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FutureNewsCorp, or how the AI Act changed the future of news

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ABSTRACT

Inspired by scenario writing methods to foster discussion on the societal implications of technology and regulation, the paper develops a 'legal fiction scenario' to anticipate the impact of the proposed European AI Act and examine some of the regulatory choices made. The paper tells the story of FutureNewsCorp – the largest news media company in Europe in the year 2043. The story of FutureNewsCorp is used for a critical analysis of the most recent draft of the AI Act and here, in particular, of the role of standardisation bodies and the division of responsibility between providers of AI systems and their professional users. Using the scenario method, the paper demonstrates that regulations like the planned AI Act can result in a shift of the power to decide what responsible use of AI is - from regulators and editors to technology developers and standardisation bodies - and that in doing so it may contribute to changing the structure and workings of an entire sector.

1. Introduction

Artificial Intelligence has long since left the realms of science fiction. The broad appeal of technologies such as generative AI contributes to turning AI into a social reality, even if it is a reality full of uncertainty and speculation. The resulting calls for regulatory 'guardrails' and legal certainty require the ability to anticipate the risks from AI systems and Large Language Models for society and fundamental rights so that regulators can create the governance frameworks that must shape AI technology's future design and deployment. But anticipating technological progress, its impact on society, and the impact of rules and regulations on the technological, economic and societal dynamics is challenging. It is even more difficult to develop a medium- or long-term vision of how legal provisions and frameworks can protect society from harm while reaping the positive effects of innovation. Scholars and regulators operate under uncertainty, complexity and information asymmetries. This article suggests that fictional or future scenario

writing could be a useful method to assist scholars, policymakers and regulators in reflecting on the impact of regulation on AI-driven technical and societal innovation.

Future scenario writing is a method that can enable creative anticipatory ethical or legal reasoning.¹ It can also be a tool to engage and integrate different perspectives or sets of expertise and facilitate debate. In this article, scenario writing is more concretely used to synthesise state-of-the-art insights into a particular sector (the media sector) and legal analysis for imagining a future that is the plausible result of some of the regulatory choices made in the European AI Act.² The goal of this article is two-fold: to engage in a critical analysis of the potential impact of the AI Act and to experiment with scenario writing as a method for anticipating potential impacts and risks from regulatory choices. A regulation like the proposed European AI Act relies on the ability of regulators and policymakers to foresee the impact of regulation on innovation, technology development and human rights in a dynamic and very complex socio-technical environment. Scenario methods can be a

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¹ Emily York and Shannon N Conley, 'Creative Anticipatory Ethical Reasoning with Scenario Analysis and Design Fiction' (2020) 26 Science and Engineering Ethics 2985. Brian David Johnson, *Science Fiction Prototyping: Designing the Future with Science Fiction* (Morgan & Claypool Publishers 2011).

² At the times of writing, the European AI was subject to trilogue negotiations with the European Commission's Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative Acts, COM/2021/206 final, Brussels, 21 April 2021 (henceforth: EC version), the Common Position of the Council of the European Union, Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts – General approach, 2021/0106(COD), Brussels, 25 November 2022 (henceforth: Council version) and the European Parliament's version, Amendments adopted by the European Parliament on 14 June 2023 on the proposal for a regulation of the European Parliament and of the Council on laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts (COM(2021)0206 – C9-0146/2021 – 2021/0106(COD)), P9_TA(2023)0236 (henceforth: EP version).

helpful tool to think through the consequences of technology regulation. The structure of the paper is as follows. Section 2 describes the use of future scenario writing as a method before section 3 provides some background on the AI Act and the use of AI in media and journalism. Section 4 will tell the story of FutureNewsCorp – one of the largest news organisations in the year 2043. The story of FutureNewsCorp is then used to engage in a critical analysis of some of the legal provisions that the proposed European AI Act is likely to introduce (section 5), and here in particular, the role of standardisation bodies and the decision to focus most legal obligations with the provider of an AI system. A central argument of the paper is that due to this choice, the realisation of fundamental rights and European and professional values is inadvertently framed as a matter of technical formalisation, standardisation and technical design choices. The power to decide what is responsible use of AI is shifting from regulators and editors to technology developers and standardisation bodies that find themselves as new arbiters of values and fundamental rights. With the help of the example of the news media, the scenario shows how that decision can potentially impact the structure and workings of an entire sector. The article concludes (section 6) that future scenario writing, combined with domain expertise, can be a tool to facilitate forward-looking thinking and reflexivity in the governance of technology and innovation.

2. Future scenario writing and anticipatory reasoning

Future scenario writing is a method in futures research with a strong conceptual focus. Johnson, one of the pioneers in the development of this method, has described scenarios as a way to blend science fiction and science fact and, in so doing, provide a "new lens through which emerging theories can be viewed differently, explored freely and ultimately developed further".³ Future scenarios are fictional scenarios that instrumentalise the power of a narrative to anticipate the development of technology or laws and their impact on society.⁴ This article argues that scenario methods as a form of anticipatory legal reasoning can help scholars, policy makers and other stakeholders to reflect on the foreseeable implications of the frameworks they create or research. In the case of the European AI Act, this is a framework that relies heavily on the ability of regulators and policymakers to foresee the impact of regulation on innovation, technology development and human rights in a dynamic and very complex socio-technical environment and on the ability of technology providers and platform operators to identify 'reasonably foreseeable risks'⁵ or 'systemic risks' that the future use of technology can produce.⁶ Future scenarios as a tool can help to think through the societal consequences of technology and innovation⁷ and "expand the boundaries around how we think of the future, and the

implications for what we do today."⁸ Ultimately, the method enables its users to ask the right questions.

Typically, scenario work has focused on exploring the impact of emerging technologies and innovation on society.⁹ Legal and ethical scholars have already used future scenarios in the form of science fiction as an inspiration for thinking about how technologies can potentially impact society and the legal questions this may trigger. Or in the words of Contreras, "Science fiction offers the ultimate legal hypothetical".¹⁰ Examples include scholarly work on questions of moral agency and legal personhood of robots,¹¹ the legal implications of humanoid criminality¹², and the treatment of legal issues in science fiction series.¹³ More important for this article is the use of future scenario writing as a tool for 'creative anticipatory ethical reasoning'¹⁴, anticipatory governance¹⁵, and as a method for policymakers to identify and validate policy problems.¹⁶ As Stahl explains, future scenarios "can jump-start discourses about what futures we believe to be possible and which ones of these we find desirable".¹⁷ Tironi sees future scenario writing in the policy context as part of a political process itself, namely "(a) as material and narrative technology for demonstrating and justifying certain options, and (b) as a mechanism of explication that can make invisible friction".¹⁸ Similarly, Schuijjer and co-authors experiment with scenario writing to engage the public to consider technology's ethical

⁸ James P. Roberts and Andrew Middleton, 'Evolving Products: From Human Design to Self-Organisation via Science Fiction Prototyping' (2014) 84 *Technological Forecasting and Social Change* 15.

⁹ Tiina Kymalainen, 'Science Fiction Prototypes as a Method for Discussing Socio-Technical Issues within Emerging Technology Research and Foresight' [2016] *Athens Journal of Technology & Engineering* 333.

¹⁰ Jorge Contreras, 'Science Fiction and the Law: A New Wigmorean Bibliography' [2020] *Utah Law Faculty Scholarship* <<https://dc.law.utah.edu/scholarship/226>>.

¹¹ Katarzyna Ginszt, 'Incorporating Robots into Human Law - An Analysis of Robot Prototyping in Ridley Scott's *Blade Runner* and Alex Proyas' *I, Robot* (2020) 5 *New Horizons in English Studies* 172.

¹² Sam N. Lehman-Wilzig, 'Frankenstein Unbound: Towards a Legal Definition of Artificial Intelligence' (1981) 13 *Futures* 442.

¹³ Christine A. Corcos, 'Visits to a Small Planet: Rights Talk in Some Science Fiction Film and Television Series from the 1950s to the 1990s' (2009) 39 *Stetson Law Review* 183.

¹⁴ Emily York and Shannon N. Conley, 'Creative Anticipatory Ethical Reasoning with Scenario Analysis and Design Fiction' (2020) 26 *Science and Engineering Ethics* 2985; Nicholas Diakopoulos and Deborah Johnson, 'Anticipating and addressing the ethical implications of deepfakes in the context of elections' (2021) 23 *New Media & Society* 1739; Philip A. E. Brey, 'Anticipatory Ethics for Emerging Technologies' (2012) 6 *Nanoethics* 1.

¹⁵ Cynthia Selin, 'Negotiating Plausibility: Intervening in the Future of Nanotechnology' (2011) 17 *Science and Engineering Ethics* 723.

¹⁶ Bernd Carsten Stahl, 'Virtual Suicide and Other Ethical Issues of Emerging Information Technologies' (2013) 50 *Futures* 35. Lucy Kimbell and Jocelyn Bailey, 'Prototyping and the New Spirit of Policy-Making' (2017) 13 *CoDesign* 214.

¹⁷ Bernd Carsten Stahl, 'Virtual Suicide and Other Ethical Issues of Emerging Information Technologies' (2013) 50 *Futures* 35.

¹⁸ Martín Tironi, 'Prototyping Public Friction: Exploring the Political Effects of Design Testing in Urban Space' (2020) 71 *The British Journal of Sociology* 503. For this reason, other authors have pointed to the importance when using prototypes or scenarios as tools of deliberation and decision-making, of also paying attention to the diversity of the group the scenario is being discussed with, James P Roberts and Andrew Middleton, 'Evolving Products: From Human Design to Self-Organisation via Science Fiction Prototyping' (2014) 84 *Technological Forecasting and Social Change* 15., and the difficulty of identifying and engaging the relevant stakeholders in the process (Cynthia Selin, 'Negotiating Plausibility: Intervening in the Future of Nanotechnology' (2011) 17 *Science and Engineering Ethics* 723).

³ Brian David Johnson, *Science Fiction Prototyping: Designing the Future with Science Fiction* (Morgan & Claypool Publishers 2011).

⁴ Léonard Van Rompaey, Robert Jønsson and Kathrine Elmoose Jørgensen, 'Designing Lawful Machine Behaviour: Roboticians' Legal Concerns' (2022) 47 *Computer Law & Security Review* 105711. Brian David Johnson, *Science Fiction Prototyping: Designing the Future with Science Fiction* (Morgan & Claypool Publishers 2011); Stuart Reeves, 'Envisioning Ubiquitous Computing' in Rebecca Grinter, Thomas Rodden, Paul Aoki, Ed Cutrell, Robin Jeffries and Gary Olson (eds), *CHI '06: Proceedings of the SIGCHI Conference on Human Factors in Computing Systems* (Association for Computing Machinery 2006).

⁵ See e.g. Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative Acts, COM/2021/206 final, Brussels, 21 April 2021, Art. 9 (2)(a) (EC version).

⁶ See Art. 34 of the Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) (Text with EEA relevance), OJ L 277, 27.10.2022, p. 1–102.

⁷ Thomas Birtchnell and John Urry, '3d, SF and the Future' (2013) 50 *Futures* 25.

and societal ramifications.¹⁹ And also policy institutions such as the European Union's EU Policy Lab, OECD and Unesco are using scenario methods as part of anticipatory governance approaches.²⁰ The European Union's Policy Lab, for examples, defines three core functions that future scenarios can have in policy making, including understanding how a problem can develop over time and change in unexpected ways, generating strategic insights and enabling impact assessments as well as stress-testing policy options.²¹ Common to most of those approaches is that they anticipate the impact of technology on society and the implications for policymaking and ethical reasoning. Still underdeveloped is the use of the method for doing the opposite: anticipating how laws and regulations can affect the development of technology and society.²² Thinking in scenario's or speculating about the future impact of regulations is not alien to legal and policy debates but what this method can add is a more structured approach and one that allows to include or engage a diversity of external perspectives and audiences.

The objective of this article is to do precisely that: to use a scenario-based method to speculate about the implications of a future law (the pending AI Act) for society with the help of a fictional scenario. In this context, it is important to stress that future scenario writing is not and cannot be about predicting the future.²³ Therefore, the goal of this article is explicitly not to make any authoritative statements about the future with the AI Act. Instead, the scenario method is used to think through the potential consequences of particular regulatory choices and identify possible points of attention for the regulation and its implementation.²⁴ More specifically, this article aims to imagine how the (draft) AI Act could shape the future use of AI in the media and journalism sector and uses storytelling to reflect on and discuss the AI Act and its respective provisions.

3. Methodological considerations

There are different approaches towards using future scenarios for anticipatory reasoning. Common to the different approaches is that they incorporate creative arts or artefacts (a story, a video, a picture, a film, a tangible prototype) to explore or imagine possible futures.²⁵ A scenario can be exploratory, examining past and present trends and extrapolating

those into the future, or normative by developing desirable and less desirable visions of the future.²⁶ The approaches differ in the way in which they produce a scenario or prototype. One approach involves a wider variety of participants, for example, citizens, through a reiterative dialogue and process of collective story writing to explore different perspectives or spark a broader discussion and reflection on particular questions.²⁷ Used in this participatory way, the method has proven useful in revealing public perceptions and preferences,²⁸ which can inform research, design and policy making. Another approach is that the researchers create one or several scenarios and invite experts²⁹ or non-specialists to assess and select the most plausible scenarios. Research has demonstrated that doing so can be a useful way to stimulate strategic thought and communication and improve internal flexibility and reflection on broader policy or ethical issues.³⁰ Finally, rather than involving participants in the design of the scenario itself, a scenario (created by the researchers) can also be used as a tool to communicate analysis, invite reflections, and explore with participants together a particular future, its ramifications and potential policy options. Here, creating a distinct vision of a desirable or not-so-desirable future through storytelling can be a tool to convey information and spark critical thinking.³¹

This paper has chosen the latter approach: using a speculative narrative to explore one possible future as the result of the draft AI Act, then discussing to what extent this is a desirable future or not, and if not, what possible lessons to draw for the legal debate. As Travis explains, "[b]y distancing itself from, or simply displacing the real, science fiction can act as a critical commentary on contemporary society. Furthermore, by allowing us to examine potential future legal approaches, we can better see the strengths and inadequacies of the law's current approaches."³² The goal is to create a normative scenario by integrating diverse sets of expertise (here: law and digital journalism studies) to engage in creative anticipatory legal reasoning and speculate on one possible direction the media sector could take with the AI Act. In this context, it is important to mention one caveat: law and regulation represent only one out of several factors that influence the developments in a particular sector, next to economic, technological and societal factors.

Two kinds of literature inspired the design of the scenario: legal texts and commentaries on the AI Act and digital journalism studies literature (including academic articles but also industry reports). In developing the scenario, the author followed and adapted Johnson's five steps to build the scenario: Step 1 in Johnson's method is a preparatory step that

¹⁹ Jantien W. Schuijjer, Jacqueline E. W. Broerse and Frank Kupper, 'Citizen Science Fiction: The Potential of Situated Speculative Prototyping for Public Engagement on Emerging Technologies' (2021) 15 *Nanoethics* 1.

²⁰ EU Policy Lab, 'Reference Foresight Scenarios of the Global Standing of the European Union in 2024' (2023); UNESCO, 'Report of Comcest on Robotics Ethics' (2017); OECD, 'Harnessing the Power of AI and Emerging Technologies' (2022).

²¹ EU Policy Lab (n 20).

²² One of the exceptions is the study by Birthchnell and Urry that include in their scenario work about the future of 3D printing also elements about the possible unintended consequences of intellectual property law, Michael Burnam-Fink, 'Creating narrative scenarios: Science fiction prototyping at Emerge' (2015) 70 *Futures* 48.

²³ Stuart Reeves, 'Envisioning Ubiquitous Computing' in Rebecca Grinter, Thomas Rodden, Paul Aoki, Ed Cutrell, Robin Jeffries and Gary Olson (eds), *CHI '06: Proceedings of the SIGCHI Conference on Human Factors in Computing Systems* (Association for Computing Machinery 2006); Brian David Johnson, *Science Fiction Prototyping: Designing the Future with Science Fiction* (Morgan & Claypool Publishers 2011).

²⁴ Martín Tironi, 'Prototyping Public Friction: Exploring the Political Effects of Design Testing in Urban Space' (2020) 71 *The British Journal of Sociology* 503.

²⁵ Michael Bennett and Brian David Johnson, 'Dark Future Precedents: Science Fiction, Futurism and Law', *P. Navais and S. Konomi (eds). Intelligent Environments 2016* (The authors and IOS press 2016) 508.

²⁶ Michel Godet and Fabrice Roubelat, 'Creating the Future: The Use and Misuse of Scenarios' (1996) 29 *Long Range Planning* 164. They further distinguish between possible, realizable and desirable and argue that a scenario approach can only be credible and useful if it complies with four prerequisites: relevance, coherence, likelihood and transparency.

²⁷ Jantien W Schuijjer, Jacqueline EW Broerse and Frank Kupper, 'Citizen Science Fiction: The Potential of Situated Speculative Prototyping for Public Engagement on Emerging Technologies' (2021) 15 *Nanoethics* 1.

²⁸ Marie Lena Heidingsfelder, Florian Schütz and Simone Kaiser, 'Expanding Participation Participatory Design in Technology Agenda-Setting', *Proceedings of the 14th Participatory Design Conference: Short Papers, Interactive Exhibitions, Workshops - Volume 2* (Association for Computing Machinery 2016) <<https://doi.org/10.1145/2948076.2948087>> accessed 23 March 2023.

²⁹ Godet and Roubelat (n 26).

³⁰ *ibid.*

³¹ Clark A Miller and Ira Bennett, 'Thinking Longer Term about Technology: Is There Value in Science Fiction-Inspired Approaches to Constructing Futures?' (2008) 35 *Science and Public Policy* 597, 600, 603.

³² Mitchell Travis, 'Making Space: Law and Science Fiction' (2011) 23 *Law & Literature* 241. In this sense also Pasquale, arguing that "[n]arratives (and accessible versions of them are critical to envisioning the future." Frank Pasquale, *New Laws of Robotics: Defending Human Expertise in the Age of AI* (The Belknap Press of Harvard University Press 2020) 224.

involves choosing a particular technology, time frame and setting and asking some critical questions about the future implications of this technology (step 1 - Pick your science and Build your world). Step 2 (Scientific Inflection Point) is concerned with building a world around that technology as the basis for the concrete scenario. Step 3 (Ramification of the Science on people) identifies and introduces concrete actors. Step 4 (Human Inflection Point) speculates how a particular technology will affect the behaviour and choices of those actors. Finally, step 5 (What did we learn) reflects on the dynamics or ramifications identified and what should stay the same or be different to realise or avoid a particular outcome or impact of the technology.³³ As in this paper, law, not technology, is the scenario's object, Johnson's method has been adapted. After having decided to use the AI Act (step 1), the article speculates on the implications of the AI Act on socio-economic developments and adoption (step 2), and how it will change the media sector as we know it (step 3), but instead of speculating then on how people will change the law (as a logical adaptation of Johnson's 4th step), the scenario explores how people might respond to technology and the broader socio-economic implications to stay within the boundaries of the law (as adaptation will be far more feasible and therefore also more realistic than changing a law once it has been adopted).³⁴ The paper concludes with reflections (step 5).

The next phase is the evaluation of the scenario. Roubelat, for example, suggests that a credible scenario must be relevant, coherent, likely and transparent.³⁵ Similarly, Fisher proposes probability (in the sense of likelihood and plausibility) and narrative fidelity (in the sense of relevancy and coherency) as evaluation criteria.³⁶ Evaluating the scenario is an important element of validation and integrating external perspectives into the research. Particularly in the policy making context, validation can provide critical insights on the reliability or plausibility of the scenario. Those can be expert or non-specialist perspectives, and they aid further reflection. For example, Diakopoulos and Johnson used crowdworkers to assess the plausibility of short scenarios that were written with the help of other crowdworkers.³⁷ For this paper here, the goal was to develop one plausible scenario that would bring together the current insights from law as well as digital journalism research and enable an in-depth analysis of the potential legal implications of the AI Act. Because of the complex and expert nature of the task, therefore 12 experts (six from the area of digital journalism and six information law experts)³⁸ were asked to critically evaluate the scenario on its relevance (in the sense of being relatable to ongoing debates), coherence and plausibility, following the criteria of Godet, Roubelat and Fisher.³⁹ The responses from the experts have been integrated and used to improve the scenario further.⁴⁰ Some parts of the scenario were adjusted, less plausible claims were removed, and additional considerations were added to the analysis. As a final step, the scenario was shared and discussed in a seminar with 30+ participants from different disciplinary backgrounds to assess its usefulness in stimulating legal reasoning. Participants were asked questions like: How plausible do you find the scenario? Which parts are more/less plausible? Is the story coherent, if not, where not? Is the future described in the narrative desirable/not desirable, and if so why? What are lessons learned for the design of the AI Act? How can the

method be further improved? The feedback from this process has been used to further improve the analysis and reflect on the method (with some of the key insights being reported in section 6).

4. Describing the context of the scenario

This section will explain the context in which the scenario is set and the considerations that contributed to its design before presenting it in section 5.

4.1. The use of AI in media and journalism

Media and journalism professionals are exploring the potential of digital technologies, including AI,⁴¹ not least as a result of rising pressure to realise new business models, efficiency gains and value-added services in a highly competitive digital environment.⁴² A recent White Paper described the various ways in which AI is expected to change journalism and the media, ranging from new ways of supporting journalists in their research, assistance in the writing of pieces, and new forms of engaging and interacting with the audience, for example, through the personalised distribution of content or the use of virtual agents, up to the dynamic pricing of articles.⁴³ Others have highlighted that contrary to folk beliefs about robots replacing humans, most of these innovations will result in hybrid collaborations between humans and AI-driven services and applications, or, as Cools has proposed, 'shared decision-making'.⁴⁴

Today, AI is changing the entire news reporting value chain, from the gathering of information through to the production, distribution and consumption of news. In recent years, we have seen, for example, a whole range of applications in the research phase being developed. One of many examples is BBC's Juicer – watching over 850 news feeds from around the world, scraping, tagging and making news searchable, e.g., for trend analysis.⁴⁵ The juicer can also be used to enhance the user experience by creating pop-up news facts when readers hover over certain words. Another vibrant area of the use of AI in the media is for fact-checking and detecting Deep Fakes.⁴⁶ And with the proliferation of Large Language Models, such as Open AI's ChatGPT or Anthropic's Claude, the development of automated content production (in the form of text, images or voice and video) has received a powerful boost.⁴⁷ One of the most common uses of AI and machine learning is still in the

³³ Brian David Johnson, *Science Fiction Prototyping: Designing the Future with Science Fiction* (1st edition, Morgan & Claypool Publishers 2011).

³⁴ Following Johnson's advice to stay within the constraints of science, here: law.

³⁵ Godet and Roubelat (n 26).

³⁶ Walter R Fisher, 'Narration as a Human Communication Paradigm: The Case of Public Moral Argument' (1984) 51 *Communication Monographs* 1.

³⁷ Nicholas Diakopoulos and Deborah Johnson, 'Anticipating and Addressing the Ethical Implications of Deepfakes in the Context of Elections' (2021) 23 *New Media & Society* 2072.

³⁸ The experts are credited in the beginning of the article.

³⁹ Godet and Roubelat (n 26); Fisher (n 36).

⁴⁰ Godet and Roubelat (n 26).

⁴¹ Simone Mutsaers and Mark Schipper, 'Technologische Trends in het Mediadomein' (NPO 2021); Nic Newman, 'Journalism, Media, And Technology Trends And Predictions 2022' Oxford Reuters Institute; EBU, N.D. "News Report 2019 - The Next Media Organisation Unlocking The Power Of AI For Public Service Journalism".

⁴² Shangyuan Wu, Edson C. Tandoc Jr. and Charles T. Salmon, 'Journalism Reconfigured' (2019) 20 *Journalism Studies* 1440.

⁴³ Anna Schjøtt Hansen and others, 'Initial White Paper on the Social, Economic, and Political Impact of Media AI technologies Anna Schjøtt Hansen (UvA) Natali Helberger (UvA), Tobias Blanke (UvA), Rasa (NISV)' (University of Amsterdam 2022) AI4Media Whitepaper <https://www.ai4media.eu/wp-content/uploads/2022/03/AI4Media_D2.2_final-compressed_compressed.pdf>; Charlie Beckett and Mira Yaseen, 'Generating Change. A Global Survey of What News Organisations Are Doing with AI' (Journalism AI 2023).

⁴⁴ Hannes Cools, *How Algorithms Are Augmenting the Journalistic Institution: In Search of Evidence from Newsroom Media organisations and Its Innovation Labs*. Doctoral Dissertation (KU Leuven 2022). See also Nicholas Diakopoulos, *Automating the News* (Harvard University Press 2019).

⁴⁵ <https://bbcnewslabs.co.uk/projects/juicer/>.

⁴⁶ Preslav Nakov, David Corney, Maram Hasanain, Firoz Alam, Tamer Elsayed, Alberto Barrón-Cedeño, et al., 'Automated Fact-Checking for Assisting Human Fact-Checkers' [2021] Proceedings of the Thirtieth International Joint Conference on Artificial Intelligence 4551.

⁴⁷ Nic Newman, 'Journalism, Media, and Technology Trends and Predictions 2023' (Reuters Institute 2023) <<https://reutersinstitute.politics.ox.ac.uk/journalism-media-and-technology-trends-and-predictions-2023>>.

distribution phase, through news recommenders, personalisation algorithms and, increasingly also, virtual agents and chatbots.⁴⁸ Virtual agents and chatbots also reshape the relationship with the audience and engage with users. For example, the Perspectives API developed by Jigsaw (part of Google's parent company Alphabet) organises reader's comments interactively so that viewers can quickly see which ones they may find "toxic" and which may be more illuminating.⁴⁹ There is also experimentation with developing fully automated news anchors.⁵⁰

The growing importance of AI-driven tools affects journalism and journalism practice on more structural and deeper levels.⁵¹ One significant trend that can be observed relates to the role of (major) technology companies such as Google, Facebook and Microsoft, but also Outbrain, Narrative Science, Automated Insights, Omniture or Chartbeat and more recently OpenAI, Anthropic, Midjourney and other providers of Large Language Models. As digital technology suppliers, many media companies depend on their services to benefit from AI-driven solutions, ranging from tools to analyse data or translation and editing services, over fact-checking and identifying the provenance of a piece of content, to the automated production and distribution of content. This is particularly true for smaller and regional media organisations that lack the skills and resources to develop their own technologies.⁵² Accordingly, academic commentators are increasingly concerned about the growing influence of technology companies over media markets.⁵³ Importantly, like journalism, AI technology companies also come with their own values and targets for optimising the technology (such as efficiency, scalability and speed). These values are not necessarily or only oriented towards the journalistic values that so far have dictated the activities of the media and journalism (such as diversity, authenticity or news value).⁵⁴ Within media companies, the algorithmic trend is causing transformational changes, resulting in new divisions of tasks, new forms of capital (e.g. data, technological capital or skills) and also

new values (such as shareability, responsiveness to the need of the audience, scalability or efficiency).⁵⁵

4.2. The proposed AI Regulation

In April 2021, the European Commission announced "the first-ever legal framework on AI, which addresses the risks of AI and positions Europe to play a leading role globally."⁵⁶ The proposed regulation lays down harmonised rules on artificial intelligence systems. It must create the conditions for innovation within the European Single Market, legal certainty, adequate governance structures and the safe and secure implementation of AI in a way that respects fundamental rights and principles of human-centric design. Subsequently, the European Council published its Common Position by the end of 2022,⁵⁷ and the European Parliament adopted its amendments in June 2023.⁵⁸ At the time of writing, the AI Act's final version was subject to trilogue negotiations between the Commission, the Council and the Parliament. This also means that all references to articles in the AI Act in this paper are provisional.

The regulation adopts a risk-based approach. It distinguishes the application of AI for specific purposes that

- a) present such significant risks to fundamental rights and society that they are unacceptable and therefore banned within the European Union,
- b) pose a high risk to the health and safety or fundamental rights of natural persons and, because of that, are subject to some concrete legal requirements,
- c) pose very concrete but manageable risks as long as it is ensured that users are provided with certain information, and
- d) low-risk uses, or application areas of AI that are left unregulated, but the regulation encourages voluntary initiatives to make these applications safe and trustworthy.

The main thrust of the provisions in the draft AI Act is directed at the high-risk category of AI applications.⁵⁹ For high-risk AI, the draft regulation (in all versions) stipulates concrete obligations about the quality of data sets used, technical documentation and record-keeping, transparency and the provision of information to deployers and users, human oversight, robustness, accuracy and cybersecurity. Most

⁴⁸ N. Newman, R. Fletcher, A. Kalogeropoulos & R. Nielsen, 'Reuters Institute Digital News Report 2019' *ibid.*, Reuters Institute for the Study of Journalism.

⁴⁹ <https://perspectiveapi.com/>.

⁵⁰ <https://www.euronews.com/next/2023/04/17/kwaid-unveiled-its-first-ai-powered-news-presenter-could-it-be-an-ethics-nightmare>

⁵¹ Nicholas Diakopoulos, *Automating the News* (Harvard University Press 2019); Seong Jae Min and Katherine Fink, 'Keeping Up with the Technologies: Distressed Journalistic Labor in the Pursuit of 'Shiny' Technologies' (2021) 22 *Journalism Studies* 1987; Seth C. Lewis and Oscar Westlund, 'Actors, Actants, Audiences, and Activities in Cross-Media News Work' (2015) 3 *Digital Journalism* 19; Federica Cherubini and Rasmus Kleis Nielsen, 'Editorial Analytics: How News Media are Developing and Using Audience Data and Metrics' [2016] Reuters Institute for the Study of Journalism.

⁵² Emily Bell, 'The Dependent Press: How Silicon Valley Threatens Independent Journalism' in Martin Moore and Damian Tambini (eds), *Digital Dominance. The Power of Google, Amazon, Facebook and Apple* (Oxford University Press 2018).

⁵³ Victor Pickard, 'Restructuring Democratic Infrastructures: A Policy Approach to the Journalism Crisis' (2020) 8 *Digital Journalism* 704; Felix M. Simon, 'Uneasy Bedfellows: AI in the News, Platform Companies and the Issue of Journalistic Autonomy' [2022] *Digital Journalism* 1; Martin Moore and Damian Tambini, *Digital Dominance: The Power of Google, Amazon, Facebook, and Apple* (Oxford University Press 2018); Emily Bell, 'The Dependent Press: How Silicon Valley Threatens Independent Journalism' in Martin Moore and Damian Tambini (eds), *Digital Dominance. The Power of Google, Amazon, Facebook and Apple* (Oxford University Press 2018); Sarah A. Ganter, *The Power of Platforms Shaping Media and Society* (Oxford University Press 2022); José van Dijck, Thomas Poell and Martijn de Waal, *The Platform Society* (Oxford University Press 2018); Author.

⁵⁴ Valerie Belair-Gagnon and Avery E Holton, 'Boundary Work, Interloper Media, And Analytics In Newsrooms' (2018) 6 *Digital Journalism* 492; Shangyuan Wu, 'A Field Analysis of Immersive Technologies and Their Impact on Journalism: Technologist Perspectives on the Potential Transformation of the Journalistic Field' (2023) 24 *Journalism Studies* 387; Mike Ananny and Kate Crawford, 'A Liminal Press' (2015) 3 *Digital Journalism* 192.

⁵⁵ Shangyuan Wu, Edson C Tandoc and Charles T Salmon, 'When Journalism and Automation Intersect: Assessing the Influence of the Technological Field on Contemporary Newsrooms' (2019) 13 *Journalism Practice* 1238; Seth C Lewis, Andrea L Guzman and Thomas R Schmidt, 'Automation, Journalism, and Human-Machine Communication: Rethinking Roles and Relationships of Humans and Machines in News' (2019) 7 *Digital Journalism* 409; Balázs Bodó, 'Selling News to Audiences – A Qualitative Inquiry into the Emerging Logics of Algorithmic News Personalization in European Quality News Media' (2019) 7 *Digital Journalism* 1054.

⁵⁶ European Commission, Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative Acts, COM/2021/206 final, Brussels, 21 April 2021 (hereinafter: EC version).

⁵⁷ Council of the European Union, Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts – General approach, 2021/0106(COD), Brussels, 25 November 2022 (hereinafter: Council version).

⁵⁸ European Parliament, Amendments adopted by the European Parliament on 14 June 2023 on the proposal for a regulation of the European Parliament and of the Council on laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts (COM(2021)0206 – C9-0146/2021 – 2021/0106(COD)), P9_TA(2023)0236 (hereinafter: EP version).

⁵⁹ Where nothing else is mentioned, reference is made to the EC version of the AI Act.

obligations relate to the systems themselves, not to the broader organisational environment, except for the elaborate rules on human oversight, data quality management and post-market monitoring. Also, the regulation requires the division of clear responsibilities and the setting up of procedures for monitoring and using AI. The recent compromise text of the European Parliament adds a set of provisions for the providers of foundational models, such as ChatGPT or Midjourney, as part of a separate risk category. Suggested obligations include the obligations for the providers of foundational models to perform risk assessments and stipulate requirements regarding data management, ecological sustainability, transparency, and the obligation to ensure auto-generated content is lawful and respects third parties' rights.⁶⁰

One regulatory choice the institutions made in the Draft AI Act is that most obligations address the technology provider (the entity that develops an AI system) and not so much the professional downstream users or deployers.⁶¹ For example, according to the compromise text by the European Parliament, providers of foundational models and high-risk AI systems must anticipate risks and realise the appropriate risk management measures through design, the implementation of control measures and human interfaces, repeated testing and the explicit instruction of the (professional) deployers of such systems. Since assessing the conformity of the AI system with the AI Regulation is, in most cases, a matter of self-assessment, the AI Act affords technology developers a considerable margin of discretion and influence over the design of AI systems and the way they live up to the requirements of human-centric and value-sensitive design.⁶² This is even more the case since the primary obligations of (professional) AI system deployers are to ensure they follow the systems' instructions and monitor the system's operation.⁶³ Under the European Parliament's Compromise text from June 2023, it is still primarily the responsibility of the providers of an AI system to ensure compliance with the AI Act, unless a deployer performs significant modifications of the system, in which case the user will be considered the provider.⁶⁴ In practical terms, this also means that the costs of compliance with the AI Act will fall primarily on providers of AI systems. For smaller providers but also deployers, this choice can disincentivise in-house technology development or adjust existing systems in favour of procuring third-party technologies from companies with the scale and resources to comply with the legal requirements.

To facilitate compliance and contribute to more legal certainty, the European law makers have defined an essential role for European Standardisation Organisations to develop more concrete and detailed standards and requirements that AI systems must comply with. The central role of technical standards follows in the European Union's "New Approach" tradition, in which binding legal rules are concretised

through technical standards to eliminate trade barriers and provide an appropriate level of product safety for European consumers.⁶⁵ In the Draft AI Act, too, harmonised technical standards will have an important role in operationalising the requirements for human-centric and value-sensitive design and development requirements, and compliance with the relevant technical standards can be a means to demonstrate conformity with the Draft AI Act.⁶⁶ Such standards could range from standardisation of risk management or data governance to standards for human oversight, accuracy specifications or quality management.⁶⁷

The instances of high-risk AI are listed in an Annex to the regulation, and it is up to the EC to amend the Annex where needed. An AI system can be classified as high risk if, in the light of its intended purpose, it poses an increased risk of harm to the health and safety or the **fundamental rights** of persons, taking into account both the **severity** of the possible harm and its **probability** of occurrence. They are used in several precisely pre-defined areas specified in the regulation. With the European Parliament's proposal, the Draft AI Act has also become more relevant for the media sector, with the proposed inclusion of the recommender systems of Very Large Online platforms into the list of high-risk AI applications, with the best effort principles that apply to all providers and deployers of AI systems,⁶⁸ and the additional rules on foundational models, including those that automatically generate text and images,⁶⁹ even if the media sector as such is not yet listed as a high-risk area.

Outside the Draft AI Act, the main thrust of regulation on the use of AI in the media has focused so far on the potential systemic risks that the use of content moderation systems, recommender systems and systems for the selection and display of advertisements of Very Large Social Media platforms pose for the exercise of fundamental rights, the dissemination of illegal content as well as a form of inauthentic use and intentional manipulation of these systems in ways that can negatively affect, among other things, the civic discourse and electoral processes.⁷⁰ A significant concern around the use of AI technology here is the problem of disinformation and the need to develop accountability regimes and responsibility for mitigating the problem of disinformation.⁷¹

5. The scenario: FutureNewsCorp (in the year 2043)

With over 20.000 employees, FutureNewsCorp is the continent's most significant computational media company. It employs an army of data scientists, automation and machine learning experts, developers, user engagement editors, immersive journalism solution architects, network analysts and futurologists. Together, these experts worked relentlessly, day and night, to bring all the news worth reading. Well-established in the news world, FutureNewsCorp is one of Europe's longest-existing computational media companies. It is a pioneer in offering a service platform to all the deployers that rely on its services to produce and disseminate their content to the audience.

⁶⁰ Art 28b draft AI Act (EP version).

⁶¹ Gerald Spindler, 'Der Vorschlag Der EU-Kommission Für Eine Verordnung Zur Regulierung Der Künstlichen Intelligenz' [2021] CR 361. The Draft AI Act defines providers as "a natural or legal person, public authority, agency or other body that develops an AI system or that has an AI system developed with a view to placing it on the market or putting it into service under its own name or trademark, whether for payment or free of charge", Art. 3 (2) Draft AI Act (EC version). A 'user' "means any natural or legal person, public authority, agency or other body using an AI system under its authority, except where the AI system is used in the course of a personal non-professional activity", Art. 3 (4) Draft AI Act (EC version). The European Parliament, in its version, suggests to use the notion of 'deployer' instead, Art. 3 (4) Draft AI Act (EP version).

⁶² Martin Ebers, 'Standardizing AI – The Case of the European Commission's Proposal for an Artificial Intelligence Act' in Larry A. DiMatteo, Michel Canarsa and Cristina Poncibò (eds), *The Cambridge Handbook of Artificial Intelligence: Global Perspectives on Law and Ethics* (Cambridge University Press 2022) 595; Natali Helberger and Nicholas Diakopoulos, 'The European AI Act and How It Matters for Research into AI in Media and Journalism' [2022] *Digital Journalism* 1.

⁶³ Art. 29 (1) Draft AI Act (EC version).

⁶⁴ Art. 28 (1) (b) Draft AI Act (EP version).

⁶⁵ Hans-W Micklitz, 'The Role of Standards in Future EU Digital Policy Legislation. A Consumer Perspective' (BEUC, ANEC 2023) Report commissioned by BEUC and ANEC <https://www.beuc.eu/sites/default/files/publications/BEUC-X-2023-096_The_Role_of_Standards_in_Future_EU_Digital_Policy_Legislation.pdf>.

⁶⁶ Art. 40 of the Draft AI Act (EC version).

⁶⁷ See European Commission, Draft standardisation request to the European Standardisation Organisations in support of safe and trustworthy artificial intelligence, Brussels 5 December 2022.

⁶⁸ Article 4a Draft AI Act (EP version).

⁶⁹ Art. 28b (4) of the Draft AI Act (EP version).

⁷⁰ Art. 34 of the Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) (Text with EEA relevance), OJ L 277, 27.10.2022, p. 1–102.

⁷¹ European Commission, 'Assessment of the Code of Practice on Disinformation – Achievements and Areas for Further Improvement' (2020) 180 SWD.

FutureNewsCorp's clients mainly consist of media organisations and individual journalists (provided they can afford the service).⁷²

Often referred to as the "Netflix of AI technology", FutureNewsCorp has revolutionised the news business with its AI technology. Specialising in the media sector, FutureNewsCorp offers a one-stop-shop for all the technical services required to produce and distribute media content, from the possibility of using advanced Large Language Models for editing and automated content production to various modes of distribution. Deployers could upload their content or data and choose between three packages: the Premium Package, including fully personalised distribution, at least 2.000 individual targeting criteria to choose from, multi-format reporting via text, VR, immersive, chat and interactivity options ("Talk to the author"), and automated content production, editing and translation. This option also came with the complete data analytics package, including personalised pricing and adjusting distribution and content to individual user preferences, predictions of readership and audience valuation over 12 months. The Standard Package included the multi-format and interactivity option, group-based targeting based on 500 individual targeting criteria and niche audiences as small as 100 readers, but without the data analytics package and a flat-rate pricing model. Finally, in the Economy Package there were no personalisation options for the economy user, nor was individualised pricing possible. The news would be distributed in untargeted and unchanged form to whoever was connected to the internet and willing to receive it. Thanks to FutureNewsCorp, it was now possible to match every reader with precisely the news products that fit their interests and station in life. Journalists and writers, or at least those that could afford it, would never again have to waste precious resources on producing articles that nobody would read.

The news business has not always been that well organised. There was a time when media organisations tried to attempt the complex business of distributing their news to the right reader without professional support. This only changed in 2024, when the European Union finally adopted the AI Act and changed the course of the Algorithmic Society. In addition to firmly establishing the principles of human-centric AI and AI systems that respect European fundamental rights, the AI Act fundamentally changed the AI value creation chain. It set clear criteria for the responsibility for AI. According to the AI Act, most responsibility for the design of AI technology shifted to the providers and developers of AI systems to ensure human-centric design and fundamental rights were taken into account from the onset of the development process. Those designers and professional providers of AI systems had to comply with wide-ranging obligations to design AI systems to serve humans, observe fundamental rights and European values, and make the systems safer for downstream deployers and end-users.

The core principles of the AI Act still apply today after more than 20 years. Soon after the adoption of the act, it became apparent that if there is a high risk to European democracy, security and fundamental rights, it stems from the use of AI-driven content moderation, recommendation algorithms, targeting and virtual agents in the media. As a consequence, only one year after the adoption of the AI Act, the European Commission added the application of AI in the media to the list of high-risk AI applications.

Before the AI Act, many original AI systems were in-house systems that media organisations, large and small, built. Off-the-shelf systems were also available, but the licensing conditions would not allow media

⁷² The author would like to thank Anna Schjott-Hansen and Tomás Dodds for an inspiring conversation, out of which the idea of distribution and amplification as a service to journalists and media organisations as deployers was born.

organisations to adequately adjust those systems to reflect the editorial values of the news outlet.⁷³ After adopting the AI Act, the compliance costs forced most media organisations to end their in-house R&D projects and dismiss their data analysts and software developers. Instead of building their own AI-driven tools and databases, news organisations started using the services of specialised providers of news AI. Soon the economics of scale and scope did their work so that eventually, only a few very large news AI corporations were left that served professional and amateur media professionals. FutureNewsCorp was, and still is, one of the largest.

The influence of a small handful of computational media companies on the functioning of the media market did raise some concern, and more and more academics, civil society organisations and national policymakers called for additional guidance to ensure their commitment to the values and fundamental rights that have shaped European societies. In the end, the solution to the problem was standardisation. The AI Act foresaw a central role for standardisation bodies to develop standards of responsible AI, and the European Telecommunications Standards Institute (ETSI), in cooperation with the International Standards Organisation (ISO), developed the 980021-standard series. ETSI 98002121-EU stood for European Media Values, ISO 98002121-US for US Media Values, ISO-98002121-CHIN for Chinese Media Values, etc.

For Europe, after the appalling experiences with the massive proliferation of disinformation that had shaken the trust of Europeans in the media and the abuse of the media as means of war propaganda in the Ukraine-Russia war, the Standardisation Organisations made it very clear that any content that would include depictions of extreme violence, despair, political provocation and polarisation or would be inclined to induce panic and disturb the public peace and constructive deliberation was not in line with European values. As a result, the ETSI 98002121-EUR standard aimed to ensure a safe level of political information and a healthy public sphere with a balanced mix of news, entertainment, sports, and cultural news. And it was only a short time before companies like FutureNewsCorp could serve journalists all around Europe with user-friendly, tolerance-inducing news to stimulate harmonious public deliberation. Europe experienced what was perhaps its most extended period of peace of mind ... until that one night in April 2043...

At night, FutureNewsCorp was a place of quiet productivity. Most human operators and experts had left for their homes. The machines kept working through the night, amplifying some evening news here or sending the latest personalised sound feeds there. All went well until suddenly, a shrill alarm rang in room 10.20 – the floor hosting the control rooms and the human oversight teams. An experienced human controller, James Solo, was on night duty. The alarm bell startled James out of his slumber. Sleepily he scrutinised the furious blinking red lights in section P of the computer dashboard before him. Section P was dedicated to the automated content screening systems that continuously and fully automatically checked all the news passing through FutureNewsCorp's AI systems. A P alarm could mean only one thing: ETSI 98002121-EUR standard had been broken!

To comply with the AI Act, FutureNewsCorp and its clients, the journalists and content producers that used their service, had committed themselves long ago to transpose ETSI 98002121-EUR. To be accredited, each journalist, professional or amateur, had to commit to the high professional standards that the ETSI standard imposed. Each journalist was also obligated to publish a transparency notice stating their name, contact details, and the degree to which AI technology has played a role in producing the content, following a latter addition to the the AI Act:

⁷³ For example, the difficulty of safeguarding professional values in third-party technology was an important reason for the BBC to start building their own recommendation technology, J. Eggink (2019). Developing personalised recommender systems at the BBC, <https://www.bbc.co.uk/blogs/internet/entries/3e4342d4-6f81-47c0-8ba2-8dc7b419eb72>.

the right to AI authenticity – the right of an AI system to know whether it was interacting with a human or a machine.⁷⁴

James Solo immediately checked the transparency notice. The code pointed to a journalist, part of the famous BrainBook⁷⁵ journalism cooperative, living in a small town south of Paris. A certain Jules Verniculum had used FutureNewsCorp's automated content production system to produce more than 150 items of downright shocking or offending political news. From the terrible pictures of the consequences of the flooding of the last Dutch city to detailed coverage of a new wave of violent civil unrest in France and the extreme human suffering as a result of a new war in the East of the Union, the newsfeed of Jules Verniculum was full of news that was offensive, disturbing, shocking and polarising.

James did not lose any more time pondering and activated the emergency protocol immediately. Half an hour later, the Paris section of the FutureNewsCorp Security Division arrived at the designated location and phasered the door. What they saw was an almost empty room. The windows were closed, and there was no light save the pulsating soft blue light of a computer screen that sat on a desk in the middle of the one-room apartment. And on the screen, a cursor was moving, continuously feeding pictures, data and text into NewsCorp's system. It wrote word after word. Behind the persona of Jules Verniculum, a member of the BrainBook cooperative, lurked a computer that was automatically producing deeply critical political news. No one knew who had created Jules V. or for whom it worked. The BrainBook Cooperative renounced any responsibility. The enforcement officers had found the first fully automated journalist in that room.

With the breach of ETSI 98002121-EUR, Jules V had also broken countless national laws that all banned the transmission of polarising or disturbing depictions of political news.⁷⁶ These transgressions were so unsettling that it was no surprise that Jules V was eventually ordered to appear before the Global Standards Oversight Board.⁷⁷

The Global Standards Oversight Board was a solution to what a leading technology innovator once dubbed the 'most cumbersome and innovation-hostile' invention of humanity – divergent national legal orders. And once standardisation had become the primary means of operationalising and harmonising legal norms across national jurisdictions, the various standardisation bodies and private stakeholders set up the Global Standards Oversight Board to uphold these standards.

The Global Standards Oversight Board united some of the world's most prominent and honourable thinkers, artists, computer scientists, politicians and legal experts. Together they had the challenging and

⁷⁴ Art. 52 of the Draft AI Act (EC, EP and Council version) introduces the so-called 'right to authenticity', according to which providers shall ensure that AI systems intended to interact with natural persons are designed and developed so that natural persons are informed that they are interacting with an AI system.

⁷⁵ An adaptation of the name Facebook, alluding to the fact that certain social media organisations, such as Facebook and Google, are engaged in distributing and producing news and media content. D. Alba (2017). Facebook's Officially a Media Company. Time to Act Like One (Open AI). <https://www.wired.com/2017/03/facebooks-officially-media-company-time-act-like-one/>.

⁷⁶ In response to the proliferation of disinformation already now, in 2023, a number of European member states has started adopting legislation against the dissemination of disinformation, as information that disturbs the public peace or peace of order, European Regulatory Group for Audiovisual Media Services (ERGA), 'NOTIONS OF DISINFORMATION AND RELATED CONCEPTS (ERGA Report)' (2019) <<https://erga-online.eu/wp-content/uploads/2021/03/ERGA-SG2-Report-2020-Notions-of-disinformation-and-related-concepts-final.pdf>>. It is also worth mentioning that e.g. according to the Terms of Use of Open AI, the production of content that offends is prohibited, see Open AI sharing and publication policy, <https://openai.com/policies/sharing-publication-policy>.

⁷⁷ Inspired by the Facebook Oversight board (<https://oversightboard.com/>), which has been repeatedly referred to as a new sort of supreme or constitutional court (Josh Cowsls, Darius Philipp, Santistevan Dominiquo and Schramm Moritz, 'Constitutional Metaphors: Facebook's 'Supreme Court' and the Legitimation of Platform Governance' [2022] *New Media & Society* 1).

critical task of maintaining justice and the rule of code. Majestically, the 50-floor construction of metal and glass floated about 2 kilometres above the countries and national borders.

Before the Global Standards Oversight Board, the proceedings were strictly confidential and protected by all imaginable secrecy and non-information laws. This is also why we will never really know what the Board discussed in detail. Here is what we do know from the information that leaked. General Advocate Anderson suggested that the case of Jules V vs FutureNewsCorp pivots around this one central question: how does the freedom of expression rights of journalists relate to the right of the audience not to be informed about events that shocked, offended or disturbed their peace of mind?⁷⁸ The added difficulty of the case was that so far, fundamental rights protection has been reserved for humans. Jules V was not a human journalist but an AI. According to the AI Act, AI systems were only allowed under human oversight and the full responsibility of the system provider. They did not qualify for legal personhood of their own.⁷⁹ The Board in the Jules V. case also did not use the opportunity to clarify this critical point, refusing pointedly to delve into what GA Anderson described as 'Asimovian utopian fantasies'. Instead, the Board observed that Jules V was essentially an AI gone rogue, an AI without a provider, or, to put it another way: a legal oddity.

Then, some surprising events unfolded in quick succession. The BrainBook journalism cooperative joined the case as an affiliated party and offered to 'adopt' Jules V and assume responsibility as its official provider. FutureNewsCorp followed suit and asked for a word with the judges and the lawyer of Jules V in private. When the judges returned, the Board announced that FutureNewsCorp would become Jules V's 'provider' on the condition that Jules V would undergo a thorough and deep value-sensitive design treatment. A week later, Jules V had been optimised for the ETSI 98002121-EUR standard. It was the first journalist ever to join FutureNewsCorp.

6. Reflections

Today, the digital media landscape is experiencing several fundamental transformations that will define the sector for the years to come. These are changes to journalistic production processes and business models, changes in the behaviour of readers and listeners and a host of ambitious legal proposals from Brussels to set the rules of the game for the digital world. These changes cannot be seen and assessed in isolation from each other. The scenario of FutureNewsCorp speculates how the dynamics in these three spheres of influence could potentially change and what the impact would be on the world of digital media as we know it today. Again, the goal is decidedly not to predict a future but to use the scenario to think through the societal consequences of the regulation and the changes it may affect if applied to a particular sector. The media sector is an interesting case study as a sector that is heavily experimenting with AI, having a well-developed system of professional values as a part of the journalism profession's self-conception⁸⁰ and

⁷⁸ Under Article 10 ECHR, the public has the right to receive information, even information that shocks or offends, ECHR Lingens. However, the court never had to decide whether the audience also had a right not to receive disturbing news.

⁷⁹ See, e.g. the discussion in (David J. Gunkel, 'The Other Question: Can and Should Robots Have Rights?' (2018) 20 *Ethics and Information Technology* 87). According to Raposo, "[t]he fact that the Draft Act remains silent on the issue of AI personhood can be taken as a stand-in itself (that AI systems are not legal persons nor can they be held accountable) or simply as the postponement of a resolution of an extremely complex question", (Vera Lúcia Raposo, 'Ex Machina: Preliminary Critical Assessment of the European Draft Act on Artificial Intelligence' (2022) 30 *International Journal of Law and Information Technology* 88).

⁸⁰ Alexander Filipović, Christopher Koska and Claudia Paganini, 'Developing a Professional Ethics for Algorithmists' Alexander Filipović, Christopher Koska, Claudia Paganini' (Bertelsmann Stiftung 2018).

traditionally relying strongly on self-regulation. Of course, the plausibility of the scenario also depends on the degree to which the use of AI in the media will be regulated by the final version of the AI Act, which is not to say that some of the lessons learned from the scenario will not be relevant more generally. In the following, I will reflect on some of these lessons.

1. *The AI Regulation could further accelerate a shift from in-house technologies towards using external technology providers.*

One potential change is related to the impact of AI and digital technology on the practices of journalism and the media. A growing body of scholarship suggests that the impact of automation, data analytics and various AI-driven services and applications could be profound. Lindblom and Gidlund describe, in the case of Sweden, how ‘journalists adapt to the industrial logics of digitisation’⁸¹ and how, as a result, new procedures and work routines emerge, positions of power and influence are rearranged, and new forms of capital appear. One crucial element of this digitisation logic is how the availability of data-driven insights drives competition for clicks, engagement and other measurable metrics as measures of success in the competition for the audience’s attention.⁸² Digital technology providers that incentivise and enable these processes are often described as an external force shaping the sector on various levels.⁸³ Reflecting on these developments, Wu et al. suggest that the growing influence of digital technology and technology providers in media markets could even reverse positions and result in a scenario where: “news organisations [...] serve as content providers whose work adds to the pool of content that may be analysed by data management firms and as collaborators on their innovations”.⁸⁴

The scenario of FutureNewsCorp develops this idea further and relates it to another potential source of transformational change: law and policy. Rules and policies can steer innovation in various directions.⁸⁵ A prominent example is the impact of the General Data Protection Regulation (GDPR) on innovation in and beyond Europe⁸⁶ or the way copyright law in China shifted the power to shape journalism away from journalistic institutions to technology companies.⁸⁷ With the inclusion of generative

⁸¹ Terje Lindblom, Johan Lindell and Katarina Gidlund, ‘Digitalizing the Journalistic Field: Journalists’ Views on Changes in Journalistic Autonomy, Capital and Habitus’ [2022] *Digital Journalism* 1.

⁸² Federica Cherubini and Rasmus Kleis Nielsen, ‘Editorial Analytics: How News Media are Developing and Using Audience Data and Metrics’ [2016] Reuters Institute for the Study of Journalism; Christopher Anderson, ‘Between Creative and Quantified Audiences: Web Metrics and Changing Patterns of Newswork in Local US Media organisations’ (2011) 12 *Journalism: Theory, Practice & Criticism* 550; Balázs Bodó, ‘Selling News to Audiences – A Qualitative Inquiry into the Emerging Logics of Algorithmic News Personalization in European Quality News Media’ (2019) 7 *Digital Journalism* 1054.

⁸³ Terje Lindblom, Johan Lindell and Katarina Gidlund, ‘Digitalizing the Journalistic Field: Journalists’ Views on Changes in Journalistic Autonomy, Capital and Habitus’ [2022] *Digital Journalism* 1; Shangyuan Wu, Edson C. Tandoc Jr. and Charles T. Salmon, ‘Journalism Reconfigured’ (2019) 20 *Journalism Studies* 1440; Valerie Belair-Gagnon and Avery E. Holton, ‘Boundary Work, Interloper Media, And Analytics In Media organisations’ (2018) 6 *Digital Journalism* 492.

⁸⁴ Shangyuan Wu, Edson C. Tandoc Jr. and Charles T. Salmon, ‘Journalism Reconfigured’ (2019) 20 *Journalism Studies* 1440.

⁸⁵ Knut Blind, ‘The Influence of Regulations on Innovation: A Quantitative Assessment for OECD Countries’ (2012) 41 *Research Policy* 391.

⁸⁶ Nicholas Martin, Christian Matt, Crispin Niebel and Knut Blind, ‘How Data Protection Regulation Affects Startup Innovation’ (2019) 21 *Information Systems Frontiers* 1307; Crispin Niebel, ‘The Impact of the General Data Protection Regulation on Innovation and the Global Political Economy’ (2021) 40 *Computer Law & Security Review* 1.

⁸⁷ Joanne Kuai, Raul Ferrer-Conill and Michael Karlsson, ‘AI ≥ Journalism: How the Chinese Copyright Law Protects Tech Giants’ [2022] *Digital Journalism* 1.

AI under the Draft AI Act, an automated content production system such as Jules V could fall under the law. The European Parliament suggested an obligation on providers of generative AI models like ChatGPT to train and design their systems so that their output does not breach European Union law.⁸⁸ And in light of the growing concerns about the algorithmic amplification of disinformation and other algorithmically mediated systemic risks,⁸⁹ nor can it be excluded that other AI systems used in the media would fall at some point into the high-risk category, particularly if controlled by a large media technology company. Under the Digital Services Act (DSA), the use of AI-driven recommender systems and systems of content moderation by Very Large Online Platforms is already explicitly mentioned as a potential source of systemic risks to fundamental rights and a democratic society. And the European Parliament has proposed to include recommender systems used by Very Large Online Platforms into the list of high-risk AI applications.⁹⁰

The scenario reflects on a situation in which the law relies primarily on AI technology providers to identify and mitigate risks around the use of technology.⁹¹ Most of the provisions applicable to high-risk AI address the providers of AI systems. On the contrary, one of the primary obligations of deployers of AI systems (in our scenario: journalists or media organisations) is to follow the providers’ instructions.⁹² There can be good reasons for justifying this division of tasks: integrating fundamental rights considerations early on into the development process can significantly contribute to making these technologies and their use safer and more responsible. Doing so can also be more effective than mitigating the potential negative effects of technologies after deployment. And particularly for general-purpose technologies like generative AI, imposing quality and safety requirements before deployment can contribute to responsible downstream uses even if, at the point of development, it is still being determined what those uses will be. Having said thus, a situation in which most of the legal obligations accrue to the providers of the technology disincentives deployers from doing more than following providers’ instructions. Under the Draft AI Act, deployers that *do* more and modify or adapt the system to their own organisation-specific context and requirements risk being considered providers in their own right and having to comply with the extensive legal obligations that apply to providers.⁹³ Seeing the legal risks and potentially considerable compliance costs for providers, this uneven division of responsibility between developers and deployers can be one additional factor in the decision not to invest in in-house technology and instead procure from external technology providers.⁹⁴ The media then benefit from very advanced technology services but are also reduced to the role of users that are dependent on the technologies of others and to the role of data producers to power that technology.

⁸⁸ Article 28b (4)(b) Draft AI Act (EP version).

⁸⁹ Philip Napoli, *Social Media and the Public Interest. Media Regulation in the Disinformation Age* (Columbia University Press 2019); Naomi Appelman, Ronan Fahy, Paddy Leerssen, Tarlach McGonagle, Nico van Eijk and Joris van Hoboken, ‘The Legal Framework on the Dissemination of Disinformation through Internet Services and the Regulation of Political Advertising’ [2019] A report for the Ministry of the Interior and Kingdom Relations. Institute for Information Law; Carmen Colomina, Héctor Sánchez Margalef, Richard Youngs and Kate Jones, ‘The Impact of Disinformation on Democratic Processes and Human Rights in the World’ [2021] Study for the European Parliament.

⁹⁰ Recital 40b Draft AI Act (EP version).

⁹¹ Lena Enqvist, ‘Human Oversight’ in the EU Artificial Intelligence Act: What, When and by Whom?’ [2023] *Law, Innovation and Technology*.

⁹² Article 29 of the Draft AI Act (EC version).

⁹³ Article 29 of the Draft AI Act (EC version).

⁹⁴ Already now many media organisations opt in favour of procuring external technology for a variety of reasons, compliance issues being only one of them, Stanislaw Piasecki and Natali Helberger, ‘A Nightmare to Control: Uncertainties and Challenges around the Procurement of Journalistic AI from External Technology Providers’ (Future of Journalism Conference 2023, Cardiff, UK, 14 September 2023).

It is important to mention here that the dependency of the media and journalism on external actors has been around for a while. McManus and also Turow described, for example, how the media became dependent on and was shaped by advertisers.⁹⁵ Technology providers are thus stepping into a tradition of dependency. Also, regulation is only one out of many factors that influence sectoral dynamics, next to, for example, the role of advertisers,⁹⁶ deployers, end-users, competitors, etc. The scenario shows the importance of a more balanced division of responsibilities between providers and deployers of AI technology, and that more attention is needed regarding the possible incentives and disincentives the Draft AI Act can produce for the in-house development of responsible AI solutions, particularly for smaller organisations.

2. The decision about professional values could shift even more from professional journalists to technology providers and technical standardisation bodies

The power to shape technology comes with the power to decide which values AI systems incorporate. Acknowledging that technologies are not neutral⁹⁷, an essential focus of the Draft AI Act is in stimulating the development of so-called human-centric design and AI that internalises and operationalises fundamental rights and European values. The Draft AI Act does not offer much concretisation or guidance on how such fundamental rights and public values can be formalised in technology design. Sensible value-sensitive technology design is a challenging task. One important challenge in that context is the decision of what values to optimise for in the first place.

In journalism, professional journalistic values have traditionally played an essential role in shaping the activities of journalists and editors and their very identity of being a journalist.⁹⁸ The self-regulatory codes, mission statements and guidelines of the press are, therefore, important means of concretising the ethical and professional commitments of the media towards readers, society and their profession. That said, journalistic ethics and professional principles are not written in stone but are subject to constant re-invention, negotiation or 'boundary work'.⁹⁹ In interviews with media professionals, for example, digitisation also brought new, more user-centric values such as personal relevance or usability to the fore. Automated content must be consistent with editorial criteria, standards for data quality,¹⁰⁰ the importance of balancing AI and human intelligence or being mindful of the influence of digital technology

companies.¹⁰¹ And yet, it is also important to realise that with the ongoing digitalisation, the definition and conceptualisation of responsible journalism is no longer to be a privilege of journalists and editors alone.

With the digitalisation of production routines and editorial processes, new roles, skills, and responsibilities emerge within and outside news organisations.¹⁰² Within news organisations, integrating AI-driven tools results in new forms of journalistic capital in the form of technology-skilled media organisation employees¹⁰³ and new central stakeholders, such as product owners, social media editors and technology developers.¹⁰⁴ The internal routines and decision-making processes increasingly depend on external stakeholders, such as social media companies, cloud companies and the providers of journalistic AI.¹⁰⁵ These technology actors come with their own professional values and value priorities.¹⁰⁶ For example, research by Belair-Gagnon and Holton describes how re-inventing professional practices and routines has begun on the level of technology providers that work with media professionals.¹⁰⁷ And Wu et al. demonstrate the extent to which the values of media professionals and providers of AI technology can differ.¹⁰⁸ The scenario exemplifies how a law like the Draft AI Act and the strong focus on the role of technology providers can contribute to

¹⁰¹ Charlie Beckett, 'New Powers, New Responsibilities. A Global Survey of Journalism and Artificial Intelligence' (Report London School of Economics 2019).

¹⁰² Rodrigo Zamith, 'Quantified Audiences in News Production: A Synthesis and Research Agenda' (2018) 6 *Digital Journalism* 418; Federica Cherubini and Rasmus Kleis Nielsen, 'Editorial Analytics: How News Media are Developing and Using Audience Data and Metrics' [2016] Reuters Institute for the Study of Journalism; Raul Ferrer-Conill and Edson C. Tandoc, 'The Audience-Oriented Editor: Making Sense of the Audience in the Media organisation' (2018) 6 *Digital Journalism* 436.

¹⁰³ Terje Lindblom, Johan Lindell and Katarina Gidlund, 'Digitalizing the Journalistic Field: Journalists' Views on Changes in Journalistic Autonomy, Capital and Habitus' [2022] *Digital Journalism* 1.

¹⁰⁴ Annelien Smets, Jonathan Hendrickx and Pieter Ballon, 'We're in This Together: A Multi-Stakeholder Approach for News Recommenders' [2022] *Digital Journalism*; Raul Ferrer-Conill and Edson C. Tandoc, 'The Audience-Oriented Editor: Making Sense of the Audience in the Newsroom' (2018) 6 *Digital Journalism* 436.

¹⁰⁵ Felix M. Simon, 'Uneasy Bedfellows: AI in the News, Platform Companies and the Issue of Journalistic Autonomy' [2022] *Digital Journalism* 1; Olga Dovbysh, Mariëlle Wijermars and Mykola Makhortykh, 'How to Reach Nirvana: Yandex, News Personalisation, and the Future of Russian Journalistic Media' [2022] *Digital Journalism* 1; Emily Bell, 'The Dependent Press: How Silicon Valley Threatens Independent Journalism' in Martin Moore and Damian Tambini (eds), *Digital Dominance. The Power of Google, Amazon, Facebook and Apple* (Oxford University Press 2018); Bogdan Kulnych, Rebekah Overdorf, Carmela Troncoso and Seda Gürses, 'POTs: Protective Optimization Technologies' in *Proceedings of the 2020 Conference on Fairness, Accountability, and Transparency*, Association for Computing Machinery; James Meese and Edward Hurcombe, 'Facebook, News Media and Platform Dependency: The Institutional Impacts of News Distribution on Social Platforms' (2021) 23 *New Media & Society* 2367.

¹⁰⁶ Van Rompaey, Jønsson and Elmoose Jørgensen (n 5). Balázs Bodó, 'Selling News to Audiences – A Qualitative Inquiry into the Emerging Logics of Algorithmic News Personalization in European Quality News Media' (2019) 7 *Digital Journalism* 1054; Mike Ananny and Katy Crawford, 'A Liminal Press' (2015) 3 *Digital Journalism* 192.

¹⁰⁷ Valerie Belair-Gagnon and Avery E. Holton, 'Boundary Work, Interloper Media, And Analytics In Newsrooms' (2018) 6 *Digital Journalism* 492.

¹⁰⁸ Wu, Tandoc and Salmon (n 55); Wu (n 54).

⁹⁵ John McManus, 'A Market-Based Model of News Production' (1995) 5 *Communication Theory* 301; Joseph Turow, 'Breaking Up America: Advertisers and the New Media World' (2000) 24 *Bibliovault OAI Repository*, the University of Chicago Press.

⁹⁶ Henrik Örnebring and Michael Karlsson, *Journalistic Autonomy: The Genealogy of a Concept* (Chicago Distribution Center 2022).

⁹⁷ Langdon Winner, 'Techné and Politeia: The Technical Constitution of Society' in Paul T. Durbin and Friedrich Rapp (eds), *Philosophy and Technology* (Springer Netherlands 1983).

⁹⁸ Mark Deuze, 'What Is Journalism?: Professional Identity and Ideology of Journalists Reconsidered' (2005) 6 *Journalism* 442.

⁹⁹ Mark Deuze, 'What Is Journalism?: Professional Identity and Ideology of Journalists Reconsidered' (2005) 6 *Journalism* 442; Lyngé Asbjørn Møller, 'Between Personal and Public Interest: How Algorithmic News Recommendation Reconciles with Journalism as an Ideology,' [2022] *Digital Journalism* 1; Mariella Bastian, Natali Helberger and Mykola Makhortykh, 'Safeguarding the Journalistic DNA: Attitudes towards the Role of Professional Values in Algorithmic News Recommender Designs' (2021) 9 *Digital Journalism* 835.

¹⁰⁰ Patrícia Ventura Pocino, *Algorithms in the Media organisations Challenges and Recommendations for Artificial Intelligence with the Ethical Values of Journalism* (Catalan Press Council 2021).

new configurations of power to decide about values in technology.¹⁰⁹

With the increasing role of technology and technology providers in realising professional values, in combination with the ambitious regulatory efforts from Brussels to regulate more human-centric and responsible technology uses, a new type of stakeholder comes to the fore: technical standardisation bodies. Private standardisation bodies have started to develop standards for AI, including CEN, CENELEC and ETSI in Europe, and the more internationally operating organisations, such as ISO or the IEC.¹¹⁰ Most of the new AI standards developed are technical standards, but the use of AI systems, for example in the media, also touches upon fundamental rights standards and European public values, and providers of foundational models could soon be required to identify and mitigate “reasonably foreseeable risks to health, safety, fundamental rights, the environment and democracy and the rule of law.”¹¹¹ But when exactly does automated content conflict with democracy or fundamental rights, and how to organise a risk assessment and mitigation procedure compliant with abstract normative requirements? One of the standards in the European Commission’s request to the European Committee for Standardisation (CEN) and the European Committee for Electrotechnical Standardization (CENELEC) concerns a standard on risk management systems for AI systems.¹¹² As a result, such harmonised standards will not be mere technical standards but will also interpret and operationalise European Union values and fundamental rights. This conclusion aligns with the overall goal of the Draft AI Act to manage the risks of AI systems, including risks to fundamental rights and European values. Under the Draft AI Act, “[s]tandardisation should play a key role to provide technical solutions to providers to ensure compliance with this Regulation,”¹¹³ and Art. 40 Draft AI Act stipulates that “[h]igh-risk AI systems which are in conformity with harmonised standards or parts thereof ... shall be presumed to conform” with the requirements of the law.¹¹⁴ In practice, standardisation organisations, therefore will play a central role in operationalising public values and fundamental rights in the Draft AI Act. Still, this situation will also raise important practical questions: Do technical standardisation bodies have the necessary fundamental rights, expertise and experience to do so? How would their decisions align with those of human rights standard-setting institutions, such as the Council of Europe, as one of Europe’s most influential human rights standard-setting organisations. And where are the limits to standardising abstract and highly contextual norms and fundamental freedoms?

Technical standardisation organisations *have* started to also work on the ethics and governance of AI and aspects of social responsibility.¹¹⁵

¹⁰⁹ Emily Bell, ‘The Dependent Press: How Silicon Valley Threatens Independent Journalism’ in Martin Moore and Damian Tambini (eds), *Digital Dominance. The Power of Google, Amazon, Facebook and Apple* (Oxford University Press 2018).

¹¹⁰ Martin Ebers, ‘Standardizing AI – The Case of the European Commission’s Proposal for an Artificial Intelligence Act’ in Larry A. DiMatteo, Michel Canarsa and Cristina Poncibò (eds), *The Cambridge Handbook of Artificial Intelligence: Global Perspectives on Law and Ethics* (Cambridge University Press 2022) 595.

¹¹¹ Article 28b (1)(a) Draft AI Act (EP version) (n 62).

¹¹² European Commission, Draft standardisation request to the European Standardisation Organisations in support of safe and trustworthy artificial intelligence, Brussels, 5 December 2022, Annex I (1.).

¹¹³ Recital 61 Draft AI Act (EC, EP and Council version).

¹¹⁴ Draft AI Act (EC version).

¹¹⁵ E.g. SO/IEC DIS 38507, ISO/IEC AWI TR 24368 and ISO 26000.

For example, the IEEE Global Initiative on Ethics of Autonomous and Intelligent Systems has started to develop an entire battery of standards on ethical rather than technical issues. The Committee for Classical Ethics in Autonomous and Intelligent Systems will, in its own words, draw “from over two thousand years’ worth of classical ethics traditions” to address pressing and emerging ethical issues around the use and development of AI.¹¹⁶ The new IEEE P7000™ standard series signifies “the emergence of national and global policies that align with these principles”.¹¹⁷ Similarly, the joint focus group by CEN and CENELEC on AI is deliberating on how AI systems can be brought into line with European public values and human rights.¹¹⁸ In other words, standardisation bodies have already begun to play a role in defining not only technical standards but in operationalising ethical values and human rights, and the Draft AI Act firmly embeds the role of standardisation bodies as “delegated rule makers” to make European AI systems more human-centric and value-driven.¹¹⁹

The European Committee for Standardisation (CEN) and the European Committee for Electrotechnical Standardization (CENELEC) are private international non-profit organisations. As such, they are not committed to fundamental rights in the same way as public institutions are.¹²⁰ The European Commission emphasised that “given the fundamental rights implications of the European standards and European standardisation deliverables requested, relevant expertise in the area of fundamental rights should also be guaranteed,” but the presence of human rights expertise alone is no guarantee that CEN and CENELEC will operationalise fundamental rights in a similar way to, for instance, the Council of Europe or the European Court of Human Rights. The function of European technical standards-setting organisations as part of the “New Approach” is market-driven, even if they are also tasked to consider the public interest.¹²¹ As an important element in the European

¹¹⁶ IEEE, ETHICALLY ALIGNED DESIGN A Vision for Prioritising Human Well-being with Autonomous and Intelligent Systems, online available at standards.ieee.org/wp-content/uploads/import/documents/other/ead_v2.pdf, p. 193.

¹¹⁷ IEEE, ETHICALLY ALIGNED DESIGN A Vision for Prioritising Human Well-being with Autonomous and Intelligent Systems, online available at standards.ieee.org/wp-content/uploads/import/documents/other/ead_v2.pdf, p. 2.

¹¹⁸ CEN-CENELEC Focus Group Report, ‘Roadmap on Artificial Intelligence (2020)’ <https://ftp.cenecenelec.eu/EN/EuropeanStandardization/Sectors/AI/CEN-CLC_FGR_RoadMapAI.pdf>.

¹¹⁹ Martin Ebers, ‘Standardizing AI – The Case of the European Commission’s Proposal for an Artificial Intelligence Act’ in Larry A. DiMatteo, Michel Canarsa and Cristina Poncibò (eds), *The Cambridge Handbook of Artificial Intelligence: Global Perspectives on Law and Ethics* (Cambridge University Press 2022) 595; Michael Veale and Frederik Zuiderveen Borgesius, ‘Demystifying the Draft EU Artificial Intelligence Act’ (2021) 22 *Computer Law Review International* 97.

¹²⁰ Traditionally, fundamental rights apply in the relationship between states and individuals and not directly in the relationship between individuals and companies Maja Brkan, ‘Artificial Intelligence and Democracy: The Impact of Disinformation, Social Bots and Political Targeting’ (2019) 2 *Delphi - Interdisciplinary Review of Emerging Technologies* <<https://cris.maastrichtuniversity.nl/en/publications/artificial-intelligence-and-democracy-the-impact-of-disinformation>> accessed 19 March 2021..

¹²¹ Article 10 (1) of REGULATION (EU) No 1025/2012 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 25 October 2012 on European standardisation, amending Council Directives 89/686/EEC and 93/15/EEC and Directives 94/9/EC, 94/25/EC, 95/16/EC, 97/23/EC, 98/34/EC, 2004/22/EC, 2007/23/EC, 2009/23/EC and 2009/105/EC of the European Parliament and of the Council and repealing Council Decision 87/95/EEC and Decision No 1673/2006/EC of the European Parliament and of the Council, OJ L 316/12, 14.11.2012.

Internal Market strategy, the primary role of technical standards is not to operationalise fundamental rights but to create legal certainty and remove obstacles to the free flow of services.¹²² European standardisation organisations are inherently driven by a different logic than the public values logic that underlies, for example, the activities of the Council of Europe or the European institutions bound by fundamental rights obligations. It is this tension between market and fundamental rights logic that the scenario explores.

In the scenario, ETSI 98002121-EUR is a standard for 'content that sells.' This may sound futuristic. The scenario is also in tension with the fundamental rights doctrine, according to which even disturbing content that shocks or offends is subject to the protection of fundamental rights.¹²³ At the same time, in the wake of the pandemic, several member states declared content that disturbs peace and public order potentially unlawful.¹²⁴ In practice, the decisions about whether or not information can disrupt peace and order are difficult to make, and the resulting legal uncertainty is in direct conflict with the goal behind standardisation to create legal certainty. From a market-logic perspective, it makes sense that a private technical standard err on the safe side and determine that content "suitable to induce panic and disturb the public peace" (from the scenario) is not in line with European values. The scenario exemplifies that a risk-based approach, in combination with standardisation, risks creating a situation where 'risky' content, in the sense of content that disturbs, shocks or offends, is being sanitised in favour of safer, less controversial and more sellable content. This, combined with the dictate of clicks and orientation towards popular content and the industry orientation of many standardisation bodies¹²⁵, could make the scenario of ETSI 98002121-EUR a standard for 'content that sells' far less futuristic than it may sound. It also demonstrates, however, that standardisation can touch upon vital interests of the media, such as freedom of expression, diversity and editorial independence. Because standardisation plays such an important role in operationalising the Draft AI Act's human-centred, fundamental rights-inspired approach, it will be all the more critical to also include the voices of those affected by this process, such as the media, citizens, marginalised communities and civil society, and procedures for reconciling potentially conflicting public values and fundamental rights.

This leads to the next question of which entity should be entitled to oversee compliance with the standards issued by technical standardisation bodies, such as CEN and CENELEC. In its ruling in the James Elliot case, the European Court of Justice argued that the standards from private European standardisation bodies could be considered part of European Union law as implementation measures and subject to judicial

scrutiny.¹²⁶ The Court's decision does not yet explain whether it would also be prepared to review the substance of such a standard,¹²⁷ and even if so whether it would conduct the review in the light of the Internal Market doctrine or the extent to which technical standards succeed in operationalising fundamental rights. At the same time, and in response to the mounting pressure on private organisations to obey fundamental rights, we also observe the creation of new bodies that must help private companies operationalise fundamental rights and public values and judge to what extent the technological solutions they use are compliant. The creation of Facebook's Oversight Board as some quasi-constitutional organ is perhaps the most prominent example of such a new private institution to define and operationalise values. Klonick described the Oversight Board as "the first platform-scaled moment of transnational internet adjudication of online speech".¹²⁸ The reference in the scenario to the Oversight Board develops this idea further, raising the question of which body or entity would be responsible for not only developing but adjudicating standards of acceptable and qualitative speech in the media environment. Given the historical reluctance of regulators to regulate the press, combined with the preference for self-regulation and growing pressure on technology companies to interpret and apply fundamental rights law, we can expect that self-regulatory bodies, such as an Oversight Board, will in the future play a more prominent role in overseeing compliance of standards with fundamental rights even outside the high risk categories.

One takeaway from this paper is the need to re-think the prominent role of standardisation bodies as quasi-regulators. With the Draft AI Act's strong emphasis on human-centric AI design that respects fundamental rights and public values, the role of technical standardisation bodies can no longer be seen separately from their impact on shaping professional standards and the operationalisation of public values and fundamental rights. This change in focus and societal impact must be reflected in the democratic legitimisation, oversight, composition as well as procedures of standardisation bodies. Also, Article's 40 Draft AI Act's¹²⁹ overreliance on standardisation as a form to signal compliance with the requirements of the Draft AI Act should be questioned to avoid a serious disconnect between the evolution of technical and professional standards and to allow for the fact that it is the dynamic interplay between technical and professional (value) standards that ultimately decides whether or not AI systems are implemented responsibly. Especially in high-risk AI systems, i.e. systems that pose high risks to fundamental rights, individuals or society, the strong technological focus of standardisation bodies, combined with the lack of democratic oversight,

¹²² Recital 11 Regulation No 1025/2012: "Like other standards, standards for services are voluntary and should be market-driven, whereby the needs of the economic operators and stakeholders directly or indirectly affected by such standards prevail, and should take into account the public interest and be based on the founding principles, including consensus."

¹²³ European Commission, Draft standardisation request to the European Standardisation Organisations in support of safe and trustworthy artificial intelligence, Brussels, 5 December 2022, Annex I (1.).

¹²⁴ European Regulatory Group for Audiovisual Media Services (ERGA) (n 80).

¹²⁵ Pierluigi Cuccuru, 'Interest Representation in European Standardisation: The Case of CEN and CENELEC' (2019) 52 Amsterdam Law School.

¹²⁶ European Court of Justice, Case C-613/14 ((James Elliot Construction Limited), 27 October 2016. Critical: Micklitz (n 68); Carlo Colombo and Mariolina Eliantonio, 'Harmonized Technical Standards as Part of EU Law: Juridification with a Number of Unresolved Legitimacy Concerns?: Case C-613/14 James Elliot Construction Limited v. Irish Asphalt Limited, EU:C:2016:821' (2017) 24 Maastricht Journal of European and Comparative Law 323.

¹²⁷ Martin Ebers, 'Standardizing AI – The Case of the European Commission's Proposal for an Artificial Intelligence Act', Larry A. DiMatteo/Michel Cannarsa/Cristina Poncibò (eds.), *The Cambridge Handbook of Artificial Intelligence: Global Perspectives on Law and Ethics* (Cambridge University Press 2022) 22.

¹²⁸ Kate Klonick, 'The Facebook Oversight Board: Creating an Independent Institution to Adjudicate Online Free Expression' [2020] Yale Law Journal.

¹²⁹ In the EC, EP and Council version.

representation of societal actors and ability to contest standards, is problematic.¹³⁰

3. Human journalists and editors do not hold a monopoly on defining professional values for journalism.

"Quality means emphasising the human factor" is a headline in a recent report on challenges and recommendations for artificial intelligence with the ethical values of journalism.¹³¹ In a similar train of thought, the Draft AI Act, like the General Data Protection Regulation before it, emphasises the importance of human oversight and the right of humans to intervene as necessary conditions for making AI systems live up to high standards of safety and respect for fundamental rights.¹³² The underlying assumption is that humans hold the key to behaving responsibly and advancing human values.¹³³

Commentators have criticised the draft AI Act's human oversight provisions for their conceptual vagueness, and for leaving considerable room for providers to decide how to operationalise these provisions.¹³⁴ Others have questioned the feasibility of human control over automation,¹³⁵ failure to account for the complexity of human-computer interactions,¹³⁶ or the need for human governance of human intervention.¹³⁷ The scenario adds another dimension to that critical literature, namely that humans can behave irresponsibly and insensitively to human values, too, because of a lack of reflection, competing own interests or institutional priorities. A growing body of scholarship documents how media professionals struggle with choosing between optimising for clicks and compromising for journalistic values. Shareability, popularity and engagement compete with the public interest, relevance and professional instinct of what the audience ought to read –

even if doing so can seriously shock, disturb or unleash public unrest.¹³⁸ Market dynamics, the dependency on social media platforms and managerial decisions can further increase the pressure to optimise for market logic and even reduce professional autonomy.¹³⁹ Research shows how dashboards can be designed to get journalists quite literally addicted to audience metrics¹⁴⁰, how platforms use their economic power to influence the production of journalistic content¹⁴¹ and how web analytics companies foster profit-oriented values in media organisations.¹⁴² Reflecting on developments like these, Moran and Shaikh ask somewhat provocatively, "is journalism merely the production of "content or something more valuable"?¹⁴³ Also, it is worth pointing out that the quality of independent journalism and the media as an institution and guarantor of professional values can differ between states and cultural contexts. This is not to paint a bleak picture of the future of professional journalistic autonomy but to demonstrate that the fact that a human operator is in the loop does not automatically mean that humans will maximise public values and fundamental rights when applying digital technology.

Do human journalists and editors have a monopoly on deploying automated journalism that reflects and respects journalistic values, such as news value or public service value? Is human control and oversight a guarantee for automated quality news? Could automated journalists be more rigorous journalists than human ones? What happens if the roles are reversed: human journalists and media companies succumb to commercial pressures to produce content for clicks? At the same time, AI systems further evolve, are trained on massive datasets of quality journalism and provide people with information about public affairs and 'must know' content. The Draft AI's Act approach to human-centred and

¹³⁰ European Parliament, Resolution of 4 July 2017 on European standards for the 21st century, P8_TA(2017)0278; Michael Veale and Frederik Zuiderveen Borgesius, 'Demystifying the Draft EU Artificial Intelligence Act' (2021) 22 *Computer Law Review International* 97; Martin Ebers, 'Standardizing AI – The Case of the European Commission's Proposal for an Artificial Intelligence Act' in Larry A. DiMatteo, Michel Cannarsa and Cristina Poncibò (eds), *The Cambridge Handbook of Artificial Intelligence: Global Perspectives on Law and Ethics* (Cambridge University Press 2022) 595.

¹³¹ Patrícia Ventura Pocino, *Algorithms in the Media organisations Challenges and Recommendations for Artificial Intelligence with the Ethical Values of Journalism* (Catalan Press Council 2021).

¹³² Enqvist (n 95); Rebecca Crootof, Margot E Kaminski and W Nicholson Price II, 'Humans in the Loop' (25 March 2022) <<https://papers.ssrn.com/abstract=4066781>> accessed 6 October 2023.

¹³³ Ben Green, 'The Flaws of Policies Requiring Human Oversight of Government Algorithms' (2022) 45 *Computer Law & Security Review* 105681; Reuben Binns, 'Human Judgment in Algorithmic Loops: Individual Justice and Automated Decision-Making' (2022) 16 *Regulation & Governance* 197.

¹³⁴ Ibid

¹³⁵ Riikka Koulu, 'Koulu, "Human Control over Automation: EU Policy and AI Ethics"' (2020) 19, 41' (2020) 9 *European Journal of Legal Studies* 9; Green (n 132).

¹³⁶ Crootof, Kaminski and Price II (n 135); Therese Enarsson, Lena Enqvist and Markus Naarttijärvi, 'Approaching the Human in the Loop – Legal Perspectives on Hybrid Human/Algorithmic Decision-Making in Three Contexts' (2022) 31 *Information & Communications Technology Law* 123.

¹³⁷ Guillermo Lazcoz and Paul de Hert, 'Humans in the GDPR and AIA Governance of Automated and Algorithmic Systems. Essential Pre-Requisites against Abdicating Responsibilities' (2023) 50 *Computer Law & Security Review* 105833.

¹³⁸ Nicole Blanchett, 'Participative Gatekeeping: The Intersection of News, Audience Data, Newswriters, and Economics' (2021) 9 *Digital Journalism* 773; Raul Ferrer-Conill and Edson C. Tandoc, 'The Audience-Oriented Editor: Making Sense of the Audience in the Newsroom' (2018) 6 *Digital Journalism* 436; C. W. Anderson, 'Between Creative and Quantified Audiences: Web Metrics and Changing Patterns of Newswriting in Local US Media organisations' (2011) 12 *Journalism: Theory, Practice & Criticism* 550; Edson C. Tandoc and Ryan J. Thomas, 'The Ethics of Web Analytics' (2015) 3 *Digital Journalism* 243; Edson C. Tandoc and Tim P. Vos, 'The Journalist Is Marketing the News' (2016) 10 *Journalism Practice* 950; Folker Hanusch, 'Web Analytics and the Functional Differentiation of Journalism Cultures: Individual, Organizational and Platform-Specific Influences on Newswriting' (2017) 20 *Information, Communication & Society* 1571. Tomás Dodds and others, 'Popularity-Driven Metrics: Audience Analytics and Shifting Opinion Power to Digital Platforms' (2023) 24 *Journalism Studies* 403.

¹³⁹ Felix M. Simon, 'Uneasy Bedfellows: AI in the News, Platform Companies and the Issue of Journalistic Autonomy' [2022] *Digital Journalism* 1; Terje Lindblom, Johan Lindell and Katarina Gidlund, 'Digitalizing the Journalistic Field: Journalists' Views on Changes in Journalistic Autonomy, Capital and Habitus' [2022] *Digital Journalism* 1; Olga Dovbysh, Mariëlle Wijermars and Mykola Makhortykh, 'How to Reach Nirvana: Yandex, News Personalisation, and the Future of Russian Journalistic Media' [2022] *Digital Journalism* 1; Mark Coddington, 'The Wall Becomes a Curtain: Revisiting Journalism News-Business Boundary' [2015] *Boundaries of Journalism*.

¹⁴⁰ Caitlin Petre, 'Engineering Consent' (2018) 6 *Digital Journalism* 509.

¹⁴¹ Olga Dovbysh, Mariëlle Wijermars and Mykola Makhortykh, 'How to Reach Nirvana: Yandex, News Personalisation, and the Future of Russian Journalistic Media' [2022] *Digital Journalism* 1.

¹⁴² Valerie Belair-Gagnon and Avery E. Holton, 'Boundary Work, Interloper Media, And Analytics In Newsrooms' (2018) 6 *Digital Journalism* 492.

¹⁴³ Rachel E. Moran and Sonia Jawaid Shaikh, 'Robots in the News and Newsrooms: Unpacking Meta-Journalistic Discourse on the Use of Artificial Intelligence in Journalism' [2022] *Digital Journalism* 1.

fundamental rights-centric AI, the strict requirements for the technology developers, and the relatively few obligations for the deployers of technology could also contribute to a situation in which AI ‘behaves’ more responsibly than its deployers. An insight from the scenario is that a ‘human in the loop’ is not in itself a guarantee that certain human values (such as critical news reporting) will be prioritised over others (economic profit), and that future research and policy debates need to question more critically the underlying motives, moral values and performance criteria that influence the outcomes of a ‘human in the loop’ mechanism.

4. Some reflections on the method

Thinking ahead and speculating about the future applications and impacts of legal provision is not alien to legal experts. One contribution of this paper is to explore a more systematic and methodological approach to doing so, aided by the valuable feedback from the invited experts and workshop participants. Overall, the scenario led to an animated discussion during the workshop. There were differences in the level of plausibility rating, and interestingly some participants had a strong, almost emotional reaction to the scenario as being desirable or undesirable (for example from a fundamental rights point of view). This points to one important advantage of the scenario method: the ability to engage and activate. Advantages that the experts and participants agreed on was the potential of the scenario to stimulate reflection or, as one expert has put it, “more creative, blue-sky thinking about the consequence of AI regulation.” For the non-legal experts, the scenario provided an accessible format to learn about the Draft AI Act, spurred active debate and anticipation of the potential implications of the regulation from a diversity of perspectives. One workshop participant pointed out that the scenario can be useful for people finding it difficult to concentrate on long (legal) texts, and enable their engagement. Developing and evaluating the scenario with experts from digital journalism studies and legal scholarship allowed, furthermore, for several different disciplinary perspectives to be integrated. Their comments and feedback helped in validating the scenario and sharpening the reflections. And while in this work, the scenario was used primarily to stimulate reflection and critical engagement with a law, the experts also pointed to the potential of the method to support risk assessments or as an analytical tool in the policy-making process. Scenario methods could, for example, be a valuable tool to identify potential and unexpected risks resulting from the deployment of AI into a particular socio-technical context, while engaging also non-experts and diverse communities. The resulting insights could then inform the actual risk assessment. Developing the method further as part of a risk assessment framework was also mentioned as a promising avenue for further research.¹⁴⁴

Experts and workshop participants also raised a couple of observations on the limitations of the methodology or where the method could be further developed. One important point referred to how to deal with the cultural embedding of a scenario’s developer(s). The ideas, perceptions, biases, or concerns of those developing a scenario will inevitably steer the narrative. Put differently, a scenario will invariably be limited by the imagination of its creator. This can be a strength of the method, for example, where scenario writing is used to make visible and

incorporate the different perceptions and how they impact future imaginaries or by engaging participants with different backgrounds, values and perspectives in the process of producing a scenario.¹⁴⁵ The embeddedness of the scenario writer can also be a limitation of the methodology to the extent that a fictional scenario reflects primarily the ideas and opinions of its author. Asking external experts to validate a scenario can be a means of mitigating this risk. A question for further research could be how to describe and make visible and account for personal context, prior experience and biases in the analysis. Another interesting suggestion made by the consulted experts that merits further investigation is to use generative AI like ChatGPT to produce scenarios. In this case, it would be not so much the attitudes and cultural embedding of the scenario’s author that influence the scenario but rather a cross-sectional representation of the different cultural perspectives on which the generative AI has been trained. Again, this could be a fruitful avenue for further research, including on the ethical and legal challenges of such an approach. For example, it is well established that AI systems come with their own biases, for example who is represented in the data set.¹⁴⁶

A question that the experts suggested may merit further experimentation is the choice of the time horizon (what time horizon is realistic and useful for policy-making and evaluation). Arguably, the more complex and dynamic a particular technology area, the more difficult it will be to develop a plausible scenario far into the future. Equally, the time horizon may not be too short either if the goal is to facilitate speculation and blue-sky thinking.

Another difficult question for further consideration that came up is the aspect of validation. Suppose future scenario writing is used to anticipate risks or the impact of policy proposals. In that case, validation will be important to avoid unrealistic assumptions and discover if important perspectives have been left out. Especially in complex technology or policy settings, it is unrealistic to be able to include all relevant considerations, perspectives or factors that may influence a particular development. It is important to be transparent about the factors considered and the limits of the method, particularly if scenario writing is part of a policy process. More generally, further research should be done on how the future scenario method can be usefully and realistically included as one argument in a broader policy debate, under which conditions and limits.

7. Conclusions

Lawmakers, like technology developers, are responsible for optimising not only for short-term goals, like banning certain practices, abolishing obstacles to the internal market or creating more legal certainty. Rather, laws and policies must also account for the long-term goals and consequences of any regulatory attempts to optimise the future. Doing so demands considerable imagination and expert knowledge, particularly in dynamic and complex areas like AI technology. This article has experimented with future scenario writing to invite reflection on the potential impact of certain policy choices and to synthesise different sets of expertise and perspectives. Future scenario writing, combined with domain expertise, can be a tool to spur the imagination

¹⁴⁴ See for example the project “Anticipating AI Impact in a Diverse Society: Developing a Scenario-Based, Diversity-Sensitive Method to Evaluate the Societal Impact of AI-Systems and Regulations”, Nick Diakopoulos, Natali Helberger, Kimon Kieslich, CASMI project, <https://casmi.northwestern.edu/research/projects/anticipating-ai-impact.html>.

¹⁴⁵ Anneke Sools, ‘Back from the Future: A Narrative Approach to Study the Imagination of Personal Futures’ (2020) 23 *International Journal of Social Research Methodology* 451.

¹⁴⁶ ‘Weapons of Math Destruction: How Big Data Increases Inequality and Threatens Democracy: O’Neil, Cathy: 9780553418811: Amazon.Com: Books’ <<https://www.amazon.com/Weapons-Math-Destruction-Increases-Inequality/dp/0553418815>> accessed 6 October 2023; *Dark Data* (2020) <<https://press.princeton.edu/books/hardcover/9780691182377/dark-data>> accessed 6 October 2023.

of regulators and legal scholars alike and enable forward-looking thinking and reflexivity in the governance of technology and innovation. The value of future scenario writing is to create a mindset open to challenging established ideas and cherished truths. It provides us with the necessary distance to critically assess our current practices, even if the results can be confronting.

The story of FutureNewsCorp illustrates how a regulation like the planned AI Act could potentially result in a fundamental shift of the power to decide what responsible use of AI is - from regulators and editors to technology developers and standardisation bodies. Regulations such as the Draft AI Act, the European Digital Services Act, or the European Media Freedom Act seek to uphold European values and fundamental rights and lay down the conditions for technology providers to have more social responsibility. In the draft AI Act, the realisation of fundamental rights and European and professional values is inadvertently framed as a matter of technical formalisation, standardisation and technical design choices, and platforms, technology providers and standardisation bodies find themselves in the position of being new arbiters of values and fundamental rights. Law and policy-makers seem to implicitly trust and assume that technology stakeholders will follow the same legal traditions and regard for fundamental rights and values that regulators, constitutional courts and governments are bound to observe. The opposite scenario is at least as likely, namely that technology providers and the (economic) companies behind them will come with their own interpretations and ways of balancing public vs private interests. By relying on technology developers, platforms and

standardisation bodies to define when AI is human-centric and respects fundamental rights and values, we also accept their authority to reshape these values. Is this a desirable choice? To understand and answer that question, we – society, regulators, and scholars – need to exert all of our imagination.

Declaration of Competing Interest

There is no conflict of interest.

Data availability

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