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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

van Hoboken, J.V.J.

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Chapter 9: Search engine access: content regulation and intermediary liability

9.1 Introduction

This chapter will discuss the legal liability of search engine providers for their role in facilitating access to information and ideas online. More specifically, it will address the way in which the law and regulatory frameworks for access to content online implicate search engines with the aim to prevent access to illegal, unlawful, as well as harmful content. The capacity of search engines to open up not only legal or uncontroversial publications but also illegal as well as controversial or allegedly harmful material has resulted in legal and regulatory pressure on search engines to adopt a variety of measures to restrict access to content through their services. These measures range from the removal of websites from the index and the monitoring of the index for illegal material to the filtering of search results for country-specific search services and the blocking of keywords to prevent certain usage of the service.

As was discussed in detail in the previous chapter, search engines have to reconcile two conflicting ideals relating to the accessibility of online material, namely the ideal to facilitate access to all the material that is available online on the one hand, and the ideal of facilitating access to the material online which is valuable for the user on the other hand. An important question from the perspective of the right to freedom of expression is whether this balance should also involve the removal of websites from search engines for legal reasons. As will be discussed in more detail below, search engines do remove illegal websites from their index because of legal reasons. In addition, in some jurisdictions, search engine providers have entered into self-regulatory and co-regulatory frameworks, which entail the voluntary pro-active removal and filtering of websites to satisfy a public policy demand.

While search engines are involved in content regulation frameworks, it is also recognized, both in the United States and to some degree in Europe, that search engines, like other online intermediaries, should not be held fully liable for third party material. First of all, search engines should be treated fairly under existing general liability standards. They should not be treated as the publisher of the content they merely refer to. Second, too strict liability standards could render it legally impossible to offer these essential services for the networked information environment. In particular, strict liability standards for search engines could have significant chilling effects under the right to freedom of expression, as they would incentivize search engine providers to monitor their index for possibly illegal material and remove lawful material from the index to avoid becoming the subject of litigation.

On the basis of the concerns over too strict intermediary liability (or third party liability) for search engines, in some jurisdictions special ‘safe harbors’ for search engines apply, alongside similar safe harbors for other intermediaries like hosting providers or access providers.⁶⁹² In addition, search engines have played a role in the broader self-regulatory frameworks that are aimed at dealing with access to illegal and harmful content online and have been developed within the boundaries set by the safe harbor framework. As will become apparent in this Chapter, in comparison with access providers, the legal position search engine providers find themselves in (in the European context), is much less clear. The intermediary liability standards for search engines are not the same in Europe and the United States. In the United States, the safe harbor depends on the type of third party liability, rendering search

⁶⁹² For a discussion of the U.S. and EU safe harbor for access providers, see Section 6.4.

engines immune for defamation and similar unlawful content in search results (CDA 230),⁶⁹³ while putting them under notice and takedown obligations in the context of references to copyright infringements on third party websites. Although early case law of the European Court seems to point to the conclusion that search engines may invoke the protection of the hosting safe harbor, it remains questionable whether search engines fall under the safe harbor regime from the E-commerce directive in the first place.

Ultimately, the question addressed in this chapter is whether the existing legal governance of access to illegal and or harmful content through search engine is consistent with the right to freedom of expression and in what ways the legal framework could be improved from the perspective of the right to freedom of expression. The chapter will first address some of the self-regulatory frameworks which lead to the removal of online material from search engines (par 9.2). The censorship of the online environment though the removal of references by search engines in China will be addressed first, because of its impact on the general debate about freedom of expression and search engine governance. Thereafter, the focus will be placed on examples of self-regulatory content regulation frameworks for search engines in Europe, specifically in Germany and the United Kingdom (par 9.2.3). After a discussion of these self-regulatory frameworks, the issue of intermediary liability of search engines for referring users to unlawful publications on the Web (par 9.3) will be addressed, comparing the state of affairs in Europe with the United States. Section 9.4 brings together the findings of sections 9.2 and 9.3 and addresses the question about the consistency of the current legal framework from the perspective of the right to freedom of expression and evaluates possibilities for improvement. Section 9.5 concludes.

9.2 Search engines and content regulation: censorship or self-regulation?

9.2.1 Search engine censorship in China

Of all issues related to access to information and Web search engines the most publicly debated one relates to a non-Western, namely Chinese context.⁶⁹⁴ Google's decision to start a country-specific search engine in China (*google.cn*) next to its Chinese language version (of *google.com*) is famous in the debate about Internet content regulation. The search company was strongly criticized for adhering to the undemocratic demands of the Chinese government to censor access to content for Chinese citizens. It has come to serve as the paradigm case of undue government interference with the right to freedom of expression in the debate about content regulation and the Internet.

Seemingly, the bad accessibility of *google.com* in China, due to the Chinese government's interference with access to online material by the 'Great Firewall of China', was one of reasons for Google to start its Chinese operations.⁶⁹⁵ This government imposed Internet filtering at the network level interfered with the accessibility of *google.com* for Chinese Internet users on a regular basis, sometimes making the site completely inaccessible, and constantly interfered with access to specific content by blocking specific

⁶⁹³ See Section 6.4.4..

⁶⁹⁴ See Levy 2011, pp. 267-314; Mueller, *Networks and States*, 2010, pp. 189-190. Deibert et al 2007; Halavais 2009, p. 118.

⁶⁹⁵ For a discussion of Google's operation of a search engine in China, see Levy 2011, pp. 267-314. See also Thompson 2006.

websites or resetting the browser of Chinese users in reaction to specific keywords. To be clear, Google was and remains only one of the many foreign information services affected by the Great Firewall. Many others, such as the BBC's news site, face similar challenges in making information available to a China-based audience.⁶⁹⁶

By moving into China, Google chose to make a compromise in terms of the governance of its index. To be able to operate an online information service, such as a search engine, in China, service providers need to obtain a license from the Chinese government. This license includes an agreement to self-regulate. More specifically, search companies have to agree not to provide access to certain types of content, including prohibited political or cultural expression. Other companies had already obtained similar licenses; Yahoo had moved into China years before that, and Chinese companies, such as Baidu, were subject to similar restraints.

Thus, by obtaining the license to operate Google.cn on Chinese soil, Google agreed to suppress the findability of political speech, in other words the type of information and ideas laying at the core of the value of freedom of expression in western democratic societies. Online material covering the 1989 protests, the Falung Gong movement, political speech relating to Tibet, and opposition or political mobilization against the regime more generally, had somehow to be made invisible to the users of google.cn. Notably, the Chinese government does not provide readily usable blacklists to do so. The information providers themselves are expected to proactively monitor and exclude content on their services in view of vague standards about acceptable speech by the government. The absence of such official blacklists is shown by computer science research about the suppression of content by search providers in China.⁶⁹⁷ There is no consistency in the suppressed references between the three major Western search engine providers in China (Google, Yahoo and Microsoft).

The compromise that Google, Yahoo and others⁶⁹⁸ made not only led to public controversy, but also to legislative proposals. In the United States, several proposals were made to guarantee that United States companies would respect human rights while conducting business abroad.⁶⁹⁹ Similar laws have been called for in the context of the European Union.⁷⁰⁰ None of these proposals have yet been signed into law. Instead, a self-regulatory framework, the Global Network Initiative, consisting of industry (Google, Yahoo, Microsoft), non-governmental organizations (Center for Democracy & Technology, Electronic

⁶⁹⁶ See e.g. BBC 2010.

⁶⁹⁷ See Villeneuve 2008.

⁶⁹⁸ Yahoo was the subject of criticism because it handed over personal data of a user of its e-mail service, a Chinese political activist, to the Chinese government, which resulted in the activists arrest and incarceration. Yahoo later faced litigation in the United States relating to the infringement of the activists privacy. Microsoft deleted the content of a blog by a Chinese user even though the hosting service in question was not based in China. Cisco was heavily criticized for providing technology and knowledge to build the 'Great Firewall of China'. See Thompson 2006.

⁶⁹⁹ See U.S. Congress, H.R. 275 [110th]: Global Online Freedom Act of 2007, 2d sess., Rep 110-481, 22 February 2008. For a discussion, see Maclay 2010.

⁷⁰⁰ See Reuters 2009.

Frontier Foundation), and research institutions (Harvard's Berkman Center for Internet & Society), has taken the lead in formulating an answer to the questions raised by 'the China problem'.⁷⁰¹

In the beginning of 2010, the 'China problem' entered a third phase, after Google announced its unwillingness to continue censoring its google.cn index in reaction to a cyber attack originating from China.⁷⁰² Only a week later, U.S. Secretary of State Hillary Clinton publicly denounced China's interference with the free flow of information in a public speech on Internet freedom,⁷⁰³ showing how high profile the issue had become. It has placed the issue firmly on the global Internet politics agenda for the coming decade.⁷⁰⁴

A discussion of the actual political and regulatory environment for search engines in China goes well beyond the scope of this research. A legal comparison is difficult to make, considering the absence of a rule of law tradition in China, the differences in the protection of freedom of expression, the absence of general freedom to operate information services without a license, and the problems relating to the Chinese language, culture, and its history. Still, it is possible to use an important practical similarity between search engine operations in China and Western countries as a bridge to the discussion of search engines and content regulation in the West, namely the proactive blacklisting of online material or keyword triggered filtering in search engines for legal or public policy reasons. Whereas the motives for, and the intensity and implementation of such interferences may be quite different, search engines regularly suppress access to content through their services in constitutional democracies as well. In the remainder of this section first the general regulatory background of such interferences in Europe and the United States will be discussed. After that, the types of content search engines typically suppress will be discussed, as well as the methods that are used to do so.

9.2.2 Self-regulatory removal of references: the German FSM framework

As was discussed in Chapter 6, the regulation of, and protection against, illegal and harmful information on the Internet tends to follow the self- and co-regulatory paradigm, introduced in the European context by the 1998 Council Recommendation.⁷⁰⁵ Since the mid-1990s, several non-governmental agencies (hotlines) have been founded to deal with the issue of illegal content on the Web, child pornography in particular.⁷⁰⁶ More often than not, search engines are not systematically addressed in these legal frameworks, which vary across the Member States and tend to focus on hosting and access intermediary responsibilities. In some Member States, such as the Netherlands, search engines are not (yet) specifically addressed at all. In other Member States, such as Germany and France, major search

⁷⁰¹ See Global Network Initiative, <http://globalnetworkinitiative.org/>.

⁷⁰² Since early 2010, Google no longer operates a search engine in China, but redirects its search traffic to its service in Hong Kong. Notably, Google did manage to renew its Internet Content Provider license to operate a website in China after it agreed to end automatic redirects for *google.cn* to *google.com.hk*. The *google.cn* website now contains a link to the Google Hong Kong website. See Drummond (Google) 2010.

⁷⁰³ United States Department of State 2010.

⁷⁰⁴ For a discussion of the international law and human rights framework in the context of Internet content filtering, see Rundle & Birdling 2008, pp. 73-102.

⁷⁰⁵ Council Recommendation 98/560, 1998 O.J. (L 270), 48 (EC).

⁷⁰⁶ For a discussion, see e.g. Mueller 2010.

engine providers, together with public authorities, have adopted specific co-regulatory frameworks for the removal of illegal or harmful references in search engines. An important example of such a co-regulatory framework can be found in Germany, which will be discussed below. In other Member States, such as the United Kingdom, there are similar initiatives, which also involve search engine providers, but no formal legal involvement of the government.

Some of the voluntary frameworks for search engines in Europe entail the pro-active removal of references and blocking of material in country-specific services. To complicate matters from a legal perspective, the voluntary frameworks exist alongside possible existing legal obligations to block or remove content from search engines.⁷⁰⁷ In Europe, it is generally assumed that providers of general purpose search engines do not have a legal obligation to pro-actively monitor and remove references to illegal and or harmful material from their services. However, there may be some specific exceptions to this general rule that search engines do not have a preventive duty of care as regards third party material. Upon notice, search engines will typically fall under a legal obligation to remove references to illegal content.⁷⁰⁸ These exceptions will be discussed in the context in which they typically arise, i.e. the context of third party liability (Section 9.3).

In some European countries, specific administrative government authorities have traditionally been assigned the task of the protection of the youth against dangerous or harmful content. In Germany, the *Bundesprüfstelle für jugendgefährdende Medien* (BPjM) ('Federal Department for Media Harmful to Young Persons') administers a blacklist of illegal and harmful content. The BPjM does not itself monitor the media, but can add media objects, including Internet sites, to its list of media considered dangerous or harmful to minors, after having received and reviewed a complaint.

After a debate in Germany about the availability of illegal and harmful material on the Internet and the resulting accessibility in search engines, major search engine providers, under the umbrella of the FSM *Freiwillige Selbstkontrolle Multimedia-Diensteanbieter* (FSM) (The Association for the Voluntary Self-Monitoring of Multimedia Service Providers), adopted a specific code of conduct in 2004. This code, the 'Subcode of Conduct for Search Engine Providers' (VK-S), was meant to prevent access to illegal and dangerous material through their German services. The FSM is a non-governmental association founded in 1997 by important players in the German Internet industry for the voluntary self-control of the Internet. The FSM is part of a European network of industry hotlines for illegal and harmful content which developed since the 1990s. According to the website of the FSM, all major search engines operating in Germany are signatories to the VK-S. The VK-S and other codes of the FSM are part of the general German framework of 'regulated self-regulation' (co-regulation) of the media, introduced by the German federal human dignity and child protection law.⁷⁰⁹

The FSM's 'Subcode of Conduct for Search Engine Providers' (VK-S) introduces a number of voluntary obligations for its search engine signatories, including the removal of references on a government

⁷⁰⁷ See e.g. Schulz & Held 2007.

⁷⁰⁸ See Spindler & Verbiest 2007, pp. 69-71.

⁷⁰⁹ Staatsvertrag über den Schutz der Menschenwürde und den Jugendschutz in Rundfunk und Telemedien (Jugendmedienschutz-Staatsvertrag – JMStV).

administered (BPjM) blacklist.⁷¹⁰ The blacklist is made available to search engine providers through a special technical tool (BPjM-Modul), which is meant to prevent the further dissemination of the BPjM blacklist. In practice, the German Subcode of Conduct for Search Engine Providers can result in reports about illegal material by members of the FSM to the BPjM and the removal of BPjM-blacklisted references from Germany-specific Web search engines, such as Yahoo.de or Google.de. These actions have a basis in Article § 2 (5) of the VK-S. Article § 2 (5), section (a), provides that complaints about references to websites shall be forwarded to the BPjM and lists the categories of content that may lead to successful complaints. Listed are the following categories of content:

Propaganda and insignia of unconstitutional organizations [...], Racial demagoguery and Holocaust disavowal [...], Incitement or inducement to criminal acts [...], Depictions of violence [...], Child, animal and violent pornography [...], Explicit sexual depictions involving minors [...], Content glorifying war [...], Degradations of human dignity.

Article § 2 (5), section (b), of the VK-S, provides that the signatories:

agree to remove and not to show respectively any URLs which are indicated by the BPjM, insofar as they have access to the URL and insofar as the commercial expense is reasonable.⁷¹¹

Notably, the BPjM also receives complaints from other organizations than FSM signatories. The German child protection law grants several German government and non-government organizations the legal right to make an official complaint about a media object. The Kommission für Jugendmedienschutz (KJM) is an example of a government organization that operates hotlines and actively monitors online media in view of possible content dangerous for minors. The BPjM has the legal obligation to review such complaints.

It is doubtful whether more than symbolic value can be attributed to the FSM framework for search engine providers. The impact of the scheme on the information practices of German users is unclear and remains undocumented. What is clear, however, is that it remains easy to find references to content in German-specific search services that under German law should clearly be considered dangerous for minors.⁷¹² Moreover, due to the restriction of the framework to German-specific services, the filtered websites also remain easily accessible for German Internet users. The filtered websites are typically not one, but two clicks away, with the use of search services not specifically targeted at a German audience such as google.com.

An important example of a website that is filtered in Germany but remains accessible through non-German-specific versions of search engines is the right-wing extremist website *stormfront.org*.⁷¹³

⁷¹⁰ See FSM 2004.

⁷¹¹ Id.

⁷¹² The FSM itself implicitly acknowledges this in its Frequently Asked Questions about the code of conduct for search engine providers: "Wenn man bei Suchmaschinen Begriffe mit eindeutig jugendgefährdendem Inhalt eingibt, erhält man trotzdem zahlreiche Treffer. Nützt das BPjM-Modul überhaupt etwas?". See FSM, FAQ Selbstkontrolle Suchmaschinen, http://fsm.de/de/FAQs_Selbstkontrolle_Suchmaschinen.

⁷¹³ For the purpose of this study, these searches were (last) carried out on 15 August 2011.

However, the treatment of this website, which hosts an active white supremacist forum, by the various members of FSM is inconsistent and confusing. Both Google and Microsoft remove results to the domain from their search services directed at Germany. Their statements about the reasons of the removal are inconsistent with the information provided by the FSM. Whereas the FSM stresses the voluntary nature of the decision to remove websites such as stormfront.org, Google and Microsoft consistently state legal reasons for the removal. Google refers to an external partner, *chillingeffects.org*, for more information about the removal of search results.⁷¹⁴ Google does not remove the site from its 'international' search engine, *google.com*, which can also be accessed through a German language interface, *www.google.com/de*.⁷¹⁵

When conducting a search for the domain stormfront.org on *bing.com/?cc=de*, no results are shown. The link to the help section that is shown does lead to a list of links about the service, one of which links to a general notice about the possible removal of references. This notice states that Bing excludes results that *"local laws, regulations, or policies (such as copyright laws and local definitions of offensive content) require us to omit."*⁷¹⁶ Elsewhere, Microsoft further addresses the production and possible removal of references, mentioning intellectual property rights, defamation, child abuse content or laws specific to individual countries. Apparently, the removal of stormfront.org must be placed in the last category. For these types of removals, however, Bing claims to interpret local laws as narrowly as possible.⁷¹⁷ This implies that Microsoft considers the FSM obligations a restatement of German law and directly contradicts the voluntary nature of the Code. With regard to child abuse material, Microsoft claims *"to remove these types of links only when we are confident that the government or quasi-governmental agency providing the links [...] limits the scope of its work to illegal child abuse content."*⁷¹⁸ This is rather puzzling considering the fact that neither the BPjM, nor the FSM restricts itself to child abuse material.⁷¹⁹ Yahoo.de does not provide any specific information that references have been removed, even though the FSM code includes a transparency obligation. While earlier FSM member Ask

⁷¹⁴ On 15 August 2011, the search [site:stormfront.org] on *google.de* produces no results accompanied by a notice that reads *"Aus Rechtsgründen hat Google 478 Ergebnis(se) von dieser Seite entfernt. Weitere Informationen über diese Rechtsgründe finden Sie unter ChillingEffects.org."* Google uses the same notice for the removal of content from its general index: *"In response to a legal request submitted to Google, we have removed [N] result(s) from this page. If you wish, you may read more about the request at ChillingEffects.org."*

⁷¹⁵ See <http://www.google.com/intl/de/>. Google seems to redirect German visitors to google.com to google.de, but allows them to subsequently visit the google.com page through a link on the google.de start site. It is worth noting that Google responds to notices relating to some categories of material, such as child pornography, by complete de-indexing on a global level.

⁷¹⁶ See Microsoft, 'Why some results have been removed', <http://onlinehelp.microsoft.com/en-us/bing/ff808530.aspx>.

⁷¹⁷ See Microsoft, 'How Bing delivers search results', <http://onlinehelp.microsoft.com/en-gb/bing/ff808447.aspx>. (*"When approached with a request for removal of search results by a governmental entity, we require proof of the applicable law and authority of the government agency, and an official request to require removal. If such proof is provided and we can verify it, then we may comply with the removal request. If we are required to implement the request, we will do so as narrowly as required by the law."*).

⁷¹⁸ See Microsoft, 'How Bing delivers search results', <http://onlinehelp.microsoft.com/en-gb/bing/ff808447.aspx>.

⁷¹⁹ The blacklist used by Lycos Germany was obtained and subsequently published by Wikileaks in 2009. See Wikileaks 2009. For a discussion, see Schäfers 2009.

did not filter the website from its German-specific service, in August 2011 it did not show any results for stormfront.org.⁷²⁰

It is clear that the various inconsistencies mentioned above, and the lack of transparency as regards the functioning of the self-regulatory framework in practice more generally, show room for improvement. The most important practical shortcoming is the absence of a demonstrable impact on the German information ecosystem. The easy accessibility of the blacklisted material for German Internet users raises the question whether the current framework is redundant in the first place. It is possible that the framework reduces the risk that minors are exposed to the material considered inappropriate under German media child protection standards. But the framework is applied regardless of the age of search engine users and absent empirical evidence that minors would actually find it harder to obtain access to blocked material the effectiveness from the policy aim remains equally doubtful.

The questionable merit of the framework in terms of its success to prevent access to illegal and harmful material also raises a question about the proportionality of the framework under the right to freedom of expression as protected by Article 10 ECHR. If a measure interferes with the right to freedom of expression but does not contribute to the stated goal, the proportionality is questionable from the start. As was discussed in Chapter 6 as well as Chapter 8, Article 10 ECHR requires that a ban on certain illegal material has to be consistent. The ECtHR considered a restraint on publication to be disproportional if the material is still legally available through import. Similarly, in the context of search engines and the Internet, it is inconsistent if public authorities, such as German public authorities, press internationally operating search engine providers to remove certain material from one part of their offering (*google.de*), but allow them to facilitate accessibility of the same material to the German population in the rest of their offering (*google.com*).

In addition, self-regulatory frameworks for the removal or blocking of online content in which public authorities play a facilitative role can be problematic because of the informal nature of government pressure and the possible lack of substantive and procedural guarantees that would apply in case of proper legal obligations. There is a risk that the main difference between the two is that in the self-regulatory framework governments get to exert power over information flows without having to base its exercise on the law, a fundamental rule of law requirement and a specific requirement in Article 10 ECHR, second paragraph. In the German context, this requirement is usually taken seriously. In fact, the BPjM's blacklisting of websites is directly authorized by German law. Still, there is a risk that self-regulatory agencies, such as the FSM, are not open to the same scrutiny as public agencies, based on a democratic legislative mandate. Of course, this may actually be a reason for the industry to prefer self-regulation over public regulation.

Moreover, the statements about the FSM framework by Google and Bing demonstrate significant ambiguity with regard to the voluntary nature of the framework and a lack of internalization by its members. What is the added value of a self-regulatory framework which involves the 'voluntary' removal of references from search engines if the obligations agreed to are actual legally obligations? In

⁷²⁰ This could be the result of the fact that Ask is (reportedly) no longer producing its own search results. See also Section 2.2.4.

fact, the German ‘voluntary’ framework and the German legal framework seem to overlap: the stromfront.org website for instance is, in principle, illegal to link to in Germany,⁷²¹ as are publications of all the categories of content that are listed in Article § 2, paragraph 5 (a) of the VK-S. Upon notice, not necessarily by a court, a search engine operating in Germany, or any other website publishing references, would normally have to remove these links.⁷²² As will be discussed in the next section, search engine liability for third party material is not particularly clear in the European context. Conceivably, search engines only adopted the FSM framework because of a lack of clarity about their legal obligations regarding references to illegal material and to prevent themselves becoming the subject of specific regulation.

The lack of transparency about the functioning of the framework as applied in Germany, which results from the inconsistencies and the confusing statements from the various participants is a final objection to the current framework. Notably, the FSM’s code of conduct for search engines actually contains various transparency obligations, which, when taken seriously by the participants, could mitigate this concern. In its current form however, the framework is not only ineffective in its aim to prevent access to illegal material for German Internet users through search engines, it may also fail to take account of the interference with the informational self-governance of end-users. As McIntyre and Scott explain:

“where [...] it is not clear what is being blocked, why, or by whom, the operation of mechanisms of accountability – whether by way of judicial review, media scrutiny, or otherwise – is greatly reduced.”⁷²³

9.2.3 Proactive keyword blocking

There is one other field of self-regulatory activity targeting the accessibility of illegal and harmful content in search engines, namely through restrictions on the available choice of keywords.⁷²⁴ Compared to the removal of references in search engines, this is not as widespread and is a rather murky field of regulatory activity, so it is not possible to go into as much factual detail. It is instructive to start with an example.

In 2008 U.S. media reported that a government funded health care search engine was blocking all searches for the query [abortion].⁷²⁵ The search engine, which claimed to be the world’s largest database on reproductive health, was run by the John Hopkins Medical School of Public Health and

⁷²¹ Notably, the German version of Wikipedia contains a lemma about the stormfront.org website, but it does not provide a hyperlink to the website itself, stating that it would be illegal under German law to do so. See Wikipedia, ‘Stormfront’, <http://de.wikipedia.org/wiki/Stormfront> (“Die Homepage von Stormfront wird von der deutschsprachigen Wikipedia aus rechtlichen Gründen nicht verlinkt.”).

⁷²² Arguably, Article 10 (2) ECHR would still require the act of notification by public authorities of illegal content to be taken down to be based on the law. See Schellekens et al 2007, p. 17.

⁷²³ See McIntyre & Scott 2008.

⁷²⁴ Since search engines are no longer just waiting for end-users to enter their own search terms but are assisting them in formulating their queries, regulatory action with regard to the choice of keyword also implicates these value added services of major search engines.

⁷²⁵ See Stirland 2008a.

funded by the U.S. federal agency for foreign aid, USAID.⁷²⁶ The reason for the blocking of the keyword abortion was related to an official government policy not to fund organizations that perform abortions, or that "*actively promote abortion as a method of family planning in other nations.*"⁷²⁷ After reports in the media about the blocking of the search term, a university official explained that the search engine administrators seemed to have overreacted. USAID had complained about two references in the search engine to websites which were one-sided in favor of abortion rights. The search engine operators had subsequently decided to block the entire keyword. The USAID official defended the complaints about the specific websites with reference to the government policy mentioned above.⁷²⁸

In Europe, the most famous example of the idea of keyword blocking is the proposal by former European Justice and Home Affairs Commissioner Franco Frattini. In 2007 Frattini told Reuters he planned

*"to carry out a clear exploring exercise with the private sector [...] on how it is possible to use technology to prevent people from using or searching dangerous words like bomb, kill, genocide or terrorism."*⁷²⁹

The plan to have search engines or other services block 'dangerous words' never seems to have materialized but was not as out of touch with reality as some commentators in the media might have thought it was. In 2005, for instance, the UK Home Office published a recommendation on good practices for search service providers, which contained the same proposal. The official government document stipulated that:

*"[T]he IWF maintains a list of key words or combinations of words which, whilst not illegal in themselves, can be used to search for illegal material. Search providers should consider using this list to prevent abuse of their services by individuals seeking illegal material."*⁷³⁰

The IWF, the Internet Watch Foundation, is the UK hotline for child abuse material online. More precisely, it is a private-public partnership with the aim to combat child pornographic material online (worldwide) and criminally obscene and incitement to racial hatred content (in the United Kingdom).⁷³¹ The IWF administers the blacklist used in the so-called CleanFeed system, which entails the blocking of child pornographic material by major UK access providers.⁷³² The IWF blacklist of "*potentially criminal*

⁷²⁶ USAID is in charge of providing foreign aid, including health care funding, to developing nations.

⁷²⁷ The so-called 'Mexico City Policy' was upheld after a First Amendment challenge due to a lack of standing of foreign NGOs (the policy only applied to foreign orgs) in *Center for Reproductive Law and Policy v. Bush*, 304 F.3d 183 (2d Cir. 2002) (arguing, as in the case of mandatory Internet filters in libraries, that the government's choice not to fund was not a justiciable issue and that all organizations remained free not to apply for funding.). President Obama overturned the policy in the first month of his presidency. See Obama 2009.

⁷²⁸ See Stirland 2008b.

⁷²⁹ Melander 2007.

⁷³⁰ Home Office UK 2005.

⁷³¹ See Edwards 2010.

⁷³² For a technical discussion of the CleanFeed system, see Clayton 2005.

URLs related to child sexual abuse content on publicly accessible websites” is provided to all members to the IWF, which includes all major search engine providers operating in the United Kingdom.

Search engine providers and other relevant members and partners not only receive the list of URLs filtered through the Cleanfeed system, they also receive the list of keywords mentioned above. According to the IWF, this is a *“list of words and phrases commonly used by those seeking out child sexual abuse and criminally obscene adult content,”* which can *“help search engine providers to improve the quality of search returns.”*⁷³³ It is unclear whether (and if so, how) search engines actually use the list to monitor, rank or block particular search results. One of the ways such lists are possibly being used is in the context of search query suggest and auto-complete functionalities. For words leading to certain predictably offensive queries the search suggest functionality does not auto-complete or trigger any suggested queries.⁷³⁴ Notably, the search suggest functionality has already by itself led to some legal developments in other countries. In Italy, for instance, Google was held liable for suggesting queries which a Court held to be defamatory.⁷³⁵ Furthermore, the music industry has successfully lobbied Google to incorporate changes to its search suggest functionality. It will now *“prevent terms that are closely associated with piracy from appearing in Autocomplete.”*⁷³⁶ The Paris Court of Appeal dismissed liability for suggesting words like ‘torrent’ or destinations like RapidShare.⁷³⁷

While the removal of a reference from search results only blocks access to the specific website through the search service, the blocking of keywords goes much further. This is a direct result of the way in which search engines produce a set of relevant references in response to a search query. The search engine would typically select all the documents in the index containing the search query terms as possibly relevant for the user. Hence, a restriction on providing references in response to a certain search query consisting of certain keywords would function like a prior restraint on search media to refer to any material containing the allegedly dangerous keywords. As a result, filtering all references for a keyword is likely to prevent effective access to a host of lawful material as well. From the perspective of the right to freedom of expression legal requirements to use such lists by general purpose search engines to block searches are likely to be disproportionate. Considering the strict requirements related to prior restraints, such legal requirements would be highly questionable under the right to freedom of expression as protected by Article 10 ECHR.⁷³⁸

⁷³³ See Internet Watch Foundation, Services, Keywords, <http://www.iwf.org.uk/services/keywords>.

⁷³⁴ See e.g. Google.com, Web Search, Help Articles, Autocomplete, <http://www.google.com/support/websearch/bin/static.py?hl=en&page=guide.cs&guide=1186810&answer=106230&rd=1>. (*“While we always strive to neutrally and objectively reflect the diversity of content on the web (some good, some objectionable), we also apply a narrow set of removal policies for pornography, violence, hate speech, and terms that are frequently used to find content that infringes copyrights.”*).

⁷³⁵ Meyer 2011. Tribunale di Milano, 24 March 2011 (*Google suggest*).

⁷³⁶ See Walker (Google) 2010.

⁷³⁷ See Jasserand 2011.

⁷³⁸ In Europe, the keyword blocking proposals also arise in another regulatory context, namely the protection of data privacy. By opening up the Web, search engines facilitate access to personal data posted online including sensitive data such as credit card data or social security numbers. The European Data Protection Authorities have advised that search engines should remove these sensitive data on request. See Article 29 Data Protection Working Party 2008.

The fact that certain terms could be used to search for unlawful material does not imply that there are no legitimate uses of the terms in search engines. In fact, controversy about a certain issue may actually imply there are strong reasons to get access to information about the issue in question. For a keyword like genocide, which was included in Frattini's proposal, it's actually hard to imagine how a search for [genocide] could have any causal connection to genocide or illegal material relating to genocide. Actually, a ban on searches for genocide would be similar to a ban on searches for [holocaust] because of the existence of holocaust denial online. If we consider a possible search term like 'child pornography', it could be true that people interested in finding child pornographic material use general purpose search engines and similar search queries to find this type of illegal material. In fact child pornography laws typically make such attempts to access child pornography a crime and all search engines readily respond to requests to remove references to actual child abuse material from their index. If the keyword is blocked instead, others that want to access information about the *phenomenon* of child pornography would be barred from using one of the most effective means available to inform themselves or could be chilled from looking further because of the blocking of these words. Notably, this also prevents people from learning more about what their government is actually doing against child pornography.

Another question is whether search engines are or should be legally allowed to voluntarily block the use of certain keywords. Surely, for search engines keyword blocking based on lists of controversial words and phrases could be one of the most economical ways for search engines to deal with the risks that they may facilitate access to illegal content. At the same time, they would risk harming their value for users as well as being accused of censoring the Web. In the United States voluntary keyword blocking by search engines would be protected by the Communications Decency Act, Section 230. In Europe there are no specific rules protecting or preventing search engines from keyword blocking. It is doubtful that voluntary blocking of keywords to prevent access to illegal content could be argued to be unlawful. Under very specific circumstances, including the type of search engine and its market power, the context, the reasons for blocking a keyword and the particular keywords that are being blocked, there could arguably be a positive obligation on the State under Article 10 ECHR to prevent certain negative effects of keyword blocking on access to lawful content from taking place. At the same time, the predictable negative and disproportionate impact of keyword blocking on access to information for end-users implies that it should not be promoted by the government as a proper way for search engines to deal with access to illegal or possibly harmful content in the first place.

9.3 Intermediary liability and search engines

9.3.1 Discussion of intermediary liability regulation for search engines

As already mentioned in the previous section, the discussion of proactive involvement of search engines to prevent access to illegal and harmful material through their services cannot be separated from their legal responsibility as regards the findability of illegal third party content. There are a variety of laws that can make the publication of references in search engines legally problematic: data protection law, defamation and general tort law, criminal law, copyright law, trademark law and the law of trade secrets. The typical lack of editorial control with regard to the legality of material in the index means

that search engines will normally contain some references that are unlawful themselves or link to unlawful material. The question is to what extent search engines can be held legally accountable for references containing or referring to unlawful information. When are search engines liable for such “unlawful references”? Is it possible that, and if so, under which circumstances are search engines themselves operating unlawfully because of their facilitative role as regards illegal material online? And more specifically, can there be a legal obligation to remove unlawful references and, if so, under what circumstances?

Generally, this is a question about intermediary liability for which specific legislation has been adopted both in the United States and the European Union. In the next section, the position of search engines in the intermediary liability framework in the EU and the U.S. will be discussed. After concluding that a clear search engine specific safe harbor for search engines is absent at the European level, in contrast to United States law, the implications of this absence for the legal liability of search engines for third party content will be discussed from the perspective of the right to freedom of expression.

9.3.2 Intermediary liability of search engines and the Directive on Electronic Commerce

The liability of online intermediaries has been on the European legislative agenda since the end of the 1990s.⁷³⁹ However, search engines have hardly been addressed in this debate.⁷⁴⁰ The core result of European legislative efforts is the Directive on Electronic Commerce (2000/31/EC).⁷⁴¹ The objective of the Directive on Electronic Commerce (shortly: Directive or ECD) is “to contribute to the proper functioning of the internal market by ensuring the free movement of information society services between the Member States.”⁷⁴² In recital 40, it is noted that “both existing and emerging disparities in Member States’ legislation and case-law concerning liability of service providers acting as intermediaries prevent the functioning of the internal market, in particular by impairing the development of cross-border services and producing distortions of competition.”⁷⁴³

The Directive aims to solve these internal market problems by introducing safe harbors for certain types of intermediaries. To be precise, the section in the Directive on the liability of information society services⁷⁴⁴ acting as intermediaries does four things. First, it defines three categories of intermediaries, namely ‘mere conduit’ (Article 12), ‘caching’ (Article 13), and ‘hosting’ (Article 14). Second, for each of these categories it contains a conditional liability exemption. Third, it explicitly leaves open the possibility for a court or administrative authority to require the provider to terminate or prevent an

⁷³⁹ Notable contributions to the discussion about online intermediary liability from a European perspective include Spndler & Verbiest 2007; Koelman 2000; Koelman 1997; Julia-Barceló 2000; Peguera 2009. See also Section 6.4.

⁷⁴⁰ Two noteworthy early exceptions are Julia-Barceló 2000, and Verbiest 1999. For an extensive resource on hyperlink and search engine liability see the online collection by German legal scholar Stephan Ott at Links & Law, <http://www.linksandlaw.com>.

⁷⁴¹ Council Directive 2000/31, 2000 O.J. (L 178) 1 (EC).

⁷⁴² Id., art. 1(1).

⁷⁴³ Id., pmb. § 40.

⁷⁴⁴ Art. 2(a) ECD refers to Directive 98/34, 1998 O.J. (L 204) 37 (EC), amended by Directive 98/48, 1998 O.J. (L 320) 54 (EC) for a definition of ‘information society service’: “any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services”.

infringement. In particular, the safe harbors do not restrict the possibility of obtaining injunctive relief, for instance a court order on an online intermediary to remove a certain piece of unlawful material from their servers or to hand over identification data with regard to subscribers. Moreover, the exemptions do not affect the lawfulness of the processing of information by providers of any of these types of intermediary services. The lawfulness has to be determined by applying the relevant laws of the Member States. Finally, the Directive proscribes general obligations on the providers of services, covered by Article 12-14, to monitor the information that they transmit or store or to seek facts or circumstances indicating illegal activity (Article 15).

An important result is that the exemptions do not protect the providers of exempted services against litigation, most notably in the form of injunctive relief, the availability of which will depend on the law of the Member States.⁷⁴⁵ An early version of the ECD proposal did contain an EU level restriction on injunctive relief – for online intermediaries within the scope of article 12, 13 or 14 ECD – to prohibitory injunctions. As Koelman explains, this restriction could be interpreted to prevent court orders that would require affirmative steps to avoid future unlawful third party activities from taking place.⁷⁴⁶ The final text of the Directive, however, does not restrict injunctive relief. In fact, recital 45 clarifies that the Directive does “*not affect the possibility of injunctions of different kinds*”. The room for injunctive relief, which depends on the law of the Member States, should of course respect the demands of Article 10 ECHR and similar safeguards of the right to freedom of expression at the national level.

The question is how search engines fit into the EU’s intermediary liability regulation. The European Court of Justice has recently started to interpret the scope of the safe harbors as applied to search services and the European Commission launched a consultation in 2010 that specifically addresses the issue of search engine intermediary liability. However, before discussing these more recent legal developments it is important to examine the legislative background of the intermediary liability framework in the EU, the United States and the EU Member States regarding the treatment of search engines.

The ECD does cover search engines as information society services, as can be seen in recital 18:

[I]nformation society services are not solely restricted to services giving rise to on-line contracting but also, in so far as they represent an economic activity, extend to services which are not remunerated by those who receive them, such as those offering on-line information or commercial communications, or those providing tools allowing for search, access and retrieval of data [...].⁷⁴⁷

Seen in its proper context, Article 21 ECD on the re-examination by the European Commission suggests that search engines (information location tools) and hyperlinks are not covered by the intermediary liability regime of the Directive. Article 21.2 ECD provides that:

⁷⁴⁵ See Spindler & Verbiest, pp. 20-23.

⁷⁴⁶ See Koelman 2000, pp. 38-39, 48-68.

⁷⁴⁷ Council Directive 2000/31, 2000 O.J. (L 178) 1 (EC), pmb. § 18. See also ECJ 23 March 2010, Joined Cases C-236/08 to C-238/08 (*Google Adwords*), § 110.

in examining the need for an adaptation of this Directive, the report shall in particular analyse the need for proposals concerning the liability of providers of hyperlinks and location tool services [...].⁷⁴⁸

This provision was added to the European Commission's proposal for the Directive as a result of an amendment by the European Parliament.⁷⁴⁹

The legislative history of the Directive does not clarify why search engines were not specifically included in the intermediary liability regime.⁷⁵⁰ The safe harbors in the ECD are modeled on the safe harbors in the U.S. Digital Millennium Copyright Act, adopted two years earlier in the United States. The DMCA, however, does contain a specific safe harbor for hyperlinking and information location tools in 17 U.S.C. § 512 (d). Apparently, it was not politically viable in the EU to extend the harmonized safe harbor regime to hyperlinks and search media. Surely, the regime of Articles 12-15 can be seen as a compromise between the interests of the major stakeholders involved in the preparatory stages of the legislative proposal.⁷⁵¹ Since search engines were less dominant players at the time of drafting and were predominantly U.S.-based, it is conceivable that they were not involved or considered in these preparatory stages. If anything, the EU safe harbor compromise in the ECD mostly settled intermediary liability for traditional access and hosting intermediary activities. Search engines, selection intermediaries more generally and other (more active) types of hosting intermediaries, such as online marketplaces such as eBay or user created content aggregators such as YouTube, were not as developed as they are now. The extent to which these other intermediaries can assert a legislative safe harbor also remains the subject of intense debate and litigation at the national and European level.

9.3.3 Intermediary liability of search engines in the United States

If one looks at the United States, for comparison, there are a number of interesting similarities and differences, in particular with regard to the position of search engines. As discussed in Chapter 6, U.S. Congress introduced two separate branches of intermediary liability regulation in the first major round of Internet legislation at the end of the last century.⁷⁵² Unlike the European safe harbors discussed above, the U.S. safe harbor regime is therefore not horizontal, resulting in a complicated set of different liability exemptions for different types laws. And unlike the EU safe harbors, both safe harbors extend to search engines and hyperlinks.

⁷⁴⁸ Council Directive 2000/31, 2000 O.J. (L 178) 1 (EC), Article 21(2).

⁷⁴⁹ European Commission 1999.

⁷⁵⁰ See also Spindler & Verbiest 2007, pp. 86-99.

⁷⁵¹ For the European Commission's reaction on a few of the amendments by the European Parliament to the proposed liability regime of the Commission, see European Commission 1999, p. 7 (*"as regards amendments concerning the liability of intermediaries (45 to 49, 53 and 54) which is a very important and sensitive area [...] a particular effort was made in the original proposal, in close consultation with the interested parties, to achieve a reasonable compromise solution that takes due account of all interests at stake."*).

⁷⁵² For a recent discussion of safe harbours in the United States, see Lemley 2007. Lemley argues for an integration of existing safe harbours into one safe harbour with horizontal effect. With regard to the European safe harbours he concludes that they have been a failure: *"While the EC's 2000 Electronic Commerce Directive provides for some safe harbors, they do not appear to have been working, at least as implemented in national legislation and the courts."* Id, p. 22-23.

One set of safe harbors was introduced by the Digital Millennium Copyright Act (DMCA) of 1998 and can be found in 17 U.S.C. § 512.⁷⁵³ The respective safe harbor for hyperlinking and search engines in section 512 (d) introduces a reactive notice and takedown obligation as a condition for protection against monetary liability for copyright infringements by third parties:

17 U.S.C. § 512 (d) Information location tools.

A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the provider referring or linking users to an online location containing infringing material or infringing activity, by using information location tools, including a directory, index, reference, pointer, or hypertext link, if the service provider--

(1) (A) does not have actual knowledge that the material or activity is infringing;

(B) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or

C) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;

(2) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and

(3) upon notification of claimed infringement as described in subsection (c)(3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity, except that, for purposes of this paragraph, the information described in subsection (c)(3)(A)(iii) shall be identification of the reference or link, to material or activity claimed to be infringing, that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate that reference or link.⁷⁵⁴

Subsection (j) restricts the availability of injunctive relief, for mere conduit, hosting and other intermediaries. For search engines, injunctive relief is restricted by 17 U.S.C. § 512(j)(1)(A)(iii) to relief that

the court may consider necessary to prevent or restrain infringement of copyrighted material specified in the order of the court at a particular online location, if such relief is the least burdensome to the service provider among the forms of relief comparably effective for that purpose.

In addition, 17 U.S.C. § 512(j)(2) lists four specific considerations a court has to account for when considering injunctive relief on intermediaries that fall within the safe harbor framework. In particular the consideration in 17 U.S.C. § 512(j)(2)(C) seemingly takes into account concerns related to the right to freedom of expression. Under U.S. law, Courts have to take into account

⁷⁵³ For a discussion of the application of the DMCA safe harbours to search engines see Walker 2004.

⁷⁵⁴ 17 U.S.C. § 512 (d). There is a growing body of case law interpreting the safe harbours in the DMCA, including section (d). See e.g. *Capitol Records, Inc. v. MP3Tunes, LLC*, 2011 WL 3667335 (SDNY Aug. 22, 2011).

whether implementation of such an injunction would be technically feasible and effective, and would not interfere with access to noninfringing material at other online locations.

As mentioned above, similar restrictions on injunctive relief are absent in the Directive on Electronic Commerce.

For other types of illegal content, such as for defamation, the safe harbor for intermediaries is provided by the Communications Decency Act (CDA) (47 U.S.C. § 230). The scope of CDA, Section 230 can be found in 230 (e), which provides that Section 230 is superior to state law and has no effect on criminal law, intellectual property law, and communications privacy law. As was discussed in Chapter 6, CDA 230 provides a safe harbor to a broad class of intermediaries, defined as interactive computer services, ranging from access providers to discussion boards and search engines.⁷⁵⁵ The case law about the scope of the safe harbor has followed the Fourth Circuit's conclusion in *Zeran* that “[b]y its plain language, § 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service”.⁷⁵⁶

The legislative purpose of CDA section 230 was also to take away legal incentives for intermediaries not to interfere with illegal and harmful third party content, indecency in particular, hence its title the ‘Good Samaritan Defense’.⁷⁵⁷ Furthermore, the immunity provided by CDA 230's is absolute in the sense that it does not include a notice and takedown obligation. Even after obtaining knowledge about specific instances of third party illegal material on its service, a search engine would not be liable if it decided *not* to remove it or prevent access to it. Hence, CDA 230 does not only protect interactive computer services from being treated as publishers, it also protects them against being treated as distributors.⁷⁵⁸ Finally, although CDA 230 does not cover liability based on criminal law, it is generally interpreted to protect against all state laws, including state criminal laws and also against civil law claims based on federal criminal statutes. The remaining space for criminal liability of search engines and intermediaries more generally is probably limited.⁷⁵⁹ Electronic communications privacy legislation is also excluded and has its own rules about the responsibility of electronic communications service providers for the use of their services for harassment or similar problems.

The two branches of intermediary liability regulation in the U.S. do not provide the complete framework for search engine intermediary liability. Trademark infringement is neither covered by the DMCA, nor by the Communications Decency Act. For trademark liability, the Lanham Act contains what could be called

⁷⁵⁵ CDA, Section 230 (c) (1).

⁷⁵⁶ *Zeran v. AOL*, 129 F.3d 327 (4th Cir. 1997), at 330, Certiorari denied, 524 U.S. 937 (1998).

⁷⁵⁷ See *Zeran v. AOL*, 129 F.3d 327 (4th Cir. 1997) (“in enacting § 230, Congress sought “to encourage service providers to self-regulate the dissemination of offensive material over their services” and to remove disincentives to self-regulation”).

⁷⁵⁸ A Court of Appeal's decision that argued otherwise (namely that CDA 230 does not affect common law distributor liability standard for defamation) was subsequently struck down by the Californian Supreme Court in *Barret v Rosenthal*. See *Barrett v. Rosenthal*, 40 Cal. 4th 33, 146 P.3d 510 (Cal. 2006).

⁷⁵⁹ In 2011, Google settled for 500 million dollar with the U.S. Department of Justice in a criminal accomplice liability case against Google, involving the advertisement, targeting and sales of pharmaceuticals to U.S. citizens through the AdWords program. See Henning 2011.

a safe harbor in section 1114(2) for the category of ‘innocent infringers’. This category could include search engines.⁷⁶⁰

9.3.4 Search engine intermediary liability in Europe at the national level

To complete the picture of search engine liability regulation from the European perspective, it is necessary to say something about the treatment of search engine intermediary liability at the level of the various Member States. The absence of a search engine specific safe harbor at the EU level from the intermediary liability regulation in the ECD has led to divergent treatment of search engines by legislatures and the judiciary in the various Member States of the European Union. Importantly, the ECD does not provide for full harmonization of intermediary liability exemptions. There were amendments in this direction by the European Parliament, but they did not make it into the final proposal.⁷⁶¹ Therefore, the ECD left room for the Member States to extend the safe harbors to search engine providers and other intermediaries. According to the European Commission’s first report on the application of the ECD this room has been used by a few Member States, including Spain, Portugal, Austria and EEA-member Liechtenstein.⁷⁶² The new EU Member States Hungary and Poland also extended the limitation on liability for providers of hosting services to information location tools.⁷⁶³ Some national courts have, like the ECJ, applied the hosting safe harbor to search engines.⁷⁶⁴ The absence of a search engine-specific safe harbor at the EU level also means that Article 15 ECD not obviously apply in the context of search engines. This would mean that EU law does not stand in the way of national legal preventive duties of care or duties to monitor for search engine providers. Notably, it is quite possible that Article 15 is merely a restatement of general legal principles which are already recognized at the national level. The same is actually true for Articles 12 to 14 ECD.⁷⁶⁵

In the remainder of this section, some notable developments in different European countries with regard to search engine intermediary liability regulation will be addressed, as well as the more recent case law of the European Court of Justice about the scope of the hosting safe harbor. The latter is significant for the legal framework for search engines as the ECJ leaves room for the view that search engines are within the scope of Article 14 ECD.

⁷⁶⁰ See Lemley 2007. See also JOLT 2005.

⁷⁶¹ See European Parliament 1999, p. 26 (“The limitations on liability established by Articles 12, 13 and 14 are exhaustive”) and European Parliament 1999, p. 58, 82 (Amendments 22 and 16 by the Committee on Economic and Monetary Affairs and Industrial Policy and the Committee on Culture, Youth, Education and the Media respectively).

⁷⁶² See European Commission 2003.

⁷⁶³ See 2001. évi CVIII Törvény az elektronikus kereskedelmi szolgáltatások, valamint az információs társadalommal összefüggő szolgáltatások egyes kérdéseiről [Act CVIII of 2001 on Electronic Commercial Services and Certain Legal Aspects of Information Society Services] (promulgated 24 Dec., 2001), MAGYAR KÖZLÖNY [HUNGARIAN GAZETTE] 2001/153; Ustawa z dnia 18 lipca 2002 r. o świadczeniu usług drogą elektroniczną [Law of July 28, 2002 Concerning the Provision of Electronic Services] (entered into force Mar. 10, 2003), DZIENNIK USTAW [OFFICIAL JOURNAL] 2002, no. 144, item 1204, available at <http://www.nowemedia.home.pl/nuke/modules.php?name=Sections&op=viewarticle&artid=6> (Poland).

⁷⁶⁴ See section 9.3.5.

⁷⁶⁵ ECJ, Opinion Advocate-General Jääkinen, 9 December 2010, C-324/09 (*eBay*), § 136.

The overview of national developments is far from comprehensive.⁷⁶⁶ Instead it functions as an overview to allow for a subsequent discussion about the merits of the legislative and different legal solutions from the perspective of freedom of expression. First, the choice of some legislatures to explicitly extend the safe harbors from the Directive to search engines will be discussed. After that, some notable case law in the Member States in which search engine liability was left unaddressed in the implementation of the Directive on Electronic Commerce will be addressed. The section will conclude with a discussion of more recent developments at the EU level, namely the European Commission review of the Directive and the case law of the European Court of Justice about the scope of Article 14 ECD.

Austria has adopted a search engine liability exemption modeled on the mere conduit safe harbor of Article 12 ECD.⁷⁶⁷ Interestingly, in the Austrian government's initial proposal, the safe harbor was modeled on the hosting exemption of Article 14, which is similar as the safe harbor for search engines in the DMCA. Various stakeholders responded to the initial choice of the Austrian government with a range of arguments against treating search engine providers like hosting providers. It was argued that search engines are not the source of the information they link to, and are not in the position to remove it from the Web.⁷⁶⁸ The Austrian legislature changed the proposal into the mere conduit regime.

The Spanish legislature chose to adopt the hosting regime of Article 14 for unlawful results of search engine providers.⁷⁶⁹ The Spanish law contains one provision for providers of hosting and search engine services. A hosting or search engine provider is not held liable for resulting damages if they do not have knowledge of the illegal nature of the information. The exemption requires that they act expeditiously if they obtain such knowledge. The Spanish implementation has been praised for providing legal certainty for search engines.⁷⁷⁰

However, the safe harbor does not protect search engines against administrative orders and litigation seeking injunctive relief. In 2011, for instance, the Spanish Data Protection Authority, which is charged with overseeing compliance with the EU Privacy Directive (95/46/EC), ordered Google to stop referencing to allegedly defamatory Spanish newspaper articles.⁷⁷¹ Google has challenged the administrative order to remove 100 links in Spanish court, which has reportedly led to referral to the European Court of Justice.⁷⁷² Most remarkably, the articles themselves, some of which are authored by major Spanish newspaper *El País*, and others, including official government reports published in the

⁷⁶⁶ It does not include a discussion of the (complicated) situation in France. For a discussion see Joslove & Krylov 2005. For example, a French court has concluded that Digg-like selection intermediaries can be held liable for third party references to unlawful third party publications. T.G.I. Paris, 26 March 2008. See also Spindler & Verbiest 2007.

⁷⁶⁷ Bundesgesetz: Regelung bestimmter rechtlicher Aspekte des elektronischen Geschäfts- und Rechtsverkehrs [E-Commerce Gesetz - ECG] [Law on Electronic Commerce] Bundesgesetzblatt [BGBl] I No. 152/2001 (Austria).

⁷⁶⁸ For a discussion of the Austrian debate about the proper safe harbour in Austria, see Van Hoboken 2009.

⁷⁶⁹ See art. 17 of Law 34/2002 on Information Society Services and Electronic Commerce (Ley 34/2002 de Servicios de la Sociedad de la Información y de Comercio Electrónico) of Jul. 12, 2002 (B.O.E. 2002, 166) (Spain). For a short overview of the Spanish implementation of the Directive on Electronic Commerce, see Julia-Barceló 2002. See also Peguera 2009.

⁷⁷⁰ See Julia-Barceló 2002.

⁷⁷¹ See Halliday 2011a.

⁷⁷² See Halliday 2011b. See also Fleischer 2011. The court still had to make the actual reference at the time this study was finalized.

interest of transparency, are not the subject of litigation and are not proven to be defamatory or privacy infringing in court. In fact, the Spanish Data Protection Authority has no power to request their removal from the sites themselves but merely seeks to limit the alleged damage of the allegedly defamatory articles through obscuring their existence in search engines.⁷⁷³ In its defense against the order Google explicitly refers to the profound chilling effect of the order on the right to freedom of expression. Spanish authorities, in turn, claim that the respective individuals have a right to be forgotten, a concept which has been made central in the review of the EU Privacy Directive by the European Commission.⁷⁷⁴ However, the idea that search engines could be ordered to remove material from their index while the actual publication of this material should be considered legal is not consistent with the freedom of search engine providers to publish references as protected by Article 10 ECHR and the protected interests of information providers to freely find their way to an audience through search engines.⁷⁷⁵

In Germany the ECD is implemented through the federal Telemediengesetz (TMG), amended in 2007. Articles 8-10 of the TMG do not contain limitations on liability for hyperlink and location tool providers, similar to the initial law implementing the Directive on Electronic Commerce, the Teledienstegesetz of 2002. Search engines, through the FSM, have expressly asked to extend the framework to search engines and to adopt the Austrian solution, but the German legislature has not acted on this industry plea (which explicitly refers to the value of a search engine-specific safe harbor for the realization of the right to freedom of expression).⁷⁷⁶ Consequently, the liability of search engines is governed by general laws, applied by German courts in an increasingly complex body of case law.⁷⁷⁷ Of special concern in the debate in Germany has been the question about the possibility of preventive duties of care on search engines imposed on the basis of the German tort law doctrine of 'accessory liability' (*Störerhaftung*), which could result in obligations on search engines to filter or actively monitor for specific unlawful references they might refer to.

The Dutch legislature transposed Articles 12-15 almost literally into the Dutch Civil Code.⁷⁷⁸ In the absence of legislation and in view of the different outcomes of legal proceedings, the liability of search engines is a difficult, possibly open, issue in Dutch law.⁷⁷⁹ Until today, the Dutch government or Parliament has not discussed the issue of hyperlink or search engine liability. Case law with regard to search engine (secondary) liability is scarce.⁷⁸⁰ Dutch courts deal with questions about search engine liability and possible duties of care to remove references through general tort law principles, which tends to lead to a standard amounting to a safe harbor similar to that of hosting providers. Only after

⁷⁷³ For a discussion, see section 8.5.4.

⁷⁷⁴ OUT-LAW.COM 2011. See also Reding 2011, p. 4; Werro 2009.

⁷⁷⁵ See Section 8..5.4.

⁷⁷⁶ See FSM 2007.

⁷⁷⁷ For an overview and discussion of search engine liability in Germany, see Spindler & Verbiest 2007, Annex D (Germany). See also Sieber & Liesching 2007; Ruess 2007; Ott 2008, Ott 2009.

⁷⁷⁸ Aanpassingswet richtlijn inzake elektronische handel [Implementation Law Directive on Electronic Commerce], Stb. 2004, 210 (Neth.). The limitations on civil liability can be found in the Dutch Civil Code, Article 6:196c.

⁷⁷⁹ For a discussion, see Van Hoboken 2008.

⁷⁸⁰ V.zr. Rechtbank [District Court] Amsterdam 26 April 2007 (*Jensen*), Rechtbank [District Court] Haarlem 12 May 2004 (*Zoekmp3*), Gerechtshof [Court of Appeals] Amsterdam, 15 Juni 2006, (*Zoekmp3*).

obtaining knowledge from which the unlawfulness of a reference is apparent would there be a duty of care on search engines to remove the reference from the index.

The United Kingdom transposed the Directive on Electronic Commerce into national law in 2002 with the Electronic Commerce Regulations 2002 and did not insert additional exemptions for providers of hyperlinks and information location tools.⁷⁸¹ In the end of 2006, the U.K. government conducted a review of the intermediary liability regime specifically addressing the question whether the existing safe harbors should be extended to providers of hyperlinks, location tools and content aggregation services.⁷⁸² The government received a predictably mixed response to its questionnaire and concluded that there was at that point insufficient evidence to justify an extension of the limitations on liability at the national level.⁷⁸³ More specifically the U.K. government concluded that the issue should be dealt with at the EU level by the European Commission in its review of the Directive.

9.3.5 Developments at the EU level and the ECJ

Article 21 of the Directive instructs the European Commission to conduct a biannual report on the application of the Directive. The report must contain an analysis of the need for proposals concerning the liability of providers of hyperlinks and location tool services.⁷⁸⁴ In the report of 2003, concluding the first and only review thus far, the European Commission concluded there was no reason to amend the existing intermediary liability rules with regard to search engines.⁷⁸⁵ The Commission did note diverging legislative choices and wrote the following about legal developments with regard to search engine liability:

“It is encouraging that recent case-law in the Member States recognizes the importance of linking and search engines to the functioning of the Internet. In general, this case-law appears to be in line with the Internal Market objective to ensure the provision of basic intermediary services, which promotes the development of the Internet and e-commerce. Consequently, this case-law does not appear to give rise to any Internal Market concerns.”⁷⁸⁶

Of course the Directive was rather new and some Member States still needed to implement it at the time of the review. The Commission subsequently placed the issue on the agenda of the next review. In 2010 the Commission finally launched a public consultation which will probably lead to an official review of the Directive. The consultation pays special attention to the question of intermediary liability, including the position of search engines in the EU safe harbor framework.⁷⁸⁷

⁷⁸¹ Electronic Commerce Regulations, 2002, S.I. 2002/2013. For a critical discussion of the UK legislative choices with regard to intermediary liability, see Turner et al 2003.

⁷⁸² See DTI 2005.

⁷⁸³ See DTI 2006.

⁷⁸⁴ Article 21(2), Council Directive 2000/31, 2000 O.J. (L 178) 1 (EC).

⁷⁸⁵ European Commission 2003, p. 22.

⁷⁸⁶ European Commission 2003, p. 13.

⁷⁸⁷ European Commission 2010b. For instance, question 63 asks for submitters to inform the European Commission about their experience with search engine liability in the Member States.

Clearly, the short overview in the previous section clarifies there is significant divergence between the Member States with regard to the liability of search engines for unlawful references. This state of affairs has consistently led researchers to conclude that search engine liability in the EU is in a worrisome state and should be amended.⁷⁸⁸ In fact, it is hard to disagree with Google's submission in response to the consultation:

*"the law in this area is in tatters. Harmony across the EU is non-existent. There is no clarity for users, information society services or the courts."*⁷⁸⁹

In the mean time, the European Court of Justice has started to answer prejudicial questions about the scope of the safe harbors in the ECD. Unfortunately, however, the ECJ may have added to the confusion by concluding that search engines – at least with regard to sponsored links - could actually assert the protection of the hosting safe harbor, instead of concluding that the ECD does not harmonize search engine intermediary liability. In addition, the ECJ has restricted the EU safe harbors to intermediary activities of a "*merely technical, automatic and passive nature*", a formula which is based on recital 42 of the Directive. A short review of the ECJ's main conclusions as well as the corresponding opinions of the Advocates General can be instructive to show the confusion about the scope of intermediary liability regulation at the EU level.

The first case touching on search engine liability to reach the ECJ was the Google AdWords case. This case was referred to the Court by the French *Cour de Cassation* in proceedings between Google France and Louis Vuitton. The case deals with the widely litigated question of whether a search engine can be held legally accountable for trademark infringements in sponsored search results.⁷⁹⁰ Amongst the prejudicial questions was the question whether:

*"the provider of the paid referencing service be regarded as providing an information society service consisting in the storage of information provided by the recipient of the service, within the meaning of Article 14 of [Directive 2000/31], so that that provider cannot incur liability before it has been informed by the trade mark proprietor of the unlawful use of the sign by the advertiser?"*⁷⁹¹

In his opinion, Advocate-General Maduro answers this question in the negative. As he rightly concludes, search engines do qualify as information society services. His analysis on this point is complicated somewhat by his consideration of the claim, that Article 21 ECD may be interpreted as meaning that search engines are not covered by the ECD at all. Usually Article 21 ECD is used as evidence that the Directive does not provide for a search specific safe harbor.⁷⁹² With regard to the question whether Google can assert the protection of the hosting safe harbor for its AdWords service, the Advocate-General relies on the nature of Google's relationship with advertisers to conclude that it cannot. In his

⁷⁸⁸ See e.g. Spindler & Verbiest 2007. See also Van Hoboken 2009.

⁷⁸⁹ See Google 2010a.

⁷⁹⁰ See also ECJ 26 March 2010, C-91/09 (*EIS.de*), ECJ 8 July 2010, C-558/08 (*Portakabin*) and ECJ, Advocate-General Jääskinen, 24 March 2011, C-323/09 (*Interflora*).

⁷⁹¹ ECJ 23 March 2010, Joined Cases C-236/08 to C-238/08 (Google Adwords),

⁷⁹² See e.g. Spindler & Verbiest 2007. See also Van Hoboken 2009a.

opinion, Google is no longer a “*neutral information vehicle*” when providing the AdWords service, because it has a “*direct interest in Internet users clicking on the ads’ links.*”⁷⁹³ The Advocate-General derives this neutrality requirement from Article 15 of the Directive, which is, in his view, “*the very expression of the principle that service providers which seek to benefit from a liability exemption should remain neutral as regards the information they carry or host.*”⁷⁹⁴ The opinion concludes that, with regard to its organic results Google does in fact fulfill this neutrality requirement, on the basis of the following argument:

*“[Google’s] natural results are a product of automatic algorithms that apply objective criteria in order to generate sites likely to be of interest to the Internet user. The presentation of those sites and the order in which they are ranked depends on their relevance to the keywords entered, and not on Google’s interest in or relationship with any particular site. Admittedly, Google has an interest – even a pecuniary interest – in displaying the more relevant sites to the Internet user; however, it does not have an interest in bringing any specific site to the Internet user’s attention.”*⁷⁹⁵

Notably, Chapter 8 of this thesis concludes that search engines are not neutral by nature, since they actively match information providers and end-users and this active role with regard to the valuation of different online destinations for users is what helps to make one search engine more valuable than another.⁷⁹⁶ Since indifference to the value of information or an online destination offering goods or services would run contrary to the role of search engines for end-users it would be wrong to use this as a criteria for a search engine liability safe harbor.

The ECJ does not follow this logic of the Advocate-General with regard to the scope of Article 14 of the Directive. The Court first explains that the hosting safe harbor in Article 14 ECD

*“applies to cases ‘[w]here an information society service is provided that consists of the storage of information provided by a recipient of the service’ and means that the provider of such a service cannot be held liable for the data which it has stored at the request of a recipient of that service unless that service provider, after having become aware, because of information supplied by an injured party or otherwise, of the unlawful nature of those data or of activities of that recipient, fails to act expeditiously to remove or to disable access to those data.”*⁷⁹⁷

In the Court’s view, the storage of “*the keywords selected by the advertiser, the advertising link and the accompanying commercial message, as well as the address of the advertiser’s site*” on the request of the recipient of the service, i.e. the advertiser, falls within the scope of this provision.⁷⁹⁸ Notably, the Court does not take into account Article 21 ECD. The ECJ then concludes that in order to profit from the safe harbors a service provider’s conduct “*should be limited to that of an ‘intermediary service provider’*

⁷⁹³ ECJ, Opinion Advocate General Maduro, 22 September 2009, Joined Cases C-236/08 to C-238/08 (*Google Adwords*), § 145.

⁷⁹⁴ *Id.*, § 143. Notably, the word ‘neutral’ does not appear in the Directive at all. See also Walden 2010.

⁷⁹⁵ *Id.*, § 144.

⁷⁹⁶ See Section 8.4.

⁷⁹⁷ ECJ 23 March 2010, Joined Cases C-236/08 to C-238/08 (*Google Adwords*), § 109.

⁷⁹⁸ *Id.*, § 111.

within the meaning intended by the legislature in the context of Section 4 of that directive.”⁷⁹⁹ It then states that

“it follows from recital 42 in the preamble to Directive 2000/31 that the exemptions from liability established in that directive cover only cases in which the activity of the information society service provider is ‘of a mere technical, automatic and passive nature’, which implies that that service provider ‘has neither knowledge of nor control over the information which is transmitted or stored’.

114. Accordingly [...], it is necessary to examine whether the role played by that service provider is neutral, in the sense that its conduct is merely technical, automatic and passive, pointing to a lack of knowledge or control of the data which it stores.”⁸⁰⁰

While mentioning a number of circumstances that must be considered irrelevant – the mere fact that service is subject to payment – as well as some circumstances that must be considered relevant – the role of the search engine in drafting the message or the selection of keywords that trigger the advertisement – the ECJ concludes that the national courts are in the best position to make the final assessment whether the provider’s conduct is actually protected by Article 14 ECD.

In the *AdWords* case the ECJ does not address the question of to what extent organic results would face a similar treatment and it avoids using the terms ‘search engine’ and ‘information location tool’ altogether. However, its conclusions directly imply that all EU safe harbors are conditional on the cited criteria of recital 42 ECD. Moreover, the Court’s considerations directly impact on the state of affairs of search engine liability in the Member States. National legislatures that assumed that the ECD did not affect search engine liability and provided for a specific safe harbor at the national level are confronted with the situation that search engines may end up being covered by the safe harbors at the EU level in a way their legislation did not anticipate. The same is true for national courts. In Germany, for instance, courts considered themselves unconstrained by the Directive in their interpretation of national legal rules with regard to search engine liability for third party content.⁸⁰¹

One explanation that the European Court’s application of the wording of recital 42 in the context of the hosting safe harbor may have been a mistake has come from within the institution itself, namely from Advocate-General Jääskinen in the case between *L’Oréal* and *eBay*. The A-G points out that the safe harbors referred to in recital 42 solely concern the exemptions relating to ‘mere conduit’ and ‘caching’ and warns the Court against further attachment of recital 42 to the hosting safe harbor in Article 14.⁸⁰² In addition, he concludes that the ‘neutrality’ test is not the right test to decide on the scope of the hosting safe harbor in Article 14 ECD.⁸⁰³ In its judgment, however, the ECJ does not follow this opinion

⁷⁹⁹ *Id.*, § 112.

⁸⁰⁰ *Id.* § 113-114.

⁸⁰¹ See e.g. Schubert & Ott 2010, pp. 85-88.

⁸⁰² ECJ, Opinion Advocate General Maduro, 22 September 2009, Joined Cases C-236/08 to C-238/08 (*Google Adwords*), § 142.

For a discussion, see Brömmekamp 2011; Van Eecke & Truyens 2011; Schubert & Ott 2010.

⁸⁰³ ECJ, Opinion Advocate-General Jääskinen, 9 December 2010, C-324/09 (*eBay*), § 146.

and restates its conclusion in *Google AdWords* that an intermediary's service falls outside of the scope of the EU safe harbors, when it,

*“instead of confining itself to providing that service neutrally by a merely technical and automatic processing of the data provided by its customers, plays an active role of such a kind as to give it knowledge of, or control over, those data [...].”*⁸⁰⁴

Similarly to the *Google AdWords* case, the ECJ adds a number of considerations which national courts have to take into account when answering this question. Amongst these considerations, of specific concern for search engine providers is the ECJ's conclusion that an intermediary service provider that has an active role in *“optimising the presentation of the offers for sale”* would lose the protection of the hosting safe harbor.⁸⁰⁵

9.4 Intermediary liability regulation of search engines and freedom of expression

9.4.1 Introduction

What is at stake from the perspective of freedom of expression in the context of intermediary liability of search engines? Freedom of expression enters the considerations about appropriate third party liability standards in a number of ways.⁸⁰⁶ First, a clear legal framework for search engine providers for one of the most significant legal issues and related risks in operating a search service, namely third party liability, facilitates a proper market for these services. Since search engines are an essential element in the public information environment, the offering of such services should clearly not be hampered by legal uncertainty, but rather facilitated instead. Second, because of their facilitative role with respect to the communicative freedom of third parties, end-users and information providers in particular, the right to freedom of expression is inconsistent with extensive duties of care on search engines with regard to allegedly unlawful references, preventive duties of care to monitor for unlawful content in particular. Such duties of care would incentivize search engine providers to restrict legal information flows to limit their legal risks of liability and would therefore have a predictable chilling effect on the effective enjoyment of the right to freedom of expression in the online environment. For these reasons it is preferable to restrict the liability of search services to instances where a high level of fault can be established. The First Amendment standard developed in *Sullivan* for the press acting as an intermediary can serve as an excellent example of this generally accepted principle.⁸⁰⁷ Finally, in the absence of clear legal standards about their proper legal obligations for the references in their indexes, search engines could be incentivized to enter into restrictive self-regulation, for instance through filtering.⁸⁰⁸

The first aspect mentioned above should not be overlooked. Freedom of expression and communication is served by the freedom of communications and information service providers to actually provide their

⁸⁰⁴ ECJ 12 July 2011, C-324/09 (*eBay*), at 113.

⁸⁰⁵ ECJ 12 July 2011, C-324/09 (*eBay*), at 116.

⁸⁰⁶ See also the discussion of liability of Internet access providers in Section 6.4.

⁸⁰⁷ *Tushnet* 2008. See also Section 5.3.2.

⁸⁰⁸ See Section 9.2.2 and Section 9.2.3.

services online. The ECD also recognizes this in recital 9.⁸⁰⁹ Proper legal certainty for, and the free movement of, search engine services in the European internal market would serve the right to freedom of expression because it would facilitate the actual offering of such services. The apparent confusion about third party liability of search engines at the EU and Member State level can only be considered problematic from this perspective. In addition, a legal framework which would facilitate and stimulate the offering of a variety of search engines in the EU internal market could serve search engine choice and diversity. Dominant search engine providers such as Google are likely to be in a better position to deal with costly litigation or fulfill extensive duties of care imposed upon them.

As to the second aspect, the substance of the third party liability standard for search engine providers, it is generally accepted that liability for third party material can lead to chilling effects on lawful communications. A search engine provider has an economic incentive to minimize legal liability. The best evidence of the chilling effect on search engine providers is provided by studies of the way in which search engines respond to notices of unlawful references under the DMCA safe harbor. This safe harbor requires that unlawful references are removed upon obtaining knowledge thereof through specific notifications, a requirement that major U.S.-based search engines adhere to on a global level. Empirical evidence shows that search engine providers may overreact to notices of unlawful references.⁸¹⁰ The search provider has to make a determination of the merits of the notification: is the reference truly unlawful? This determination isn't easy and involves a prediction of what a judge would ultimately rule on the merits. The provider has to strike a balance between the risk of being too responsive to notices, thereby obstructing legal information flows and diminishing the social utility of its service, and the risk of being too restrictive in responding to such notices, thereby not fulfilling the condition of the safe harbor and becoming liable.

Preventive duties of care not to provide references to unlawful material ever would basically mean that search engines would have to take strict editorial responsibility for the references provided by their services. The only way providers could be able to escape continuing risks of third party liability would be to review every reference in their index. The typical open governance of search engines, in which reliance is placed on billions of third party signals, would be impossible. Moreover, search engines would probably start to use Internet content filters and additional human review of every reference. In view of the amount of websites that is typically included in the index of general purpose search engines, this could mean that the index of general purpose search engines would be drastically reduced. And the dynamic nature of websites would pose an additional problem, possibly leading to white listing instead of general indexing of the Web. In short, general purpose search engines such as we know them would be made legally impossible.

It is also clear that in the case of search engines services some balance needs to be struck between the freedom of expression interests addressed in detail in this study and the need to enforce copyright law, defamation and privacy law and other laws imposing restrictions on information flows. It seems safe to assume that Web publishing will remain free and the barriers to entry will remain low. Prior restraints

⁸⁰⁹ See Section 6.4.6.

⁸¹⁰ Urban & Quilter 2006.

on the mere possibility to start a website are themselves unacceptable from the perspective of freedom of expression. At the same time, it is hard to argue against the assumption that some end-users will use this freedom to publish illegal or unlawful material online. General purpose search engines will subsequently crawl such websites and make them more widely available for a worldwide audience. Hence a balance has to be struck between compromising information retrieval for the Web and the Internet more generally on the one hand and accepting access to unlawful references in search engines on the other hand.

Clearly, when deciding on the proper boundaries of search engine liability for third party material the right to freedom of expression is not the only concern. As was mentioned above, there are a variety of reasons why references might be legally problematic and their removal from search engines may be argued to be desirable. Search engines do, as a result of the way in which they operate provide references to material that may cause harm to a variety of third parties. To better understand the way in which a balance is and could be struck, it is important to understand the reasons for requiring search engines to remove such references in the first place. To arrive at this understanding, the next sections section will discuss the liability of search engines for references to unauthorized copies of creative works on the one hand and the liability of search engines for referring users to defamatory content and unlawfully published private information on the other hand.

9.4.2 Search engine liability, freedom of expression and copyright infringing material

The Internet and the Web facilitate the unlawful dissemination of copyright protected works in various ways, a full discussion of which is far beyond the scope of this study.⁸¹¹ What is clear, however, is that the effectiveness of the various dissemination models for creative content partly relies on the availability of an effective system to provide for findability of the content that is actually available for sharing. Obviously, the World Wide Web (in combination with search engines) is uniquely qualified to facilitate access to creative works. If a band publishes one of their songs on their website, it becomes available to a global audience. The same is true, however, if someone other than the copyright owner posts an unauthorized copy of a song online. Leaving aside the possible constraints on bandwidth of the respective website, the only thing that could stand in the way of a global audience having effective access to the unlawfully published material is the absence of an effective means to find it: a search engine. Hence, search engines typically end up facilitating the accessibility of unlawfully published creative works, such as movies, music and written material.

To strike a balance between the need for effective information location tools and the interests of rights holders, the United States Congress provided for the specific safe harbor for information location tools in the DMCA, discussed in the previous section.⁸¹² In contrast, such a specific safe harbor for information location tools in the context of intermediary liability for copyright infringements was not adopted at the European level. Instead, the legal responsibility for carrying references to unauthorized copies of copyright protected material depends on the law of the Member State. In practice, the lack of a

⁸¹¹ See e.g. Stamatoudi 2010; Huygen et al 2009.

⁸¹² Section 9.3.3.

harmonized legal standard with respect to copyright infringements in the EU is compensated by the fact that all major general purpose search engines do not restrict their DMCA policies to the United States context but comply with all notices about copyright infringement, as if the DMCA safe harbor were applicable on a global level.

Hence, in practice notifications to general purpose search engines such as Google or Bing of references linking to copyright infringing material will usually lead to their removal. The fact that there has been no well-publicized case law in Europe about intermediary liability of general purpose search engines for references linking to copyright infringing material is evidence of a generally accepted status quo between rights holders and dominant search engines that follows the lines of the policy prescribed by the DMCA.

From the European perspective, it is important to reflect on the question whether the DMCA is the lowest common denominator, or whether general purpose search engines based in the U.S. are exporting a free speech-friendly standard to the rest of the world. The absence of a safe harbor at the European level implies that national law has to be as strict in its treatment of search engines as United States law. Dutch law, seemingly, maximally requires general purpose search engines to remove references to infringing material, if they are ‘unmistakably infringing’.⁸¹³ Arguably, this allows for a less responsive treatment of notifications of copyright infringement by general purpose search engines as required under the DMCA, which does not include similar wording “unmistakably” to prevent legal content from being removed. And this is certainly the case under Austrian law, which treats search engines as mere conduits for the content of third parties. Hence, leaving aside the issue of jurisdiction which obviously complicates matters considerably, it is possible that from the perspective of the law of certain European Member States general purpose search engines are removing too much.

Of specific concern in the context of search engines and copyright infringements is the existence of specialized search engines for certain types of material on the Web, for instance for MP3 files, movies, software or for the so-called torrent files which make the exchange of such material over peer-to-peer networks possible. In this context the current status quo may more aptly be called an arms race. This arms race continues to result in plenty of litigation directed at specialized search tools, both in the United States and in Europe, with different results, a full discussion of which goes beyond the scope of this study. For instance, in the Netherlands, a Dutch Court of Appeals found MP3 search engine *Zoekmp3* was to have acted unlawfully.⁸¹⁴ This case involved a dispute between rights holders and a provider of a crawler-based search engine specialized in links to MP3 files on the Web. In the initial judgment, the District Court in Haarlem imposed a duty of care on *Zoekmp3* similar to the safe harbor for hosting providers. *Zoekmp3* had to remove ‘unmistakably unlawful’ references upon receiving notice. However, the Dutch Court of Appeals in Amsterdam ruled that the service was acting unlawfully, based on general Dutch tort law principles. The court concluded that the search engine was making its money by “*structurally exploiting the availability of unauthorized mp3-files on the World Wide Web*”,

⁸¹³ See Vزر. Rechtbank [District Court] Amsterdam 26 april 2007 (*Jensen*).

⁸¹⁴ For a discussion, see Van Hoboken 2009a.

finding Zoekmp3 had not taken the interests of rights holders sufficiently into account.⁸¹⁵ The conclusion logically implies a duty for similar (vertical) search engines under Dutch law to actively prevent unlawful references from showing up in their service.⁸¹⁶

9.4.3 Search engine liability, freedom of expression and the protection of private life and reputation

Another important reason to press search engines for the removal of references is the protection of privacy and the reputation of individuals. Without having to consider precise empirical evidence, it is clear that defamatory publications are posted on the Web on a daily basis and the Web is a significant source of unlawfully published personal data.⁸¹⁷ Search engines retrieve and include information and statements as related to natural persons in their lists of references. Notably, the actual harm that results from these publications typically manifests itself in the context of search results of popular search services like Google.

It is in this context of defamation and privacy infringements through search engines that there are significant differences in the legal treatment of search engine liability between European states on the one hand and the United States on the other hand. In the United States the absolute safe harbor for search engines in CDA 230 has resulted in a situation in which plaintiffs have no proper legal redress when confronted with unlawful information in search results. In Europe the absence of a search engine specific safe harbor for intermediary liability implies that the legal obligations of search engines for these kinds of references will depend on the law of the Member State, while on a more fundamental level these obligations, like for the press and other types of media, will have to reflect a proper balance between the right to freedom of expression and the legally protected interests of the aggrieved person, including the right to private life as protected by Article 8 ECHR.

Consider a hypothetical example of defamation in search results, for instance an untrue statement on an online forum that “X is an alcoholic.” The initial publication of this statement would typically be unlawful. If the online forum hosting the statement is crawled by search engines, the statement will normally show up as a reference in the search results for the query [X]. This will become a problem if there aren’t many people bearing the name ‘X’ and the reference is prominently ranked in popular search engines.

If X were to notify the search engine provider of the unlawful reference, what should the search engine provider do? Under United States law, CDA Section 230 (c)(1) immunizes search engine providers for carrying the statement and showing the reference. The search engine could voluntarily decide to, but does not have to remove the reference.⁸¹⁸ If it would remove the reference CDA section 230 (c)(2) also immunizes the search engine against possible legal claims from third parties, including the website and the author of the statement.

⁸¹⁵ Gerechtshof [Court of Appeals] Amsterdam, 15 Juni 2006, (*Zoekmp3*).

⁸¹⁶ The same reasoning was recently applied by the Dutch District Court of Utrecht to the popular torrent directory *Mininova*. For a discussion, see Van Hoboken 2009d.

⁸¹⁷ For a discussion of the responsibility of search engines under EU data protection law, see Article 29 Data Protection Working Party 2008. See also Fleischer (Google) 2008.

⁸¹⁸ See e.g. *Murawski v. Pataki*, 2007 WL 2781054 (S.D.N.Y. 26 September 2007).

A growing number of U.S. commentators considers the blanket immunity provided by CDA 230 problematic.⁸¹⁹ Neither the provider of the discussion forum, nor the hosting service of that discussion forum, nor a provider of a search engine that would refer to the forum would be under an obligation to remove the statement.⁸²⁰ Obviously, the problems for X worsen if the website allows for anonymous postings – e.g. by not logging or registering any information, such as ip-addresses, about users – and refuses to delete the statement after notification by X. There are several documented cases with this background, the most well-known cases involving the websites JuicyCampus and AutoAdmit and the defamation, harassment and threatening of two female Yale Law School students.⁸²¹ AutoAdmit provided an unedited discussion forum, did not log any information about the users of its service, and let search engines freely crawl the content on the website.

The absence of any legal duty of care on Internet intermediaries as regards damages resulting from defamation, even after specific notification of apparently unlawful speech, is exceptional. It can be interpreted as a combination of the exceptional value that is placed on the value of free speech in United States law,⁸²² combined with so-called cyberspace exceptionalism, i.e. the idea that legal governance online does not have to correspond to legal governance offline.

The situation under United States law, in which the victim of a privacy infringement or an act of online defamation is left without any legal remedy to get the content removed from the search engine or the platform where it is posted is quite unthinkable in Europe. In the European context there is a clear need to strike a balance, as identified by the English court in *Metropolitan* discussed further below. This stands in stark contrast with the blanket immunity which is granted under United States law to a range of intermediaries. The precise duty of care of search engines, however, will depend on the national law of the Member States. Under Austrian law, search engine providers carrying the statement would be treated as mere conduits and exempted from monetary relief, even if they would have obtained knowledge of the unlawful nature of the statement. However, European safe harbors leave open the possibility of injunctive relief, which could also entail the removal of the statement from the search engine's index. Other European countries have provided for an explicit safe harbor, comparable to the safe harbor for hosting providers. In these jurisdictions, search engine providers would have to remove the website containing the defamatory statement from their indexes after being specifically notified. A complicating factor in this regard is that search engine providers are not in a very good position to evaluate the defamatory nature of online content, while the massiveness of their index will have implications for their ability to respond to requests about problematic references.

A different category of search engine liability cases relating to privacy and reputation involves the manipulation of search results to attract an audience. These cases are intricately linked to the operation

⁸¹⁹ See e.g. Solove 2011.

⁸²⁰ Even if the author itself would ask the website provider carrying its statement to remove it, the provider could refuse to do so. See *Sturm v. eBay, Inc.*, No. 1-06-CV-057926 (Cal. Super. Ct. July 27, 2006). This seems to imply that search engines could continue carrying unlawful statements in their index even after they have been removed from the original website.

⁸²¹ For a discussion, see Leiter 2011. See also Solove 2007, pp. 149-160; Gasser, & Palfrey 2010, p. 107; Citron 2008; Citron 2010.

⁸²² See Section 4.3.3.

of search engines and their central role in the 'attention economy'. There are a number of cases which involve the manipulation of search results to attract an audience for instance by providers of pornography websites. This manipulation typically consists of the use of popular search queries, such as a name of well-known persons in websites' text, or in their metadata. The providers (spammers) use the popularity of celebrities to manipulate search results and attract traffic. This practice is commonly referred to as spamdexing.⁸²³

One of such cases, in the Netherlands, involved a TV hostess who complained to Google about the search results for her name.⁸²⁴ A reference, titled *Urmia Jensen naakt* (Urmia Jensen naked), suggested the availability of nude material on the Web, even though no such nude material of the TV hostess was available on the websites. The Dutch Court of First Instance in Amsterdam ruled out the possibility of preventive duties of care for search engine providers as regards the content of search engine results and the content of the websites referred to. It also did not consider it the duty of care of Google to remove the material from its index if, after being notified, it was not found to be 'manifestly unlawful'. A similar standard, using the wording 'unmistakably unlawful', had been developed for hosting providers in Dutch online intermediary liability case law with regard to hosting before the implementation of the ECD. Ultimately, the court concluded that Google had not been in the position to determine the unlawfulness of the reference and therefore it did not have to block the results in question after being notified.⁸²⁵

In Germany there was a similar case with a different result. In the German case the court ordered the search engine to block the results and to install a filter that would prevent any future references with the combination of the plaintiff's name and the word *naakt* (naked) from showing up in its search results.⁸²⁶ This type of keyword blocking is the type of preventive measure that was discussed in the previous section. These preventive measures, because of their overbroad character, should probably be considered inconsistent with the right to freedom of expression as applied to the search engine context.

This case seems an outlier in German case law. In general, German courts have been more receptive of the public freedom of expression interests associated with the operation of search engines and have called for a careful balancing of the right to freedom of expression and information with competing interests such as the right to respect for privacy and integrity of the person.⁸²⁷ Probably the most important German court ruling relating to search engine and hyperlink liability is the *Paperboy* ruling of the German Supreme Court (BGH). In its report on the ECD, the European Commission took specific note

⁸²³ For an early discussion of the practices and legal problems related to spamdexing, see Nathenson 1998.

⁸²⁴ See Vزر. Rechtbank Amsterdam [District Court Amsterdam] 26 April 2007 (*Jensen*).

⁸²⁵ This is remarkable, because the mere fact that no nudity of the plaintiff was available on the website, which is quite easy to check, even for a search engine provider, arguably makes the content of the reference unlawful (under Dutch law). Furthermore, the Court did recognize that Google itself had removed the websites because of the manipulation of its search results. It's hard to see how such manipulation would not imply that the reference in question was unlawful with respect to the proper subject of manipulation, i.e. the TV hostess. For a discussion, see Van Hoboken 2007.

⁸²⁶ LG Berlin [District Court Berlin], February 22, 2005, AZ 27 O 45/05.

⁸²⁷ For a discussion, see Spieker 2005.

of this judgment's consideration of the public interests in the functioning of search engines and hyperlinks, which it considered encouraging.⁸²⁸

The *Paperboy* judgment affirmed the permissibility of the use of hyperlink technologies by crawler-based search engines with a decision referring both to the social utility of selection intermediaries and the fundamental right of freedom of expression and information.⁸²⁹ In a more recent ruling, the Court of Appeals in Hamburg built on the BGH's reasoning in *Paperboy*, concluding that the normal liability standard for publications would be too strict in the case of the publication of references by search engines.⁸³⁰ The Hamburg Court of Appeals concludes that the normal liability standard requires an exception in the case of search engines.

*"This follows from the required balancing between the general personality right and the freedom to impart and receive information, which is called for by a search engine decisively. That is to say, without the operation of search engines the practical application of the informational abundance on the World Wide Web would not be possible. In light of the tremendous amount of websites to be gathered, an automatic process is the only option for the gathering, extraction and presentation."*⁸³¹

In other words, the court argued that the liability of search engines for possibly unlawful expressions in their references – the result of the automatic reproduction of possibly unlawful information from the billions of websites on the Web – should be lowered because of the significance of search engines for the freedom of expression and information.⁸³² The Court nullified a ruling of the Hamburg Court of First Instance which had ruled that search engines start to become liable for the reproduction of unlawful publications of third parties in their references as soon as they become aware of them. In addition, the provider, in the lower court's view, would have to take preventive measures to ensure that similar infringements of the rights of others were not to take place in the future.⁸³³ The Court of Appeals disagreed with the Court's conclusion. First, it considered that the snippets in question were not necessarily infringing, because of the automated nature of their composition and publication. The particular snippets were ambiguous and the average user could not interpret them in a way that would entail an infringement of the rights of the plaintiff.⁸³⁴ The Court did leave open the possibility that a duty

⁸²⁸ European Commission 2003, p. 13.

⁸²⁹ BGH [German High Court] 17 July 2003, I ZR 259/00 (*Paperboy*). The *Paperboy* case addressed the permissibility of hyperlinking and deep linking by a German search engine for press articles under German copyright law and unfair completion law.

⁸³⁰ OLG Hamburg [Court of Appeals Hamburg], 20 February 2007, AZ. 7 U 126/06.

⁸³¹ *Id.* (translation provided by the author).

⁸³² For a discussion of this case, see also Ott 2008.

⁸³³ LG Hamburg [District Court Hamburg], 28 April 2006 - Az.: 324 O 993/05.

⁸³⁴ Differently, *Gerechtshof Amsterdam* [Court of Appeals Amsterdam] 26 July 2011 (*Zwartepoorte*). In this case, the court orders a webmaster to adjust the content on its website to prevent a certain combination of text to appear in the snippet alongside its reference in Google. Notably, the content itself was perfectly lawful. The snippet combination, however, in the Court's view, suggested that the company was bankrupt which caused damage to the plaintiff. The 'damaging' snippet would only show up for a query with the company's name in combination with the Dutch word for bankrupt, 'failliet': [*Zwartepoorte failliet*].

to remove unlawful references as well as a subsequent duty to prevent similar references from showing up in the future, could exist in a different context, for example if the content of the search results were to be unambiguously unlawful.

In the United Kingdom there is a recent case, *Metropolitan*, which concerns the duty of care of search engines through the proper application of common law standards for defamation to search engine results at length.⁸³⁵ The High Court Judge in London decided that the defendant search engine could not be considered the publisher of the defamatory statements, neither in the search results nor on the underlying websites, before receiving specific notice. No could it be between the moment that it received notice and the moment it decided to remove the respective website from its index. The ruling draws specific attention to the state of search engine third party liability for defamation on websites across Europe, with numerous references to implementations of the Directive on Electronic Commerce and the case law in other Member States. In addition, the Court pays attention to the requirements of Article 10 ECHR. First the Judge accepts that he should “*develop the law*, in so far as it is necessary to do so, in a manner which is compatible with Article 10 [ECtHR].”⁸³⁶ In this context he points to “*the principle now recognized in English law (and, for that matter, in Strasbourg jurisprudence) that no one Convention right is to be regarded as taking automatic precedence over any other [...]*.”

The Judge then points out that he has to draw a balance between the right to sue effectively for defamation and the interference with the right to freedom of expression; the interference needs to be proportionate and necessary, ex Article 10 ECHR. The Judge summarizes this balance in the context of this case as follows:

*“I am invited here [...] to come to the conclusion that it is neither necessary nor proportionate to impose potential liability for defamation on the owners or operators of a search engine in respect of material thrown up automatically on any of their “snippet” search results. It is to be borne in mind that in cases where there is a genuine need for compensation or vindication the relevant complainant would (at least in theory) have a remedy, somewhere, against the person(s) who put the original article on the Web, to which the search engine has merely drawn attention.”*⁸³⁷

The Judge concludes that “the purpose of Article 10 is to protect not merely the right of free expression but also, correspondingly, the right on the part of others to receive information sought to be communicated.”⁸³⁸

The need to strike the balance, as identified by the English court in *Metropolitan* lies at core of European intermediary liability law. This stands in stark contrast with the blanket immunity which is granted under United States law to a range of intermediaries. Arguably the European Convention would not even permit European Member States to adopt a provision, similar to CDA 230, since it would be at odds with

⁸³⁵ *Metropolitan International Schools Ltd. V. Designtechtechnica Corp* [2009] EWHC 1765 (QB) (16 July 2009).

⁸³⁶ *Id.*, § 42.

⁸³⁷ *Id.*, § 43.

⁸³⁸ *Id.*, § 44.

the requirement that a proper balance must be struck between the right to an effective remedy for infringements of Article 8 ECHR.⁸³⁹ This requirement is most recently addressed by the ECtHR in the case *K.U. v. Finland*. In this case, an unknown person placed an online solicitation for a sexual relationship under the name of a young boy, listing the boy's name, phone number, date of birth and picture. A second person contacted the boy and was later identified and prosecuted for this act. In addition, the notice was taken down, but the publisher of the notice remained unknown except for the IP address at the time the notice was placed. The victim tried to identify the publisher with the help of law enforcement agencies through the access provider that had issued the IP address. At that time, however, Finnish law did not give the police the authority to order the access provider to hand over the data to the police, because of the low punishment for the crime of acting under a fake identity. Finnish courts affirmed this impossibility. The complainant in *K.U. v Finland* subsequently claimed that Finnish law did not give him an effective remedy (Article 13 ECHR) under the Convention with regard to an infringement of his private life (Article 8 ECHR).

In answering to the complaint under the Convention, the Court pointed to the positive obligation under Article 8 ECHR in the sphere of the relations of individuals between themselves. It concludes that the Member States

“have a positive obligation inherent in Article 8 of the Convention to criminalise offences against the person, including attempted offences, and to reinforce the deterrent effect of criminalisation by applying criminal-law provisions in practice through effective investigation and prosecution [...]”

Subsequently, it emphasizes the need to identify and prosecute offenders on the Internet:

“It is plain that both the public interest and the protection of the interests of victims of crimes committed against their physical or psychological well-being require the availability of a remedy enabling the actual offender to be identified and brought to justice, in the instant case the person who placed the advertisement in the applicant's name, and the victim to obtain financial reparation from him.”

In line with this reasoning the ECtHR concludes that the legal barrier under Finnish law to get access to the personal data held by the access provider, which blocked the identification and prosecution of the perpetrator was an infringement of the Convention.

“An effective investigation could never be launched because of an overriding requirement of confidentiality. Although freedom of expression and confidentiality of communications are primary considerations and users of telecommunications and Internet services must have a guarantee that their own privacy and freedom of expression will be respected, such guarantee cannot be absolute and must yield on occasion to other legitimate imperatives, such as the prevention of disorder or crime or the protection of the rights and freedoms of others. Without

⁸³⁹ Leaving aside the question of to what extent the right to one's 'reputation' is protected under the right to protection of one's private life of Article 8 ECHR. See ECtHR 28 April 2009 *Karakó v. Hungary*.

prejudice to the question whether the conduct of the person who placed the offending advertisement on the Internet can attract the protection of Articles 8 and 10, having regard to its reprehensible nature, it is nonetheless the task of the legislator to provide the framework for reconciling the various claims which compete for protection in this context.”

Clearly a blanket immunity for Internet intermediaries to continue carrying publications which entail severe infringements of the right to private life would run contrary to the demands of a proper balance between Article 8 and 10, as stated by the ECtHR in this case.⁸⁴⁰ Although the ECtHR does not specifically address the question about the need to have an effective remedy to get references to unlawful material removed from search engines, the Court’s reasoning seems to point in the direction of a positive obligation on the State under the Convention to provide for some kind of effective remedy to get material ultimately removed from search engines. The question is if, and how, this remedy can be constructed in a way that is both compatible with the freedom of expression and communication of Internet users and the rights and freedoms of third parties.

9.4.4 The future of search engine intermediary liability in the EU: a recommendation

Any third party liability imposed on search engines, for instance in the form of a safe harbor, conditional on a reactive duty of care to remove references to infringing, unlawful or illegal content, would have some negative effects on robust findability of online material. This last section of this Chapter will identify the legal option for regards search engine intermediary liability that best takes into account the right to freedom of expression while still observing the overarching need to strike a balance between the competing interests which are at stake in this context.

As has been demonstrated, there is currently no clear answer to the question about search engine liability for third party material at the European level, and even at the level of the Member States much remains unclear. Since search engines are amongst the core services that make the online information environment work for everyone, there is quite obviously a good case for harmonization at the European level. Harmonization would strengthen the internal market for search engine providers, enhance the free movement of search engine services, and provide legal certainty which is currently missing.

The initial reasoning of the European legislator not to harmonize was based on a combination of a lack of understanding of the significance of search engines for the online information environment and a willingness to wait for legal developments in the Member States. This has quite obviously led to a situation in which search engines, the most important of which are typically operating at a transnational level, are presented with a variety of legislative choices across Member States and continuing legal uncertainty in terms of complex legal developments in the case law of the Member States.

Arguably, the recent case law of the ECJ has not improved the situation. Its emphasis on the standard from recital 42 ECD that intermediaries need to be neutral, as well as passive, merely technical and automatic in nature, may have further worsened the current state of affairs. Existing EU intermediary

⁸⁴⁰ For a discussion of the possibility of aligning intermediary liability for defamation in the U.S. and EU, see Rustad & Koenig 2005.

liability regulation is already under continuous pressure. Introducing proposals for new exemptions will be difficult in an environment that seems to lean towards extended duties of care for intermediaries. However, the necessary discussion at the EU level about the need for an extension of intermediary liability regulation to hyperlinks and selection intermediaries should not start from the assumption that the current status quo is the result of a full discussion of the subject. Search engine liability was for the most part ignored in the process leading to the ECD and ultimately stalled in Article 21 ECD. The question is what form a search engine specific safe harbor at the EU level should have and under what circumstances and conditions a search engine provider could be legally required to remove unlawful references from its index.⁸⁴¹

Regardless of the type of safe harbor that would be applied to search engines, it is important that the obligation on Member States in Article 15 ECD not to impose general obligations to monitor third party content for illegal or unlawful communications on Internet intermediaries would be extended to search engine providers. Such general obligations could easily result in overly restrictive indexing practices by search engine providers, thereby resulting in serious obstacles to the right to freedom of expression online. Currently, the relevance of Article 15 (1) ECD for search engine providers comes to depend on the question of whether search engines can assert the protection of one of the safe harbors in Article 12-14 ECD, since Article 15 ECD only applies to activities of information society services covered by the definitions of hosting, caching or mere conduit.

In addition, the application of the requirement derived from recital 42 ECD in the ECJ's case law that intermediary service provider's activity should be "*neutral, in the sense that its conduct is merely technical, automatic and passive, pointing to a lack of knowledge or control of the data which it stores*"⁸⁴² should be revisited. For search engines this requirement, when not specifically restricted to unlawful references could be particularly problematic, since the value of their intermediary activity in the public networked information environment is directly related to their lack of neutrality with regard to the value of the content for end-users. Moreover, the condition that its activity must remain technical and automatic could incentivize search engines to choose a hands-off approach with regard to the manual adjustment of problematic, low quality or possibly harmful search results.⁸⁴³ In fact, search engines do manually interfere with search results on a regular basis to enhance the quality of their services. The requirement that a search engine should remain passive could also have undesirable implications for innovation and improvements in the field of search result quality. Clearly, any conditions tied to a search engine specific safe harbor should leave room for search engine providers to develop new methods to enhance the quality of their service for end-users and to optimize their service as platforms for information providers to compete for an audience.

⁸⁴¹ More generally, the safe harbor framework in the ECD has not always functioned adequately, neither from the perspective of the services that have asserted their protection, nor from the perspective of third parties, including government, that have sought to the assistance of Internet intermediaries to prevent (access to) infringing or unlawful content or activities. See also Chapter 6. A discussion of the open issues in EU intermediary liability regulation more generally is beyond the scope of this research.

⁸⁴² ECJ 23 March 2010, Joined Cases C-236/08 to C-238/08 (*Google Adwords*).

⁸⁴³ This is precisely the dilemma that led to the enactment of the Communications Decency Act, section 230. For a discussion, see Chapter 6.4.4.

When choosing between the current safe harbors in the Directive of Electronic Commerce, maybe the most logical, and probably the most politically viable option for a search engine specific safe harbor, would be the hosting safe harbor. This would lead to a situation for search engines under EU law which is comparable to the legal situation for search engines in U.S. law under the DMCA, section 512 (d). As discussed before, several European Member States have already chosen to adopt a similar search engine specific safe harbor similar as for hosting providers in their national implementations of the Directive on Electronic Commerce. Due to the current policies of dominant search engine providers, this choice would also not have any practical impact on search engine governance in the context of online copyright infringements,⁸⁴⁴ and it would clarify the duties of care in the context of other interests such as defamation and privacy infringements.

Arguably, however, from the perspective of the right to freedom of expression the hosting safe harbor is too strict for a number of reasons. First, research on the impact of the DMCA safe harbor on the practices of major search engines shows that search engine providers may end up removing allegedly unlawful material upon notice without conducting a proper review of the merits of the claim. Actually, search engines may not be properly situated to make the required legal assessment in the first place. Second, the condition which is typically tied to the hosting provision, to remove unlawful content once the provider has obtained knowledge of the unlawful nature of the content, could also be too strict. It could easily result in the removal of references while the original content remains on the Web. As was concluded in Chapter 8, the matter of fact availability of material online should be taken into account when assessing the permissibility of a legal obligation not to refer to this material. Notably, the hosting safe harbor is based on the standard for the duty of care of distributors.⁸⁴⁵ It may make sense to treat the hosting providers of (the publications on) websites as distributors. Search engines, however, are not the distributors of online material. They merely assist in the effective distribution of material that is already present. They are not in a proper position to remove it. Due to the properties of the World Wide Web and the Internet, search engines, like any other publisher of hyperlinks to online material, do have the capacity to provide end-users with direct access to the actual material. This should not lead to the conclusion that search engines should be considered everyone's sole distributor.

It may make more sense to treat search engines similar as mere conduits, similar as with Internet access providers.⁸⁴⁶ As was discussed above, search engines currently have the status of mere conduits under Austrian law, and, not surprisingly, this is also the preferred legal status of search engines themselves.⁸⁴⁷ And as was discussed in the context of effective legal remedies against references to online publications that qualify as infringements of Article 8 ECHR, a mere conduit safe harbor for search engines could not be absolute, like CDA section 230 in the United States. Even in the case of a mere conduit safe harbor for search engines, there should be room for an effective remedy against certain unlawful references in search results. If the safe harbor would leave open the possibility for "*a court or administrative*

⁸⁴⁴ If the safe harbor would also contain an exception for 'abuse', i.e. search engine services which are specifically and predominantly tailored to profit from or advertised in terms of the findability of unlawful material.

⁸⁴⁵ See Section 6..4

⁸⁴⁶ Id..

⁸⁴⁷ See Google 2010a; Yahoo! Europe 2010.

*authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement,*⁸⁴⁸ as all the safe harbors in the ECD currently do, there is arguably such a legal remedy available.

Strictly speaking, this would mean that everyone that is negatively affected by unlawful material in search engine results and who seek a remedy would depend upon a court or administrative authority to order the removal of this material from the search engines' indexes or the voluntary removal on request by the search engine. Existing self-regulation such as discussed in Section 9.2.2, if continued, would acquire a more voluntary character. Search engines would not be liable for monetary relief, even after obtaining knowledge of the unlawful nature of the material, but they would still be subject to litigation (seeking injunctions) and possible administrative orders, if provided for under national law. Predictably, in such litigation, search engines would not be treated completely the same as Internet access providers, since search engines can actually remove the references to unlawful material, whereas Internet access providers do not have an index to remove anything from.⁸⁴⁹ Similarly as for hosting providers, courts and administrative authorities could maximally order search engine providers to remove the material if the material is unlawful. The idea that search engines could also be ordered to remove material from their indexes of which the actual publication online should be considered lawful is not consistent with the right to freedom of expression in the first place. An obligation on information providers to prevent references to lawful publications from showing up in search engines, for instance through the mandatory use of the robots.txt protocol, is similarly problematic.⁸⁵⁰

If one would accept that search engines have a duty of care to remove unlawful references as soon as they become aware of them, the law would need to clarify what it means for a search engine provider to become aware. The knowledge requirement in the hosting safe harbor has usually been understood as requiring actual knowledge of specific unlawful material.⁸⁵¹ A sufficiently clear notice to a search provider pointing to the specific unlawful material on a specific website could typically function as proof that the provider had knowledge of the unlawful nature of the material. To prevent a situation in which search providers err in favor of complaints about allegedly unlawful but actually perfectly lawful online publications, it would be preferable to restrict a reactive notice and takedown obligation of search engine providers to material that is manifestly or unmistakably unlawful. More generally, notice and takedown obligations on intermediaries could be codified in a way that guarantees due process with regard to the communicative interests of information providers and end-users and transparency and accountability with regard to the removal of content in particular. The guidelines relating to transparency and accountability in the CoE recommendation on freedom of expression and Internet filters, discussed in Chapter 6, can be useful in this context.

The existing safe harbor model which comes closest to striking a proper balance between the societal interest in the freedom of expression and information in the context of search engines and the interests to prevent access to illegal and unlawful material on the other hand, is the safe harbor for proxy caching

⁸⁴⁸ Article 12 (3) ECD.

⁸⁴⁹ This would change as soon as access providers would install the technical possibility to filter Internet access. See Section 6.5.

⁸⁵⁰ See Section 9.3.4. See also Section 8.5.

⁸⁵¹ See e.g. Helberger et al 2008.

services, the most obscure of the three safe harbors in the ECD. Proxy caching is an activity of network and access providers which involves the storage of popular online material closer to the end-user. The role of proxy caching is to enhance the accessibility of online material, but the material remains accessible regardless of whether it is cached by the particular network or access provider. The caching safe harbor in Article 13 ECD provides that information society services which provide transmission services are not liable for proxy caching if a number of conditions are satisfied. In particular, the content should not be modified, while conditions on access must be observed, as well as industry standards on the updating of and recording of data on cached content. Most importantly, the provider has to act

expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement.⁸⁵²

This condition on a search engine specific safe harbor would on the one hand reflect the reality that search engines, in their intermediary role, are merely facilitating access to online material and are not able to remove the material for end-users. On the other hand, it would provide some room for the legal requirement of search engines to remove references to illegal and unlawful material once the material is no longer available, or once a proper judicial authority, under applicable legal safeguards, has acquired a legal order to remove the actual material at its source.

9.5 Conclusion

This chapter has addressed the existing position of search engines in content regulation as well as their legal liability for referencing to third party material from the perspective of the right to freedom of expression. It has been shown that self-regulation by general purpose search engines, as currently exists in a number of European Member States is problematic from the perspective of freedom of expression. On the one hand, it is somewhat symbolic, and ineffective in addressing the underlying concerns. The analysis shows that these self-regulatory frameworks confuse the legal reasons for the pro-active involvement (to escape liability and further regulatory pressure), and the possible genuine willingness to address the concerns of public authorities about the facilitative role of search engines to open up illegal and unlawful content on the Web. Various examples show how public authorities and officials press search engines informally to block and remove websites from their indexes, and to pursue other strategies to prevent access to content, in a way that would be overbroad and therefore inconsistent with the right to freedom of expression if made into a legal obligation.

A complicating factor is the lack of clarity about the legal responsibility of search engines for facilitating access to illegal and unlawful content online. Due to the connection between self-regulatory frameworks and actual legal responsibility, the analysis of self-regulation of access to illegal and harmful content in search engines leads to an analysis of the actual legal responsibility of search engines for the illegal publications of third parties.

⁸⁵² Article 13(1)(e) ECD.

The analysis of the position of search engine services in the regulation of Internet intermediary liability shows that search engines are inadequately addressed in these regimes, at least from a European perspective. The safe harbors for Internet intermediaries in Article 12-14 ECD, as well as the prohibition to impose general duties of care Internet intermediaries, do not clearly extend to providers of search engines. This stands in stark contrast to the legal situation of search engine providers under United States law, which not only contains safe harbors for the same categories of intermediaries which are exempted by the European Directive, but also provides for limited liability of search engines. As shown by the analysis, the absence of a harmonized safe harbor as regards intermediary liability of search engines, does not lead to strict liability at the level of the Member States, but instead a patchwork of legislative choices in some Member States to extend the safe harbors in different ways to search engines and complex legal developments in the case law of other Member States.

The overview of intermediary liability of search engines in the Member States shows that freedom of expression, in particular the interests of end-users to access and use effective means to find online material, is often taken into account by the national courts when addressing the liability of search engines for third party material. However, the analysis also shows that there are many inconsistencies. Because of the general lack of uncertainty in the European context, the legal framework as regards intermediary liability for search engines can only be called unfavorable. In the mean time the lack of legislative clarity about the status of search engines and other intermediaries under the EU safe framework has started to produce case law at the European level. The analysis of this case law shows that the ECJ may have added to the confusion by concluding that search engines could actually assert the protection of the hosting safe harbor, instead of concluding that the ECD does not harmonize search engine intermediary liability. In addition, the fact that the ECJ has restricted the EU safe harbors to intermediary activities of a "*merely technical, automatic and passive nature*", may be problematic for search engines, considering the nature of the media.

From the European legal perspective, it is clear that intermediary liability for search engines and possible additional alternative regulation of search engine access need to strike a balance between the freedom of expression interests addressed in this study and the need to enforce laws imposing restrictions on information flows on the other hand, such as defamation and privacy law or copyright law. A choice for blanket immunity, such as imposed by the Communications Decency Act, section 230, has been shown to be inconsistent with fundamental European legal principles, in particular the right to respect for private life (Article 8 ECHR). In that sense, Europe will have to formulate its own proper answer to the complex issue of intermediary liability of search engines.

The final part of this chapter addressed the most obvious possible ways in which intermediary liability of search engines could be harmonized at the European level. From the perspective of freedom of expression, it is argued that a safe harbor, as is currently applied to hosting services, would be suboptimal, because of the tendency of search engines to be too responsive to legal notices in the context of a similar legal regime as imposed by the DMCA. Either the current mere conduit or the caching safe harbor should be taken as the starting point for formulating a proper safe harbor for search engines. This safe harbor should also take account of the communicative interests of end-users and information providers in transparency and due process, when websites are being removed for legal or

self-regulatory reasons. The current legal framework and actual search engine practices in regard to the removal of references for legal reasons do not sufficiently address these concerns.