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Helberger, N.

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POLICY IMPLICATIONS FROM ALGORITHMIC PROFILING AND THE CHANGING RELATIONSHIP BETWEEN NEWSREADERS AND THE MEDIA

Natali Helberger

The news media are experimenting with new ways of engaging with the audience, and the use of algorithmic profiling and targeting is an important element of this strategy. The personalised newspaper is no longer only a vision from science fiction novels but is becoming a reality. The resulting shift from public information intermediary to personal information service creates new dynamics but also new imbalances in the relationship between the media and their users. The objective of this article is to explore how exactly this shift affects the relationship between the news media and news users, and what the implications are for media law and policy. More specifically, the article will argue that there is a need to conceptualise what this author calls “fair media practices”; that is, values and principles that should guide the relationship between the media and users, and the way media content is presented and marketed to users with the help of algorithms.

KEYWORDS news media; personalisation; algorithms; media law and policy; fair media practices

Introduction

An old dream about the mass media seems to be coming true. In 1889, the novelist Jules Verne already had a very clear idea of how the perfect news media should look: “Instead of being printed, the Earth Chronicle is every morning spoken to subscribers, who, from interesting conversations with reporters, statesmen and scientists, learn the news of the day” (Verne 1889, 262). Verne not only foresaw what would later become broadcasting. He also saw a customised news service, in which the media would report to individual users based on what they wanted to know. Twenty years later, in 1911, science fiction author Hugo Gernsback described newspapers that would invite users to set up a personal interest profile (Gernsback 1950). With the help of this profile, the newspaper would transmit only the news that the user was interested in. The newspapers would do so while users slept—so their sleeping time would be productive. Or take the example of Hackworth’s newspaper in Neal Stephenson’s novel *Diamond Age*:

Hackworth picked up a large sheet of blank paper. “The usual,” he said, and then the paper was no longer blank; now it was the front page of the Times. Hackworth got all the news that was appropriate to his station in life, plus a few optional services ... A gentleman of higher rank and more far-reaching responsibilities would probably get different information written in a different way. (Stephenson 2000, 36)

In other words, long before some of the mass media that we know today became mainstream or was even invented, the idea of an individualised relationship between users and the media had already inspired authors and visionaries. These visions are not “science fiction” any more. Jules Verne’s *Earth Chronicles* remind us of *The Post*—a Dutch online magazine in which users can subscribe to individual reporters.¹ We recognise Gernsback’s personalised interest profiles in the invitation from the *Frankfurter Allgemeine Zeitung* to choose interest categories and individual journalists who readers find personally most relevant, interesting and engaging. Also, it seems that even Stephenson, when writing *Diamond Age*, had a presentiment of how close Big Data and smart algorithms would bring us to a vision of a news medium that gives each of us exactly the kind of information we need.

For the mass media as we know them, this shift is fundamental. It is a shift from a public information intermediary to a personal information service. No longer simply broadcasting programmes into the air, hoping they find their audience—today, information services can be targeted at individual users. No educated guesses in the newsroom about what “the audience” might or should be interested in—today, the media know exactly who is interested in what, when and where.

This article will describe how the mass media are shifting from public to personal news media, and place this development in its broader context—changing user habits and the competitive conditions in the marketplace of ideas. The main objective of the article is to explore how this shift affects the relationship between the news media and news users, and what some of the implications for media law and policy are. This is a conceptual article, based on a review of a selection of the relevant communications science, journalism and law and policy literature, legal text and official documents. The article concludes with a call for “fair media practices” and a research agenda.

Profiling and Targeting Media Users as Part of a Larger Trend towards Audience Development

Customising media services and adjusting them to personal preferences and likings is part of an ongoing trend to more interactivity and the development of a dynamic relationship between the media and the audience. The digital mass media, such as broadcasting and newspapers, are moving away from the traditional one-to-many approach. Instead, they are developing individualised relationships with members of the audience.

Users as a Bottleneck

The driving force behind this development is the abundance of digital information and services that are competing for the attention of users. Gernsback’s idea of a personal interest profile was born out of the realisation that there is more information publicly available than users can possibly hope to process. Since then, the number of channels, news apps and news websites has multiplied. From the perspective of the audience this means that users need to be more selective in their choices as they cannot watch and read all the media content that is available to them. This also means that today’s scarce resource is not transmission frequency, technology or even access to content; it is the attention of users—making users the new bottleneck in digital media markets.

The competition for users' attention has not left the users unaffected. Their attitude to and use of digital media is changing as well (Bardoel 2010; Deuze and Boczkowski 2004). Where the news media once have been trusted gateways to quality content, users have also 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. As a consequence, the news media are finding themselves in competition with a whole range of new players, such as search engines, social networks and app stores, who compete for the users' attention—because it is worth money. This situation calls for a serious reconsideration of the media's relationship to the audience.

New Strategies are Needed

In their recent Innovation Report, *The New York Times* offered perhaps the most impressive testimony to the changing relationship between users and the media (New York Times 2014). Referred to by some as the "key document of this media age" (Benton 2014), and by others as a "disaster" (Warsh 2014), the report first describes *The New York Times'* successful offline home-delivery and single-sales system. It then continues:

But when the time came to put our journalism on the web, we adopted a much more passive approach. We published stories on our home page and assumed that most people would come to us. (New York Times 2014, 24)

Which they did less and less. This is why *The New York Times* concluded that its future strategy would need to focus on "the art and science of getting our journalism to readers" and to "pursue smart new strategies for growing our audience" (New York Times 2014, 3 and 6). In this new strategy, the user is central, requiring the development of a two-way relationship with the audience. On the one hand, through social media and encouraging users to actively contribute as bloggers and commenters. On the other, the media need to discover smarter ways of presenting and promoting media content (New York Times 2014).²

The report is just another sign that in times of digital abundance it is simply no longer good enough to "print and see" (Pavlik 2000; Deuze 2004). 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.

A distinction can be made between user and media-driven personalisation (Thurman and Schifferes 2012). With user-driven personalisation, users tell the media what types of content they are interested in. Examples are Gernsback's personal interest profile, or the opportunity to personalise "My FAZ"—a service offered by the Frankfurter Allgemeine Zeitung (Mein FAZ.Net). But user-driven personalisation is also the possibility to buy individual items of information instead of a whole package. An early example of this was pay TV, and a more modern version would be the digital news-kiosk service Blendle, which allows users to buy selected newspaper articles from different newspapers, instead of buying the entire package (i.e. one newspaper). These two examples are just two out of a range of more versatile business models that have evolved, offering users individualised choices: pay-per-view, watch on-demand, buy single articles (Kraak 2014) or subscribe to a favourite journalist (Wietschge 2013).

In contrast, in media-driven personalisation it is the media who collect information about the user; for example, by placing cookies on the user's computer—little pieces of software that make it possible to see which websites one visits, which parts, for how long, from which location and with which device. Social networks such as Facebook or Twitter

are another valuable source of information, as are search engines and e-commerce sites. Equipped with this information, smart algorithms can then define individual profiles and even predict what will interest users today and tomorrow. This knowledge is used to personalise and customise recommendations, the selection of media content or even the way in which content is presented; for example, by customising headlines.

An important side effect of media personalisation is that it is no longer the editor alone who decides which content users will see. This is why journalism scholar Neil Thurman has likened the modern editorial process to Cerberus, the three-headed hound of Hades: involving the editor, the reader and the algorithm (Thurman 2011, 413). In reality, the value chain has grown even more complex, and many more parties are involved in making personalised news. These include the user, of course, as well as the producers of algorithms, analytics companies, social networks, search engines, data exchanges, data analysts and advertisers. The latter play a particularly central role. Media scholar Joseph Turow provides a commanding account of how advertisers are pressuring the media into ever more detailed monitoring of the preferences and practices of their users so that they can use the media as background for tailored commercial messages (Turow 2005).

Implications for the Relationship between Users and the News Media

We are only just beginning to understand how fundamental this shift from public information intermediary to personal information service really is, and how it will affect the media and users and the way they relate to each other. This is also true for the normative implications.

There are implications for the practical work of news editors and journalists. In a recent article, the Dutch newspaper *De Volkskrant* explained that many newsrooms experiment with ways to inform journalists about buzzwords and trending topics so that journalists know immediately which topics are likely to become popular with the audience and can generate high click rates. Marketing lingo, algorithms and data analytics are no longer something for the “guys in the marketing department”. For journalists and editors, the “dictate of the user” can raise fundamental professional and ethical questions about the mission and traditional agenda-setting function of the media (Deuze and Boczkowski 2004; Underwood 2011).

There are then implications for the future of competition in the marketplace of ideas (for a critical discussion of this theory in general, see Napoli [1999]). Many new players entered the media market, bringing new dynamics and fundamental changes to the nature of competition. This is no longer a competition between ideas, but between formats, packages and the smartest way of capturing the user’s attention. In one of his novels, Philip Dick (1963), another science fiction author, developed the idea of a homotopic news-vending machine: the machine would seek out a potential newsreader and wave the newspaper in front of her face until she decides to buy one. Perhaps the future competition for users’ attention can be compared with hundreds of these pro-active virtual news-vending machines waving their news in people’s faces and trying to outsmart each other.³

Perhaps in the future the competition for the marketplace of idea is no longer a competition about who has the best stories or the most convincing facts, but who knows the user best and is able to arrest her attention and loyalty.

Finally, there is the issue of how personalisation affects the relationship between the media and their users, the topic the reminder of this article will concentrate on, because in the ongoing debate about algorithmic profiling in the media this is commonly a topic that receives the least attention.

Media personalisation can benefit users in many ways. The amount of information users are confronted with on a daily basis is enormous, and the feeling of missing out on important information is for many users very upsetting. Adjusting media content to personal profiles and preferences can be a way to help users find the information that is helpful for them. There is a price to be paid, however, for more relevant, interesting services, even if they are being advertised as being “for free”. As Mireille van Eechoud, professor at the University of Amsterdam and specialised, among others, in open data, and many others remarked: there is always a trade-off (Van Eechoud 2014).

Your Newspaper—and Many Others—are Watching You

One such trade-off is the willingness to accept increasingly alarming levels of public and commercial surveillance. Certain parts of the Dutch news website nu.nl place more than 43 different cookies; the Frankfurter Allgemeine Zeitung uses 15. Not only adults but also children are being tracked and targeted. Geo-mini, a children’s journal, uses 18 cookies and Nickelodeon uses nine. Smart phones, Smart-TVs and game consoles have made the news and caught the attention of regulators because they also collect information, can watch and can even listen to users while they are watching television (College Bescherming Persoonsgegevens 2013). Also, with the Internet of Things, the media will be able to move into even more personal areas. One of the experiments of *The New York Times* is a smart bathroom mirror, able to deliver personalised headlines.

It is not only the media that is intent on learning more about the user, but also advertisers, social media, search engines and analytics companies. Legal scholar Axel Arnbak and others have done important work demonstrating the data-hunger of intelligence agencies, and how little there is to stop them (Arnbak and Goldberg, 2015). But the more detailed knowledge about user interests and reading habits can be potentially also interesting for politicians, youth protection agencies, insurance companies and book shops, to name but some.

From the perspective of the media user, the important question is not only what happens to this information. Equally important is the question of how the constant monitoring of users’ reading behaviour will affect the way they use media content. Will users start to self-censor the information they look for, or start avoiding controversial outlets? What would that mean for the diversity of information which is being consumed? Or for users’ intellectual development? After all: we are what we read. What will monitoring mean for the exercise of our constitutional right to freedom of information? As Neil Richards reminds us, the ability to benefit from freedom of information also depends on our “intellectual privacy”: the possibility “to develop ideas and beliefs away from the unwanted gaze or interference of others” (Richards 2008, 389).

Knowledge Is Power

The importance of intellectual privacy cannot be overstated for another reason: knowledge is power. Detailed knowledge about the user also potentially gives the media a new power to shape our thinking, influence our view of the world and lead us to take particular political or commercial decisions—for better or worse. The more the media or advertisers know about us, the better they can serve us—and the more effectively they can manipulate us because they know us so well. This is why scholars like the US scholar Ryan Calo warn that “[f]irms will increasingly be able to trigger

irrationality or vulnerability in consumers” (Calo 2014, 1035). Also, as Facebook just taught us in a recent experiment, not only our minds but also our emotions can be modelled (Kramer, Guillory, and Hancock 2014).⁴

Personalised or customised information can also be more persuasive in itself. Research suggests that under certain circumstances personalisation and customisation can make that message more persuasive. It can make it appear more relevant and affect the users’ attitude to the message (Petty and Cacioppo 1986; Brigtha and Daugherty 2012; Kalyanaraman and Sundar 2006; Maslowska, Van der Putte, and Smith 2011). Could the media’s knowledge about users be used to manipulate them into reading and watching particular types of content over others? Or advertisements? Is that possibly what *The New York Times* referred to when it talked about “the art and science of getting our journalism to readers”?

Smart Differentiation

Personalised media use their knowledge about users to differentiate between users and respond to individual information needs and preferences. In so doing, media personalisation could be the long-awaited response to decades of scholarly complaints about the “elitist patronizing behaviour” of the media (Wentzel 2002): telling the audience what it should know, without minding the actual interests and preferences of the audience. The future could look like Hackworth’s newspaper cited earlier:

Hackworth got all the news that was appropriate to his station in life, plus a few optional services ... A gentleman of higher rank and more far-reaching responsibilities would probably get different information written in a different way. (Stephenson 2000, 36)

At first glance, this makes a lot of sense: each user is different, and has different information needs and preferences. After a second look, one starts to wonder. Today’s ideal of the citizen is the well-informed all-rounder who is able to deliberate on all matters of public interest. As the US media scholar Oscar Gandy put it:

If full and equal participation in the public sphere is a fundamental requirement for the realization of the goals of the idealized democracy, then the use of segmentation and targeting by political consultants is a serious threat. (Gandy 2001, 155)

But Stephenson is talking about information ranks and hierarchies. Information depends on one’s station in life: rank, profession and social responsibilities, but possibly also gender, income, nationality and postal area. These criteria will then determine what information users receive—and from which information they are excluded. In other words, husbands could be targeted with different news to that of their wife; professors could receive a different perspective on politics to students; and some parents at one school could become smarter than others because they live in a different postcode area.

Of course, even today different users use different information. Yet it will matter whether these different usage habits are the result of individual autonomous choices or whether they are pre-determined and structurally coded into the digital DNA of smart media services. Much is technically possible. The media and we, as a society, will need to ask ourselves in which situations and on which grounds we are willing to accept algorithmic inclusion or exclusion from information access. As the Dutch information law scholar Egbert Dommering so aptly

remarked about the modern media user, “he is the most emancipated and the best controlled citizen who has ever existed in our universe” (Dommering 2008, 7).

The trend for audience growing and personalised services has emancipated users, insofar as their preferences and interests suddenly matter, and very much so. But personalisation also invites unprecedented levels of surveillance and power to manipulate minds and shape audiences. Maybe it is no longer users who rule, but their virtual interest profiles. In any event, it has become clear that both the media and users are facing a fragile balance between controlling and being controlled.

Implications for Media Law and Policy

The trend to more direct interaction between the media and users has played a prominent role in the general media policy debate over recent years, albeit in a strangely one-dimensional way. In order to understand why, one has to understand that the law, to date, has treated different media differently: audiovisual services, for example, are subject to the relatively stricter requirements of audiovisual law, whereas the press is largely subject to sectoral self-regulation. Interactive online media, including the websites of newspapers and broadcasters, as well as Google, YouTube and Twitter, fall under e-commerce law, which basically refers users to the general rules of consumer law.

One of the reasons why audiovisual media has been considered differently has been the alleged pervasiveness of the broadcasting medium and the lack of control that users can exercise over programmes. As the US Supreme Court once said: “To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow.”⁵

This is a powerful representation of the viewer as helplessly exposed to the airwaves. With this image of the viewer in mind, it is not surprising that audiovisual law regulates the output rigorously. This way, the law can make sure that once the programme hits the audience it is sufficiently diverse, safe and balanced. Interactive media, such as personalised media, in contrast, “are different from television broadcasting *with regard to the choice and control the user can exercise*... This justifies imposing lighter regulation”—at least according to the Audiovisual Media Services Directive (emphasis added).⁶

The disparate approach to media regulation has always puzzled scholars. “Clumsy” (Barendt 1993, 9), “a historical accident” (Sunstein 2000, 512) or a “fundamental weaving flaw” (Dommering 2014, 26) are just some of the notions that experts used to complain. With its Green Paper on a fully converged audiovisual world (European Commission 2013), the European Commission had finally initiated a long-needed debate about a future regulatory framework for the media. In The Hague, the Dutch government also prepared its vision for the regulation of what it refers to as “the internet value web” (referring to the growing interconnectivity of digital transmission infrastructure, services, devices and connectors; Kamp 2014a; Ministerie Economische Zaken 2014).

A central aspect in this debate is whether to move away from a more protectionist sector-specific approach towards the much more liberal e-commerce approach (Ministerie Economische Zaken 2014). If the user is able to determine the time and place of receiving the information—so goes the argument—she can take the protection of her interests into her own hands. For example, through personalisation. This is a new conceptualisation of the user: the idea of the empowered user. It is a particularly popular idea among regulators these days, and for several reasons it is flawed.

One may already wonder how much control users have. How much control do 20 interest categories really give over the accessibility of information, about the conditions under which it is offered and over the price to be paid? How much control can users ever hope to have over the collection of personal and individual information? Or the way algorithms process this information into personal profiles that then decide what users get to see? The far more important question is not what the user controls but: who controls the user? This leads back to the earlier point about interactivity, and in particular personalisation strategies, which involves entirely new dimensions of pervasiveness, persuasiveness and the ability to influence choices through smarter ways of presenting and promoting content in the media.

These are new challenges to media law and policy that are not yet addressed by either audiovisual law, e-commerce law or the self-regulatory framework for the press. Today's media policy is about the content. It is not about the presentation or promotion of media content. It is thus also not about the fairness, ethics or societal acceptability of smart strategies to arrest the attention of the audience.

Future media law and policy need to pay greater attention to the way media content is presented, personalised and promoted. It is time to deliberate on the principles and values that should govern the relationship between users and the media. This article argues that what is needed are "fair media practices" that address new challenges to intellectual privacy, persuasive power and information ranks. In order to identify the building blocks of fair media practices, one has to look beyond the traditional boundaries of media law and e-commerce law, and expand the regulatory horizon to other areas, such as data protection law and consumer law—and the other way round.

Media User Privacy

A good example to illustrate this point is the Dutch cookie walls. In October 2012, a large proportion of Dutch websites forced their users to accept tracking software before being allowed to enter the website (Helberger 2013b). No cookies, no access. Users were not happy. But it was the cookie walls from the news media in particular, and above all from the public broadcaster, that caused a public outcry. "Public broadcaster blackmails the public with cookie walls" (Wisselink 2014) or "Taken hostage by a cookie" (Van der Woude 2013) were just some of the headlines.

It is worth noting that in the end it was the Dutch Data Protection Authority which condemned the use of cookie walls by the Dutch public broadcaster. Not the Media Authority, which is responsible for the media sector. The Dutch Data Protection Authority found that the publicly funded Dutch broadcaster would exploit its factual monopoly on public service content (College Bescherming Persoonsgegevens 2014). If a user wanted to read or watch public service content, there was simply no way around being monitored. Importantly and remarkably, the Data Protection Authority interpreted the application of data protection law in the light of the conditions and practices of a specific target group: media users. It also acknowledged that the interests and vulnerabilities of media users can differ from, for example, users of e-commerce sites.

In contrast, the Dutch media authority remained silent. Partly because the rules about using cookies and processing personal data do not fall under their jurisdiction, and partly because there are no sector-specific provisions for the media on how to deal with the personal data of their users. A similar situation holds for the self-regulatory codes of the press: they deal with the privacy of those the media report about. They do not deal with the

privacy of those they report to. This state of affairs only demonstrates how seriously we need a debate about ways to protect the “intellectual privacy” of media users (Aufsichtsbehörden für den Datenschutz im nichtöffentlichen Bereich and Datenschutzbeauftragten der öffentlich-rechtlichen Rundfunkanstalten 2014; De Cock Buning 2006, 48).

From the perspective of media law and policy, the acceptability of cookie walls is not only a matter of informed consent or compliance with data protection law. It is also a matter of information access. Already mentioned was the importance of intellectual privacy and of a level playing field on which users can explore and form opinions. The media law scholar Peggy Valcke (2004) highlighted the importance of media pluralism, also in a convergent environment. Also, the German scholar Wolfgang Schulz’s (1998) concept of “equal communication chances” is very relevant in the personalisation context. The latter suggests that one of the tasks of media policy is to prevent excessive exclusionary control of access to information. This is why the Dutch information law scholar Frederik Zuiderveen Borgesius was right in suggesting the banning of cookie walls for the public service media (Zuiderveen-Borgesius 2015, 388). From the media policy point of view, and the perspective of intellectual privacy in particular, however, cookie walls are not only problematic in the context of public service media. More generally, making access to information conditional upon the requirement to provide personal data can lead to conflicts with media users’ privacy and the exercise of their right to freedom of expression.⁷

It is true that it is part of the commercial media’s freedom to determine the conditions and set the price of information access. Going along with the “paying with your data” analogy, however, it would only be logical to apply consumer law principles and demand that the price is transparent and the conditions are fair (for further reaching suggestions for “audiovisual consumer law”, see Helberger [2013a]). More fundamentally, and as the European Court of Justice (22 January 2013) reminded in the case of Sky Austria, the media regulators must also strike a balance between economic freedom and users’ freedom of expression.

Beyond Privacy and Data Protection: Protection of Editorial Independence

To take this debate one step further, when viewed from a media policy point of view, there is a need for debate on whether there are situations in which it is simply not desirable that users are tracked and traced when using the media or that such information is shared with third parties.⁸ To understand this point we need to look beyond matters of data protection and privacy. Data protection and privacy are still the primary and far-too-narrow framework in which the debate about profiling and targeting is being led.

A central media political consideration for the media is, for example, how to protect the independence of editorial choices and the user’s trust in that integrity. The question of who influences editorial choices also matters in the context of profiling, targeting and personalising media content. As observed earlier, media personalisation involves many heads that can potentially influence the editorial process, including advertisers, but also, possibly, ideological groups, governments, security agencies or politicians, to name but some examples. Politicians, for example, have a long history of using the media for their own purposes, and they also have discovered the blessings of personalisation, as could be observed during the last Obama campaign.

Finding the right balance between editorial choices and external influences is a central topic in media law and policy. This is why media law has developed the principles of transparency about and separation of editorial and commercial content. Because of the

democratic and educational function of the media, some players are not allowed to use the media for their purposes. According to the Audiovisual Media Services Directive Article 10 (2), for example, audiovisual media services or programmes shall not be sponsored by undertakings whose principal activity is the manufacture or sale of cigarettes and other tobacco products (products that are considered dangerous for users' health). Because of the particular democratic function of the media, they are not allowed to sponsor news and current affairs programmes (Audiovisual Media Service Directive Article 10(4)). Other groups, such as minors, are specifically protected against commercial influences. Also, some types of content are considered to be so critical to the core function of the media, or so intimate, that they cannot be subjected to advertising at all.⁹ This is true for news, current affairs and religious services.¹⁰ The overall goal of these provisions is not only to protect users and the functioning of the media. Importantly, these rules must also "minimize the temptation for businesses to exercise" commercial influence.

In other words, there are valid public policy reasons to take a closer look at the driving forces behind personalisation and how they affect editorial independence and user rights. More concretely, this could mean, for example, that it can be necessary to examine the desirability of profiling and targeting children with personalised media content—or to declare it unacceptable that the media share information about the way users use news and current affairs with advertisers or politicians.

It is time to initiate a debate on the conditions under which we are willing to accept the profiling and targeting of media users and media uses. Core values of media regulation—such as the protection of editorial integrity, trust, equal opportunities and diversity—are also valid in a converging environment. These values should inform the personalisation debate, together with new values, such as intellectual privacy and user autonomy. There will be an important role for research to identify how and by which means the law, policy-makers but also the media themselves will be able to do so.

Fair Media Practices

The provisions to protect users' trust in editorial independence can be seen as part of a larger set of "fair media practices". The media have a special responsibility to behave fairly or, as Bart van der Sloot would argue, virtuously in relation to their users (Sloot 2014). This is because of their unique democratic function as information medium and public watchdog, and because of the trust users invest in them, but also because of the potential pervasiveness and persuasiveness of personalised media communication. The goal of fair media practices must be to restore the balance and remove asymmetries between users as receivers of personalised information and the media as a user of personalisation strategies.

An emerging body of scholarship about Big Data ethics and the ethics of persuasive technology can inform these principles (Spahn 2012; Verbeek 2006; Richards and King 2014). It emphasises, for example, how important it is to properly inform the user, asking for permission and giving them a choice.

However, fair media practices should go further and also address matters such as unacceptable discrimination or the fine line between personalised presentation and misleading persuasion. For example, various national self-regulatory codes demand that the headings of articles should not mislead users about their content. Transposed to the context of media personalisation, this could mean that personalised recommendations should not propose content as personally relevant if it is not; or be untruthful about the

parameters that have resulted in a particular recommendation. Personalised recommendations should also not to be opaque about the actual intent: is this personalised recommendation meant to better inform the user, or simply increase circulation and the profitability of particular media items?

Opportunities

What is considered fair behaviour in relation to the user is, of course, also a matter of the task and public mission of the media (Verbeek 2006). The shift from public information intermediary to personal information service opens up exciting new opportunities here. For the media to serve users. For users to receive information. For public policy to contribute to informed citizens, and diverse information choices. It is worth noting that the BBC Trust (2013) recommended that the BBC should use personalisation to offer users better value, while the Dutch Raad voor Cultuur (2014) recommends that the public service media should assume a new guidance function for individual users.

But guidance to do what? Media personalisation is still primarily discussed as a tool to serve individuals, providing them with more personally relevant content—much like Gernsback's individual interest profiles. But personalisation could do more. For example, some smart algorithm could discover that this author is used to reading information about technology and law. The next elections are coming up. Instead of providing the author with more law and tech issues, this algorithm could also gently nudge her by presenting items about pensions, finances or the environment—items that are clearly missing from her media diet (more extensively about the possible role of the public service media in nudging the user to consume more diverse information; Helberger 2015). Or because professors at the University of Amsterdam should be more broadly informed.

This brings us back once more to Hackworth's newspaper: everybody has the information that they need, depending on their station in life. Hackworth's newspaper is not only about individual information, it is about education. *Diamond Age*, the novel in which Stephenson described Hackworth's newspaper, is essentially a book about the potential of the media to coach individual users through life. Could media personalisation also be used to coach media users? For example, to make more varied information choices, or broaden their horizons?

Such a coaching role could, for example, be a logical extension of the mission of the public service media. They always had an additional educational role to play. To quote the Council of Europe:

Public service media should continue to play a central role in education ... and should actively contribute to the formation of knowledge-based society ... taking full advantage of the new opportunities. (Council of Europe 2007, para. 21)

But where, then, should the line between acceptable education and unacceptable manipulation be drawn? Again this is a question that the Council of Europe but also the BBC Trust and the Raad voor Cultuur leave open. A critical aspect is the objective of such an exercise. Education aims at personal development, producing an autonomous being. Manipulation seeks to exploit asymmetry and foster dependence (Spahn 2012). In other words, if media personalisation is used to broaden the horizon and help the information-overloaded user to find her way, this certainly can be a useful exercise. Whether it is also acceptable depends on the availability of structural and legal safeguards related to fair

media practices. Also, it depends on whether users will continue to be able to say both “Yes, please” and “No, thank you”.

Concluding Remarks

A major challenge for the decade to come is for scholars, the media and policy-makers to define fair media practices together. These are the values and principles that should guide the relationship between the media and users, and the way media content is presented and marketed to users. To this end, fundamental rights, media law, consumer law, data protection law and unfair commercial practice laws should be regarded as pieces of a larger puzzle. Not only are technologies converging, laws and norms are too. But research into the use and users of information also requires the crossing of disciplines. Too often, laws and policies are made without a sound understanding of the technologies, economics and the behaviour of users. There is still much to learn and understand about the actual processes, actors and effects of personalised communication, and what this means for the legal design.

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NOTES

1. <http://www.thepostonline.nl/> (accessed 19 March 2015).
2. One of the suggestions made there is that the newsroom should more closely collaborate with the people from the Reader Experience department, including analytics, digital design, technology, product and research and development.
3. “At the door of the restaurant an automated news vending machine appeared, with a late edition of the Chronicle. It’s Rushmore Effect bleated out ‘Special coverage of the Luckman murder case.’ The restaurant, with the exception of their party, was empty; the news vending machine, being homotropic, headed toward them, still bleating. ... It waved the newspaper in their faces. Getting out a coin, Sharp inserted it in the slot of the machine; it at once presented him with a copy of the paper and pulled back out of the restaurant, to hunt for more people” (Dick 1963, 73).
4. In the experiment, Facebook users were (unknowingly) served more and respectively less emotional (positive and negative) content in order to test whether emotional posts of

- others affect Facebook users' own emotional response. The researchers found that emotions can be influenced in social networks by peers, a phenomenon that the researchers called "emotional contagion".
5. *United States Supreme Court, FCC v Pacifica Foundation* 438 US 726 (1978), About the link between right to privacy and media diversity: Pollack, 343, U.S. at 468 subsq. (Douglas, J., dissenting).
 6. Recital 58 of Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), OJ L 95, 15.4.2010, 1–24.
 7. To the extent that personal data collections are the basis of a financing model, there are good reasons to argue to offer media users at least the choice between paying with personal data and more anonymous forms of payment such as money, as suggested by Hoofnagle and Whittington (2014).
 8. In a similar direction, Richards and King (2014, 396) argue that we, as a society, must "begin to think imaginatively about the kinds of data interferences and data decisions we will allow".
 9. In this sense also Article 18(3) of the European Convention on Transfrontier Television. As the Explanatory Memorandum to the Convention explains in paragraph 291: "This paragraph reflects the special interest of the member States of the Council of Europe in the guarantee of the plurality of information sources and the independence of news and current affairs programmes. The prohibition of the sponsorship of such programmes reinforces the principles embodied in the preamble, Article 7, paragraph 3, and Article 13, paragraph 4".
 10. Article 14(5) of the European Convention on Transfrontier Television.

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Natali Helberger (corresponding author) is Professor at the Institute for Information Law (ViR), University of Amsterdam, Amsterdam, the Netherlands. Email: n.helberger@uva.nl