Searching questions

Freedom of expression, competition and search engines

*by **David Wood****

Freedom of expression is recognised as one of most fundamental freedoms protected by modern society. It is one of the oldest constitutional principles, first adopted during the French Revolution. Article 11 of the French Declaration of Human and Civic Rights dated 26 August 1789 still forms part of the French constitution and describes the freedom of expression as "one of the most precious rights of man".

Today, in Europe, the right to the freedom of expression is enshrined in article 10 of the European Convention on Human Rights 1950 (the ECHR) and is part of the legal regime of 47 countries, including the EU 27. Article 10 not only enshrines the principle of the right to the freedom of expression but also the right to hold opinions, and to receive and impart information and ideas.

The ECHR enforcement mechanism is the European Court of Human Rights (ECtHR) in Strasbourg, which is an organ of the Council of Europe (CoE), separate from the legal order of the EU. While a reference from the European Court of Justice (the ECJ) to the ECtHR is not possible, a negative European Commission (EC) competition decision can be challenged on the basis of article 10, given that, post the 2009 Lisbon treaty, the ECHR now has the same legal value as the EU treaties.

Unlike some other rights enshrined in the ECHR, freedom of expression is not an absolute right, but must be viewed in relation to its "social purpose". Article 10(2) sets out an exhaustive list of restrictions on the exercise of the freedom of expression:

> "The exercise of these freedoms … may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

The ECtHR applies this necessity test strictly since it considers the freedom of expression to be "one of the basic conditions for the progress of democratic societies and for the development of every man" (see *Handyside v the United Kingdom*, 7 December 1976, Series A No 24, [1976] ECHR 5, section 49). It follows that national authorities have a discretion to determine whether there is a "pressing social need capable of justifying a restriction on freedom of expression" (see ECJ Case C-245/01 *RTL Television* [2003] ECR I-12489, section 73 and ECtHR, *Markt intern Verlag GmbH and Klaus Beermann*, 20 November 1989, series A No 165, section 33).

Freedom of expression and search

One of the key antitrust complaints against Google relates to its distortion of natural search rankings: Google artificially favours its own services over competing offerings. This behaviour has been under formal investigation by the EC since November 2010 and was the subject of a statement by Commissioner Almunia on 21 May 2012 regarding the need for Google to offer remedies.

It is expected that one of Google's principal defences against an EC finding that this discriminatory behaviour amounts to anticompetitive conduct will be that its search rankings fall within the scope of the right to freedom of expression. Recently, a Google-commissioned paper claimed that its editorial judgment benefits from the protection of the first amendment of the US constitution (USC), categorising search engines as "media enterprises" (see *Google: First Amendment Protection for Search Engine Search Results*, 12 April, 2012). Google has, in fact, already made this argument before a US district court in *Search King v Google* (Case No CIV-02-1457-M, *Search King Inc v Google*). In that case, Search King argued that Google was guilty of tortious interference with contractual relations, having purposefully and maliciously decreased the page ranks previously assigned to Search King. In its defence, Google countered that such relief would effectively chill speech protected under the first amendment USC.

The most directly relevant body of law to such a line of defence in Europe is that developed by the European Courts on the concept of free press, which forms part of the freedom of expression. It is generally accepted that, under article 10 of the ECHR, publishing houses, reporters, journalists and editors benefit from the freedom of expression with respect to their editorial policy (see *Freedom of expression in Europe - Case law concerning Article 10 of ECHR*, Human Rights Files no 18, CoE). The ECtHR has recognised that, as a general principle, the media is free to exercise editorial discretion except in exceptional circumstances and that any interference in the media's freedom of expression must be proportionate and legitimate (see ECtHR, *Melnychuk v Ukraine*, No 28743/03, 5 July 2005 ECHR 2005-IX). It follows that newspapers can choose to publish articles according to their editorial policy and to address ideas on political issues, even if controversial, unless publication is viewed as disproportionate to the aim pursued (see ECtHR, *Thorgeir Thorgeirson v Iceland*, judgment of 25 June 1992, Series A No 239, sections 59-70).

Editorial discretion, however, has its limits and, in the UK, media enterprises defending libel claims must prove that published statements are true. However, if it can be shown that a publication is a matter of public interest and a product of responsible journalism, a claimant will be barred from

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recovering damages (see UK House of Lords, *Jameel v Wall Street Journal Europe SPRL* [2006] UKHL 44, p 1291).

The argument that search rankings might benefit from the protection of article 10 seems far-fetched. Search engines like Google do not exercise editorial control (unlike, for instance, publishers, reporters and journalists) in determining their search results. Such results are determined by Google's algorithm, a predetermined mathematical equation which calculates the relevance of search results to a given query. By contrast, editorial control has been found by the ECtHR to include "the choice of the material that goes into a newspaper, the decisions made as to limitations on the size and content of the paper and the treatment of public issues and public officials – whether fair or unfair – constitute the exercise of editorial control and judgment" (see ECtHR, *Saliyev v Russia* No 35016/0321, October 2010).

Google itself has argued on at least two occasions before the French courts that it does not exercise editorial discretion over its search results since its results are entirely generated by its algorithm, on the basis of objective criteria corresponding to users' search queries ("Google ne suggère pas ces résultats. Ils sont générés de manière totalement algorithmique, sur la base de critères purement objectifs correspondant notamment aux requêtes préalablement saisies par les internautes. Ils ne sont donc aucunement issus d'un choix éditorial de la part de Google" (Le Monde 28 April 2012). See also Decision of the Tribunal de Grande Instance, Paris, 7ème Chambre civile, 15 February 2012).

The French courts in intellectual property cases also appear to have drawn a clear distinction between press editors and online editors, such that editors of internet content are not considered comparable to press editors, the latter being defined by specific legislation relating to press and audio-visual communication. Moreover, according to French jurisprudence:

> "only the choice exercised by those posting content online shall constitute editorial discretion, such that the fact of having organised RSS feeds … in accordance with the rankings chosen by the site creator shall not mean that the site creator can qualify as an editor given that he does not determine the content posted" [unofficial translation] (see decision of TGI Paris, 3 juin 2008, No07/02914 Lafesse et autres / OVH et autres).

This strongly indicates that only those involved in the creation of content can be viewed as exercising editorial discretion.

This view is in keeping with the CoE's position that only the author, originator or otherwise intellectual owner of the information can benefit from the freedom to impart information under article 10, as well as the decision of the European Commission of Human Rights (the Human Rights Commission) in *De Geïllustreerde Pers NV v The Netherlands* (6 July 1976, No 5178/71, DR 8, p5). In this case, the Human Rights Commission found that protection under the freedom to impart information could only be granted to the person or body who produces, provides or organises that information: "[in] other words, the freedom to impart such information is limited to information produced, provided or organised by the person claiming that freedom being the author, the originator or otherwise the intellectual owner of the information concerned".

In the light of these cases, it seems unlikely that an EU Court would afford Google the protection of article 10 since the content of the vast majority of sites Google ranks does not originate from Google, nor is Google the author or the owner of the information contained in those sites. Moreover, as discussed below, the rationale behind Google's manipulation of search results would also seem to preclude the application of article 10.

Commercial interests cannot be protected under the ECHR

Google prominently features its own services at or near the top of search results for certain types of queries, bypassing the algorithm it uses to rank other websites. In this way, Google discriminates against rival products, by driving traffic to its own services and away from competing sites for its own commercial ends.

In the *De Guïllusteerde Pers NV* case, the Human Rights Commission considered that "the protection of the commercial interests of particular newspapers or groups of newspapers is not, as such, contemplated by the terms of article 10 of the Convention". The Committee of Ministers of the Council of Europe (the CoE Committee) published a recommendation in 1977 confirming the Human Rights Commission's opinion that the inability to reproduce programme listings did not amount to a violation of article 10 of the ECHR, since the purpose of the European Convention on Human Rights was not to protect commercial interests.

The EU Courts have followed similar reasoning in dismissing arguments raised under article 10 of the ECHR which have as their purpose the protection of commercial interests. In *VBVB & VBBB* (ECJ Joined Cases 43/82 & 63/82, *VBVB and VBBB v Commission* [1984] ECR 19, sections 21-34), two associations representing publishers and book traders challenged – on the basis of article 10 of the ECHR – a decision of the EC finding that their agreements on exclusive dealing and retail price maintenance were contrary to what is now article 101 of the treaty on the functioning of the European Union (TFEU) on the basis that "the abolition of resale price maintenance would lead … to a situation of indirect censorship". The Court rejected this argument, holding that:

> "Although it is true that certain economic provisions may not be without effect from the point of view of freedom of expression, the position nevertheless is that the applicants have not established in this case the existence of any real link between the Commission's decision and freedom of expression as guaranteed by the European Convention, even on the supposition that it might be possible to interpret it in such a way as to include guarantees regarding the possibility of publishing books in economically profitable conditions. To submit the production of and trade in books to rules whose sole purpose is to ensure freedom of trade between member states in normal conditions of competition cannot be regarded as restricting freedom of publication which, it is not contested, remains entirely at the level of both publishers and distributors. This submission must therefore be dismissed."

Article 10 ECHR and competition policy

It is strongly arguable that Google's dominance and practices undermine the freedom of others in the online ecosystem to receive and impart information and ideas.

In previous cases, the ECtHR has found that a company's dominant position can negatively impact on democracy when it can exercise pressure over companies which transmit ideas and information to the public. In short, monopolies can restrict media pluralism. The ECtHR explicitly recognised this in *Manole v Moldova*, stating that:

> "a situation whereby a powerful economic or political group in a society is permitted to obtain a position of dominance over the audiovisual media and thereby exercise pressure on broadcasters and eventually curtail their editorial freedom undermines the fundamental role of freedom of expression in a democratic society as enshrined in article 10 of the Convention, in particular where it serves to impart information and ideas of general interest, which the public is moreover entitled to receive" (see ECtHR, 17 September 2009, [2009] ECHR 13936/02 section 98).

The opening paragraph of a recent recommendation issued by the CoE Committee addressed search engines' ability to "enable a worldwide public to seek, receive and impart information and ideas and other content in particular to acquire knowledge, engage in debate and participate in democratic processes" (see CM/Rec (2012) 3, 14 April 2012). In this recommendation, the Committee acknowledged the dangers search engines pose to this freedom, recognising the "pivotal role" played by search engines and stressing that human rights and fundamental freedoms can be threatened by the way in which search engines rank their results:

> "The action of search engines can affect freedom of expression and, given their role in facilitating access to information, can bear even more on the right to seek, receive and impart information…Such challenges may stem, inter alia, from the design of algorithms, de-indexing and/or partial treatment or biased results, market concentration and lack of transparency about both the selection process and ranking of results."

Interplay between ECHR and EU competition rules

As noted above, it is possible to appeal an EC decision before the EU Courts on the basis of breach of a right protected under the ECHR. Were an EU Court to rule that Google's search rankings benefit from article 10 protection, it would still have to balance any rights and freedoms protected under article 10 against the TFEU principles of fair competition (see the preamble of TFEU) and consumer protection (see article 4(2)(f) of TFEU).

The European Union Courts carry out such a balancing exercise on a case-by-case basis, "[weighing] up the interests involved, having regard to all the circumstances of the case, in order to determine whether a fair balance is struck between those interests" (see ECJ Case C-112/00, ECR 2003 p I-5659 section 81).

In the *Schmidberger* case, the ECJ was required to weigh the ECHR right to the freedom of expression against the freedom of movement of goods, one of the four fundamental freedoms enshrined in TFEU. This case involved a one-off authorised demonstration in Austria which obstructed traffic on a single route for approximately 30 hours. A private party challenged the authorisation as contrary to the principle of free movement of goods. The ECJ found in favour of the demonstrators' freedom to express their opinion peacefully, since an outright ban on the demonstration would amount to an unacceptable interference with this freedom.

With respect to search rankings, it is likely that an EU Court would seek to balance any measure interfering with the freedom to rank search results in a discriminatory manner with the question of whether that practice was also likely to benefit consumers. Consumer protection is one of the most important aims of EU competition policy and is a principle enshrined in TFEU. In *Karner*, the ECJ was faced with a conflict between the right of freedom of expression and the aim of consumer protection, finding that the latter should prevail. *Karner* concerned a challenge based on article 10 against the Austrian Law on Unfair Competition which prohibited information likely to mislead the public in the course of trade, and more specifically banned public announcements or notices advertising the fact that goods originate from an insolvent estate, when that was no longer the case. The ECJ held:

> "In this case it appears, having regard to the circumstances of fact and of law characterising the situation which gave rise to the case in the main proceedings and the discretion enjoyed by the member states, that a restriction on advertising as provided for in [the Austrian Law on Unfair Competition] is reasonable and proportionate in the light of the legitimate goals pursued by that provision, namely consumer protection and fair trading" (see ECJ Case C-71/02, 25 March 2004, ECR 2004 p I-3025, section 52)

In the light of the relationship between competition policy and consumer protection, this case law indicates that even if Google's search rankings were able to benefit from the protection of article 10 of the ECHR, it is likely that an EU Court would hold that the goal of fair competition outweighs Google's freedom to rank its search results in a discriminatory manner intended to serve its own commercial interests.

Conclusions

Article 10 of the ECHR has been developed in a way that provides a degree of protection for editorial policy. However, an interpretation of the cases referred to above suggests that Google's discriminatory search rankings cannot qualify as editorial discretion, since Google merely crawls content. In fact, Google's own classification of the nature of its search rankings is inconsistent. In some circumstances, Google has argued that in no way does it exercise editorial judgment over the way in which it organises its search results, whereas on other occasions it has claimed full protection for its search rankings, akin to broadcasters and the press.

If search rankings are protected by article 10, any discriminatory practices still need to be reviewed under the competition and consumer protection aims of TFEU and a balancing exercise carried out. That balancing exercise would need to consider not only the freedom of expression but also consumer interests, as well as the proportionality and impact of the discriminatory practices in question.