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

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Chapter 11: Summary, Analysis and Conclusions

11.1 Introduction

This final chapter summarizes and analyzes the main findings of this thesis in order to answer the main research question:

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

This question was born from the observation that the Web search engine has emerged as a central intermediary in the public networked information environment, but that the implications of one of the fundamental legal principles that should inform the legal governance of Web search engines were far from understood. Clearly, the available technologies, services and online practices that constitute the infrastructure for the opening up of the Web – understood as the process of connecting information and ideas online to their societal use – are of considerable economic, cultural, and political significance. This is particularly true for dominant search engine providers like Google.

Search engines have been at the heart of some of the most important legal and regulatory developments with regard to the proper governance of information flows on the Internet. They are essential for information providers to connect to audiences and they are amongst the primary means for Internet users to navigate the Web and inform themselves freely. This thesis addresses the way in which freedom of expression should and can inform the legal governance of Web search engines. It discusses the role of search engines in the public information environment from the perspective of freedom of expression doctrine and explores the regulatory issues in which freedom of expression can play a particularly important role.

The first part of this thesis (Chapters 2 and 3) provides insight into the history and emergence of the search medium in relation to the Internet and the World Wide Web. It gives an overview of the market developments that have led to the currently available search media. It explains the basic inner workings of Web search engines, their position in the networked communications environment and the value chains on the Internet as well as their relation and function from the perspective of information providers and end-users.

The second part (Chapters 4 to 8) proceeds in three steps. Chapter 4 discusses freedom of expression doctrine in general as well as the specific legal provisions the analysis is focusing on, namely Article 10 ECHR and the First Amendment. While the focus in this thesis is placed on a legal analysis from a European perspective, First Amendment doctrine has been introduced as a comparative legal element to reflect on the conclusions about the implications of Article 10 ECHR for search engine governance.

Chapters 5, 6 and 7 provide the broader historical and contextual foundation for the general research question by discussing the implications of the right to freedom of expression for the governance of the press, the Internet access provider and the public library. These chapters share a similar structure and logic while seeking to do justice to the particular nature of each of these institutions.

Chapter 8 addresses the general question about the implications of the right to freedom of expression for the legal governance of Web search engines, with an emphasis on the development of a theory of the protection accorded to search media under the right to freedom of expression, as well as the way in which the right to freedom of expression of end-users and information providers should further inform a theory of search engine freedom. Notably, Chapter 8 discusses the societal role of search engines from a normative perspective, by making a comparison with, and drawing on, the societal role of the press, the access provider and the public library as informed by freedom of expression doctrine.

The final part of the thesis (Chapters 9 and 10) moves from the protection of communicative freedoms in the search engine context to a number of specific regulatory issues with regard to the governance of information flows through search engines. It addresses issues that have a strong link to the right to freedom of expression. The results of the second part of the thesis and the conclusions in Chapter 8 are used to discuss the extent to which the right to freedom of expression has been and could be properly taken into account in the legal and regulatory practices addressed in this final part of the thesis.

Chapter 9 addresses regulatory issues related to the governance of access in search engines and the legal issues related to search engine intermediary liability for potentially opening up illegal, unlawful as well as harmful material online. Chapter 10 deals with three regulatory issues related to search engine quality. First, the notions of diversity and pluralism are discussed in the context of search media. Second, the value of transparency about the ranking and selection of search results is addressed as well as the regulatory practice of separation between sponsored and organic results in search engine result pages. Third, Chapter 10 discusses issues of user privacy and data protection, while focusing specifically on the instrumental nature of privacy and data protection laws with regard to the intellectual freedom and informational autonomy of search engine users.

11.2 Search engines in the public networked information environment

The starting point for the analysis of freedom of expression and search engine governance is an understanding of the current role of search media in the public networked information environment. To that effect, Chapter 2 has first analyzed the history and market developments related to Web search engines. Chapter 3 offered conceptual models for the Web search engine's information architecture and the way it can be positioned in the online information environment as a whole.

The historical analysis shows that the search engine has its origins in the scientific developments relating to the organization of digital information collections. Already more than 50 years ago, visionaries of the digital age such as Vannevar Bush and Licklider imagined the way in which information technology could be used to strengthen the effective organization of the access to knowledge in our societies. Notably, their thinking placed particular emphasis on the ways in how accessibility and navigation could be improved.

The history of the current Web search engines begins very soon after the successful launch of the hypertext standards for online publication, the World Wide Web. Notably, the Web's design purposefully left the actual organization of online material to its users. The idea was that effective navigation of online material would emerge as a result of linking by Web users. In that respect the

Web's design was different than another contemporary system for Internet publishing, Gopher, which entails a more rigid model for the organization of materials in its design.

The revolutionary rise of the Web as a universal platform for online publication resulted in a strong demand for navigational media and services to help users find valuable online material. Most of the first Web search engines were developed in the academic realm. Later on the business opportunities related to search engines, which proved to be among the most attractive in the Internet industry, became an important driver for the further development of the search engine industry and the innovations that have taken place since then, such as the dominant pay per click advertisement-based business model.

From a regulatory perspective, the gradual consolidation of the search engine market is the most significant market development since the end of the 1990s and most notably the dominance of Google. Chapter 2 presents some of the major elements and historical factors that contributed to this consolidation such as the evolving user expectations, the growing complexities of operating a general purpose search engine and the dynamics of the digital media and ICT industries.

Although Google's dominance raises concerns, this study argues and shows that it remains important to look beyond it. Chapter 2 supports this argument on the basis of a short exploration of remaining competition and of alternative models for the production of Web search functionality in the broad sense. The amount of research and commercial activity which is focused in improving and facilitating the findability of online information gives one little reason to be pessimistic about the question of reliance on a single company. Semantic web projects are also of interest in this context. While they would allow all search engines to improve their offerings, they could also diminish some of the power of dominant search engines – the part which is based on their *exclusive* understanding of the material on Web – by opening up improved meta-data to the Internet community as a whole.

Chapter 3 finds that search engine providers are Internet 'users' like anybody else. Search functionality and the organization of content are built on top or, better to say, on the borders of the network like any other service or application. This means that from a technical perspective there is in principal nothing special or essential about the position of Google as a referencing service. Both from the perspective of end-users as well as information providers there is a variety of alternatives to Google. These alternatives may take place on a much smaller scale on the one hand, or in different contexts such as the newer phenomena of online social networking and micro-blogging services like Twitter on the other hand.

By looking at the position of search media in the layered model of networked communications, Chapter 3 clarifies that search engines map both to the top of the applications/services layer as well as to the content layer of the layered model of networked communications. On the one hand, Web search engines are complex systems of software, typically server-based, which made accessible for users of the network through their Web browsers. On the other hand, search engines have a rather unique link with the content layer as well. First, search engines can be argued to consume and produce 'content' of their own, namely information *about* information – shortly – meta-information. Second, Web search engines derive their functionality from the existence of publicly accessible content elsewhere on the Web. Without the open and unstructured dynamics of content creation on the Web, search engines would not

play the role that they do today. The complexities with regard to the proper legal treatment of the production and proliferation of this kind of 'meta-information' or 'meta-content' are a key element in the legal issues arising in the context of Web search engine governance.

A representation of the search engine in view of the essential value chains in the public networked information environment offers more insight into the critical position of search media in practice. The first value chain in which the search engine plays an important role is the flow of knowledge, information, data, news, and commercial offers from all sorts of online information and service providers to end-users. The second value chain, which is of particular importance from the business perspective of Web services, represents the flow of user attention and activity, in the form of their page views, clicks, purchases and personal data. In both of these value chains search media, and selection intermediaries more generally, have established themselves as one of the central mediating institutions. Search media like Google are uniquely situated to negotiate between the interests of the various stakeholders involved in these value chains.

Chapter 3 concludes with a discussion of search media from a functional perspective, first from the perspective of users and subsequently from the perspective of information providers and advertisers. The discussion of Web search media from the perspective of users draws upon the models of users' needs in information retrieval. These models clarify that in comparison to traditional information retrieval systems, in which the information needs of users were typically only *informational*, Web search media tend to serve two additional types of user needs, namely *navigational* and *transactional*.

Navigational queries are the type of queries with which users aim to reach specific online destinations which they know or simply assume exist. By satisfying navigational queries, such as returning the website of the University of Amsterdam (UvA) as the first result in return to the query [uva], search engines help Internet users to speedily reach the home page of various institutions, organizations, companies or persons. From the perspective of the user, navigational queries have only one right answer. The search engine, however, will have to speculate intelligently, for instance on the basis of other information available about the user such as his location, what the real information need of the user is and whether it should actually return the website of the University of Virginia instead (UVA).

Informational queries represent the need of a user to learn about a certain topic. For Italian users the query [uva] could, for instance, express an informational need to learn about grapes. These kinds of queries, which range from the political and the educational to the medical and the cultural, do not implicate a clear right answer. It is in this context that the questions about search engine quality discussed in Chapter 10 are most pertinent. Is the way in which search engines rank, select and present search results serving the users' right to inform themselves freely? What is the impact of search engines on pluralism and diversity and what to think of the advertisement-based business model and the lack of transparency about and general complexity of ranking and selection practices by dominant search providers?

Transactional queries represent the type of user needs which are directed at reaching a destination where the user will be able to use, buy, or consume a resource. The Web is a tremendous (marketing)

platform for these resources provided by millions of information and service providers, sometimes for free. The fact that users use search engines to gain access to resources makes search engines particularly attractive marketing platforms. It also helps to explain the integration of specific types of search, for instance for videos, geographic information, scholarly articles or pictures, into the offering of general purpose search engines and has informed the vertical integration of search engines into the markets for certain attractive resources.

In sum, the search engine is much more than as a simple telephone directory or yellow page service for the World Wide Web. They help users with a large variety of quite different information needs by actively selecting and ranking lists of online destinations. These information needs range from the political, medical and educational to the navigational, commercial, domestic and recreational. This shows not only the societal breadth of the function of search engines in our public networked information environment but also hints at the large variety of public and private interests that are tied to their operation. In addition, this leads to a conclusion about how search engines end-up selecting and ranking results for their users can be qualified. It can be seen as the expression of a range of underlying judgments about the relevance of various kinds of information and destinations in relation to the relative importance of the perceived needs of their users.

11.3 Freedom of expression implications for media and communications services

Since this dissertation's aim is to understand the proper role of government with regard to a specific medium under freedom of expression doctrine, the question was studied to what extent this role depends on the type of medium or communications services. Hence, the analysis of freedom of expression implications for the press, the Internet access provider and the library studied the way in which the right to freedom of expression has informed the legal and regulatory environment of these institutions. In particular, Chapter 5 to 7 paid close attention to the way in which the different interests of the stakeholders in the communicative processes facilitated by these entities, seen as functional intermediaries between users and information providers, were legally sanctioned by the right to freedom of expression. Taken together, this analysis of freedom of expression implications provides a rich picture of the normative value of the right to freedom of expression for different entities in the public networked information environment and their legal governance.

11.3.1 Press freedom

Both the European Court of Human Rights and the United States Supreme Court have dedicated some of their most significant judgments to press freedom. What stands out is that the press is considered to have a particular role in constitutional democracies. The right to freedom of expression sanctions the freedom of the press partly because of its role in informing the public and contributing to the free dissemination of information and ideas, important ideals underlying freedom of expression doctrine. Hence, the communicative interests of the primary stakeholders in the communicative process are instrumental for the way in which the right to freedom of expression operates in the press context. Notably, the press can claim the highest available protection under the Convention and the First Amendment. However, it does not have a specially protected status that is unavailable to others who are not part of the organized press but still contribute to the publication and dissemination of matters of

public concern in a similar matter. Since the organized press is subject to disruptive developments which are partly the result of convergence, digitization and the entry of new players such as search engines, news aggregators and 'amateur' journalists, this conclusion is significant. It illustrates the need to conceptualize the values *underlying* the freedom of the press, as well as the need to identify the various entities in the public networked information environment that could have similar claims to protection under freedom of expression standards.

The press must be free to contribute to the interests of speakers and readers, but this 'instrumental' aspect of press freedom is limited by the protection of the press versus government interference, its editorial freedom in particular. Freedom of expression implies that the regulatory role of the State with regard to the affairs of the press is minimal and press governance is mostly a matter of self-regulation, professional ethics and the proper application of general applicable laws. Both the ECtHR and the U.S. Supreme Court do not rule out the permissibility of prior restraints, an absolute restriction on editorial freedom, but do apply heavy presumptions against its permissibility under the right to freedom of expression. The protection of the press under the right to freedom of expression also limits the ways in which the State can actively promote the ideals underlying press freedom mentioned above. More specifically, an agenda for positive government involvement, such as indiscriminatory subsidization, media concentration rules, and media pluralism policies more generally, can be permissible means to promote a healthy media environment, but these policies all have to be carefully drafted in light of press freedom as constraint on interference by public authorities.

Under United States law the editorial freedom of the press with respect to the selection of possible speakers is absolute, as follows from *Tornillo*. In this seminal decision the Supreme Court referred to editorial freedom as the exercise of editorial control and judgment. It includes discretion about the choice of material to go into a newspaper, the decisions made as to limitations on the size and content of the paper and their treatment of (public) issues. Under the European Convention, editorial freedom of the press is also strongly protected but it is possible that certain interferences with its freedom to decide what to print can be legitimate, for instance with reference to the rights and freedom of others, such as in a right to reply which is available in some European countries. In addition, the press has to exercise its editorial freedom in accordance with the duties and responsibilities mentioned in the text of Article 10 ECHR itself. The self-regulation of the media, the ethics of journalism, the impact and the technical means used for communicating ideas and information are relevant in this context. In *Stoll* and other recent judgments the Court has made clear it takes these duties and responsibilities seriously. In the Court's view the media has to ensure accuracy, precision, reliability and sometimes even prudence and reasonableness. The duties and responsibilities need to be interpreted in light of the present-day conditions of the media environment, in which in the ECtHR's view they have taken on an added importance.

First Amendment law contains a number of additional interesting doctrinal elements which reflect on the protected interests of potential speakers to reach audience and the interests of the audience with regard to receiving information freely. First, under the First Amendment overbreadth doctrine the Supreme Court can scrutinize the effects of legal restrictions on unprotected speech on the free flow of protected matter. The possibility of chilling effects of unprotected speech regulation on protected

speech can make a restriction impermissible. The regulation of speech to protect against unwilling exposure of a captive audience can be legitimate due to the protection of what can be seen as the informational self-governance of the audience. Finally, the First Amendment also contains a heavy presumption in favor of the rationality of the audience, which is illustrated most clearly in its case law about the protected status of commercial communications and the public's right to receive them.

11.3.2 ISP freedom

In stark contrast with the regulatory model for the press there has traditionally been extensive regulation of communications network providers. However, content regulation tends to be absent or minimal in this context and raises issues under the right to freedom of expression. In vertical relations the owners of the means of communications such as Internet access providers can assert their own right to 'freedom of expression' against government interference, and this right includes the right to access, receive and transmit. Even more than in the case of the press, these rights are informed by the communicative interests of the users of such communications networks.

The interests in communicating freely with the use of steadily improving communications techniques (postal mail, telegraphy, telephony and now the Internet) were clearly served by a practice in which the network owners would not restrict communications over the network. In that respect the regulatory concepts of 'common carrier' and 'universal service' which have helped to shape the regulatory models for communications network providers can also be seen as informed by the right to freedom of expression. Universal service requirements acknowledge the way in which access to communications networks is essential to societal participation. The common carrier requirement guarantees equal treatment of users of the networks, thereby limiting the discretion of network providers to restrict lawful information flows. The discussion about net neutrality involves discussion of the application of similar obligations on Internet access providers.

Clearly, convergence has complicated the regulatory environment for electronic communications services such as Internet access providers significantly. Internet users can use one and the same Internet connection to correspond privately, watch 'television', and broadcast their views or the data they have stored on their devices to a global audience. The facilitating role of Internet access providers with regard to the *public* networked information environment means that the normative role of the right to freedom of expression for the governance of communications networks has increased in importance. Traditionally, the constitutional right to privacy and confidentiality of private correspondence, such as protected by Article 8 ECHR, were of relatively greater importance. This is not to say that the right to confidentiality of private communications is no longer relevant. On the contrary, pressure on Internet access providers to interfere with unlawful communications, business strategies related to price discrimination between different kinds of content and communications on their network and the availability of technical means such as deep packet inspection to actually monitor the communications of end-users show the lasting importance of Article 8 in the context of access providers.

In Chapter 6 the regulatory answer towards access providers in view of the public flow of illegal or unlawful content over the network was used to study the implications of the right to freedom of

expression in this context. This regulatory framework was shown to consist of safe harbors that set the legal boundaries for the liability of access providers for third party communications on the one hand, in combination with an emphasis on further self- and co-regulatory action on the other hand. The case law relating to these laws as well as their legislative history show that freedom of expression has been taken into account in this framework but it remains questionable and debated to what extent this has been done properly.

Legal obligations on access providers to prevent the use of their communications networks for illegal purposes or to prevent the possibility to access illegal material lead to clear problems under the right to freedom of expression. Such general obligations could only be adhered to with the use of Internet filters, the mandatory application of which is more than constitutionality doubtful. Although the pressure to move towards stricter legal responsibility of Internet access providers remains and proposals to require blacklisting by access providers have been debated in European Parliament and elsewhere, the right to freedom of expression is an important reason why these kinds of proposals have mostly not materialized into actual laws.

Generally, public policy aimed at having access providers restrict the accessibility of content and information flows on the Internet has not focused on command-and-control types of regulation but instead has minimized the official role of the State while at the same time aiming to achieve more restrictive practices. This self-regulatory paradigm can partly be viewed as a positive thing, as in the case of the governance of the press, precisely because of the right to freedom of expression. However, the relation between access providers and Internet users is quite different to that of the press with its readers and sources. Whereas for the press the freedom to select information and ideas for publication is sanctioned by the right to freedom of expression *because* of the importance of editorial freedom of the press, the legal protection of exclusion or blocking of communications by access providers is hard to harmonize with the ideals underlying freedom of expression.

This leads to one of the more complex and controversial issues touched upon in Chapter 6: how should the current legal framework for the horizontal relations between access providers and Internet users be evaluated from the perspective of the right to freedom of expression? Or to put it differently, what are the proper implications of the right to freedom of expression for the legal discretion of ISPs to restrict communication over their networks? Two different general points of view in this debate emerge in the analysis, a debate which has reached a climax in the United States in the context of ongoing litigation over the FCC's net neutrality obligations.

The first perspective, which may best be called the user freedom theory, tends to equate the right to freedom of expression in these potential conflicts of interests between access providers and users to the communicative interests of Internet users. In this theory, if freedom of expression legally requires anything with regard to the legal governance of these horizontal relations, it would be that government must safeguard the user's interest against undue interference by Internet access providers. Such safeguards might include the establishment of net neutrality, new types of common carrier and universal service rules or the establishment of due process guarantees in case of specific legitimate interferences with the flow of content or use of the network. In other words, the role of the law should

be aimed at the realization of the free exercise of the right to freedom of expression by Internet users. Council of Europe recommendations touching upon these issues testify to this perspective in European freedom of expression doctrine. Within the boundaries of this theory much debate remains about the nature of the implications of the right to freedom of expression in the context of access to communications networks, in particular whether there is a real obligation for the State to act – which is generally hard to defend – or if it is better to speak of freedom of expression in this context as a regulatory principle that can inform or legitimize legislative action.

The second perspective, for which support is more common in the United States, tends to equate the right to freedom of expression with the discretion over the use of communicative means as established by the free market. This theory may be best called the ownership discretion theory of freedom of expression. From this perspective the right to freedom of expression protects the owners of the means of communications and media more generally against legal interferences with the freedom to decide how to use those means in the free market. The result of this theory is that government regulation aiming to safeguard the users' interests of having free, equal, and indiscriminatory access to the Internet, would be restricted by the right to freedom of expression of access providers, more specifically their First Amendment right not to transmit or to exclude.

Chapter 6 concludes that Article 10 ECHR does not support a freedom of expression claim of an access provider to interfere with traffic on their networks. Instead, any claim in favor of interference would have to be based on the provider's market freedoms and its right to private property. In the safe harbor framework for Internet service providers in the Directive on Electronic Commerce, the right to freedom of expression can also be shown to be understood by the EU legislature to relate to the communicative interests of Internet users. Notably, the way in which freedom of expression has been internalized into the EU intermediary liability regime leaves room for criticism. No due process guarantees have been prescribed, such as in the U.S. Digital Millennium Copyright Act, the room for injunctions is left wide open, and the hosting safe harbor, the scope of which is less clear than ever, has been shown to incentivize intermediaries to restrict lawful communications. In addition, the role of public authorities in the design of self-regulation has been questionable. Moreover, the right to freedom of expression has not demonstrably informed the way in which public authorities have sought cooperation with the industry with the aim of establishing more policing by access providers of communications on their network.

Looking at the U.S., the analysis of how the right to freedom of expression has been accounted for in the legal framework for the responsibility of access providers for communications over the network and the safe harbors in particular shows a mixed picture. Some elements in the regulatory framework sanction the discretion of ISPs to disregard the interests of information providers and end-users in horizontal relations. Section 230 of the Communications Decency Act, also applicable to search engines, is perhaps most striking in this regard. It not only shields against liability but its 'Good Samaritan Defense' also provides far-reaching discretion for 'interactive computer services' with regard to third party communications.

A study of the background of this provision enacted in 1996 shows that this provision has in many ways prevented First Amendment doctrine from having a further impact on the proper legal regime for various kinds of Internet service providers in the U.S., including search engines. The different legal standards for carrier, distributor and publisher liability as they applied in defamation cases before the Internet, and the way in which editorial freedom and control had played a role in the formation of these standards in a rich set of court decisions, have been replaced by a double-edged sword for Internet intermediaries: a shield against liability on the one hand, and legal discretion to block various kinds of illegal and objectionable content, not excluding constitutionally protected communications, on the other hand. From the perspective of freedom of expression of Internet users as well as the public interests underlying the notion of common carriage, this solution can be seen as suboptimal.

The two theories mentioned above reflect perspectives on the right to freedom of expression with implications that go well beyond the context of Internet access providers or search engines. In the networked communications environment a variety of new models and technological means to control communication flows have provided the means for traditionally passive conduits to be more actively involved in the selection and prioritization of content flows on the network. At the same time, those that tended to be more actively involved, such as news media, may have gained the means to be more 'passive', allowing third party contributions to the publication, selection and the valuation of news. Chapter 6 sheds some light on the fundamental questions this raises about the way in which freedom relates to discretion and control relates to responsibility, and the way in which those answers should ultimately find their ways into properly informed legal treatment for various mediating entities in the public networked information environment.

11.3.3 Library freedom

Chapter 7 gives an overview of the ways in which freedom of expression has informed the legal governance of the library, one of the oldest societal institutions dealing with the organization of knowledge, information and ideas. Between European countries and the United States there is considerable divergence with regard to the understanding of freedom of expression in the context of public libraries. Generally speaking, in the American public library context more emphasis is placed on individual rights and freedom of speech. This is probably best illustrated with the fact that many public libraries have an actual bill of rights. Historically this can be explained by a strong cultural adherence to free speech values as individual rights in the United States in combination with the continuing pressure on American libraries to suppress controversial materials, such as books containing homosexuality.

In Europe library policy tends to be part of general education, culture and welfare policy. Freedom of expression, fundamental rights and the social welfare state have blended together into a mix of publicly funded culture, media and information access support in which the public library still occupies an important position. The enabling role of government with regard to providing basic access to knowledge and culture stands to the fore, and as a result legal scholars tend to argue that by funding public libraries the State is acting under its positive obligation to promote basic levels of access to (high quality) information. However, the publicly funded library institutions are to remain independent with regard to their collection policies, which are informed by library practices.

In the United States, the Supreme Court is not willing to accept any such positive obligations for the state to promote the substantive liberties of its citizens or interpret state funding to promote access to information in this light. In fact, in its last ruling on public libraries, which involved the constitutionality of a condition on public library funding to install Internet content filters, the Supreme Court ruled that public libraries do not have a *“role that pits them against the Government, and there is no comparable assumption that they must be free of any conditions that their benefactors might attach to the use of donated funds or other assistance.”*¹⁰²⁶ It is striking that precisely in the United States, where individual political liberties have had and continue to have a significant impact on library governance, the political independence of libraries from the state is thus constitutionally disregarded.

By looking at some of the normative principles underlying library governance and relating to the freedom of expression, Chapter 7 also clarifies some of the specific ways in which freedom of expression has informed collection management and access to library material. Interestingly, public libraries are supposed to provide their constituencies with a collection that respects the principle of diversity. As such, they will sometimes confront library users with material they would not have selected themselves, for instance because they find it offensive. The negative reaction of a part of the constituency to this practice has been one of the main drivers for library censorship, understood as the undue suppression or removal of material. Notably, due to the nature of library collection management which implies selection of materials in the first place, the suppression of material can sometimes be hard to distinguish from legitimate selection decisions.

From the perspective of free access to information, the unmonitored access to library materials is of particular concern for the governance of libraries. The increased possibilities of personal data processing due to digital access and automation of library management systems more generally has made the privacy of public library users a present concern. At the same time such data processing can contribute to the ideal of better serving the needs of library patrons. The analysis clarifies how the right to privacy of library users can be understood as instrumental to the exercise of their right to freedom of expression. In light of the amounts of user data being collected by Web search engines about information access behavior, this conclusion establishes an interesting analogy to the search engine context.

11.4 Freedom of expression and search engine governance

As the analysis in Chapter 5, 6 and 7 shows, the freedom of expression implications in these contexts are informed by the dominant normative conception of the societal role being fulfilled by the press, the Internet access provider and the library respectively. Hence, one of the underlying aims of this thesis has been to explore the way in which such a role for search media in the public networked information environment can be described. Moreover, by comparing the search medium’s role in the networked information environment with the role of these institutions, a number of interesting conclusions can be drawn.

11.4.1 The societal role of search engines

¹⁰²⁶ *United States v. American Library Association*, 539 U.S. 194 (2003).

Search media combine a passive (conduit/access) and active (editorial/selective) role in their production of meta-information, which is ultimately directed at the relative accessibility of information and ideas online. In their role as search engines they do not, like publishers, produce content themselves and compared to traditional editorial media they therefore play a much more 'passive' role. On the other hand however, search media are intrinsically more 'active' than a passive conduit such as an Internet access provider. The value of search engines is directly related to the ways in which they actively rank and select information and destinations online in return to the user's input. This process can both be compared to the editorial selection of the press and to the active organization of information and ideas by libraries.

Related, when looking deeper into the societal role of search engines two conflicting ideals emerge: the ideal of universal access on the one hand and the ideal of information quality on the other hand. The first ideal for search engines is to help Internet users navigate the entire Web by ordering it and making the material that is available universally accessible. The second ideal is to prioritize the publicity of valuable, relevant and attractive information and ideas over lesser ones. The general purpose search engine, by definition, has to reconcile these conflicting ideals in its operations. Much of the debate about the proper role and responsibility of search media could be explained with reference to the tension between these two different ideals.

This tension between information quality and information access that exists in the public networked information environment did not exist, in the same manner, in the information environment predating the Web. Traditionally, the organization of access to information for the public was separated from the organization of basic levels of quality and legal permissibility. Hence, access in the context of the press was restricted, in principle, to everything 'fit to print'. Likewise, the public library first selects the sources it subsequently makes accessible. Libraries apply their information quality criteria in the context of these selection decisions. After having established a collection, a transparent accessibility infrastructure informed by professional principles for the organization of knowledge ensures universal access to the materials that have been selected. For access providers to such a relatively controlled information environment a discussion about the responsibility to prevent access to certain information and ideas, a discussion which is ongoing for Internet access providers, would mostly have been inconceivable.

The conflicting ideals of access and quality lie at the core of many of the debates about the governance of information flows on the Internet. The Internet and the Web, and the possibility of self-publication unrestricted by traditional knowledge institutions, has broken down the institutional encirclement of certain sources of information deemed fit by professionals for societal consumption. This 'disintermediation' has often been presented as one of the central promises of the Internet and the Web, with particular reference to freedom of expression values. By others it is seen as a central flaw, since they would place more emphasis on the value of a shared platform for debate in which the circulation of information and ideas is restricted by minimal levels of quality, or on the need to restrict access to illegitimate, illegal and potentially harmful information flows more generally.

The above leads Dutch philosophers of science Marres and De Vries to the claim that the societal legitimization of knowledge in the networked information environment takes place through processes of

opening up. In practice, to a significant extent the governance of information quality on the Web no longer takes place through control over what is actually available on the network, but through processes that determine the relative accessibility of information and ideas. Web search engines in particular help to establish the relative accessibility of information and ideas in the networked public information environment.

If one follows this logic, the overarching public interest in the legal governance of Web search engines, seen from the ideals underlying the right to freedom of expression, lies in the establishment of a rich and robust societal infrastructure for the opening up of the Web, understood as the process of connection information and ideas to their societal use. This characterization of the public interest in the governance of relative accessibility of the Web captures both perspectives, access *and* quality, which lie at the core of search engine governance. This also clarifies that search engine providers have to make non-trivial choices with regard to the balance between quality and access. In the networked information environment publicity is no longer restricted to entities that offer *a priori* legitimacy to the information and ideas they make public. And the choices are not only non-trivial, they are of a political nature and involve the complex balancing of different public and private interests, including the interests of end-users and information providers who depend upon search engines as well.

11.4.2 Whose free speech?

Whose freedom of expression should one talk about when addressing the implications of the right to freedom of expression for the governance of search engines? The conclusion of this thesis is that all three primary stakeholders in the communicative process mediated by the Web search engine have reasonable claims under the right to freedom of expression, some of which are directly actionable. For example, the analysis showed that under Article 10 ECHR the search engine can claim protection for its publication of references to information online. The user can claim protection for the free use of online search media. And the information provider can claim protection for allowing its information offering to end up in a search engine and being referred to Internet users.

In addition to these somewhat trivial examples, there are cases in which search engine providers can be argued to have a strengthened claim under Article 10 ECHR because of the way in which they serve the freedom of expression interests of information providers and end-users. A good example would be the claim of a search engine under Article 10 ECHR against a hypothetical legal obligation to actively monitor the index for unlawful or illegal content. The predictably negative impact such monitoring would have on the freedom of expression interests of search engine users to navigate the online environment, as well as the role of search engines as a forum for online information providers, could both be decisive in the establishment of the impermissibility of this interference.

There are also a variety of legal contexts, however, in which the interests of search media, end-users, and information providers in the legal governance of Web search media do not align. This poses the question of which interests should prevail from the perspective of the right to freedom of expression. Take for instance the possible – but in practice and for legal reasons beyond the scope of the analysis unlikely – decision of Web search engines to ignore no-crawling instructions with respect to lawful and

publicly accessible information which the search engine deems valuable for its users. In the legal conflict that could arise from this decision by the search engine provider, it could arguably defend its decision under Article 10 ECHR with reference to its own right to access and analyze publicly accessible information online as well as the interests to access information of its end-users.

Considering the above, the answer to *whose freedom of speech?* cannot be answered categorically for the search engine context. Furthermore, it is not feasible to provide a detailed analysis of the way in which freedom of expression would apply to all the possible legal conflicts that could arise with respect to the governance of information flows by a Web search medium. Instead, a different approach was chosen in this thesis, namely to arrive at a proper understanding of the typical protected interests of search engines, end-users, and information providers, and to provide a general framework for the ways in which these interests should be balanced against each other in certain selected instances. The analysis of the freedom of expression implications for the press, the ISP and the library, as well as the conception of the societal role of search engines provided the foundation for this endeavor which continues in the third part of the thesis.

The legally protected interest of the search engine user under the right to freedom of expression is best understood as the right to inform oneself freely by exploring the Web to its full potential, using available search technologies and services that enhance the findability of information, ideas and resources in the public networked information environment. End-users rely on search engines to find news and other resources, to inform themselves about products, culture, political candidates and diseases, and to reach destinations and other online services. The user's freedom obviously implies a right to be able to choose which available navigational media to use. In addition, the user has a general interest in navigational media of high quality, but this interest cannot be understood as an actionable legal claim. Instead, this interest of the end-user is an aspect of the right to freedom to expression that can inform legal and regulatory involvement directed at the search engine market and the promotion of robust findability more generally.

The protected interests of information providers under the right to freedom of expression can be best understood as the freedom to be included in the search engine's index and to find their way to an audience. What is at stake for information providers can also be formulated in terms of representation. The inclusion into a search engine's index is a prerequisite for being found in the first place. If no search engine includes a particular source of information, this would deprive it the possibility of acquiring attention and legitimacy. Hence, de-indexing by a dominant search engine is particularly problematic from the perspective of information providers. The same may be said about an unfavorable treatment through selection and ranking decisions. However, it is impossible to argue that all information providers could have a legal claim to be in a dominant general purpose search engine index, or to receive favorable treatment by selection and ranking algorithms. Besides being unattainable in practice, this claim would overlook a variety of legitimate grounds a search engine may have for the de-indexing of information providers or for an unfavorable ranking, grounds directly related to the protection of search engines providers under the right to freedom of expression and the interests of end-users. The best possible outcome from the perspective of information providers is that they would have a claim to

be treated fairly and that interferences by dominant search engines providers to effectively reach an online audience would need to be reasonable and justified.

While discussing the respect for the communicative interests of information providers in their relation with search engines, it is important to acknowledge the extent to which they are actually in control of their indexing and ranking. This control is substantial and leads to the continuing manipulation of search results. It also leads to the de-indexing of lawful information in particular search engines through the use of robots.txt instructions. More problematically from the perspective of the right to freedom of expression may be the legal pressure to adopt such instructions, with the aim of negating the impact of certain lawful information that may be considered harmful, damaging or too sensitive. The effectiveness of search engines like Google to actually open up the networked information environment may explain the pressure on information providers to adopt these practices. The result can hardly be called favorable from the interests of end-users in navigating the Web and informing themselves.

Search engine providers have a larger variety of legal claims under the right to freedom of expression. First, their basic operations which together provide the basis for publishing referencing information clearly fall under its scope, that is the crawling of online references and the operation of a publicly accessible website that publishes references to online material in response to user queries. The weight that should be attached to these claims can be strengthened because of the way in which they contribute to the free flow of information on the Web in general and to the communicative interests of Internet users and information providers in particular.

It is important to recognize that freedom of expression doctrine, like in the case of press freedom, should focus on protecting the way in which search engines contribute to the ideals underlying freedom of expression and the functioning of the networked information environment as a whole. More fundamentally, the grounds for protecting Web search engines to operate freely ultimately lie in the public interest of a rich and robust infrastructure for the societal process of the opening up of the World Wide Web. This is another argument to look beyond Google. The societal process mentioned above is a complex phenomenon in which Google may play an important role, but to which a large variety of organizations, services, practices and technologies contribute. Moreover, the way in which this process is organized is still relatively open, reflecting design principles of the World Wide Web discussed in Chapter 2, and strongly depends on the potential input of the entire collection of Web authors and users in general.

The legal protection of the search engine provider's freedom to rank and select under the right to freedom of expression is one of the most interesting questions dealt with in this thesis. Chapter 8 looks at early U.S. case law about the way in which the discretion of search engines to apply the selection and ranking of their choice, specifically in conflicts with information providers over unfavorable rankings, was considered to be protected as an editorial choice. In *SearchKing* an Oklahoma Court applied the editorial freedom standards as developed by the Supreme Court in decisions such as *Miami Harold* and *Sullivan* to the freedom of search engines to decide freely how to rank and select references in response to user queries.

Since operating a search engine implies choices of how to value online resources and how to serve the different information needs of individuals and the public, there is much to be said for this part of the Oklahoma Court's conclusion. The choice of search engine providers of how to select, rank, and present can be considered an editorial process, which deserves protection under the right to freedom of expression. The predominantly technological nature of the way in which these choices materialize says less about the nature of the underlying process than about the massiveness of the index and the way in which technological innovation has offered new ways to organize and provide access to digital information collections. A proper understanding of the societal role of search media points in the same direction: by prioritizing the publicity of certain information and ideas in their index, Web search engines help to reconcile the ideal of universal access and navigation of the entire Web with the ideal of information quality.

Notably, accepting that a search engine providers' decisions how to select, rank and present would be protected by the right to freedom of expression, does not imply, at least not in the European context, that such freedom would be unlimited, nor that it could not be restricted. The conclusion that there may not be and should not be 'one correct way' to select and rank search results does not logically imply there cannot be any legally impermissible ways to do so. Under Article 10 ECHR, proportional restrictions remain possible, for instance in the context of the application of general laws like unfair competition law, tort law or antitrust laws. Moreover, one can imagine certain editorial choices by search engine operators that could be unlawful in themselves, such as the choice to implement algorithms that are specifically directed at causing harm or that cause harm while having no justifiable purpose. Second, the right to freedom of expression as enshrined in Article 10 ECHR is not absolute and may be restricted in the interests and freedoms of others. It is possible to imagine legitimate restrictions being imposed on dominant search engine providers in the aim of ensuring that the communicative interests of information providers and end-users remain sufficiently respected.

Of special importance in the European context is the question about the duties and responsibilities of search engines which are tied to the exercise of the right to freedom of expression. The duties and responsibilities under Article 10 ECHR are tied to the exercise of one's expressive liberties and need to be interpreted in light of the present-day conditions of the media environment, in which in the ECtHR's view, they have taken on an added importance. The potential impact of the medium and the nature of the content that can be found through a search engine will play a role in the determination of its possible duties and responsibilities. In other words, it is likely that major general purpose search engines such as Google, with a particular strong impact on the public information environment, could have enhanced duties and responsibilities based on their widespread use. In this context it is worth noting that the ECtHR's case law seems to imply that the more a communicator does to abide by professional standards with regard to quality and the mode of communicating, the more it will be able to defend itself against interferences.

Generally, the lack of editorial control with regard to the actual content referred to and the lack of oversight over the inclusion of references could weaken a search engine's protection under Article 10 ECHR. But there are other arguments in favor of less stringent or different types of duties and responsibilities as regards the quality of references in search engines. Arguably, duties and

responsibilities should cut both ways. On the one hand, they could be argued to imply a professional responsibility on Web search providers to promote and care for the quality of their references. On the other hand, they could be argued to entail a duty on search engine providers to be comprehensive and not to exclude references too lightly. In fact, an important normative principle in the Court's case law (*Open Door*) is that a communicator that leaves the decision to act upon its communications to the receiver cannot in principle be blamed for those decisions. The more facilitative the search engine would be with respect to the decisional autonomy of its users, the more protection it would receive against interferences that seek to prevent a certain reaction by the audience.

11.5 The role of government: reasons for restraint and room for action

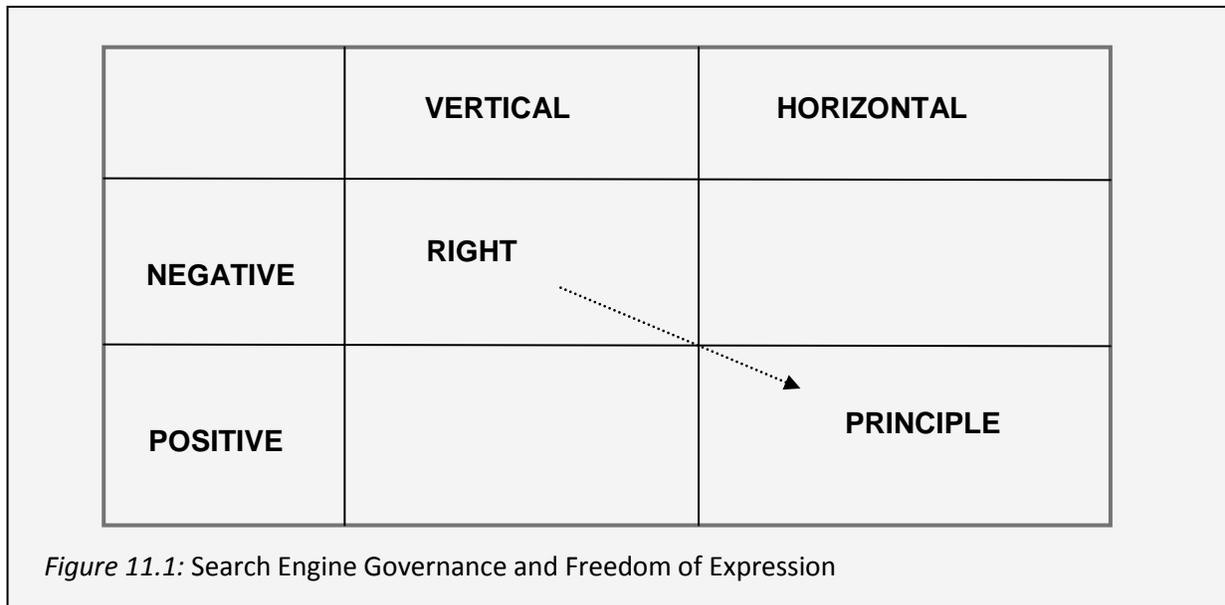
Based on the above, it is also possible to discuss the ways in which the right to freedom of expression impacts the proper role of government with regard to search engine governance. This discussion is also important for the final part of this thesis, which studies the question of how specific legal and regulatory involvement with search engine governance should be evaluated. It is useful to discern, like in Chapter 4, the general normative implications of the right to freedom of expression on the basis of the different modalities of State and regulatory involvement. These implications depend, on the one hand, on the character of the legal relation: vertical or horizontal. On the other hand, they depend on the question of whether the involvement of the state in different instances should be characterized as an interference with, or whether it could be seen as promoting the right to freedom of expression of one or more of the stakeholders involved. Together, these questions allow for the construction of a diagram of modalities of State involvement in which the various ways in which the right to freedom of expression is implicated in the governance of search engines can be visualized (See Figure 11.1 below).

The legal issues arising from the legal governance of search engines discussed in this thesis can be mapped onto this quadrant. For instance, the protection of commercial search engine providers under Article 10 to publish references to third party material without undue government interference should be placed in the upper left quadrant. The issue whether too strict intermediary liability rules for search engines could incentivize them to not reference certain lawful Internet content is an example that fits into the upper right. The public funding of search engines for end-users in view of their interests in accessibility to content and high quality search tools could be placed in the lower left. And finally, the way in which government regulation could try to promote accessibility and diversity for end-users are examples that fit into the lower right quadrant.

Notably, the character of the right to freedom of expression changes if one moves from the upper-left corner to the lower-right corner of this diagram. Most importantly, freedom of expression as a legal right is strongest in the upper left quadrant, with corresponding fundamental legal obligations on public authorities not to interfere and actionable rights of affected private parties against such interference. When moving downwards and to the right this character changes and it may at some point be more appropriate to speak of a fundamental legal and regulatory principle instead of a fundamental right.

In addition, in horizontal relations the different fundamental interests under the right to freedom of expression of search engines conceptualized in the previous section need to be balanced. Of course, such balancing will typically involve other fundamental legally protected interests. When acting under its

positive obligation under Article 10 ECHR, or when acting to promote freedom of expression more generally, the State has considerable legal leeway in shaping its specific involvement. Notably, such positive interference with regard to search engine governance has to take the protection of search engine providers under freedom of expression as a negative right into account.



When focusing on the proper governance of search in horizontal relations, the way in which a balancing of interests ultimately must take place and the extent to which certain positive role of government may be considered desirable will depend on the specific circumstances as well the larger context. A first factor that is important in this regard is the extent to which basic levels of effective exercise of the right to freedom of expression of end-users or information providers may be threatened. The market structure as well as an analysis of the actual practices of dominant market players may play an important role in answering this question.

The third part of this thesis explores and illustrates the ways in which legal and regulatory involvement related to access and quality in the context of search can be further informed by a proper understanding of the implications of the right to freedom of expression. The main findings of these last chapters are put into perspective here, also taking into account the conclusions presented above. More specifically the sections below presents the conclusions of Chapters 9 and 10 about the way in which freedom of expression could be used to improve existing laws and regulatory practices in the field of search engine governance.

It must be mentioned here, that on the basis of the analysis of the concerns addressed in this thesis, there is no reason to recommend a general sector-specific approach to the regulation of search engines like it exists, for instance, for Internet access providers or audiovisual media. The justified claims under the right to freedom of expression for search engine providers imply that a specific framework of legal obligations with respect to the governance of information flows by Web search engines would be

problematic and self-regulation in the sector preferable. Of course, the quality of self-regulation can still be considered a regulatory concern and with regard to specific issues, legal rules may be adopted that specifically address the search engine context. Sector-specific regulation of most of the issues discussed in this thesis would be hard, however, due to the heterogeneity and differences in scale of the various actors and services that contribute to the societal role of search engines and that perform similar actions.

11.5.1 Search engine intermediary liability and content co-regulation

Amongst the most pressing legal issue for search engine providers in Europe is the question about third party liability. By opening up the Web general purpose search engines make illegal, unlawful, or harmful information published online more easily accessible for Internet users. This state of affairs, which actually reflects the accomplishments of search engine providers in facilitating access to information for end-users, raises the question of to what extent search engine providers can be held legally responsible for their role in facilitating such access. Unfortunately, this question has not been answered clearly in the European context.

In the United States intermediary liability rules for the Internet provide specific exceptions for search engine providers. The same type of rules has been adopted in the EU's Directive on Electronic Commerce but this framework of safe harbors for intermediaries does not provide for a specific safe harbor for search engines. In addition, the EU safe harbor framework does a relatively poor job in internalizing the freedom of expression interest in the free flow of information through intermediaries more generally. The character of the Directive on Electronic Commerce, which harmonizes national rules related to information service providers and e-commerce, may also have stood in the way of properly addressing these concerns of a non-economic nature properly.

The result of the lack of a specific safe harbor for search engines has been a complex patchwork of different legal approaches in the various Member States for search engine intermediary liability. Recent case law of the European Court of Justice with regard to third party liability for trademark infringement has added to the confusion by leaving room for the application of the existing EU safe harbor for hosting activities to search engines as long as the activity of the search engine remains "*merely technical, automatic and passive in nature.*" This standard was not written with search engine activity in mind and does not fit with the understanding of the functioning and role of search engines as intermediaries in this thesis.

The legal uncertainty with regard to third party liability for search engines, in combination with continuous litigation and regulatory pressure by public authorities is problematic from the perspective of freedom of expression. It incentivizes search engine providers to respond too willingly to legal notices of illegal or unlawful content in their index, which can harm the communicative interests of end-users and information providers in the governance of search. It also makes it harder to operate a search engine in Europe in the first place, thus having a negative impact on the development of a robust and diverse infrastructure for the opening up of the Web.

The second review of the Directive on Electronic Commerce, launched in the end of 2010, provides an opportunity to reflect on the position of search engines in the EU safe harbor framework. Again, the nature of the Directive may imply an emphasis of the economic aspects of the governance of the online environment. In addition, the subject of search engine liability may be considered too controversial. It is clear, however, that an EC position on search engine liability would minimally need to reflect a balance between the freedom of expression interests that are at stake and the need to enforce intellectual property laws, defamation law, privacy law and other legal restrictions on communications. When looking for appropriate safe harbors for search engines, it can be argued that a safe harbor that implies a notice and takedown obligation is suboptimal in consideration of the role of search engines in opening up the Web. It would wrongly conflate the search engine with a distributor. On the other hand, the kind of blanket immunity for third party defamation and privacy infringements that is offered to search engine providers by the Communications Decency Act section 230 in the United States would be inconsistent with fundamental European legal principles, in particular the right to respect for private life (Article 8 ECHR). Europe will have to formulate its own answer to the complex issue of intermediary liability of search engines.

The lack of certainty about the actual legal responsibility with regard to third party material also makes voluntarily participation in self-regulatory frameworks more problematic. From the perspective of freedom of expression, the self-regulatory paradigm which is also prevalent in the governance of the press should come together with a clarification of the actual legal responsibilities of search engine providers for illegal or unlawful content. Presently, the willingness to give in to extra-legal pressure on search engines to self-regulate – in the form of blocking of references or on the basis of blacklists – can hardly be seen as voluntary. The informalized role of public authorities in these frameworks is also problematic from the perspective of freedom of expression due to the fundamental legal requirement under Article 10 ECHR that interferences with the right to freedom of expression should be ‘prescribed by law’.

11.5.2 Search engine quality: diversity, transparency and accountability towards end-users

Chapter 10 of this thesis addresses three selected issues in the regulatory debate about search engines with regard to search engine quality, in particular with regard to the way that search engines rank, select and present search results. In the literature on the impact of search engines on the public information environment, much thought has been put into the possible biases of dominant commercial search media and the ways in which they may not be serving the public’s right to receive information and ideas freely. This line of thought suggests a more positive agenda for government involvement in the search engine market aimed at safeguarding the freedom of expression interests of end-users and information providers in the governance of search. The consolidation of the search engine market, and the dominance of Google in particular, has been the reason for concerns about the impact of search engines on the accessibility of information and ideas and the values of diversity and pluralism in the public networked information environment.

In an online information environment characterized by abundance, a proper analysis of pluralism and diversity must take special account of search engines and selection intermediaries more generally. They

have a considerable impact on the information and ideas that Internet users are confronted with. Moreover and related, in an environment characterized by abundance an analysis of diversity and pluralism should emphasize the exposure to information and ideas instead of merely addressing what is available online. Some researchers that have studied the impact of search engines on exposure diversity and the quality of search intermediation have warned for certain forms of search engine bias. Chapter 10 concludes that some of the critiques of search engines' biases may be best understood as the demystification of utopian assumptions about the equalizing, democratizing and disintermediation effects of the Internet and the World Wide Web. To the extent that such assumptions were simply unrealistic, untenable or actually undesirable, such as the idea that search engines should facilitate access to information and ideas completely equally, these critiques are rather unsurprising and can hardly serve as a starting point for further analysis.

When addressing the offerings of search engines in the European context from the perspective of diversity and pluralism, a first possible concern is the consolidation of the search engine market and a second possible concern is the impact of the dominant search engine on the European market, Google. This thesis concludes that there is not enough evidence for a negative impact of the current market structure on diversity and pluralism to warrant specific regulatory action. On a general level, the mere existence of general purpose search engines can be considered positive for pluralism and diversity for end-users, due to the underlying diversity of information and ideas on the World Wide Web. There also remain a variety of alternatives to search engines – and to Google – which help users to find or be confronted with information and ideas that may not necessarily show up prominently in major search engines' rankings.

However, to be able to address the question about the impact of search engines on diversity and pluralism properly, more research needs to be done on the impact of market competition on search engine quality. On the one hand, commercial search engines may end up trying to do exactly the same things in their competition for users. On the other hand, a lack of competition could diminish incentives to innovate on search engine quality for end-users. Other open questions that need to be addressed in this context are the specific impact of dominant players in the industry on diversity of search results as well as the way in which other players in the public networked information environment could alleviate possible concerns following from market concentration in the search engine market.

Notably, search engines could be more forthcoming about the value they attribute to diversity of search results and the fair representation of different information providers. The analysis shows that general purpose search engines actually have a number of incentives and possibilities to promote diversity. At the same time, the search engine business model implies that search engines may be particularly interested in optimizing their offerings in view of particular information needs of end-users of a commercial nature, and of them being marketing platform for advertisers. This can and does result in the reduction of diversity of the first set of search results and decreases the amount of results that satisfy other information needs of end-users. Personalization of search results could also become problematic from the perspective of diversity and pluralism, but the question whether that is actually the case depends on the values and principles underlying such personalization and warrants further research.

The most problematic aspect in the context of pluralism and diversity is the impact that certain online information providers have on the quality of search results and the overall robustness of the search medium. Search engine ‘optimization’, while also fulfilling legitimate functions, effectively pushes legitimate sources of information out of the end-users’ view. Troublingly, these practices are not considered problematic and are even endorsed by search engine providers like Google. More generally, because of the opportunities to optimize search engine rankings or participate in sponsored search result programs, search results can be expected to be biased towards information providers with sufficient financial and organizational means to participate in the ongoing competition for favorable rankings. This is a concern that deserves specific attention from the perspective of ongoing efforts to monitor, promote and enhance diversity and pluralism, and of the development of the public networked information environment more generally.

Search engine quality to a considerable degree is shaped by the users themselves. Due to the interactive nature of search engine services, the quality of the search experience, in terms of the diversity of information and ideas user are presented with, will depend upon a user’s general knowledge, sophistication and critical engagement with the search interface. The proper choice for a suitable search service, the awareness of alternatives, the ability to formulate and reformulate search queries effectively, and the use of advanced search options are amongst the things that impact significantly on the quality of the Internet user’s search experience. It is clear from empirical research that expectations of user skill should not be unrealistic and that even users that do have the skills will often accept easy answers. The concerns this raises with regard to the impact of a search engine like Google are not new, and ultimately best solved through education.

Chapter 10 also addresses the question whether the search engines’ advertisement-based business model is a concern from the perspective of the end-users interest in high quality search engines. An analysis of the current labeling obligations with regard to the delineation of sponsored and organic search results, which is aimed at protecting the users’ interest, shows them to be shortcoming. Noticeably, this delineation is based upon the traditional distinction found in traditional editorial media. However, general purpose search engines do not operate in a manner that can provide the independence and information quality guarantees for organic listings that the labeling obligation assumes. The parallel with editorial media further breaks down upon closer examination and the value the labeling provides to end-users is questionable due to the convergence of organic and sponsored search results and their optimization.

This points to the general lack of transparency about the functioning of search engines, information of which is currently provided voluntarily. This voluntary nature of transparency in the context of search has some obvious drawbacks. Search engines like Google claim to engage in a number of best practices with regard to search engine quality, but a proper mechanism for verifying their claims independently is lacking. On the other hand, transparency obligations could also be considered problematic. On a practical level, they could impact the ability of search engines to resist manipulation. More fundamentally, strict transparency obligations could be at odds with the right to freedom of expression as applied to the choices of search engines to rank and select in relative freedom.

Competition law can be expected to be one of the drivers for increased transparency in regards to the selection and ranking practices of dominant market players, as several complaints of monopolistic abuse are pending at the European Commission, national competition authorities, and in the United States. These investigations will also have to come to terms at some point with the question about the editorial freedom of search engine providers to rank and select search results.

The final sections of Chapter 10 address the concerns related to the massive amounts of user data that search engines collect, process, and analyze from the perspective of data protection, user privacy and the right to freedom of expression. European data protection authorities consider the processing of user data by search engine providers to be covered by general data protection law. The current legal framework, however, does not specifically recognize the special role or status of data about information seeking and access behavior in the digital information environment. Search services have strong incentives to compete for more and more user data. These data collections are unprecedented in scale and, once collected, are valuable for a range of other purposes unrelated to facilitating access to information and ideas or even marketing. They are typically stored in undisclosed locations outside of the control of end-users and are accessible by law enforcement and national security agencies under a range of applicable local laws. The possible chilling effects on information seeking of a lack of privacy in the search engine context and the need to protect intellectual freedom more generally are reason to reflect on the need to adopt specific rules to safeguard intellectual freedom of search engine users.

Increased personalization and the lack of transparency about end-user modeling can be seen as a threat to the informational autonomy of search engine users. European data protection law already contains a number of provisions which can enhance transparency about and accountability for these types of user data processing if the user data can be considered personal data. If data protection authorities were right in their interpretation of how European data protection law applies to search engines, and will prove more successful in imposing this view on the market, this framework could be instrumental in establishing the interest in informational autonomy of end-users in the search engine context.

11.6 Conclusion

Web search and the organization of information and ideas inherent in its operation is a new phenomenon with technological, cultural, economic and political dimensions. While not providing the final answer this thesis makes an important contribution to the legal and regulatory debates on the proper governance of Web search engines from the basis of a heretofore underdeveloped perspective, that of the right to freedom of expression.

The conceptual and institutional approach of studying freedom of expression in better understood and functionally related contexts proves valuable, helping develop a well-informed general framework of freedom of expression implications for the governance of search. This study shows how roles in the public information environment are shifting and that a re-articulation of the values underlying the right to freedom of expression is at stake. In the networked information environment a fundamental shift has taken place from the governance of access to the governance of accessibility. While the Internet may treat censorship as damage and route around it as some claim, the intermediaries that control the

relative accessibility of information and ideas may route around important conversations as a result of legal or regulatory interference or as a result of the dynamics inherent in the operations of search media.

Considering the centrality of search in an information environment characterized by abundance, the importance of critical engagement with search media from a user perspective as well as on a regulatory level cannot be understated. This engagement, however, must come hand in hand with an acknowledgement of the value search engines provide for users and information providers, the importance of search media performing their editorial and organizational practices in freedom, and an the technological and economic realities of search. Rather than seeing law and regulation as a potential means to restrict certain practices, this thesis shows that there is room for a positive and enabling role of the State in the European context. This role is to ensure that the services, technologies, and societal infrastructure for the opening up of the Internet can be and remain uninhibited, robust and wide-open.