an accurate factual basis and provide "reliable and precise" information in accordance with the ethics of journalism"*<sup>257</sup>

The *Stoll* judgment is also of interest because the Court reflects on the duties and responsibilities of the press in the light of present-day conditions.<sup>258</sup> These present-day conditions, in the Court's eyes, have strengthened the importance of journalists abiding by their professional ethics:

*"[T]hese considerations play a particularly important role nowadays, given the influence wielded by the media in contemporary society: not only do they inform, they can also suggest by the way in which they present the information how it is to be assessed. In a world in which the individual is confronted with vast quantities of information circulated via traditional and electronic media and involving an ever-growing number of players, monitoring compliance with journalistic ethics takes on added importance."*<sup>259</sup>

Thus, the influence and impact of media as well as the risk they pose in terms of misinforming the public increase the duties and responsibilities on the media. However, the Court's judgment in *Stoll* has been criticized for relying too much on the judgment of the Swiss press council and placing too much emphasis on duties and responsibilities.<sup>260</sup>

The problem is that the duties and responsibilities tied to the exercise of freedom of expression in Article 10 and linked to the ethics of journalism by the Court in its case law, consistently mirror the actual freedom of expression which Article 10 ECHR is aiming to provide. Thus on the one hand, the right to freedom to expression not only applies to the substance, but extends to the *means of communications* and *the form* in which information and ideas are made public.<sup>261</sup> On the other hand, the duties and responsibilities include the responsible use of media and means of communication, in light of

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<sup>254</sup> ECtHR 14 December 2006, *Verlagsgruppe News GmbH v. Austria*, § 33.

<sup>255</sup> *Id.* See also ECtHR 29 March 2001, *Thoma v. Luxembourg*, § 64.

<sup>256</sup> See ECtHR 26 April 1995, *Prager and Oberschlick v. Austria*, § 38 ("*Journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation.*"). It is interesting to note that the Court has never considered provocation and exaggeration to be a duty or responsibility.

<sup>257</sup> ECtHR 10 December 2007, *Stoll v. Switzerland*, § 103.

<sup>258</sup> The need to interpret the Convention in light of present-day conditions was established in ECtHR 25 April 1978, *Tyrer v. the United Kingdom*, § 31. See also Section 4.3.2.

<sup>259</sup> ECtHR 10 December 2007, *Stoll v. Switzerland*, § 104.

<sup>260</sup> See Judge Zagrebelsky, dissenting, in ECtHR 10 December 2007, *Stoll v. Switzerland*. See also Voorhof 2008, pp. 197-203.

<sup>261</sup> See ECtHR 26 April 1995, *Prager and Oberschlick v. Austria*, § 57, and ECtHR 22 May 1990, *Autronic v. Switzerland*, § 47.

their respective impact and influence, and the form in which information and ideas are being presented in view of the difference in suggestive capabilities of different forms of communications and media.

What is missing in the Court's recent case law is a consistent acknowledgement of the importance of leaving the press and others leeway as to the definition and fulfillment of their duties and responsibilities, which in addition tend to be presented as generally accepted standards, instead of the contested ones they really often are in their practical application.<sup>262</sup> In 1994, the Court still refers to this leeway with regard reporting techniques in *Jersild*, when it concludes that “[i]t is not for this Court, nor for the national courts for that matter, to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists.”<sup>263</sup> More recently however, there is a tendency in the Court's case law in which duties and responsibilities consistently serve to legitimize limitations on the right to freedom of expression, thereby providing an extra line of defense for public authorities to limit expressive liberties. A perceived disregard for certain media ethics standards may lead to a lower level of scrutiny and a higher margin of appreciation for the State, thereby making it less likely that the interference will be considered unnecessary in a democratic society.

This emphasis on duties and responsibilities is problematic and difficult to reconcile with the principle that freedom of expression provides something extra in terms of protection.<sup>264</sup> In addition, how one should actually assess the influence and impact of different media or other related non-legal standards remains unanswered in *Stoll* and in the ECtHR's case law in general. Media is everywhere in contemporary society, but its impact and influence is hard to measure, let alone in terms of negative or positive contributions. If left unqualified, the perceived impact of the media and the perceived 'present-day conditions' remain hypothetical and can serve as an excuse for restricting the right to freedom of expression. The doctrine of duties and responsibilities may in some cases even result in a shift of the Court from scrutinizing the actual interferences with the media by public authorities to scrutinizing the actions of the media.<sup>265</sup>

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<sup>262</sup> There are references to this leeway but they are rather weak, such as in ECtHR 21 January 1999, *Fressoz and Roire v. France* (“In essence, [Article 10] leaves it for journalists to decide whether or not it is necessary to reproduce such documents to ensure credibility. It protects journalists' right to divulge information on issues of general interest provided that they are acting in good faith and on an accurate factual basis and provide “reliable and precise” information in accordance with the ethics of journalism”). In theory, the deterrent effect doctrine could provide such an answer. See the dissenting opinions in ECtHR 14 June 2007, *Hachette Filipacchi Associees v. France*.

<sup>263</sup> ECtHR 23 September 1994, *Jersild v. Denmark*, § 31.

<sup>264</sup> This extra line of defence for the authorities defending an interference can be identified in ECtHR 22 October 2007, *Lindon and others v. France* (“Nonetheless, novelists – like other creators – [...] are certainly not immune from the possibility of limitations as provided for in paragraph 2 of Article 10. Whoever exercises his freedom of expression undertakes, in accordance with the express terms of that paragraph, “duties and responsibilities”). Recent dissents in the Court's case law show an internal conflict at the ECtHR about the emphasis on duties and responsibilities and journalistic ethics. For a discussion, see e.g. Voorhoof 2008b; Voorhoof 2008c.

<sup>265</sup> See e.g. ECtHR 29 July 2008, *Flux v. Moldova (No. 6)*, § 26 (“The Court will examine whether the journalist who wrote the impugned article acted in good faith and in accordance with the ethics of the profession of journalist. In the Court's view, this depends in particular on the nature and degree of the defamation at hand, the manner in which the impugned article was written and the extent to which the applicant newspaper could reasonably regard its sources as reliable with respect to the allegations in question.” Three of the seven justices joined a strong dissenting opinion, concluding that “in the Court's view the

Such possible critiques notwithstanding, it is clear that the considerations of the Court as regards duties and responsibilities will have to be taken into account in the context of the Internet, the Web and dominant search engines. Since the duties and responsibilities in the Court's case law tend to place an emphasis on professionalism, maybe not too much should be expected from the ECtHR in the context of unorganized, often irresponsible, self-publications on the Internet. And in particular, since duties and responsibilities consistently mirror the actual freedoms in specific contexts, duties and responsibilities for Web search, as a means of communication and having a distinct impact or influence and way of presentation, should be formulated.

#### 5.3.4 Press freedom and the permissibility of prior restraints

Of all interferences with the freedom of expression, prior restraints are consistently considered the most problematic, both under Article 10 of the Convention as well as under the First Amendment.

The ECtHR concludes in *Guardian and Observer v. United Kingdom* that Article 10 ECHR “does not in terms prohibit the imposition of prior restraints on publication, as such.”<sup>266</sup> The Court does however assert that prior restraints “call for the most careful scrutiny on the part of the Court,” in particular when the press is concerned because: “news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest.”<sup>267</sup>

This specific case is also interesting because it bases the impermissibility of the prior restraint upon the factual availability of the material. This could be argued to be important for the context of obligations to remove references to content on Web search engines, since they are not able to remove the material from the Web. The case cited above dealt with a prior restraint imposed by a Court in the United Kingdom on *Spycatcher*, a book documenting sensitive dealings of British national security agencies. The court held that the wide availability of the publication – it had been rather successfully published abroad and the United Kingdom had not sought an import ban – rendered the prior restraints imposed on the U.K. publication disproportionate. Hence, the matter-of-fact availability of information imposes further restrictions on the permissibility of prior restraints, in particular if government does not seek restrictions immediately.<sup>268</sup>

First Amendment doctrine contains a heavy presumption against the constitutional permissibility of prior restraint on the press.<sup>269</sup> Prior restraints are “the most serious and the least tolerable infringement on First Amendment rights.”<sup>270</sup> The press is protected against prior restraints on publications, but not against being punished for them after publication if the publication is found to be illegal. In *Nebraska*, the U.S. Supreme Court explains this difference as follows:

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*social need to fight poor journalism is more pressing than that of fighting rich corruption. The ‘chilling effect’ of sanctions against press freedom dreaded by the Court’s old case-law has materialised through the Court’s new one.”*

<sup>266</sup> ECtHR 26 November 1991, *Observer and Guardian v. the United Kingdom*, § 60.

<sup>267</sup> *Id.*

<sup>268</sup> ECtHR 26 November 1991, *Observer and Guardian v. The United Kingdom*, § 66-70.

<sup>269</sup> *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976). See also *New York Times Co. v. United States*, 403 U.S. 713 (1971).

<sup>270</sup> *Nebraska Press Association v. Stuart*, 427 U.S. 539, 559 (1976).

*"If it can be said that a threat of criminal or civil sanctions after publication "chills" speech, prior restraint "freezes" it at least for the time".*

The damage of prior restraints can be particularly great when it restricts the communication of news and commentary on current events brings in extra weight, since *"the element of time is not unimportant if press coverage is to fulfill its traditional function of bringing news to the public promptly."*<sup>271</sup>

The restrictions on prior restraints and on licensing as a form of prior constraint go beyond restrictions on the act of publication. They also protect against city laws requiring prior permission for the distribution of printed materials.<sup>272</sup> Such standardless licensing laws would restore a system of censorship and licensing which is abolished by the First Amendment. When dealing with standardless licensing laws, the Supreme Court tends to declare these laws invalid on their face, instead of looking into the application of the law in the particular case at hand. The problem with standardless licensing from the perspective of the First Amendment, even of laws that merely aim to restrict littering, is that control over the circulation of information and ideas is vested in a government agent without appropriate standards to guide his actions.<sup>273</sup>

To some extent, First Amendment safeguards against prior restraints are procedural. In a case involving a prior restraint on the issuance of films to prevent (unprotected) obscene speech, the Supreme Court established that under appropriate procedural safeguards eliminating the dangers of censorship the prior restraint would have been constitutional.<sup>274</sup> These procedural safeguards include that the burden of proof for the unprotected status of speech must lay on the censor, that before judicial review prior restraints must be limited to the preservation of a status quo for the shortest period possible, that they are compatible with sound judicial procedure and that a prompt final judicial determination of obscenity must be assured.<sup>275</sup> The Supreme Court has recently distinguished cases with a content-neutral licensing scheme from prior restraint cases. The latter can be considered permissible time place and manner regulation if they serve legitimate interests and do not restrict speech disproportionately.<sup>276</sup>

## **5.4 The Press as gatekeeper: editorial freedom and access to the press**

### **5.4.1. Background to the debate about access to the press**

Due to the power of the press in its intermediary role between speakers and potential sources of information and the general public, access to the press and the media as a gatekeeper more generally is

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<sup>271</sup> *Nebraska Press Association v. Stuart*, 427 U.S. 539, 561 (1976).

<sup>272</sup> *Lovell v. Griffin*, 303 U.S. 444 (1938) (Concluding that such an ordinance is void on its face because its character strikes at the very foundation of the freedom of the press by subjecting it to license and censorship. Liberty of the press started initially a right to publish *"without a license what formerly could be published only with one."*)

<sup>273</sup> *Kunz v. New York*, 340 U.S. 290 (1951). For an overview of the objections against licensing and prior restraints, see Emerson 1955, pp. 656-660.

<sup>274</sup> *Freedman v. Maryland*, 380 U.S. 51 (1965).

<sup>275</sup> *Freedman v. Maryland*, 380 U.S. 51 (1965).

<sup>276</sup> See *Thomas v. Chicago Park District*, 534 U.S. 316 (2002) (Stating that *Freedman* is *"inapposite because the licensing scheme at issue here is not subject-matter censorship but content-neutral time, place, and manner regulation of the use of a public forum."*).

a hotly debated topic related to press freedom.<sup>277</sup> The press is modern society's town hall and the press is characteristically seen as one of the primary places for public debate and shaping of public opinion. Hence, it is problematic if the press as a whole is generally biased in its coverage or does not offer the opportunity for certain views or facts to be published and subsequently received by an audience at all.

Of course, it is important to acknowledge the various alternatives for a speaker or a source of information more generally if a newspaper would decide to not publish it. It may find an alternative outlet to be published in. If one newspaper does not want to publish, there may be other outlets that will. In practice, national and international news agencies have a great influence on what information will be published by the press, so their access policies are important as well. Another option for speakers in search of an audience for particular information or ideas would be to pay for publication, in other words to self-publish or advertise. Access for advertisers, be it editorial or commercial, is usually restricted as well, but in a different fashion. Finally, and in the current situation maybe most importantly, the speaker could decide to self-publish on the Web.

Taking into account the range of alternatives and keeping in mind the low barriers to entry to publish information and ideas on the World Wide Web, the discussion about access rights in the context of the press may seem awkward. Unsurprisingly, the discussion about access rights was most prominent in a time when entry barriers were higher, the media were quite concentrated, and were considered by many too biased in their coverage and selection, and not sufficiently open for a wide range of speakers to be heard. One interesting account of the power of traditional mass media in defining the boundaries of public debate has been offered by media scholar Hallin.<sup>278</sup> He analyzed in detail how the press can systematically undermine the recognition of certain points of view in society by systematically excluding them or exposing them as unacceptable.

Those who lamented the power of traditional mass media as the gatekeepers of public debate have welcomed the lower entry barriers to publishing that the networked information environment offers.<sup>279</sup> As a result, the discussion about access rights to the mass media may now have partly shifted to different intermediaries, such as search engines.<sup>280</sup> For this reason the debate about access regulation of the press remains of great interest, and it will therefore be revisited here. Access regulation under the First Amendment and the Article 10 framework will be addressed together.

From the perspective of the right to freedom of expression, the relation between speakers and important speech forums such as the press raises a number of issues. The issue that will be discussed here is the possibility to legally guarantee the opportunity of certain speakers to have information and ideas published in a particular news outlet against the will of the publisher. The analysis will be based on an analysis of the constitutionality of right of reply statutes under the right to freedom of expression.

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<sup>277</sup> See Barron 1967; Lange 1973, Lichtenberg 1987, pp. 329-350; Nieuwenhuis 1991, p. 146 and cited references.

<sup>278</sup> Hallin 1986. For studies in communications science on the gatekeeping role of the mass media, see White 1950. Innis et al 1991. Shoemaker 2001.

<sup>279</sup> For a discussion of the power of the press in defining the legitimate spheres of debate in society and the way in which the Internet may have reduced that power, see Rosen 2009. See also Aikens 1996.

<sup>280</sup> Pariser 2011; Introna and Nissenbaum 2000; Chandler 2007; Pasquale 2010; Kreimer 2001. See also Section 10.2.1.

Clearly, access rights for speakers to the press interfere with the editorial freedom of the press, since they would affect the press' freedom to choose which information and ideas to carry and which to exclude from its publications. Economically, it would also interfere with the operation of the press in the sense that it would have to dedicate resources to the publication of information and ideas, resources which it would otherwise have dedicated to other information and ideas. Hence, an access right for speakers also affects the economic freedom of the media. This economic freedom of the media, in turn, indirectly impacts on the media's editorial freedom, since it means that particular economic incentives arise in the context of the exercise of its editorial function.<sup>281</sup> To summarize, access regulation of the press sharply raises the question about the protection of the editorial freedom of the press under the right to freedom of expression. After looking at its (un)constitutionality, this section will conclude with a discussion of the editorial freedom of the press more generally.

#### 5.4.2 Access regulation and editorial freedom

The most common access right in the press context, which exists in some European jurisdictions, is a reactive right, namely a right of reply. The idea behind the right of reply is that it offers the opportunity to have an opposing view published, to correct false statements of fact, or to present an opportunity to reach an audience by someone who has been negatively affected by a publication. Such a right to access a media outlet can be seen to be based on the right to freedom of expression of the particular speaker, as a corollary of the audience's right to inform itself, or as a remedy for an infringement of other protected interests such as the right to private life or the speaker's reputation.<sup>282</sup>

Many countries do not have a right of reply at all, for instance the Netherlands and the United States, because of the limitation it implies for the press' editorial freedom. Access rights in the context of the press are unconstitutional under the First Amendment. The unconstitutional status of access regulation of the press can be contrasted with the United States broadcasting framework, in which access regulation is generally more common and the FCC was committed to the so-called 'fairness doctrine' for decades.<sup>283</sup> The fairness doctrine imposed an obligation on broadcasters to guarantee balanced reporting with regard to different points of view.

The consensus is that Article 10 ECHR does not imply a right to access the press and in particular no right to reply or right to rectification.<sup>284 285</sup> However, under the appropriate circumstances, the right to reply or rectification is not seen as an undue interference with the right to freedom of expression of the press

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<sup>281</sup> See *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

<sup>282</sup> Van Dijk et al 2006, pp. 786-787. See also Barendt 2005, pp. 422-427.

<sup>283</sup> For an overview of the debates about the fairness doctrine, which was applied by the FCC as a condition for broadcasting licensing, approved by the U.S. Supreme Court in *Red Lion*, and finally abolished during the Reagan presidency in the 1980s, see Benjamin et al 2006, pp. 197-240.

<sup>284</sup> See Barendt 2005, p. 425-27.

<sup>285</sup> See Council of Europe, 'Recommendation of the Committee of Ministers to Member States on the right of reply in the new media environment', Rec(2004)16. See also Recommendation of the European Parliament and of the Council of 20 December 2006 on the protection of minors and human dignity and on the right of reply in relation to the competitiveness of the European audiovisual and on-line information services industry', OJ L 378, 27.12.2006, pp. 72-77.

under Article 10 ECHR.<sup>286</sup> The decision about what to publish by the press is an editorial decision and thereby protected under Article 10 ECHR. An access right, granted by the law, is an interference with the protected interests of the press under Article 10 ECHR and needs to satisfy the test of Article 10 ECHR, second paragraph. This interference could be based on the possibility to restrict the right to freedom of expression of the press in the interests of the ‘protection of the reputation or rights of others’. If viewed as a vertical freedom of expression issue between the state and the press, the interference would need to be ‘necessary in a democratic society’. However, to the extent that the State could be seen to act under its positive obligation to protect the fundamental rights of others by granting a right to access the press, a mere balancing of interests would be taking place.

The European Human Rights Commission has rejected a challenge to a right to reply provision.<sup>287</sup> Also, the German Constitutional Court has concluded that right of reply provisions do not interfere with press freedom as enshrined in the German Constitution. Interestingly, the German Court concluded that these provisions not only protected the personality rights of individuals but also the right to freedom of expression, specifically the rights of readers to be better informed about a dispute.<sup>288</sup> Finally, the ECtHR’s interpretation of duties and responsibilities under Article 10 ECHR colors the editorial freedom of the press under the Convention. From the perspective of Article 10 ECHR, the editorial freedom of the press goes hand in hand with the responsible use of the freedom to select information and ideas for publication.

Under the First Amendment a right to reply in the context of the press is plainly unconstitutional, as the Supreme Court’s judgment in *Miami Herald v. Tornillo* clarified. *Tornillo* sets a strict standard in the First Amendment’s protection of editorial freedom.<sup>289</sup> The Court addressed the issue whether a state statute granting a political candidate a right to equal space to reply to criticism and attacks by a newspaper violated the guarantees of a free press in the First Amendment. After a discussion of the arguments in favor and against access rights to the press,<sup>290</sup> the Court pointed to the necessary implementation of a governmental or consensual mechanism to enforce these kind of rights. The Court concluded that no such mechanism could be imagined that would be consistent with the First Amendment’s protection of a free press and held the Florida statute unconstitutional. First of all it asserted that what was at stake was “*whether editors and publishers can be compelled to publish which reason tells them should not be published.*”<sup>291</sup> After this first reference to editorial freedom, it concluded that access rights function as an economic penalty – taking up space – and might lead editors to avoid controversy. In the final paragraph of its judgment the Court addressed the press’ editorial freedom, which according to the Court ultimately bars access rights to the press. Because of its clarity and continuing influence on United States freedom of expression doctrine, it is cited here in full:

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<sup>286</sup> See e.g. ECtHR 14 June 2007, *Hachette Filipacchi Associees v. France*.

<sup>287</sup> European Human Rights Commission, 13010/87, *Ediciones Tiempo v. Spain* (1989) 62 D&R 247.

<sup>288</sup> BVerfG 14 January 1998, 1 BvR 1861/93. See Barendt, p. 457.

<sup>289</sup> *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

<sup>290</sup> See Barron 1967; Lange 1973.

<sup>291</sup> *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256 (1974).

*“[T]he Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors. A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials -- whether fair or unfair -- constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.”<sup>292</sup>*

Thus, the editorial freedom of a newspaper consists of the freedom to decide what material goes into the newspaper, the content, form and size of the articles and the way the newspaper treats the issues it chooses to report. Even if this treatment may be unfair, biased or wrong, the First Amendment does not allow government to encroach upon it, for instance by granting rights to speak through the paper for specific individuals.

A question that remains unanswered in *Tornillo* is when and on which grounds an intermediary should be considered a passive receptacle or conduit and when it should not. This is an important question as the freedom to exercise editorial control and judgment about information flows is typically used to delineate the press from passive receptacles or conduits. It is also important because of the different modalities of control and selection one finds in the networked information environment. Finally, since the exercise of editorial control and judgment is linked to strong First Amendment protection against regulation, this also implies that other intermediaries which want to defend a certain level of discretion in their intermediation policies may invoke the *Tornillo* standard against government interference.

Moreover, *Tornillo* does not provide for a clear distinction between the exercise of the right to freedom of expression by a journalist or editor or the exercise of that right by a news organization as a whole. This implies that the economic freedom of news organizations is further strengthened by the organization’s First Amendment claims against government interference.<sup>293</sup> In fact, First Amendment doctrine seems increasingly hostile to any distinction between the economic freedom of speech intermediaries in society and their possible right to freedom of expression.<sup>294</sup> This discussion and the possible distinction between editorial media and passive conduits, and the way in which search engines should be positioned between these two models, will be further addressed in the next chapters.

## **5.5 The press and its audience: the right to be informed, the role of advertising and the reader’s privacy**

### **5.5.1 Press freedom and the right to be informed**

Section 5.3 showed that, to a considerable extent, the rationale of press freedom is linked to the interest of the public to inform itself. In fact, the ECtHR has consistently spoken of *a right* of the public to inform itself. In this section, the question will be addressed to what extent this right can be invoked

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<sup>292</sup> *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 259 (1974) [footnotes omitted].

<sup>293</sup> For a critical discussion of the use of free speech claims as disguised property claims, see Lichtenberg 1987, pp. 329-350.

<sup>294</sup> See *Citizens United v. Federal Election Commission*, 558 U.S. 8 (2010).

against the press itself or serve as the basis of legitimate government interference with the functioning of the press.

Notably, the freedom of expression under Article 10 ECHR, as well as under the First Amendment, implies the freedom to gather and receive information without undue interference by public authorities. This right to gather and receive information freely is the minimum of what can be expected from this right to be informed. Freedom of expression doctrine gives no reason to believe that there is something such as a right to be informed by a particular news outlet about particular issues.<sup>295</sup> Such a right to gain access to information by the press would amount to a rather grave interference with the press' freedom, which actually allows the press to not be transparent about its functioning, for example by protecting the confidentiality of journalistic sources. Still, under Article 10 ECHR the Court has provided some further qualifications to the right to be informed that will be discussed below.

In practice, the reader's or end-user's freedom to receive information is guaranteed by a free market in information products. Potential readers can choose freely which of them to patronize and whether or not to read them. Public libraries and public broadcasting are often legitimized with reference to a market failing from the perspective of the interests of the public. The idea is that certain information products will not be produced in large enough quantities or in certain qualities from a public policy perspective. In metaphorical terms, such interventions by public authorities could be said to aim to improve the marketplace of ideas.

Even in relation to government Article 10 ECHR does not in general imply a right to access specific information, or what is sometimes called a right to know or a right to information. Recently the ECtHR came close to acknowledging such a right, which would reflect the rights granted in freedom of information laws, but it still considers the right of the public to access government information freely as a negative right.<sup>296</sup> In *Guerra*, where the issue was first brought before the Court, the Court recognized that it had "*recognized that the public has a right to receive information as a corollary of the specific function of journalists, which is to impart information and ideas on matters of public interest.*"<sup>297</sup> After naming a few of the specific circumstances of the case, the Court clarified that

*"[Article 10] basically prohibits a government from restricting a person from receiving information that others wish or may be willing to impart to him. [...] That freedom cannot be*

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<sup>295</sup> For an in depth analysis of a possible 'right to information' from the media, see Helberger 2005, pp. 67-89.

<sup>296</sup> See ECtHR, 14 April 2009, *Társaság a Szabadságjogokért v. Hungary*. The Court recognizes "*that the public has a right to receive information of general interest*", and declared restrictions on access to information held by the Hungarian Constitutional Court unconstitutional. However, the Court does not conclude there is a positive obligation for the state to actively produce or impart information. It considered the restrictions on the possibility to gain access to the government held information to be an interference, which could not be justified under the second paragraph: "*In view of the interest protected by Article 10, the law cannot allow arbitrary restrictions which may become a form of indirect censorship should the authorities create obstacles to the gathering of information. For example, the latter activity is an essential preparatory step in journalism and is an inherent, protected part of press freedom*".

<sup>297</sup> ECtHR 19 February 1998, *Guerra v. Italy*, § 53.

*construed as imposing on a State, in circumstances such as those of the present case, positive obligations to collect and disseminate information of its own motion.*"<sup>298</sup>

It is possible, but improbable, that under different circumstances, a positive obligation to actively impart information might exist. In *Guerra* the ECtHR overturned the Commission's decision, which had construed a positive obligation based on Article 10 ECHR to make the information in question available to the public.<sup>299</sup>

The Court has further qualified the right to receive information and ideas as a corollary to press freedom in *Lentia* and in cases involving publicity about private individuals such as *Von Hannover*. The *Lentia* judgment contains the following complex argument:

*"The Court has frequently stressed the fundamental role of freedom of expression in a democratic society, in particular where, through the press, it serves to impart information and ideas of general interest, which the public is moreover entitled to receive [...]. Such an undertaking cannot be successfully accomplished unless it is grounded in the principle of pluralism, of which the State is the ultimate guarantor."*<sup>300</sup>

In other words, the audience has a right to receive information and ideas freely, and more specifically it has a right to a diverse, pluralist media offering. The state itself has the obligation to promote and even guarantee pluralism, but in the way it pursues this objective it can restrict media freedom disproportionately.<sup>301</sup> A closer look at *Lentia*, in which a state monopoly on broadcasting was declared to be incompatible with the demands of Article 10 ECHR, further shows that the Court, from the perspective of freedom of expression and media pluralism, prefers wider access of different channels over a constrained environment with guarantees for diversity.<sup>302</sup>

Finally, under Article 10 ECHR the weight that must be attached to the right to receive information and ideas freely under Article 10 ECHR depends upon the subject matter. It must be interpreted more narrowly, in situations in which publicity does not serve the democratic ideal of public debate, such as when it merely serves the curiosity of readers in the details about the private life of individuals.<sup>303</sup>

First Amendment doctrine contains many of the same doctrinal elements as have been discussed above. However, a positive obligation to promote pluralism in the interest of the public to inform itself is absent. Generally, the First Amendment can be seen as protecting the individual's informational self-governance. In situations in which the media audience is 'captive', in the sense that it may be presented with certain media contents unwillingly, the government is, under circumstances, allowed to regulate media and protect these interests without breaching the First Amendment.

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<sup>298</sup> *Id.*

<sup>299</sup> *Id.*, § 52-53.

<sup>300</sup> ECtHR 24 November 1993, *Informationsverein Lentia v. Austria*, § 38.

<sup>301</sup> See Nieuwenhuis 200, pp. 367-384.

<sup>302</sup> ECtHR 24 November 1993, *Informationsverein Lentia v. Austria*, § 39.

<sup>303</sup> See ECtHR 24 June 2004, *Von Hannover v. Germany*.

The text of the First Amendment does not specifically mention the right to receive information freely, but the First Amendment certainly implies such a right. In *Griswold* the Supreme Court clarified that the fundamental rights from the Bill of Rights have to be thought of as creating a ‘penumbra of rights’.<sup>304</sup> In particular the right of freedom of speech and press includes not only the right to “utter or to print,” but the right to distribute, to receive, to read, the freedom of inquiry and thought, and the freedom to teach, because without these ‘peripheral rights’ the specific rights would be less secure.<sup>305</sup> The First Amendment does not establish a right to access information or a right to know.<sup>306</sup> In certain contexts, such as in case of judicial proceedings, government cannot withhold certain information from the public or restrict its publication.<sup>307</sup>

More generally, the right to freedom of expression on the receiving end of communications can be seen as a form of self-governance with regard to the information flows an individual decides to engage in. In that sense the right goes beyond a right not to be hindered by the State when one attempts to access available information. First Amendment case law involves a number of interesting additional elements relating to this self-governance of incoming communications, which are worthy of discussion here, namely the idea of the captive audience in media regulation, more generally the right to choose freely what to read and listen to, and the presumption against paternalism in the case law about commercial speech. In comparison with the European framework, these elements place much more emphasis on free speech as a guarantee of a State-free zone, independent in its protection of other higher values such as a well-informed public in a democracy.

The idea of the captive audience can be found in a number of rulings of the Supreme Court. The idea is that restrictions on the right to impart information and ideas can be legitimate when communications would intrude upon the fundamental interest of the audience in its informational self-governance. It is worth noting that in the context of the press the captive audience doctrine cannot legitimize interferences. In the broadcast context however, the Supreme Court accepted that there is a stronger case for regulation, because of the “*uniquely pervasive presence of the broadcast medium in the lives of the public.*”<sup>308</sup> Thus, protection of the public against over-intrusive (indecent) speech can be constitutional, in particular if it is capable of intruding upon the privacy of unwilling listeners.<sup>309</sup> In

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<sup>304</sup> Compare Chandler 2008, p.4.

<sup>305</sup> *Griswold v. Connecticut*, 381 U.S. 479, 482-483 (1965).

<sup>306</sup> For a sceptical discussion of any ‘right to know’ under the First Amendment, see BeVier 1980.

<sup>307</sup> *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982).

<sup>308</sup> *FCC v. Pacifica Foundation*, 438 U.S. 726, 747-750 (1978). More in particular, indecency can be regulated, in contrast to the press medium, because broadcasts extend into the privacy of the home, and it is impossible completely to avoid those that are patently offensive. Broadcasting, moreover, is uniquely accessible to children. Ironically, *Pacifica* involved the broadcasting of a satire about the indecency regulation of the FCC.

<sup>309</sup> See also *Stanley v. Georgia* 394 U.S. 557 (1969) (additional protection of speech in the private sphere); *United States v. Reidel* 402 U.S. 351 (1971) (Stanley does not imply a right to distribute the obscene material that could not be penalized constitutionally under Stanley.); *Osbourne v. Ohio*, 495 U.S. 103 (1990) (Stanley inapplicable to child pornography.); *Paris Adult Theatre I v. Slaton* 413 U.S. 49 (1973); *Rowan v. Post Office Department*, 397 U.S. 728 (1970), (government may act to prevent intrusion into the privacy of the home of offensive speech. It may even acknowledge a request not to receive any more communications by a certain other party over the mail. “A man’s home is his castle” into which “not even the king may enter.”);

*Martin* the Court made clear that the First Amendment protects the freedom of the unwilling audience not to receive information, but this does not imply that the house to house distribution of material (literature) can be prohibited in general: “[T]he city may make it an offense to ring the bell of a householder who has appropriately indicated that he is unwilling to be disturbed. This or any similar regulation leaves the decision as to whether distributors of literature may lawfully call at a home where it belongs – with the homeowner himself.”<sup>310</sup>

The doctrine of the captive audience is interesting in the context of the Internet and the intermediary role of search engines precisely because there seems no reason at all to assume a captive audience in this context. The interactive nature of the public networked information environment strongly enhances the possibility of Internet users in the self-governance of their information intake. Obviously, search engines play an important role in that regard, since they help Internet users to select and access the material they themselves find worthy of their attention.

### 5.5.3 Press freedom and commercial communications

Many of the regulatory interferences by public authorities in the relation between the public and entities that impart information and ideas are legitimized with reference to the interests of readers and the readers’ right to receive information and ideas in particular. One interesting example of this is the way in which the right to receive information freely has informed the constitutional status of commercial communications under the First Amendment and Article 10 ECHR. Of special interest in the context of commercial communications and press freedom is the triangular relationship between the media, its audience and its advertisers. These two topics will be discussed below.

Both the U.S. Supreme Court and the ECtHR have granted commercial speech significant protection, in view of the rights of the public to receive such communications. In both cases commercial communications are protected but enjoy a lesser status and can be regulated.<sup>311</sup>

The Supreme Court’s gradual extension of First Amendment protection for commercial speech is worth recounting here because of its strong dependence on a specific interpretation of the right to receive information freely. Under the First Amendment commercial speech was first considered to be low-level speech and could therefore be regulated.<sup>312</sup> In the Seventies the Court started narrowing the unprotected status of commercial advertising. Advertisements that did more than just propose a commercial transaction, but provided factual information on a matter of public interest became protected speech.<sup>313</sup> In *Virginia Pharmacy* the Supreme Court went further and concluded that commercial intent could not render speech wholly unprotected.<sup>314</sup> Thus even speech that solely proposes a commercial transaction does not lack protection under the First Amendment. The core

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*Cohen v. California*, 403 U.S. 15 (1971) (‘Fuck the Draft’ utterance in Court and captive audience). See also Stone 1974, pp. 262-272; *Erznoznik v Jacksonville*, 422 U.S. 204 (1975).

<sup>310</sup> *Martin v. City of Struthers*, 319 U.S. 141 (1943).

<sup>311</sup> On government regulation of commercial speech under the First Amendment, see Stone 2008, pp. 161-186.

<sup>312</sup> *Valentine v. Chrestensen*, 316 U.S. 52 (1942) (Commercial advertising is added to the list of low level speech in *Chaplinsky*).

<sup>313</sup> *Bigelow v. Virginia*, 421 U.S. 809 (1975).

<sup>314</sup> *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

argument for this conclusion is basically a very strict argument against paternalism: suppression of truthful non-deceptive advertising is unconstitutional because it denies the audience the right to decide for themselves what is in their best interest.<sup>315</sup>

Hence *Virginia Pharmacy* establishes that truthful, non-deceptive commercial advertising is protected under the First Amendment.<sup>316</sup> Finally, in *Liquormart* the Supreme Court concludes that the fact that an activity, e.g. gambling, could be constitutionally banned in its entirety, does not imply that, if it is not, the non-misleading advertising about the activity can be banned or unduly restricted. This is because such bans usually “rest solely on the offensive assumption that the public will respond ‘irrationally’ to the truth” and, in fact, the First Amendment “presumes that attempts to regulate speech are more dangerous than attempts to regulate conduct.”<sup>317</sup> Thus, the First Amendment seems to contain a heavy presumption in favor of the rationality of the audience.<sup>318</sup> The public may not be protected by the government against its possible inclinations to act unwisely in response to advertising.<sup>319</sup>

The European Court of Human Rights has made a similar gradual move towards a protected status of commercial speech under Article 10.<sup>320</sup> And more generally, the idea of an informed media consumer who can decide, or at least be allowed to decide, what media to engage in, has firmly established itself in European media law and policy. We will come back to this debate in the context of search engines and their end-users in Chapter 8.<sup>321</sup>

Of specific interest in the context of the press and the status of advertising under the right to freedom of expression is the triangular relationship between commercial media, their audiences and their advertisers. Commercial media that make profits through advertising have to strike some kind of balance between the interests of readers and their potential advertisers.<sup>322</sup> Income through advertisements has been a primary source of revenue of the periodical press since the Nineteenth Century and remains a primary source of income for the newspaper industry.

In the press context, one finds some of the more advanced ways of dealing with the tension that media face when having to balance advertising and their audience interests. Over the years the more serious newspaper outlets developed a range of voluntary institutional guarantees with respect to the quality of

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<sup>315</sup> *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 770 (1976) (“The alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them. [...] It is precisely this kind of choice between the dangers of suppressing information and the dangers of its misuse if it is freely available, that the First Amendment makes for us [...].”).

<sup>316</sup> For the four step test for the constitutionality of regulation of commercial advertising see *Central Hudson Gas v. Public Service Commission of New York*, 447 U.S. 557 (1980).

<sup>317</sup> *Liquormart Inc. v. Rhode Island*, 517 U.S. 484 (1996).

<sup>318</sup> Or, one can say critically, it is indifferent to the rationality of the audience’s reaction. Compare Lippmann 1920, pp. 27-28.

<sup>319</sup> For a critical overview of the effects of the Supreme Court’s treatment of laws regulating commercial advertising on the public sphere, see Collins & Skover 1996 (Claiming for instance that “America’s marketplace of ideas has largely become a junkyard of commodity ideology”). See also Redish 2001.

<sup>320</sup> See Sakulin 2010, p. 144, Randall 2006.

<sup>321</sup> See Section 8.6.2.

<sup>322</sup> See Baker 2002.

newspaper journalism in relation to the profit making motives of their employers. The most important of these guarantees is the wall of separation between the editorial processes and advertising in the news industry. In the United States, this separation took place in the beginning of the 20<sup>th</sup> century.<sup>323</sup> Related, around the same time the rule was developed that advertisements in the news media should be clearly recognizable by readers. This was a response to the proliferation of so-called reading notices, i.e. advertisements that read like news stories.<sup>324</sup>

Clearly, the editorial independence from commercial motivations is under more pressure in the context of media which are completely paid for through advertisements.<sup>325</sup> A commercial enterprise offering a free newspaper will need to focus on optimizing advertising revenue. It has been noted that this can have distorting effects on the quality of information being offered, since the interests of readers and advertisers do not necessarily align.<sup>326</sup> In addition, when the reader can access news freely the economic signaling function in the market between publishers and readers deteriorates; readers are no longer capable of expressing their willingness to the publisher to pay for (greater) quality. Currently, an increasing amount of news, in particular the offering of electronic media, is entirely paid for through advertising. The free nature of many information products online may increase the focus on advertisers as the primary constituency. This leads to the practice in which the popularity of stories is really the only measure for the performance of journalists.<sup>327</sup> In Chapter 8 and in more depth in Chapter 10, the question will be addressed of how search engines have responded to the incentives arising out of their advertisement based business models and the ideal of independence, expressed through a separation between editorial and advertising processes.<sup>328</sup>

#### **5.5.4 Press freedom and the reader's privacy**

The discussion above shows how the press's business model can impact on the audience's ability to inform itself freely. This points to a final aspect of the legal relation between readers and the press which is relevant from the perspective of the right of media users to receive information and ideas freely, namely communications privacy or reader privacy. Especially in the digital environment, the reader's privacy may come under increased pressure due to the ways in which reading habits are used to profile audiences and support the optimization of revenues.<sup>329</sup>

Privacy is instrumental to the freedom of citizens to inform themselves freely. Moreover, the concept of privacy itself is strongly linked to the prevalence of the written word, the enjoyment of which happens to take place in private. It can be seen as a normative outcome of print culture in modern societies, as a range of communications scientists has shown.<sup>330</sup> As Felix Stalder puts it:

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<sup>323</sup> See Nerone & Barnhurst 2003, pp. 435-449.

<sup>324</sup> See Lawson 1993, pp. 25-44.

<sup>325</sup> For a discussion, see Baker 2002.

<sup>326</sup> *Id.*, pp. 24-26, 88-89.

<sup>327</sup> See McGrath 2010; Peters 2010. See also Pariser 2011.

<sup>328</sup> See section 10.3.1.

<sup>329</sup> See Richards 2008.

<sup>330</sup> For a short overview of this discussion, see Stalder 2002.

*“While the separation between the private and the public was never without its own set of contentions, print’s physical nature has ensured that the gap between the two domains was maintained fairly reliable and unproblematic. There was simply no efficient way for authors to observe readers, even if they wanted to. As print culture became more deeply entrenched in Western culture, privacy, its unintended effect, became seen as one of society’s central virtues.”*<sup>331</sup>

This classic communications model, in which publishing (public) and reading (private) are neatly separated, has been broken. The way in which communications between the electronic press and its readers is currently structured online has strongly individualized the communications between the press and its readers. In contrast to print, digital technologies allow for the continuous surveillance of reading and information accessing habits. Web publishing supports the personalization of the press offering in view of the specific interests of individual readers. Why would an online newspaper continue to serve sports news to the reader who tends to read reports about local politics and literature reviews? And why would it continue to serve local news to the reader who is consistently looking for recent market developments? The strongest driver for personalization in the news industry may, ultimately, be the need to compete for advertising revenue online. The personalization and underlying profiling of readers can strongly serve the media’s interest in optimizing its advertising revenues. In fact, it is now commonly suggested that the only way for the newspaper industry to survive will be to make use of the behavioral targeting offerings of the Internet advertising industry.<sup>332</sup>

When looking at the classic communications model from a constitutional perspective, it was mentioned that the First Amendment protects against intrusion by the government into freely receiving information in the home.<sup>333</sup> Since the right to respect for private life of Article 8 ECHR extends to informational privacy and communications traffic data, it can also be invoked to grant protection in this context. But Article 10 ECHR may strengthen the value that is attached to the protection of privacy in this context. If one is free to access information, but such access is registered and subsequently accessible to public authorities, this would amount to an interference with freedom of expression. In addition, the registration of media use could be a deterring factor to engage in the media. Thus, through the doctrine of chilling effects, Article 10 ECHR could take into account the need for privacy safeguards in the context of individualized media use.

To conclude, the importance of readers’ privacy in the context of electronic press access is increasing because of the way in which the communications between publishers and readers are structured online. Internet communications happen one-to-one and interactively, and as a consequence online information providers, including newspapers, can and increasingly choose to keep detailed logs on the consumption of their publications by end-users. These logs are extremely useful, because they can be

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<sup>331</sup> See Stalder 2002.

<sup>332</sup> See Pariser 2011.

<sup>333</sup> *Rowan v. Post Office Department*, 397 U.S. 728 (1970). See also *Lamont v. Postmaster General*, 381 U.S. 301 (1965). A state court recently held that access to bookstore records intrudes upon First Amendment rights, *Tattered Cover, Inc. v. City of Thornton*, 44 P.3d 1044, 1053 (Colo. 2002). For a discussion see Richards 2008, footnote 189 and accompanying text. But see Stone 2005 (pointing to the lack of protection of confidentiality of bookstore records).

used to improve and personalize editorial content and to better target advertising, resulting in higher revenues. These logs can also be used in ways that the reader of online media may not suspect. They can be used to identify particular readers and discriminate between them. Although some commentators have raised the issue of the tension between a free press and extensive reading profiling, these developments, and in particular the practices of behavioral advertising have not yet led to new legislation or constitutional case law in the United States or Europe.<sup>334</sup> Notably, the issue has been most prominently addressed in the context of Web search engines. Of all entities in the networked information environment they know the most about information accessing behavior.<sup>335</sup>

## 5.6 Conclusion

Both the European Court of Human Rights and the United States have dedicated some of their most significant judgments to the press and its freedom under the European Convention and the American Constitution respectively. What stands out, in particular in the considerations of the European Court of Human Rights as regards the protection of the press, is that the press is considered to have an important role in our constitutional democracy. The right to freedom of expression sanctions the freedom of the press partly because of its role in informing the public and contributing to the dissemination of information and ideas. A free press also implies that the regulatory role of the state with regard to the affairs of the press is minimal. Press governance is mostly dealt with through self-regulation. We have also identified a general development as regards the role of the state in the European context, in which positive involvement, such as indiscriminatory subsidization, media concentration rules, and media pluralism policies more generally, are permissible means to safeguard a healthy media environment. Of course, examples of restrictive legal pressure remain, and in this context Article 10 and the First Amendment call for a compelling justifications.

The press can claim the highest available protection under the Convention and the First Amendment but does not have a specially protected status which is unavailable to others who are not part of the organized press. Hence, other institutions, groups and individuals should be able to claim similar protection if they contribute to publications about matters of public concern as well as their selection and dissemination. Importantly, under Article 10 ECHR everyone engaged in their protected expressive liberties also commits themselves to certain duties and responsibilities. The self-regulation of the press, the ethics of journalism and their context, their impact and the technical means used by them for communicating ideas and information are relevant in this context. In *Stoll* and other recent judgments the European Court of Human Rights has signaled that it takes these duties and responsibilities seriously. The press has to ensure accuracy, precision, reliability and sometimes even prudence and reasonableness. The duties and responsibilities are inherent limitations on the exercise of one's expressive liberties and need to be interpreted in the present-day conditions with regard to the new media environment, in which, in the ECtHR's view, they have taken on added importance.

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<sup>334</sup> See Richards 2008; Cohen 1996; Solove 2007.

<sup>335</sup> See Section 8.6.4 and Section 10.4.2 for the discussion of privacy and access to information in the context of search engines. See Section 7.4.7 for a discussion of the value of the patron's privacy in the context of the library.

The instrumental character of press freedom standards, which seems to weigh most heavily in the European context, is limited by the independent protection of the press and its editorial freedom in particular. In this context, United States free speech doctrines seem to attach more weight to the protection of the press independent from the interests of the public to inform itself or the interests of possible speakers to reach an audience. It thereby arguably entails a less instrumental notion of press freedom. In fact, the editorial freedom of the press *vis a vis* possible speakers is absolute in the United States, as follows from *Tornillo*. The First Amendment completely bars access regulation of the press. The Supreme Court refers to editorial freedom as the exercise of editorial control and judgment. It includes discretion about the choice of material to go into a newspaper, the decisions made as to limitations on the size and content of the paper, and their treatment of (public) issues and officials. Under the European Convention editorial freedom of the press is also protected but it is possible that certain interferences can be legitimate, for instance with reference to the rights and freedom of others. In addition, the press has to exercise its editorial freedom in accordance with the duties and responsibilities mentioned above. Both Courts do not rule out the permissibility of prior restraints, an absolute restriction on editorial freedom, but apply heavy presumptions against its permissibility under the right to freedom of expression.

First Amendment law contains a number of additional interesting doctrinal elements which reflect on the protected interests of potential speakers to reach an audience and the interests of the audience with regard to receiving information freely. First, under the First Amendment overbreadth doctrine the Supreme Court can scrutinize the effects of legal restrictions on unprotected speech on the free flow of protected matter. If there is a mere possibility of chilling effects of the regulation of unprotected speech it can make a restriction on unprotected matter impermissible under the First Amendment. The regulation of speech to protect against unwilling exposure can be legitimate if the means of communications used would impose upon the self-governance of the audience. Finally, the First Amendment also contains a heavy presumption in favor of the rationality of the audience, which is illustrated most clearly in the Supreme Court's case law about the protected status of commercial communications and the public's right to receive them.

As was noted in the beginning of this chapter, the organized press is subject to disruptive change, as a result of a range of developments, such as convergence, digitization and the entry of new players such as search engines, news aggregators and amateur journalists. These developments will have a lasting effect on the press' business model. In this light, it is all the more important to conceptualize the values underlying the right to freedom of expression and the freedom of the press and the various entities in the emerging networked information environment that could be the inheritors of its freedoms.