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NEWS READERS’ PRIVACY AND FAIR ALGORITHMIC MEDIA PRACTICES: LESSONS TO BE LEARNED FROM MEDIA LAW AND THEORY

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1. INTRODUCTION

“The challenge of using data effectively will be central.”

Why are certain forms of algorithmic engagement with news readers perfectly acceptable, and why should we be concerned about others? How can we define the dividing line between using algorithms to offer people more personally relevant news and encapsulating them in “filter bubbles”? Is it acceptable that the news media make access to their websites conditional upon the unconditional acceptance of cookies? And are there some players that we would rather not see engaged in profiling and targeting the news readers, such as political parties, religious groups or governments?

The media are data-driven, always have been. And yet, the ability to collect data on a massive scale and use high performance data bases and algorithms to process that data is also changing the way the media operate and engage with their users in quite profound ways. The news media is one of those sectors where experimentation with Big Data and algorithms is in full swing. And probably one of the most difficult and most pressing questions concerning the news media sector for scholars, policy makers and the media alike is: what kinds of algorithmic practices are useful for users and acceptable for society, and when does profiling and targeting lead to undesirable outcomes and unfair situations?

So far, the scholarly debate on profiling and targeting has taken place first and foremost in the broader privacy and data protection arena. Privacy and the rules about data protection are the central benchmarks against which profiling and targeting the user are being assessed. This article argues that looking at data protection law alone is not enough. The situation of a news reader is different to that of someone buying a pair of shoes or a Fitbit user. News readers have different concerns, and different demands for privacy. What is more, the news media sector is subject to its own public policies, values and constitutional

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guarantees: freedom of expression, non-discriminatory access to information, media diversity and freedom from censorship. And this is why we are suggesting here that the profiling and targeting of media users, and more generally algorithmic news making, should be also considered from the sector-specific perspective of media law and policy, and the essential values and principles that guide them (such as impartiality and independence from commercial influences, diversity, inclusiveness and non-discrimination but also the responsible use of the “power to influence”). Thus far, this is a perspective that has been underrepresented in the ongoing debate on profiling and targeting users.

This paper demonstrates that it is not only privacy concerns that need to figure more prominently in the media policy debate. The values and objectives enshrined in media law and policy also provide an important source of inspiration for a more general debate about “fair algorithmic media practices” and the protection of news readers’ privacy. More specifically, this article presents three arguments. Firstly, it demonstrates and explains that the use of algorithms and Big Data, and the way the news media use and engage with the personal data of news readers, can have profound implications for the realisation of important media policy objectives, such as media diversity, non-discriminatory access to information and equal chances to communicate and participate in the “market place of ideas”. The discussion about filter bubbles is instructive: when the media profile and target the user to offer more personally relevant services, not only privacy concerns are at stake, but broader societal concerns about diversity, information access and the democratic role of the media.

From this follows, secondly, that the question of how to protect the rights and interests of users should not be viewed exclusively from the perspective of data protection law, and the values enshrined here, but also from the perspective of media policy and the realisation of the (fundamental) rights and freedoms of users and society these policies serve. In other words, there is merit in placing algorithmic profiling and targeting into the broader media political context. An instructive example are the debates in Europe about smart TVs and cookie walls. To the extent that these matters are debated at all, this is done by national data protection authorities against the background of data protection law. As this paper shows, adding the perspective of media law and policy would lead to a different and far more differentiated approach. This part of the argument builds on Neil Richard’s writings about intellectual privacy and Julie Cohen’s work about the right to read anonymously, and takes the argument further, relating it to the specific role of the news media in a democratic society.

Finally, the insights from media law and policy can also help to define “fair algorithmic media practices” and algorithmic ethics in the media sector. Note that it is not the intention of this article to debate of whether media law should be extended to online services.³

³ Note that, at least in Europe, audiovisual media, online media and the press are regulated in different ways. This paper will not go in deeper into that distinction, because it does not analyse the applicability of these
Rather it looks at some of the values and considerations behind media law, and to what extent these could usefully inform the debate on where the diving line is between fair and individually or socially unacceptable algorithmic practices. For example, a central political consideration for the media is how to balance editorial and commercial influences – an issue that is also of great relevance in algorithmic news making. Media law gives users a concrete right to be informed when the media inform or sell ideologies or products. Being transparent about the motives behind personalised messages (whether that is to offer more personally relevant information or to persuade readers to buy products) could also be an important way of ensuring fairness in algorithmic profiling of the media user. To give two other examples: media law and policy has for long acknowledged that some groups, such as minors, warrant a higher level of protection than other groups in the population because of their credulity. Again it is worth exploring to what extent that reasoning could be beneficially extended to the case of profiling and targeting kids as news readers. Finally, media law acknowledges that some types of content are so critical to the functioning of our democracy, or so intimate, that they cannot be subject to commercial influences at all (for example current affairs news or religious content). Are there reasons to argue, following a similar line of thought, that privacy concerns of newsreaders when reading about current affairs or religious content should weight heavier than when reading about lifestyle news?

This paper opens with a brief description on the current state of experimentation with Big Data and algorithms in the news media in Europe and the US, and how this can affect news readers privacy. It then devotes a section to the current protection of media users’ data under European data protection law (and here in particular the new Data Protection Regulation) and media law. It shows that neither data protection law nor media law are currently prepared to consider the specific situation of the profiled reader. Following this, the paper demonstrates how media user privacy and the realisation of important media policy objectives are closely intertwined. This section focuses in particular on four examples or case studies: (1) the question of information access in exchange for data, using the example of the Dutch cookie-walls; (2) the debate on media diversity and the so-called filter bubbles; (3) equal chances to communicate vs. algorithmic bias, and (4) targeting advertising in the media and how this relates to the demands of trust and editorial independence. Based on this analysis, the article develops some concrete suggestions for how news readers’ privacy should play a greater role in media law and policy. The paper concludes with some reflections on the broader lessons to be learned for what “fair algorithmic media practices” could be.

This is a conceptual paper based on desk research with the goal to bridge two areas that, so far, have not been discussed in context: media law and theory, and privacy and data protection. To this end, the paper bases its analysis on the emerging literature about algorithmic news making; media law, theory and policy scholarship and documents, norms to new, data-driven instances of media distribution, but is rather interested in the underlying values and theories, many of which the different approaches to regulation in the media sector share.
fundamental rights analysis, policy documents (and here in particular of the Council of Europe) and case law of the European Court of Human Rights; and some of the relevant scholarly literature about privacy and data protection law (and here in particular the writings about profiling and targeting, Big Data Ethics, intellectual privacy, etc.). In addition, in order to provide insights into concrete user concerns, the paper reviews some of the existing empirical work in the relevant communications science literature on the effects of personalised communication, and injects some first own empirical findings. The research is part of a multi-year project “Profiling and targeting news readers – implications for the democratic role of the digital media, user rights and public information policy – PersoNews”, financed by the European Research Council.

2. ALGORITHMIC NEWS MAKING AND ALGORITHMIC NEWS AUDIENCES

Data, algorithms and data analytics impact the media and their work in more and more newsrooms, and along the different stages of the process of making news: access and observation, selection/filtering, processing/editing, distribution, and interpretation. Large scale data bases (such as the Snowden files, the Panama Papers, open government datasets but also Twitter and ‘user generated data’ that flows from the many smart devices that surround users every day) form an increasingly important source of information for data journalists to dig into. Searching and selecting from the available information the relevant one, discovering patterns and newsworthy irregularities, but also making sense of that data and making that data visible is another way in which data and algorithms affect journalistic activities. Again, the Panama Papers are a good example as their publication unleashed a


6 See e.g. this report in the Wired on how the Sueddeutsche Zeitung used data analytics to investigate and report about the Panama Papers http://www.wired.co.uk/news/archive/2016-04/04/panama-papers-data-leak-how-analysed-amount. Also: http://www.niemanlab.org/2016/04/heres-how-over-400-journalists-at-dozens-of-news-orgs-reported-out-the-massive-panama-papers-story/
wave of data journalism in different media outlets. Another famous example is the analysis of taxi and Uber data to show how New York is moving, and where. Doing so also requires new skills and equipment, notably programming skills and skills in the areas of statistics and data analytics but also data visualisation. Data and algorithms such as NarrativeScience can play a role in the actual processing and editing information, up to actually writing news reports more or less independently ('robot journalism'). And data and algorithms also impact rather fundamentally the way in which media content is being distributed and disseminated to the audience. It is this latter aspect that this paper concentrates on in particular, as it is here, together with the collection of increasing levels of data about users as new sources of information, that data and algorithms directly impact the relationship between the media and users, and create new challenges for news readers’ privacy and autonomy.

When the New York Times set out its new digital vision it expressively highlighted that today, journalistic activity is about more than researching and writing stories. Actively engaging with the audience, trying to build up brand loyalty and finding new, smarter ways of presenting and promoting media content are an important element of that strategy. Or as the New York Times puts it: focusing on ‘the art and science of getting our journalism to readers’ and to ‘pursue smart new strategies for growing our audience’. Similar, the BBC points in its Future of the News Reports to the need to rethink the media’s relationship with the audience and the need of making news more personally relevant (“News you can use”). And the editor of the Volkskrant, one of the major Dutch newspapers, speculated that in the not so far away future, nobody would receive the same headlines anymore as headlines and content selections have been carefully adjusted to individual preferences. In times of digital abundance it is simply

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7 See e.g. this example from the Süddeutsche Zeitung that used the data to research the underlying political connections and affected jurisdictions http://panamapapers.sueddeutsche.de/articles/56eff9f22f17ab0f205e636a/ For more examples of computational journalism on the basis of the Panama Papers, see https://discuss.okfn.org/t/best-examples-of-data-journalism-and-computational-journalism-projects-around-tax/2404/7
10 https://www.narrativescience.com/
Making media is no longer about the content only: it is also about bringing that content to the attention of users and persuading them to read and watch. Media personalisation is an important part of this strategy. With the help of data and smart algorithms, media content can be distributed in a far more targeted and customised way. Profiling and targeting media users can consequently be an important way to direct the attention of users to particular types of content, influence their reading habits and increase personal relevance. This before the background of the abundance of digital information and the fierce competition for the attention of users as the new scarce resource in media markets. Users have grown accustomed to the convenience of social media and search engines that deliver content about the topics they are interested in and help them to sort through the digital abundance—a situation that calls for more sophisticated and personalised distribution strategies.

It is clear that this focus on more sophisticated distribution and engagement strategies is in parts driven by business considerations. As such, it has been preceded by other examples of more personalised distribution models, including pay TV, but also mail order services such as the old Netflix, to more sophisticated forms of on demand, pay per channel, pay per content services, micropayment enabled services such as digital news kiosk Blendle, or User Generated Content platforms, as YouTube and Facebook once were. Monitoring users via cookies, social media, feedback mechanisms, click-rates and measure of reading behaviour does provide increasingly fine-grained insights/data about users. That sophisticated digital knowledge quite obviously impacts the activities of journalists and editors/media makers, and their attitudes towards news making, as well as their relationship with, and attitude towards users. The BBC writes in its Future of New Report that “[i]t will become of real value to understand and predict how individuals want to be told the news at any particular time.” As an example, the BBC gives health: “As

18 BBC, 2015, 40. The same: “Real personalisation will mean a new approach to reporting and editing.” (BBC, 2015, 46).
people become more aware of their personal health and fitness – receiving personalised messages from their devices and used to remote health diagnostic techniques and treatment - it is likely that they will expect health news to be equally targeted for their needs and interests.” This quote is interesting also insofar as it refers to a changing perception of the media of its audience, the users, and their changing expectations, preferences and degree of active involvement.

With the ability to know which topics and headlines are scoring well, and what types of contents and advertisement work best for which kinds or groups of users, the pressure to use that knowledge to adjust content and presentation accordingly is invading and expanding journalistic activity. Accordingly, the media are in the middle of a process of finding the right balance between courting and pleasing the audience, and informing it, if necessary with contents that the audience may not be immediately interested in, or even like, but should know – according to the democratic role of the media (see section 4). Or as the BBC has put it: “We will need to find new ways of connecting with individuals and serving their specific needs, whilst also retaining an overview of what is most important and most interesting, in our own editorial judgment.” It is needless to say that for each media outlet this balancing process can lead to very different interpretation of what the “right mix” is between editorial judgement and user-orientation, but also between wishing to learn as much as possible about the audience versus the awareness that privacy is another constituting factor in the trust relationship between users and their media. The way the technology is changing from a dumb tool, such as a typewriter or an external storage, to a smart extension, and sometimes even replacement of what has traditionally been perceived the core of journalistic activity, eventually needs to be reflected in best practices and ethical and professional standards for that sector. Not always can they take recourse to existing standards. The proliferation of data-veillance and new ways of collecting, processing and interpreting information about users, for example, confronts journalists, editors and news rooms to reconsider their stance towards, and responsibility for the privacy of users but also established values behind journalistic activity, such as

19 BBC, 2015, 41.
20 Robert G. Picard, "Twilight Or New Dawn of Journalism?: Evidence from the Changing News Ecosystem," Journalism Studies 15, no. 5 (2014), 500-510. arguing that “media companies are becoming more focused on distribution rather than gathering and producing news” and are changing to a “service mode”.
21 BBC, 2015, 18.
balanced and diverse reporting, independence and the right balance between editorial and commercial pressures.

The media are not negotiating these values alone. The media have always acted within a broader system of internal and external actors, all with their own motives, requirements and values. With the increasing importance of data, that network further expands: including IT designers, system specialists and data analysts, providers of external analytics services; platforms such as social networks and search engines, app developers, as well as advertisers and marketing departments, but also funders, grass root initiatives, NGOs, and politics. This also means that the media is only partly in control of the processing of distribution, and even making news, having to share control with other external partners.

The divergent interests and motives to collect and use personal data, as well as divergent ideas about relevance, privacy or the role of users can lead to conflicting demands on the way media users are profiled and targeted. Privacy is an example of this. While the media have been traditionally under quite some pressure from advertisers to gather ever more intelligence about the audience, to optimise advertisement, e.g. in the form of behavioural targeting, smarter placing of content & advertisement, and exploring new forms of user-centric advertising, from the perspective of editors and news media, respecting the privacy of their users can be an important element in earning and keeping readers’ loyalty and trust. Diversity, as well as relevancy are other examples: again, there may be different opinions as to the extent to which it is desirable to not only serve users the content that matches their interests best, but also a healthy measure of controversial, unpopular, less spectacular content.


3. MEDIA USER PRIVACY UNDER THE CURRENT LEGAL FRAMEWORK

Profiling and targeting news readers, and the implications for news readers’ privacy is a debate that has led to extensive discussions in the data protection law and privacy discourse, and to a far lesser extent in media law and policy. This can be partly explained by the technical, one-to-many nature of ‘mass communication’ but also by the history of privacy regulation in the realm of the media. This is a history of conflicts and careful balancing of contrasting rights and freedoms, notably the right to privacy and freedom of expression. The press, or more generally, the media, as the “fourth power” in a democratic society do have an important task in investigating and uncovering news and events. Doing so can require that journalists venture far into the private sphere of those that they investigate about. The question where the freedom to seek information ends and the right to privacy begins has a long and rich tradition of heated and famous debates.\(^\text{29}\) Central in that debate have been, so far, the privacy rights of those that the media report about, and how to balance the interest of the media in reporting, and those whose personal space the media invade when doing so.\(^\text{30}\) This precarious balancing act between freedom of expression and privacy explains, both, current media law’s and data protection law’s approach to privacy, respectively the relative lack of attention for matters of news reader privacy and data protection in both, media and data protection law.

The potential conflicts between data protection law and freedom of the press, respectively freedom of the media have long been acknowledged. In a report of the Council of Europe’s Committee of Experts on data protection from 1990\(^\text{31}\) the Committee sought to list possible conflicts between data protection law and freedom of expression. Two of the most important conflicts, according to the committee, were at this time the possibility that data protection rules could prevent press agencies from collecting, storing and processing information, thereby having a hindering or chilling effect for the press; as well as the practical difficulties that come with data protection law’s requirement to e.g. ensure that


\(^{30}\) Warren Brandeis: focus on right to be let alone, and protection from publication of embarrassing facts. More recently: Leveson Inquiry into the Culture, Practices and Ethics of the Press

personal data is kept accurate and up to date.\textsuperscript{32} In response, specific derogations for the media in data protection law have been created with the goal of creating a certain level playing field for the media. The Convention for the protection of individuals with regard to automatic processing of personal data\textsuperscript{33} has permitted Contracting States to exclude data processing by the media from the scope of national data protection laws. As a result, a number of European Member States have excluded the application of data protection law to the media in general (e.g. Finland, Norway and Sweden)\textsuperscript{34}, others have included explicit exemptions into their data protection law for the media (e.g. the Netherlands and Germany). Only in some data protection law is fully applicable also to the media (e.g. Croatia, Czech Republic and Spain).\textsuperscript{35} 14 years later, the European 95/48 Data Protection Directive introduced at least for the member states of the European Community further harmonising measures in the form of the so called media exception, first in Article 9 of the 95/48 Directive on Data Protection,\textsuperscript{36} and more recently in Article 80 of the European General Data Protection Regulation (GDPR). According to Article 80 (2) of the GDPR, member states are free to provide for far-reaching derogations from the provisions of the Regulation when the processing of personal data is carried out for journalistic purposes, including in the area of general principles (chapter 2), rights of the data subject (chapter 3), the allocation of responsibility between controllers and processors (chapter 4), data transfers (chapter 5) and competent authorities (chapter 6).\textsuperscript{37} If one accepts that in today's digital landscape "journalistic purposes" must be interpreted broadly to also include new, personalised forms of engaging with the audience and distributing media content (as argued in section 2), this means that in many European member states, data protection does not apply, or only to a limited extent to core activities of the media.

See guidance IOC: suggesting a broad interpretation of journalism: https://ico.org.uk/media/1552/data-protection-and-journalism-media-guidance.pdf (day-to-day business)

\textsuperscript{32} Other issues that the committee identified include the difficulty of applying data protection law to "the world of hard copy", possible conflicts between the principle of fair and lawful data collection and investigative journalism; the right to rectification with the danger that "history may be rewritten" (echoing very timely concerns about today's discussions about the right to be forgotten and the press; challenges for digitisation and archiving; transborder dissemination of personal data; online access by the public to press products.

\textsuperscript{33} Council of Europe, European Convention for the protection of individuals with regard to automatic processing of personal data, Strasbourg, 28 January 1981, Article 9.2.b.

\textsuperscript{34} David Erdos, "EUROPEAN UNION DATA PROTECTION LAW AND MEDIA EXPRESSION: FUNDAMENTALLY OFF BALANCE," 65, no. 1 (2016), 139-183.

\textsuperscript{35} Ibid.

\textsuperscript{36} "Member States shall provide for exemptions or derogations from the provisions of this Chapter, Chapter IV and Chapter VI for the processing of personal data carried out solely for journalistic purposes or the purpose of artistic or literary expression only if they are necessary to reconcile the right to privacy with the rules governing freedom of expression.

\textsuperscript{37} One may wonder, however, whether the processing of personal data of users for the purpose of tailoring services to their specific interests and preferences falls under the notion of "journalistic purposes" as referred to in the Data Protection Directive and also in the Regulation.
At the same time, the derogations from the application of data protection law for the press are not necessarily compensated by introducing countervailing rights for news readers into media law. To the extent that European and national media and press laws are concerned with matters of privacy this is, first and foremost, again in the form of measures that strengthen the position of those that the media report about against (privacy-invasive) reporting. Examples are the provisions about the right to reply, rectification, libel and defamation laws. One may already wonder to what extent the right to reply, libel or defamation but also newer rights, such as the European Court of Justice’s “right to be forgotten” are an effective and sufficient response to new, massive forms of engaging with user data in data journalism. Maybe even more relevant for the purpose of this article, however, is that these remedies entitle only users that are subject, and not object to reporting. In other words, until now, neither data protection law nor media law has paid much attention to the arguably special position of media users as recipients (and not objects) of new, sophisticated and user data-driven forms of media distribution. European telecommunications law does little to address that lacunae because services providing, or exercising editorial control over content are principally excluded from its scope, and because the few rules that do apply (e.g. the provisions about cookies in the ePrivacy Directive) serve different purposes and values. Put differently, the specific privacy

38 The Netherlands, for instance, is an example of a country that has adopted derogations in its data protection law. According to Art. 3 (1) of the Dutch Data Protection Law, certain provisions of the law are not applicable to the processing of personal data for journalistic purposes (including the provisions about legitimate grounds and fair processing, data security, the right to damages). Another exceptions applies to the ban on processing of personal data (Art. 3 (2) of the Dutch data protection law). At the same time, no countervailing provisions were incorporated into the Dutch media law. Right now, it is simply unclear how, if not obliged to comply with certain provisions of the data protection law, the media need to behave with respect to the personal data of others. And also the Dutch self-regulatory code for the press addresses this topic only very rudimentarily.

39 C-131/12 - Google Spain and Google, Judgment of the Court (Grand Chamber) of 13 May 2014, Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González.


concerns of news readers (and the next section will show that these are indeed specific) are not accounted for under European law, and many of the national laws that implement it.42

There are exemptions to the rule, that also will be discussed later in more depth. For example, though German data protection law exempts the media from the application of most of the German’s Federal Data Protection Law’s provisions, it does oblige the German countries to provide for sector-specific provisions for the media in media law (on a number of selected issues, including confidentiality, technical and organisational measures and procedures for codes of conduct; interestingly with more stringent provisions for the Deutsche Welle than for the other media services).43 In addition, and rather exceptionally, the German Telemedia law provides for a number of sector-specific data protection provisions for the users (as recipients) of electronic media services (so-called information society services), including a right to watch anonymously (in more detail in section 5).44 Check Art. 47 Rundfunstaatsvertrag, interestingly also applying to teleshopping services. Insofar, the situation in Germany resembles to some extent the situation in the US, where a number of sector-specific data protection provisions also protect media users: notably Art. 47 U.S.C. 551 § 631b of the Cable Communications Policy Act (CCPA) aims to protect the personal data of cable tv subscribers, and the Electronic Communications Privacy Act (ECPA) protects more generally users of electronic communications services, comparable to the European ePrivacy Directive (18 U.S.C. § 2511(1) EPCA). Such more user-centric provisions, especially in Europe, remain the exception however (at least outside the area of telecommunications services).

As the Dutch example, and more generally this brief account of the history of privacy in media law and policy demonstrates, the focus in legal approaches to privacy in the media so far has been primarily on solving conflicts between freedom of expression interests of the media, and the privacy of those that the media report about. In this context, privacy and media freedom have been traditionally perceived as competing, rather than mutually enabling values.45 As a consequence, neither media or data protection law have a tradition of dealing with the privacy concerns of media users, or defining how engaging with data relates to the realisation of other important public policy and fundamental values behind media law and policies, such as pluralism, deliberation or accessibility. As shown in the previous section, the change towards more personalised modes of reporting and


43 Art. 41 (1) of the German Federal Data Protection Law (Bundesdatenschutzgesetz).

44 The German Telemediengesetz knows sector specific data protection requirements for providers of so called Telemediendienste (information society services), Paragraph 12-15, including limitations on the combination of user profiles with data that can help to re-identify the user, the right to use telemedia anonymously, limits on the sharing of usage data with third parties and obligations to protect the data from unauthorised access.

distributing media content takes the relationship between users and the media to a new, for more interactive and intimate level. The argument that this article will develop is that as a consequence, privacy will get a very different meaning in news media making and distribution, and will need to find its place amidst a range of other public policy objectives and values in media law and theory.

4. VALUES AND PRINCIPLES ENSHRINED IN MEDIA LAW AND POLICY

For the following analysis it is insightful to recite the vision of the Council of Europe for the purpose of the media. This is because over the past three decades the Council of Europe has been particularly influential in conceptualising the role of the media in a democratic society in Europe, and translating this concept into law and policy. According to the Council of Europe:

“Since their emergence as a means of mass communication, media have been the most important tool for freedom of expression in the public sphere, enabling people to exercise their right to seek and receive information. Media animate and provide a space for public debate, Media offer comment and opinion as part of political dialogue, contribute to setting the political agenda and the shaping of public opinion, and they often seek to promote certain values. Media facilitate the scrutiny of public and political affairs and private or business-related matters, thereby increasing transparency and accountability. Moreover, media provide education, entertainment, cultural and artistic expression. Media also play an important part in the economy, create jobs and generate income.”

4.1 MEDIA WITH A MISSION

Put differently, the media offer a platform for information and deliberation, but they are also active participants. As active participants, the media feed the public discourse with information, they set the agenda and organise public debates. When so doing, as the above quote also shows, the media have an important role in realising of fundamental rights and freedoms in democratic societies, notably the right to freedom of expression. As the European Court of Human Rights reiterates in Jersild, “freedom of expression

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46 Including the press, broadcasting and the online media.
47 Council of Europe, RecommendationCM/Rec(2011)7of the Committee of Ministers to Member States on a New Notion of Media (Strasbourg: Council of Europe,[2011c]).
48 According to the German Constitutional Court (Bundesverfassungsgericht), “Der Rundfunk ist "Medium" und "Faktor" dieses verfassungsrechtlich geschützten Prozesses freier Meinungsbildung” (BVerfGE 12, 205 [260])
constitutes one of the essential foundations of a democratic society". What that concretely means for the media is explained in the same decision:

"Whilst the press must not overstep the bounds set, inter alia, in the interest of "the protection of the reputation or rights of others", it is nevertheless incumbent on it to impart information and ideas of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog."\(^50\)

The court’s characterisation of the democratic role of the press (which it expanded to the media more broadly elsewhere) recalls discursive or deliberative theories of journalism, according to which it is the task of journalists to “facilitate [original emphasis] public deliberations aimed at reaching rational-critical public opinions that are autonomous vis-à-vis the private sphere and the state.”\(^51\) The reference to the public watchdog role implies a further-reaching commitment of the media to uncover the information that the audience needs to have in order for the audience to be able to play its role as attentive and responsible citizen. We will revisit these ideas of the democratic role of the press in the context of the question of where to strike the balance between user orientation and public mission. For here, it is important to understand that the constitutional protection of the media comes with certain duties and responsibilities in the public interest. The German Bundesverfassungsgericht accordingly characterised media freedom as a serving freedom (“dienende Freiheit”)\(^52\) (as opposed to a mere right of defence against the state). It is clear that such a principled function of the democratic role of the media affords the media not only rights (in the sense of constitutional protection and positive obligations for the state to create the conditions so that the media can exercise its role, but also responsibilities) but also duties and responsibilities. Respect for the privacy of others, and more generally, respect for the rights of others, belong to these responsibilities, as does adherence to strict journalistic requirements of professionalism and ethical behaviour.\(^53\) Another important responsibility of the media is to promote the values that underlie the vision of the media as a facilitator of the public discourse: inclusiveness, deliberation and dialogue, civility and mutual respect.\(^54\) The obligation to respect and promote media and cultural pluralism is a


\(^{50}\) Ibid.


\(^{52}\) BVerfGE 57, 295 320 – 3. Rundfunk-Urteil (FRAG-Urteil) ; much more immediate and powerful effect than the print media. European Court of Human Rights, Purcell and Others v. Ireland, Commission’s admissibility decision of 16 April 1991, application no. 15404/89, Decisions and Reports (DR) 70, p. 262.

\(^{53}\) As a matter of fact, compliance with the ethical codes and norms is often considered a constituting factor of being qualified as journalist or a journalistic medium.

\(^{54}\) Myra Ferree et al., “Four Models of the Public Sphere in Modern Democracies,” Theory and Society; Renewal and Critique in Social Theory 31, no. 3 (2002), 289-324.
good example hereof. In Europe, the media have a key-role, for example, in fostering mutual understanding through displaying cultural diversity.

It is worth noting that when talking about duties and responsibilities, European media law, theory and policy have traditionally distinguished between different grades of responsibility. Since the commercial media is to a greater extent subject to commercial pressures, the expectation to conform to high ideals of democratic contribution are lower, as compared to the public service media (which is not to say that there are no public expectations). Striking the right balance between social responsibility and commercial requirements is important as the media are seen as an important driver of economic prospering in the European Union.

Another, increasingly controversial distinction is that between different media outlets. Traditionally, the broadcasting media have been considered particularly influential, or persuasive, and here in particular the audiovisual media are considered to have a “much more immediate and powerful effect than the print media” because they have “means of conveying through images meanings which the print media are not able to impart.” The aspect of greater responsibilities due to the persuasiveness of the medium will be an important consideration in the latter analysis. Another, related consideration to justify the stricter regulation of some media vis-à-vis others is the perceived greater vulnerability of users, respectively their lack of control. Different degrees of user interaction and orientation on the needs and preferences of the user play an important role here. Interestingly, from the perspective of European media law, the presumable higher level of control in the case of interactive and more personalised services is frequently considered an important argument in favour of de-regulation. According to the European Audiovisual Media Service Directive, for example, interactive services ‘are different from television broadcasting with regard to the choice and control the user can exercise ... This justifies imposing lighter regulation...' This publication is not the place to critically assess the argument of the impact of the

55 See e.g. Council of Europe, On the Media and the Promotion of a Culture of Tolerance (Strasbourg: Council of Europe, 1997).


57 European Court of Human Rights, Purcell and Others v. Ireland, Commission’s admissibility decision of 16 April 1991, application no. 15404/89, Decisions and Reports (DR) 70, p. 262

58 European Court of Human Rights: “In considering the "duties and responsibilities" of a journalist, the potential impact of the medium concerned is an important factor and it is commonly acknowledged that the audiovisual media have often a much more immediate and powerful effect than the print media.” (Jersild, para. 31).

audiovisual media vis-à-vis the press, or whether this would justify more or less legal and normative responsibilities. However, the distinction is important to understand the structure of, and objectives behind the current regulatory and normative framework. And to the extent that personalised media offers can indeed be found to be more pervasive and influential for public opinion making, the distinction also offers some food for thought for how to approach new services such as social networks or other highly personalised news outlets.

4.2 Public and Individual Expectations Towards the Media

Realising the different roles that the media play goes along with certain expectations towards the media, and, most relevantly for the purpose of this article, the relationship between the media and its audience. In order to be able to fulfill its various roles, the relationship between the media and the audience must be characterised by certain qualities or values. The broad accessibility of the mass media is one example. In order to be able to play its role as public watchdog and platform for the democratic discourse, access to the information in the media may not be limited to a small elite (which does not exclude the existence of niche services as long as those are principally open to the interested public). Closely related are principles of equality and the discursive structure of the media. This article will argue that a certain respect for the privacy of media users, and a certain level of confidentiality between the media and its users is another quintessential characteristic.

The Council of Europe lists five what it refers to as “public expectations”: availability, pluralism and diversity, reliability, respect of professional and ethical standards and accountability and transparency. These “public expectations” are part of the constituting criteria that allow policy makers to identify a particular medium as “media” in the sense of being subject to media laws and policies. They are also among those that inform the regulatory framework whose task it is to manifest and honour these expectations. Note: no mentioning is made of privacy.

“Availability” refers to the fact that services are, in the words of the Council, “there for them [the users] when they wish to turn their attention to it and “broadly accessible”. This


63 The Council does mention respect for individual dignity and privacy as one of the responsibilities of the news media though, Part III Section C. of Council of Europe, *RecommendationCM/Rec(2011)7 of the Committee of Ministers to Member States on a New Notion of Media* (Strasbourg: Council of Europe, 2011c).
expectation of availability seemingly focus in the first place on the technical/practical aspect of actual availability. An interesting question is to what extent availability also requires accessibility. While not an issue with the traditional mass media that were in principal available and accessible for everyone who possessed the necessary technical equipment, matters of accessibility are more pressing in the digital age. Pay-TV and the implementation of electronic access controls is a relatively early example, issues of network neutrality or the matter of cookie-walls, \(^{64}\) which will be discussed later in this chapter, are other, more ‘modern’ examples of this. The demands of availability also extend to online media, at least according to the Council of Europe: “They [users] have a reasonable expectation that Internet services will be accessible and affordable, secure, reliable and ongoing.”\(^ {65}\)

On a more normative level, the criterion of availability is not complete (from the perspective of the goals it is serving) without considering another public expectation, and that is equal chances to communicate or participate.\(^ {66}\) Again, this can be a technical issue (e.g. in the case that certain rural areas have no internet access), but it also can be a more societal issue: One example is that certain parts of the population are excluded from access to certain services (because they are part of a cultural minority, or because they lack the (digital) skills or resources to do so). Another possible example of inequality could be exclusion as the result of algorithmic profiling and differentiation (‘based on your virtual profile we believe that you are interested in this and this new, but not in this) (for a more extensive discussion see the next section).

The expectations “pluralism and diversity” refer not so much to the factual availability and accessibility of informational content, but rather to its (democratic) quality. That is: not textual or stylistic quality but rather democratic quality, as the ability to contribute to the public discourse or the functioning of the ‘market place of ideas’- depending on which conceptualisation of the media in a democratic society one wishes to follow. The importance of pluralism and diversity as guiding principles of media regulation and policy cannot be understated, in Europe, but also in the US. The European Court of Human Rights has characterised media diversity to be a characteristic part of freedom of expression, and Article 11 (2) of the Charter of Fundamental Rights of the European Union specifically calls upon member states to respect the freedom and pluralism of the media. National media laws have developed a range of diverse pluralism safeguards, including provisions about media concentration and the control of market power.

“Reliability”, “respect of professional and ethical standards” and “accountability and transparency” can be subsumed under the broader header of “trust”. In order for the media

\(^ {64}\) I.e. making access to a website conditional upon the acceptance of cookies.

\(^ {65}\) Council of Europe, *On the Protection and Promotion of Universality, Integrity and Openess of the Internet* (Strasbourg: Council of Europe,[2011a]). para. 8.

\(^ {66}\) This is certainly true for a discursive model of democracy, but also more liberal and even constructive models of the democratic role of the media. See Gourd, 2002, p. 115.
to be able to play its role in a democratic society, the audience has to trust it. 67 Without such trust, news readers will hardly be able to engage with the media, and judge the information it provides upon its merits. Protecting the trust of news readers into the news media has inspired a broad range of regulatory activities, including the rules about the separation of advertisement from editorial content, transparency in the media but also transparency about and control over market power and media concentrations, restrictions on sponsorship and advertising, unfair commercial practice rules, but also the publication of self-regulatory codes and conducts of the (press) media. To the extent that digitalisation and more recently, the algorithmisation of the media is encroaching on the (trust) relationship between the news media and users, trust is more than a very fashionable word in Brussels and Washington. It is actually a constituting characteristic of the relationship between the media and its users, similar to the relationship between users and their lawyers or financial advisers.

Finally, there is one expectation of the audience towards the media that the Council of Europe has not mentioned, and that more generally is often left out in the debates about the democratic role of the media, but that is more and more important, especially in an algorithmically driven media environment. This is the autonomy of the audience/media users. For the audience to play its role as informed and critical citizen, it is not enough that the media offer information and information choices (in the sense of a plural and diverse media landscape). Users must be equally free to exercise these choices. Partly, this aspect is linked to the concept of “equal chances to communicate” discussed earlier, but news reader autonomy is about more. The current debate on the potential chilling effects of surveillance on users’ choices is one example. 68 The debate about nudging and predictive profiling is another. Therefore, enabling free and informed choices, and protecting users from hidden manipulation is another important value behind existing media law and policy, and one that, as we will see, also becomes relevant when looking closer at the impact that profiling and targeting can have on the choices of media users.

5. DATA, ALGORITHMS AND PRIVACY FROM A MEDIA LAW AND POLICY PERSPECTIVE

After this brief introduction into media law theory, and the way the media regulator frames the democratic role of the media as well as the values and public expectations that the


media serve, the following section will re-assess a number of discussions that, so far, have been discussed primarily in terms of data protection and privacy. The objective of this section is to show that taking into account also sector-specific theories, objectives and values for the media, can throw a different light on some discussions. Doing so can also help to create additional guidance under which situations profiling and targeting news readers should be considered a perfectly acceptable practice, and when it may be undesirable or even harmful from an individual, societal and public policy point of view.

5.1 AVAILABILITY, ACCESSIBILITY AND COOKIEWALLS

The controversy about take it or leave it choices and the so-called cookie walls in the Netherlands is an excellent example of this. In October 2012, Dutch internet users run quite literally into a wall. Access to the website of most of the major Dutch newspapers as well as the public service media, was suddenly made conditional upon the acceptance of cookies. If users did not accept the cookies they were refused entry to the website.

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69 Natali Helberger, Freedom of Expression and the Dutch Cookie Walls. (Amsterdam: University of Amsterdam, [2013]).

70 Ironically, even the reading about the cookie-situation on the website of the public broadcasters was made conditional upon the acceptance of cookies.

71 Cookies are small text files that websites can place in a user’s browser after she has visited that particular site. The cookie allows websites to get to better know a user, to remember her preferences, when did she visited parts of a website and how often, etc.
It were the cookie-walls from the newsmedia, and from the public broadcaster in particular, that led to a public outcry. “Public broadcaster blackmails the public with cookie walls”\(^{72}\), “Taken hostage by a cookie”,\(^{73}\) “the websites of the public broadcaster go in hiding behind cookie-walls”\(^{74}\) were some of the headlines. Eventually, the complaints about the cookie walls lead to parliamentary hearings and an amendment of the Dutch rules on cookies.\(^{75}\) The Dutch Parliament decided that the situation was not only user-unfriendly, but seduced users into mindlessly clicking “I accept” buttons and thereby missing the entire point behind the law. Maybe the most remarkable aspect of the parliamentary debate, however, was the fact that the debate was framed from the beginning to the end in terms of data protection law.\(^{76}\) Any considerations related to media law and policy, and the question of how the fact that access to the websites of the public service media is being made conditional upon the acceptance to all sorts of tracking and profiling relates to the mission of public service media, were missing. In the end, it was the Dutch data protection authority that criticised the use of cookie-walls by the public service media:

> “The main objective to finance NPO from the public budget is that NPO offers a public service, which is essential for everyone in our society. There is no alternative available for users of online services to access the information and emissions of the public service media. It can be said that NPO hold a factual monopoly. Through forcing the acceptance of cookies pay users for their visit with their personal data. This cannot be regarded as a free and valid consent.”\(^{77}\)

In doing so, the authority stretched the interpretation of data protection law with arguments that are essentially related to the public mission of the public service media. Embedded in a discussion under which conditions consent to data processing can be

\(^{72}\) http://www.volkskrant.nl/vk/nl/3184/opinie/article/detail/3331966/2012/10/15/Publieke-omroep-chanteert-burgers-met-cookiemuur.dhtml

\(^{73}\) http://www.cloudtools.nl/algemeen/gegijzeld-door-een-cookie/

\(^{74}\) http://tweakers.net/nieuws/84841/websites-publieke-omroep-gaan-achter-cookiemuur.html

\(^{75}\) It is worth noting that the legislator’s response was not to prohibit cookie-walls, or to initiate a discussion under which conditions targeting and profiling by e.g. the media are still acceptable. Instead the responsible minister promised to loosen the existing rules, by excluding not only functional but also statistical cookies from the informed consent requirement, and exploring the possibilities for moving from an explicit to an implicit consent regime. The present cookie rules are included in Article11.7a, 3b of the Dutch Telecommunications law (Telecommunicatiewet).

\(^{76}\) See also the explanatory memorandum for the law amending the cookie provisions: https://zoek.officielebekendmakingen.nl/kst-33902-3.html The discussions regarding the cookie-walls of the public service media only led to a very general remark about institutions with a public mission: “Dat de via de bezoekte website aangeboden informatie en diensten onderdeel uitmaken van een publieke taak zal er over het algemeen ook toe leiden dat deze ook moet worden aangeboden als de bezoeker geen toestemming geeft voor privacygevoelige cookies.” (section 4.2.4.)

considered to be given freely, the authority concluded that the fact that the public service media held a quasi-monopoly on public service media information exercised pressure on users. The consequence is that their consent to accept cookies cannot be an expression of their own free will. Interestingly, the authority made a second argument, namely that of double payment: the Dutch users already pay for the public service media indirectly, namely through taxes. Requiring users to ‘pay’ with their data for entry to the website of a publicly funded service would amount to double payment.

By contrast, the Dutch media authority, competent for the media sector, remained silent in the debate. Partly, this could be explained with the division of responsibilities between supervisory authorities: data protection law does not fall under its competency, and media law does not make any explicit references to the placing of cookie walls in the (public service) media (see also section 3). Arguably, a closer investigation of Dutch media law might have provided at least arguments for the media authority to assess the Dutch cookie walls – had it considered itself competent. According to Art. 2(f) of the Dutch media law, for example, the programs of the public service media need to be accessible for everyone. And Art. 3 of the Dutch media law requires that the program offer of the public service media must be available to all households at no additional costs than the purchase of the necessary hardware (e.g. TV set). This is the openness criterion that was referred to earlier in this article (section 4). One may at least wonder to what extent the requirement to give data in exchange for program could be considered such a prohibited, additional cost. Similarly, making access to the website conditional upon the delivery of data could render the site inaccessible for at least the more privacy-conscious members of the Dutch population (as this author). Put differently, had the cookie-wall debate been framed in terms of media law and policy, rather than data protection law, it would have soon become obvious that the cookie-walls from the public service media are unacceptable from a public policy point of view.

Are take it or leave it choices problematic only for the public service media? It is true that the public service media, at least in Europe, are burdened with special responsibilities towards the user and the democratic project (see also section 4). Not only are they (partly)
funded by public money, the expectations to contribute to the public sphere and the democratic project are particularly high. The public media must serve the entire public with quality information, education and entertainment, and more generally content of public interest. This is not to say, however, that other, commercial media, including the press have no role to play in a democratic society. Media is speech, and when consuming media content it does matter who the speaker is. Turning away and/or listening to another speaker is therefore not necessarily an option (see also later in this section when discussing pluralism and diversity). Or put differently, cookie walls potentially preclude access to any speaker, and could for this reason be problematic not only for the public service media, but also for the (news) media in general.

Again, it is instructive to look at media policy and the ideas and objectives that motivate it. Here, the example of pay-TV is particularly instructive, because of the perceived tension between the exercise of exclusive rights (to e.g. control access) and what is often referred to as a right of the audience to free access to information. When pay-TV was introduced in the early 50ties of last century, the fact that the audience was required to actually pay tolls or fees for access was held as an important argument against pay-TV as a new distribution model. In Europe, the European Committee on Culture, Youth, Education and the Media of the European Communities, warned – rather dramatically – that due to pay-TV and the technical encryption of television programming, national services were beginning to vanish into the 'ghettos of encryption'. From this quote speaks a long tradition of thinking about the media and the conditions that must be fulfilled so that they can complete their mission. Openness and accessibility are important elements in that, true to the Rawlian idea that “if the public forum is to be free and open to all, and in continuous session, everyone

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82 The Council of Europe once defined the specific role of public service broadcasting as “to promote the values of democratic societies, in particular respect for human rights, cultures and political pluralism; and with regard to its goal of offering a wide choice of programmes and services to all sectors of the public, promoting social cohesion, cultural diversity and pluralist communication accessible to everyone.” Council of Europe, Recommendation CM/Rec(2007)3 of the Committee of Ministers to Member States on the Remit of Public Service Media in the Information Society (Strasbourg: Council of Europe, [2007]).

83 Ibid.


should be able to make use of it. All citizens should have the means to be informed about political issues." 87 This can be even true for access to particular events of special importance. As the European Court of Justice in Luxembourg remarked in a case involving media law’s right to short reporting88: "the marketing on an exclusive basis of events of high interest to the public is increasing and liable to restrict considerably the access of the general public to information relating to those events."89 In other words, creating a situation in which access to media content is made conditional upon certain conditions (such as the obligation to pay a price) would inevitably result in the exclusion of parts of the public. 90 From the perspective of media law and policy, cookie-walls are just another version of exclusivity – instead of programmes being reserved to subscribers, access to the website is reserved to those that are willing to accept cookies. This could be an additional reason to be wary of cookiewalls, at least in the media sector.

This is not to say that access to media content must be unconditional, or not attached to a price. Media law does not convey a right of access free of charge. Neither is it the goal of cookie-walls to block entrance to the media’s website, rather to make access conditional upon the acceptance of tracking technologies. Insofar, upon a closer look, the cookie-wall discussion is also and foremost a discussion of the conditions of access to media content, and more specifically about the individual and societal fairness of these conditions. Can users be asked to ‘pay’ data in exchange for access to the media? The answer will depend


88 The right to short reporting (Art. 9 and 9a European Convention on Transfrontier Television) is yet another example of the perceived tensions between access controls and openness. According to European media law, member states can introduce a right for broadcasters to take over short excerpts from events of high interest for the public from other broadcasters (who have acquired the exclusive licenses to report about these rights). The reason is that the ‘right of the public to information of high public interests should not be hampered by the exercise of exclusive rights, e.g. in pay-TV, Article 9 European Convention on Transfrontier Television, and para. 174-180 of the Explanatory Memorandum, see also Art. 15 of the Audiovisual Media Service Directive. In addition, there are the so called lists of important events: member states may draw up lists of events that are of such high joint public interest that they may not be subject to exclusive transmissions in pay-TV.

89 The decision concerned the so called right to short reporting. According to Article 15 (1) AVMSD “any broadcaster established in the Union has access on a fair, reasonable and non-discriminatory basis to events of high interest to the public which are transmitted on an exclusive basis ....” The idea behind the right to short reporting is to make sure that all the other broadcasters who did not acquire the rights, are not automatically crowded out of the market, but have at least the opportunity to report about events of public importance. In a similar vein, Jackie Harrison, European Broadcasting Law and Policy, ed. Lorna Woods (Cambridge etc.: Cambridge etc.: Cambridge University Press, 2007). 37, arguing that “true diversity of choice would be met only if something for everyone was available free-to-air.”

90 See also Harriet & Woods, 2007, p. 36.
on whether requiring data in return for access to services could form a principle obstacle to information access (which is an empirical question), or whether the conditions imposed are disproportional or even contrary to the public mission of the media.

Interestingly, European media law used to impose quantitative limits to the level of advertising users can be expected to accept – arguably another form of ‘immaterial’ return service. As curious as the provision may be, as interesting is the reasoning behind it. Its objective is to strike a fair balance between the commercial interests of broadcasters, the interests of viewers and the public function of the media. As the Council of Europe explained in the explanatory memorandum to the European Convention on Transfrontier Television, the provision must ensure that “the amount of transmission time devoted to [advertising] is neither excessive nor detracts from the function of television as a medium of information, education, social and cultural development and entertainment”. This is the idea of establishing some sort of equilibrium between the service, and the conditions of access – considerations that could also be worth discussing regarding the proportionality of data that users are required to share in exchange for information vs the media’s mission to inform. Seen from this perspective, data protection law’s principles of purpose limitation and data minimalisation could not only be ways to guarantee fair processing. They could be seen also as instruments of balancing the amount of surveillance users are required to accept in exchange for access to media content, and should therefore certainly also apply to the media, even in the context of their journalistic activities.

When striking the balance, it is therefore important to not only look at individual ‘costs’ from media surveillance, but also at the possible broader societal costs. These could be, for example, costs in terms of what Neil Richards has coined “intellectual privacy”. According to Richards, “a meaningful measure of privacy is critical to the most basic operations of expression, because it gives new ideas the room they need to grow.” Presenting the public with cookie-walls to get users to consent to potentially very far-reaching data collections

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91 Art. 18 of the Television Without Frontiers Directive, and Art. 12 of the European Convention on Transfrontier Television (maximum of three hours a day). The provision was not uncontested, and had been abandoned in a later update of the directive because the quantitative restrictions was not reached in practice Mira Bürri Nenova, "The Reform of the European Community Audiovisual Media Regulation: Television without Cultural Diversity," *International Journal of Cultural Property; Int J of Cult Prop* 14, no. 2 (2007), 169-204. 181.


94 To what extent the existing principles about purpose limitation and data minimalisation are fit to take into account also public policy considerations, such as the public mission of the media, is another question, and possibly a reason to consider corresponding provisions in media regulation.


96 Ibid, p. 392.
does not seem like the right way to afford the audience that measure of privacy. Or to put it differently, it is time for a debate in media law and policy to consider limits to the extent of private surveillance for the sake of the intellectual privacy of users (see for some more concrete suggestions later, in section 5.4). Closely related is the aspect of chilling effects as another potential individual and social cost. Chilling effects is an important concern in both the recommendations of the Council of Europe as well as the case law of the European Court of Human Rights.\textsuperscript{97} Though typically addressed in the context of journalists,\textsuperscript{98} also users’ freedom of expression interests can be potentially affected.\textsuperscript{99} The Council of Europe noted explicitly in the context of tracking users online, “[t]hese capabilities and practices can have a chilling effect on citizen participation in social, cultural and political life and, in the longer term, could have damaging effects on democracy. ... More generally, they can endanger the exercise of freedom of expression and the right to receive and impart information protected under Article 10 of the European Convention on Human Rights.”\textsuperscript{100} In the Netherlands, the Dutch Data Protection coined a new notion of “sensitive” data to qualify data about media users’ viewing behaviour because it can reveal very individual patterns which potentially disclose the specific social background, financial or family situation.\textsuperscript{101} And more specifically for the context of Smart TVs, a joint position by the German data protection authorities (coordinated within the so called Düsseldorfer Kreis) remarked on possible tensions between the right of access to information and monitoring user behaviour:

“Fernsehen ist ein maßgebliches Medium der Informationsvermittlung und notwendige Bedingung für eine freie Meinungsbildung. Das Recht auf freien Informationszugang ist verfassungsrechtlich geschützt und Grundbedingung der freiheitlich demokratischen Grundordnung. Die Wahrnehmung dieses Rechts würde durch die umfassende Erfassung,


\textsuperscript{98} See e.g. the European Court of Human Rights, Case of Goodwin v. The United Kingdom, Application no. 17488/90, STRASBOURG, 27 March 1996, para. 39.


\textsuperscript{100} Declaration of the Committee of Ministers on Risks to Fundamental Rights stemming from Digital Tracking and other Surveillance Technologies (Adopted by the Committee of Ministers on 11 June 2013, para. 2.

\textsuperscript{101} College Bescherming Persoonsgegevens, Onderzoek Naar De Verwerking Van Persoonsgegevens Met of Door Een Philips Smart Tv Door TP Vision Netherlands B.V (Den Haag: College Bescherming Persoonsgegevens,[2013]).
Auswertung und Nutzung des Nutzungsverhaltens empfindlich beeinträchtigt.” 102 (Television is an central medium to inform and an essential conditions for freedom of expression. The right to unhindered information access is constitutionally protected and necessary for the democratic order. The comprehensive collection, processing and using of information about user behavior will critically affect the exercise of that right. Translation by the author).

In response, the Düsseldorfer Kreis re-emphasised the importance of users’ right to watch media content anonymously, a right that is conveyed to users by the German Telemedia Law.103 This right seems to be a direct response to Julie Cohen’s suggestion to introduce a ‘right to read anonymously’ (albeit in the context of DRM).104 Basing her argument on freedom of speech theory and the threat of chilling effects, Cohen suggests that the legislator should introduce “a right of anonymous access to reading material that are otherwise made available by willing distributors.” One may wonder about the potential of anonymity requirements to protect users in an age of Big Data, connected devices and complex data chains. Also, more research is needed on what exactly constitutes this special position of news readers, and how it is affected by data and algorithms. And yet, the arguments forwarded by thinkers like Cohen and Richards, but also the Council of Europe, the Dutch and German data protection agencies invite us to be critical about cookie-walls in general, and argue, maybe even more than for other instances of profiling and targeting (e.g. for purposes of behavioural advertising) in favour of some option for users to choose between accepting cookies and more anonymous forms of ‘payment’ in exchange for media access, for example through the payment of a subscription fee.106 In addition, a look into media theory teaches us that it is not only the fact that monitoring of users takes place, but also the extent to which this is being done (with or without cookie walls). Excessive data collections can result in an unfair and unproductive balance between access to information and value-in-exchange that users are expected to return. And when assessing what a fair balance is, also the types of media content and their ‘democratic sensitivity’ can matter, respectively the particular vulnerability of certain media users (a thought that will be developed in more depth in section 5.4).

102 Duesseldorfer Kreis,

Gemeinsame Position Der Aufsichtsbehörden Für Den Datenschutz Im Nicht-Öffentlichen Bereich (Düsseldorfer Kreis) Datenschutzbeauftragten Der Öffentlich-Rechtlichen Rundfunkanstalten, Smarter Fernsehen Nur Mit Smartem Datenschutz, may 2015Duesseldorfer Kreis,(2015)).

103 Art. 13 (4) No. 6 of the German Telemedia Law (Telemediendienste-Gesetz).


105 Ibid, 25.

106 Interestingly, the Dutch Newspaper Volkskrant did offer users for some time the option to either accept cookies or subscribe to the newspaper.
Having said so, protecting the intellectual privacy of users and their right to reading anonymously can only be part of the response to profiling and targeting users in the media. This is because there will be many instances in which reading not anonymously and sharing preferences and reading habits with the media can be very useful for users if that means that the media can help them to navigate the digital information jungle. Insofar, it is important, but not enough to afford users some privacy to think and read unmonitored. Equally important is it to ensure that to the extent profiling and targeting is taking place, this is done in a way that is compatible with public mission of the media, and other fundamental rights and freedoms of users, such as access to a plural and diverse media landscape, but also equal chances to participate.

5.2 PLURALISM & DIVERSITY VS PERSONALISED RECOMMENDATIONS

One area in which profiling and targeting media users has triggered considerable discussion, even in the area of media law and policy are the concerns about the potential effects of such strategies for the diversity and plurality of media content to which users will be typically exposed. Often also referred to as “filterbubbles”, echo-chambers, information cocoons or ego-casting, the main consideration here is that by inferring from data personal preferences, such insights can and are being used to adjust media content to individual profiles. This again can result in situations in which personal ideas and preferences are reinforced, and users potentially excluded from access to a more diverse information diet. In reality, the impact from personalisation strategies on the public debate is far from clear. At present, there is little empirical evidence to support any pressing concerns about a ‘filterbubblishation’ of the audience. Partly this is so because, to date, personalised recommenders simply lack sophistication. Partly this has to do with the way how people consume media, and how they tend to use a mix from personalised and non-personalised news sources. And yet it cannot be excluded that the effects for diverse exposure will become stronger once media personalisation becomes more common, and the technologies for doing so more precise, or media diversity within and between sources and platforms is being reduced. Data, and the way it is used to engage with users, arrest their attention and secure (exclusive) access could play an important role in both, increasing but also reducing that diversity – if, and how is an important challenge for research to discover. It is worth noting that from the perspective of media diversity policies, it is important to look not only at isolated instances of profiling and targeting, but at the effect on media consumption across the overall media landscape. From the point of view of pluralism and diversity

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policies, therefore, both, the (rather unlikely) situation that the entire media offer is personalised or the (more likely) situation that some particular dominant (personalised) platform channel a significant part of media users’ news consumption, are potentially problematic. This is also the reason why the steady move of some of the new, data-driven intermediary platforms, such as Facebook, into establishing themselves as media players deserves scrutiny and attention from the scholarly community, but also from media regulators.

Even if there may be no immanent filterbubble concern, this does not take away that media diversity could and should play a role as a design principle in personalised media services, and personalised media recommendations. Media diversity is one of the key principles of media law and policy, and directly flows from the constitutionally protected freedom of expression. Media diversity and pluralism is seen as the necessary premise for the exercise of people’s fundamental right to freedom of expression, which ‘will be fully satisfied only if each person is given the possibility to form his or her opinion from diverse sources of information’.109 To this end, existing laws and policies must guarantee that a wide range of content from diverse sources is available.110 As such, pluralism has always been tightly linked to the quality of the public debate, and its contribution for democracy. According to the European Court of Human Rights,

“[f]reedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. [...] it is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no ‘democratic society’.”111

In other words, it is in the very nature of media diversity, and the democratic discourse, that citizens shall be exposed to a wide range of ideas and opinions, and not only to those that conform to their personal preferences and likings. And the European Court of Human Rights has left little doubt that the media’s task to inform “cannot be successfully accomplished unless it is grounded in the principle of pluralism, of which the State is the ultimate guarantor.”112 In other words, personal relevancy can never be the only criterion to guide the design of algorithms in the media - exactly because freedom and media pluralism as its

109 Council of Europe, Recommendation no R(99)1 of the Committee of Ministers to Member States on Measures to Promote Media Pluralism (Strasbourg: Council of Europe,[1999]).

111 European Court of Human Rights, 7 Dec. 1976, Handyside v. UK, para. 49.
112 European Court of Human Rights, 28 November 2002, Case of Informationsverein Lentia and others v. Austria, para. 38.
constituting element include exposure to contents that do not conform to individual preferences. This is evident for the public service media, where the commitment to media diversity is often part of their legally mandated mission statement, but also for the press, and, albeit to a lesser degree, for the commercial media and the press. The importance of diversity as a value is also shared by users. For example, according to a recent survey we conducted in the Netherlands a majority of the users value diversity in access to news. Only 14.4% of the population disagrees with the statement “I think it is important that I have access to a large volume of news about many different topics”.

Editorial commitment to diversity can create tensions in situations in which the media operate with external parties, such as news app developers, developers of recommenders or social networks where personal relevancy or popularity are still the prime benchmark against which the quality of recommendations or selections is measured (see also section 2). About editorial independent). Similar is true for outlets that are not committed to media diversity as a core value. We will return to the issue of media pluralism in a moment when discussing the matter of bias in recommending algorithms.

Before that some words on media diversity and privacy are in place. This is because the issue of media diversity confirms the importance of privacy not only for the sake of individual users, but also for the sake of the realisation of critical public policy goals for the media sector. The fact that, at least at present, concerns about filterbubbles are probably overrated has to do with the fact that users choose to receive content from multiple sources. This again stresses the importance of having a closer look at personal autonomy and privacy as a safeguard against future filter-bubble situations.

While much of the debates about media pluralism concern the structure and quality of media markets, it is equally important to acknowledge the role that users, and users’ autonomous choices, play in the realisation of media pluralism. Irrespective of whether one adheres to the “market place of ideas” conception of media pluralism (which characterises much of the US debate) or a more deliberative conceptualisation, one critical precondition is that users can live up to their role as critical, reflective and most importantly, independent choice makers. Otherwise, the very essence of their active role in the process of weighting ideas and opinions is threatened. In other words, not only the media need to be

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113 For detailed information about the fieldwork see Moeller, Trilling, Helberger & de Vreese (forthcoming).
114 See Ananny and Crawford, A Liminal Press: Situating News App Designers within a Field of Networked News Production, Vol. 3 Routledge, 2015), 192-208.; M. Nunez, “Former Facebook Workers: We Routinely Suppressed Conservative News,” Gizmodo (15 May 2016, 2016) explaining how trending (in the sense of most popular topics) were the prime measure for Facebook’s trending news section.

independent, users need to be independent, too, in order to be able to make informed and diverse choices. Media diversity, as a constituting factor of freedom of expression and the role of the media in a democratic society can only function if users enjoy a certain autonomy, i.e. independence from the government or commercial forces, in making their decisions, and weighting the arguments. Privacy rights, for example, can provide the necessary democratic breathing space for individuals to form their distinct and diverse identities and ideas. 116 Put differently, protecting the privacy of users, in their relationship to the media but also to advertisers and other third parties that seek to influence the way users choose and reflect upon media content is a way of protecting the very activity we expect media users to engage in: critical and diverse thinking. Dawes speaks in this context of a ‘political privacy’ dimension. He argues that: “[v]iewed from a civic republican perspective, therefore, the political legitimacy of the state is guaranteed by the public sphere, which in turn is dependent upon privacy.” 117 Insofar, arguments from the demands of media pluralism and the role of citizens in a democratic society can further underline the importance of (intellectual) privacy, also in the realms of media law and policy. But next to the freedom to think, users must be able to actively participate and make their voices heard. Which leads us to the next point:

5.3 EQUAL CHANCES TO PARTICIPATE IN THE LIGHT OF ALGORITHMIC DIFFERENTIATION

Discrimination and price and service differentiation has become an important issue in the more general Big Data Debate. 118 And while algorithmic differentiation is a topic that triggers spontaneously strong reactions in favour or against, it is very difficult to pinpoint where the actual problem, if any lies, and how to judge fair from unfair forms of discrimination. 119


Again, moving away from the general debate and having a closer look at sectoral policies can help.

Discrimination on the basis of e.g. race or ethnic origin is also a relevant issue in media law and policy, for example in the debate about the treatment of minorities in the media. The European Court of Human Rights has made it very clear that discrimination on account of ethnic origin is incompatible with the demands of a pluralistic society: “In any event, the Court considers that no difference in treatment which is based exclusively or to a decisive extent on a person’s ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures.”

Part of the reason is that such forms of discrimination affect the chances of certain parts of the society to actively participate in the public sphere. The concept of “equal chances to communicate” or what Rawls refers to as “equal participation” is a useful framework for discussing algorithmic differentiation in the media context and judging under which conditions it is (un)acceptable. Motivated by ideals of a pluralistic democratic debate on the one hand, and fundamental rights to freedom of expression but also non-discrimination on the other hand, equal chances to communicate essentially means that for the democratic discourse to flourish, citizens must be able to freely communicate with each other in a way that each citizen has a fair opportunity to develop himself or herself by exercising this freedom. One party’s ability to influence the chances of another party to participate can cause asymmetries that can lead to inequalities not only in the communicative but also in the democratic process. As one of the leading thinkers on the principle of equal chances to communicate in media theory, Wolfgang Hoffmann-Riem, explained:

“Es muss fuer Kommunikationsbedingungen gesorgt sein, die Orientierungen und Selbstentfaltung in den jeweils vom einzelnen selbst dafuer vorgesehen Lebensbereichen ermoeglichen und damit die Faehigkeit zur realen Entfaltung subjektiver Moglichkeiten absichern. In diesem Sinne ist fuer kommunikative Chancengleichheit zu sorgen.” (It is necessary to create the conditions for each individual’s orientation and self-deployment in self-selected areas of life, and thereby secure the ability to develop her individual capacities. In this sense, it is necessary to create the conditions for equal chances to communicate. Translation by the author).

From the perspective of equal chances to communicate, it is not only, or not so much the fact that personal data and profiles are used to differentiate between people, but the effect that this has on democratic participation and a pluralistic public sphere.

To take the example of the perfectly personalised newspaper à la ‘Hackworths newspaper’ in Neal Stephenson — a newspaper that gives each citizen exactly the kind of information

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120 European Court of Human Rights, 21 February 1986, Case James and Others, para. 56.
121 Rawls, A Theory of Justice, New ed ed. (Oxford etc.: Oxford etc. : Oxford University Press, 1973). at 225: “If the public forum is to be free and open to all, and in continuous session, everyone should be able to make use of it. All citizens should have the means to be informed about political issues.”
that corresponds with the person’s profession, level of education, social background, hobbies, etc. Such a newspaper could bring us a step away from the traditional, well-informed citizen who is able to speak out on all matters of public interest, and closer to “the specialised citizen”. These are citizens that understand that in today’s global information abundance it is simply futile to strive for perfect information on all matters of importance for society. Instead, they specialise on a number of topics that reflect their personal interests, public role and personal influence sphere, possibly in the fashion of Lin and Mash’s “expert citizens” and “Everyday Makers”. Insofar, data-driven differentiation could be a good thing if one is willing to let go of some traditional ideas of how the market place of ideas is supposed to work. It could, however, also be a bad thing if this process of differentiating results in a situation in which users, knowingly or not, are excluded from access to information, because it is not relevant for them, does not correspond to their profile, or is unlikely to lead to the desired level of engagement. This also means that the assessment of whether algorithmic differentiation is acceptable or not depends on the extent to which citizens are able to access the information elsewhere, should they wish so. Most importantly, differentiation is unacceptable if the overall result is that it affects people’s equal chances to participate in the public discourse. Practically, this means that personalisation may never be absolute, but must always entail some options for citizens to change the parameters of differentiation. In a similar direction has also argued the Council of Europe, when saying that users must be not only informed about filtering, and the logic behind, but also able to activate or deactivate filters. Maybe more importantly even, the Council has assigned explicitly a social and ethical responsibilities of those designing, using and monitoring filters, because of their potential impact on the exercise of the right of freedom of expression and information, privacy but also the active participation in public life and democratic processes.

An obvious example to test this principle of social and ethical responsible is the example of algorithmic bias. More and more research is pointing to the fact that the algorithms that newsrooms use to recommend or not recommend certain kinds of media content can include a certain level of bias. For example, Thurman et.al. show that one of the algorithms used to extract relevant news from social media, SocialSensor, “prioritises stories that show a spike of interest in the short term, and stories about people, places, and organisations; and it listens to those who are vocal and have an audience—many of whom are men in the

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126 Recommendation CM/Rec(2008)6 of the Committee of Ministers to Member States on Measures to Promote the Respect for Freedom of Expression and Information with Regard to Internet Filters (Strasbourg: Council of Europe,[2008]), para. I.

127 Ibid, Para. 1 (vi)
media.” 128 In a presentation at the “Unlocking the Black Box Conference” in spring 2016 in Yale, 129 Brad Greenberg’s presentation showed that some algorithms tend to push down minority contents, in favour of contents with more mass-appeal. And a recent report about Facebook’s Trending Topics section triggered a heated debate about possible biases in Facebook’s news recommendation algorithm. 130 These are examples of forms of algorithmic differentiation that create challenges for the equal chances to communicate: for users as well as for speakers. Insofar, it is useful to reiterate the Council of Europe’s call for social and ethical responsibility of those that design filters and recommenders – be they traditional media, or mediators of media consumption, such as social networks, search engines and designers of recommendation algorithms.

5.4 TRUST AND INTEGRITY

A necessary precondition for the media to be able to inform, set the agenda and instil a public debate is trust from users towards the media that inform them. In order to take media content seriously, to be willing to ponder upon it and engage with it, the audience has to be able to judge the information upon its value (whether it is well-researched, accurate, biased or not) and its sender upon its trustworthiness (commitment to journalistic values, independency, motives, political bias, etc.). This is probably even more true under conditions of information overload, where users need to manage their time and attention even more critically. Protecting trust and integrity in the media has therefore since long held a critical position in media law and theory. This the more since the media do not operate in a vacuum, but within a broader powerplay of advertisers, politicians, lobby groups, and other external forces.

In today’s data-driven media environment, if anything, the number of external parties has only multiplied (see section 2). In order to produce and distribute media content, the media depend more than ever on external parties such as app developers and external developers of recommendation algorithms, social networks, search engines, data analytics companies, and, of course, their users. 131 In addition, data analytics enable far more sophisticated forms of targeted advertising, and purposeful fusions of editorial and commercial content (native advertising). From the perspective of news readers, it is thus even more difficult to grasp why they are (not) seeing particular contents. And from the perspective of editors, the pressure of external influences on editorial decisions increases steadily. Advertisers are only


129 http://isp.yale.edu/event/unlocking-black-box-promise-and-limits-algorithmic-accountability-
professions/register-black

130 Nunez, Former Facebook Workers: We Routinely Suppressed Conservative News,

131 Picard, 2014, p. 505; Van der Haak, Parks and Castells, 2012, also pointing out, however, that what the authors refer to as ‘networked journalism’ can also be an opportunity for the independence and quality of reporting as it frees professional journalists from strict corporate control.
one of the possible sources of influence. The recent discussions about the controversial relationship between the media and Google and Facebook, and their news recommendation algorithms, are examples of how new forms of information intermediaries pressure the media into rethinking formats, forms of presentation and their relationship to their audience as well as competing, data-driven platforms. But also users, and audience analytics seem to have a profound impact. In a recent study Thurman et.al. found that over 40% of British journalists consider audience research to be very or even extremely influential for their work. The same study found that “[a]bout twice as many journalists believe that their freedom to make editorial decisions has decreased over time as believe it has increased”. Interestingly, in the light of findings like these protecting the privacy of users and some element of proportionality between data collection and media activity could also be a means to reduce the pressure of audience metrics, and protect the editorial independency of newsrooms.

Revisiting values and instruments to safeguard editorial integrity, and the audience’s trust in editorial integrity, seems thus a timely and valuable exercise. Again, the analysis here can only focus on the main reasoning and values behind the rules, and how they might inform our thinking about fairness in profiling and targeting media users. Two categories of safeguards, and the values and reasoning’s behind them, deserve mentioning in particular. The first is the attempt to temper or even banish external influences on particular categories of content – because of their particular importance for society, the public sphere, but also individual sensitivities and freedoms. Then there are the more explicit safeguards that must protect editors from external pressures. Corresponding are the provisions that stress the importance of editorial control and responsibility.

**Bans on certain forms of influence in relation to certain types of programs, certain influencers or particularly vulnerable groups**

In the ongoing debate about profiling and targeting news readers, seldomly a differentiation is being made between the types of services or kinds of information that provide the backdrop for profiling and targeting. To date, there is still little discussion if we should be more concerned, and if so why about profiling and targeting in one area (e.g. media) as

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132 And according to Thurman et.al, 2015, not even the most influential one, p. 43.
compared to another (commerce). A look to sectoral policies, such as media law and policy, can bring some light into that matter. Though the argument is not uncontested, some forms of media content are considered so central to the public opinion forming process or the public sphere that they warrant special consideration vis-à-vis advertisement and external influences. An example are the aforementioned public service media, but also: news reports and religious programs. According to Art. 10 (4) of the AVMSD, for example, “[n]ews and current affairs programmes shall not be sponsored.” In addition, member states are free to prohibit the showing of sponsorship logo’s during children’s programmes, documentaries and religious programmes. And according to Art. 20(2) of the AVMSD, “no television advertising or teleshopping shall be inserted during religious services”.

The Council of Europe in its explanatory memorandum on the corresponding provision in the European Convention on Transfrontier Broadcasting (Arts. 14 (5) and 18 (3)) explains that this is so because of the importance attached to news and current affairs programs.\footnote{Explanatory memorandum, para. 252.} Castendyk and Ullrich, when commenting on the provision, further expand on this by pointing to the ‘fundamental sensitivity and importance of their particular content in respect to private and social life.”\footnote{Ullrich Castendyk, “Art. 11 TWFD,” in European Media Law, ed. Castendyk, O., Dommering, E., Scheuer, A. (Den Haag: Kluwer Law International, 2008).} Other reasons that are being advanced are the fact that certain types of program are in need of greater protection from inappropriate or excessive advertising, respectively dominant commercial influences,\footnote{Harrison, European Broadcasting Law and Policy, ed. Woods (Cambridge etc.: Cambridge etc.) : Cambridge University Press, 2007). 200. E. M. Barendt, Broadcasting Law : A Comparative Study (Oxford; New York etc.: Oxford : Clarendon Press, 1993), 198.} but also the impact of broadcasting and the particular expectations of citizens with regard to particular types of programming,\footnote{Harrison and Woods, 2007, p. 201.} such as that news content and religious affairs are free from external influences. Common to all the justifications provided is the theory that there are certain contents of greater sensitivity to external influences because of their specific democratic role and/or their relevancy for private believes, respectively the vulnerability of certain target groups. This sensitivity calls for a special attention to external intrusions when watching these programs, e.g. through advertisers and sponsors, and the creation of ‘advertisement free’ zones in the public/private interest.

When viewed within the context of profiling and targeting users it becomes clear that news and religious affairs programs are not only programs of particular democratic, respectively individual sensitivity. Watching these programs can also provide particular sensitive insights into the believes and convictions of these users (data about religious or political believes belong to the so called special categories of data).\footnote{Compare College Bescherming Persoonsgegevens, Onderzoek Naar De Verwerking Van Persoonsgegevens Met of Door Een Philips Smart Tv Door TP Vision Netherlands B.V (Den Haag: College}
users when reading news or religious contents are not only particularly ‘vulnerable’ to private surveillance, but also entitled to a greater measure of ‘democratic breathing space’ and protection from external influences that might interfere with the special mission of the media to inform? Another question is to what extent the specific social and individual sensitivity of news, religious and current affairs programs could justify a political decision to be more alert about profiling and targeting news and religious content consumption altogether, also in view of the particular chilling effects that the collection of such information about users might have. Adding the media policy perspective also makes it clear that it is not only the collection and processing of such information that needs special attention, but also the effect that this has on the information behaviour of users, and their (trust) relationship to the media.

**PROTECTING AND STRENGTHENING EDITORIAL INTEGRITY (SECTION WILL BE FURTHER DEVELOPED)**

With new data-driven forms of media operations, also new external influences mingle in the process of news making, that either exercise influence in the process itself, (e.g. search engines, social networks, app developers, etc.) or the outcome (e.g. in the form of new forms of advertising). From the point of media law theory, this raises the question of the protection of editorial independence, and users’ trust in that independence. An important principle, enshrined in media regulation is that external parties, such as advertisers, shall not influence the responsibility and editorial independence of the media.¹⁴² From this principle speaks a deeper conviction that there are potential conflicts between editorial and non-editorial influences, and that there can be good reasons – relating to the democratic role of the media - to strengthen the standing of editors and to make sure that they continue to be able to make independent decisions. Or, as one commentator has put it, to minimize the temptation for businesses to exercise commercial influence.¹⁴³ And in today’s digital environment such influences do not any longer come from advertisers alone, but also from new competitors, such as search engines and social networks.

For similar reasons, users have a right to learn why contents are shown to them. An established principle in media law and policy for all media services (including broadcasting and internet services) is the clear separation of editorial from commercial content and rules that oblige the media to be transparent about potential commercial influences on an organizational level (rules about media transparency)¹⁴⁴ as well as on a content level (rules

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Bescherming Persoonsgegevens, 2013). though the College does not distinguish between certain types of content.

¹⁴² See e.g. Art. 10 AVMSD, but also self-regulatory codes of the press.
¹⁴⁴ Council of Europe, Recommendation no. R(94)13 of the Committee of Ministers to Member States on Measures to Promote Media Transparency, 22 November 1994 (Strasbourg: Council of Europe,[1994]).
that oblige the media to separate editorial from commercial content). The primary goal of these rules is to protect the editorial independence of the media and the ability of viewers to judge for themselves whether external influences have shaped a program. The separation principle also entails an element of consumer protection, namely to avoid consumers being misled by "editorially camouflaged advertisement". An important question for further research that goes beyond the scope of this article is to what extent these rules are potentially useful in revealing commercially-motivated personalization of media content, or more generally hidden bias in (the selection of) media content. The recent controversy about potential bias in Facebook’s newsfeed again confirmed, if anything, how little users know about why particular contents are (not) shown to them, and how important it is to think about ways to make not only commercial, but also political/ideological, etc. bias transparent. More research would also be needed on the question of whether disclosure of eventual commercial influences would actually influence the valuation of people for the media content in question (particularly if it is close to their interests). Important for the given context is it to note that from the perspective of media law and policy, the question about transparency and opacity of algorithms could gain an additional dimension, namely not so much whether users should be informed about the fact that they are subjected to algorithmic decision making and which are the logics involved, but also the intent behind algorithmic recommendations, and whether this is to inform, or to sell products and ideologies.

The flipside to the protection of editorial independence is of course that the media also have a certain editorial responsibility, e.g. the responsibility over the (selections) of content or its presentation and arrangement, and that it complies to editorial policies, and more broadly to journalistic ethics and the media’s mission. This editorial control can also extend to, or be partially mediated, by algorithms.

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145 Art. 9 (1) a and 19 of the Audiovisual Media Services Directive (applicable to offline and online video services); Art. 6 of the E-Commerce Directive (applicable to the online versions of newspapers); Unfair Commercial Practice Directive (applicable to all media), Annex I No. 11.


148 In a similar direction arguing Pasquale, 2015, p. 70-71, warning from “murketing" (murking marketing tactics).

149 http://www.nytimes.com/2016/05/12/technology/facebook-bias-is-built-in-and-bears-watching.html?_r=1

150 In this sense at least the Council of Europe: “Editorial processes may also be automated (for example in the case of algorithms ex ante selecting content or comparing content with copyrighted material).” Council of Europe, Recommendation CM/Rec(2011)7 of the Committee of Ministers to Member States on a New Notion of Media (Strasbourg: Council of Europe,[2011b]). recital 32.
6. **Concluding remarks: Towards fair algorithm media practices**

Using Big Data and smart algorithms to profile and target the newsreader changes the relationship between readers and those that were formerly known as the “mass media”. Instead of the traditional one-to-many model, the news media get to learn their users, their preferences and reading habits, and can adjust headlines, presentation and context selections accordingly. The media can also better match advertising to contents read or interests shown. As such, data and personalisation strategies can be an important means to serve users better, to distribute media content more effectively and to take on new journalistic roles, such as guiding users through the abundance of media content and helping them to get smarter, better informed or better entertained.

This paper has demonstrated that the privacy of news readers matters, also for the realisation of central media policy goals, such as media pluralism and the openness and availability of the media offer. The paper has also attempted to show that the values and principles enshrined in sectoral policies, such as media law and policy, can add a new, more differentiated perspective to the so far rather general debates about profiling and targeting. Specifically for the media this has to do with the democratic role and responsibility of the media, as well as the role of users as critical citizens and autonomous decision makers.

Information is power, power to influence minds, manipulate people, exclude or sell eyeballs. Seeing this power, but also the democratic mission of the media as sources of information and platforms for public deliberation, the media always had, and will continue to have a particular degree of societal responsibility to behave fairly – also when using data and algorithms. Very concretely this means that we need to look at profiling and targeting news readers differently than we look at e.g. profiling and targeting online shoppers. This is because of the public role of the media to inform and behave as public watchdog – a role they can only properly perform if users trust the media, and the media’s intention to inform. Respect for the intellectual privacy of news readers is an important element in that, as many media companies are very aware, as is fairness in collecting and using news readers’ data for the development of ‘smarter’ ways of communicating and selling that content to users.

This also means that the media are not entirely free to operate as they like. The flipside of the special constitutional protection of the media is a certain measure of **societal responsibility and accountability to the public.** Media law and policy has a long tradition in carving out and defining the elements of that societal responsibility: respecting and promoting diversity, equal opportunities, fair conditions of access, and responsible use of the power to influence and manipulate. As this paper has sought to demonstrate, these are values that also make sense in a data-driven environment, and that can inform the use of
data and algorithms to profile and target news readers (whether in the context of traditional media, or new intermediary platforms that mediate media consumption).

Others have made first suggestions of how to conceptualise this special position of the news reader. Neil Richards concept of intellectual privacy and Julie Cohen’s right to read anonymously acknowledge the special situation of the news reader, and seek to create a certain democratic breathing space or neutral zone around the reader, in which the reader should be free to read and think unmonitored and untampered with. In a similar vain, Data Protection authorities in Germany and the Netherlands have pointed to the sensitive position of news readers, and news readers’ data. This paper has argued that respecting the intellectual privacy of readers is not only important for the sake of the individual reader, but also for broader societal principles such as the demands of media pluralism and the role of the reader as autonomous decision maker in the market place of ideas. Insofar, it is necessary and appropriate that media scholars and media law find ways of conceptualising and integrating aspects of intellectual privacy into media law and the ethical guidelines that guide the media.

This is not to say that collecting information about users is unacceptable per se, but it should be in proportion to the service delivered, the public interest attached to it, and there should be a choice of currencies. Neither does it mean that access to media contents must be “free” and not subject to any conditions. It does mean, however, that for access to the media, maybe even more than for access to other products and services, the individual and social fairness and adequacy of the conditions of access do matter. As long as market conditions guarantee that the price that users are required to pay is fair and adequate there is little reason to be concerned. The analysis of the Dutch cookie-walls, however, has demonstrated that there are alternative forms of exchanges taking place – data against information. These exchanges are more problematic. This is so not only because they potentially exclude the more privacy sensitive parts of the population (if those still exist) but also because agreeing to far-reaching private surveillance can be a very high price to pay, for users and society. The paper has argued, for example, that for the sake of intellectual privacy but also principles of openness and accessibility of media content, users should never be forced to accept surveillance in exchange for access to information. The paper has also suggested that certain types of content (news, current affairs, religious content) may be more sensitive than others, from a democratic and public policy perspective. A blunt – and still to be tested – conclusion from this could be that profiling and targeting on these parts of the website are less acceptable than on others. And finally, it has made clear that in situations in which users do decide in favour of and consent to the sharing of information, this can never be a blanco permission to use the information as the media see fit. Instead, values and principles such as media diversity, equal chances to communicate and editorial independence continue to matter.
Another important principle that emanates from the analysis of the principles and freedoms enshrined in media law and theory are the principles of pluralism and equal chances to communicate. While a scenario in which all media content is being personalised and users are all encapsulated in their own private filterbubble may still seem far away, it is also good to be aware that one of the reasons why at least at this stage we can refute these concerns is the diversity within and between sources of media content. In this light, the article has pointed to the importance of monitoring information streams and making sure that the audience continues to be able to access content from a mix of personalised and non-personalised outlets and platforms. And if the media is supposed to play its role as watchdog and facilitator of the public sphere, and if users are expected to participate and engage as emancipated decision makers, this also means that nobody should be structurally excluded on the basis of her behaviour, interests or characteristics from access to, and engagement with the information presented in the media. Equal chances to communicate and the demands from media pluralism give a more differentiated picture on certain forms of algorithmic differentiation if the result is that certain parts of the readership are structurally excluded from access to contents, or access to an audience. Even if such differentiation may not qualify as (prohibited) discrimination, it still can conflict with the demands of a pluralistic media landscape. Or, to formulate more positively, next to personal relevancy, also pluralism and diversity should inform the design of recommenders and algorithmically mediated choices. Doing so can increase the quality of recommendations, both for individual users as well as a democratic society. Here lies a clear task also for scholars and policy makers to ‘operationalise’ media diversity in a way that it can actually inform the developers of media apps, recommenders, etc. And, to continue this positive line of thinking, it is also important to keep in mind that profiling, targeting and personalising media content can also be interesting as a means to enhance engagement, participation and equal chances to communicate.

Finally, this paper has addressed the notion of trust as a critical pre-condition for the media to fulfil their role. This can be trust that the media respect news readers’ privacy. This can also be trust in the integrity and independence of the media. Upholding such trust is no easy quest in an environment in which the media is maybe more than ever exposed to external influences and pressures: from advertisers, but also from app developers, data analysts, strategists and, last but not least, users. In the light of the complex dynamics that can underlie algorithmically mediated selection and distribution of media content, old values about transparency, editorial separation and the insulation of sensitive types of information (services) from external pressures and temptations seem to take on a new relevancy – even if we are still far from understanding if, and how the underlying rules can be modified to fit the changing conditions and dynamics. Clear is that the demands of editorial integrity and independence re-enforce calls for more algorithmic transparency and accountability, not so much about how the algorithm works or operates (at least not for users) but about the power dynamics, influences and motives behind the algorithm.