



Freedom of Speech and Search Engine Search Results

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(Based on a White Paper commissioned by Google)

Where to Find Information?

- Newspapers.
 - Guidebooks.
 - Encyclopedias.
 - Search engines.
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- Editorial choices.
 - *TV Times* vs. *TV Guide*.

First Amendment

- Fully protects editorial choices about what to include or exclude in one's speech product.
- Fully protects facts and opinions on nonpolitical subjects.
- Fully protects interactive media.
- Fully protects even speech that is seen as “unfair,” not “objective,” not “neutral,” etc.

What's the Constraint on Google?

- You.
- Why did you switch to Google?
- How hard would it be for you to switch away?
- What if there were only one?

What's the Constraint on Google?

- *Turner Broadcasting v. FCC* (1994): Cable system operators were physically able to “prevent . . . subscribers from obtaining access to programming [the operator] chooses to exclude.”
- Analysis would not apply to newspapers, “no matter how secure [their] local monopoly” – no “power to obstruct readers’ access to other competing publications.”

The First Amendment and Antitrust Law

- *Noerr* (1961) and *Pennington* (1965).
- *Lorain Journal* (1952): Antitrust violation in excluding advertisers solely because they were advertising on competing radio station (*not* based on content of ads).
- *Miami Herald* (1974): “The clear implication [of the Court’s antitrust cases] has been that any ... compulsion to publish that which ‘reason’ tells them should not be published’ is unconstitutional.”

The First Amendment and Antitrust Law

- Even a newspaper plausibly alleged to have a “substantial monopoly” couldn’t be ordered to run a movie advertisement: “Appellant has not convinced us that the courts or any other governmental agency should dictate the contents of a newspaper.” *Assocs. & Aldrich* (9th Cir. 1971).
- The Court’s cases “do not suggest that merely engaging in protected speech may constitute an antitrust violation.” “[T]he First Amendment does not allow antitrust claims to be predicated solely on protected speech.” *Jefferson County* (10th Cir. 1999).

The First Amendment and Labor Law

- Aimed at protecting against misuse of economic power.
- May usually be applied to most business decisions by speakers.
- But Court has stressed “the full freedom” of a speaker “to publish the news as it desires it published or enforce policies of its own choosing with respect to ... editing” *AP v. NLRB* (1937).