

Freedom of expression and the Dutch cookie-wall

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“Thoughts are free, who can guess them?
They flee by like nocturnal shadows.
No man can know them, no hunter can shoot them
with powder and lead: Thoughts are free!”²

1. Introduction

Is it problematic if the leading national newspapers track and profile all users that visit their websites? Should public service media be allowed to make access to their website conditional upon the acceptance of personalized advertising? How does the personalization of media content relate to public information policy goals such as freedom of expression, media diversity but also privacy? And what is the proper role of the advertisement industry in all this? What started out as a well-meant attempt to safeguard the privacy of Dutch consumers culminated in a media policy fiasco of impressive dimensions, and raised these and many more very thorny questions.

In October 2012, a large share of Dutch websites, including the websites of the leading Dutch newspapers but also of the public service media forced their users to accept tracking technologies (cookies) before being allowed to enter. The Dutch cookie-walls were a response to, or rather: act of resistance against a new Dutch law that was originally meant to protect users privacy vis-à-vis the placing of cookies. The cookie-walls were greeted by a wave of protest from disgruntled citizens, and led to a range of uncomfortable questions before parliament and, finally, a promise of the Dutch minister to adapt the law. The incident is not only an interesting example of how website publishers in the Netherlands managed quite successfully to get rid of an uncomfortable law. On a more fundamental level the conditioning of access upon acceptance of cookies raises a number of intriguing legal and media policy questions about the role and mission of public broadcasting online, the conditions under which the “free market place of ideas” is still free, as well as the rights to privacy and personal autonomy of media consumers.

This paper will use the example of the Dutch cookie-walls to discuss some of these more fundamental underlying aspects of the debate about targeting and profiling in the media. The paper will first provide a concise account of the Dutch cookie-wall incident. It will argue that the incident is symptomatic of the change in the relationship of the media and its audiences, and that neither the public, media laws nor regulators are prepared for that change. It will then discuss in more depth three aspects of the use of cookies and targeting technologies by the media. One concerns the transition from “broadcasting” to personalized or even intimate media, and speculates about the norms and guiding principles that should govern this new symbiosis between the media and audiences. The second concerns the pricing of media access. The paper will argue that current rhetoric’s of a ‘public’s right to free access to media content’, a popular idea in European media

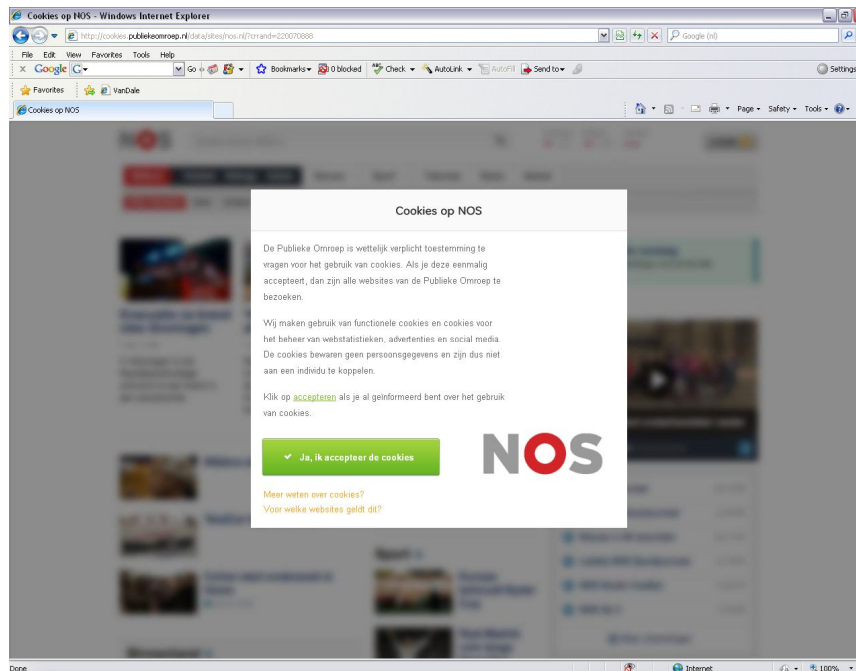
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² Popular German song about the freedom of thoughts, for a ‘Denglish’-version: <http://www.youtube.com/watch?v=dbwQXVcbkUO>

policy, is misleading and diverts attention from the fact that users always pay 'a fee' for media content, be it in the form of money, attention or personal data. The real question is when and under which conditions the price of access to media content becomes too high, for example in situations that people are forced to accept hundreds of cookies in the process. The paper will then, thirdly, turn to a key player in the Dutch cookie-wall debate, public broadcasting, and examine how the cookie-walls, and more generally, targeting and personalization strategies relate to the public service media's mission to provide the public with universal access to a broad range of diverse content from diverse sources, also online.

2. The Dutch cookie-wall

In October 2012, Dutch internet users experienced an unpleasant surprise. When surfing to the websites of the public service media in order to watch last day's talk show or see the news on the web, users run quite literally into a wall. Where a day ago their favorite news site used to be, they encountered suddenly a pop-up window saying:³ 'The law obliges us to ask your permission for the use of cookies. If you give us your permission you are free to visit all websites of the public service media. We make use of functional and statistical cookies, advertising and social media. The cookies do not contain personal data and thus not be used to identify you as an individual. Click on accept if you are informed about the use of cookies.' The text was followed by a green "Yes, I accept cookies" button.⁴ For suspicious minds, under the accept-button a small orange link lead users to an information site that explained what cookies are, which cookies the public media place, and for which reasons. There was no "No, I do not accept cookies" button, and if users did not accept the cookies they were refused entry to the website.



³ <http://cookies.publiekeomroep.nl/data/sites/nos.nl/?crrand=806332165/> Ironically, even the reading about the cookie-situation on the website of the public service medias was made conditional upon the acceptance of cookies.

⁴ Note that the actual accept button does not only say that the user has been informed about cookies, as announced in the text, but also that she accepts cookies.

The websites of the public service media were not the only one's to hide media content behind electronic cookie-walls. Other broadcasters followed (RTL, Veronica and SBS6), and most of the major Dutch newspapers, such as AD.nl, volkskrant.nl, trouw.nl, parool.nl, nrc.nl, to name but some. They were in the company of a league of other websites, be it commercial websites, be it the websites of the Dutch railways or the automobilist club. What united them all was an act of resistance against the way in which the so called cookie laws were implemented in the Netherlands.

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. There are different kinds of cookies with different functions. So called session cookies are used to store temporary information, such as the content of a shopping cart, a password or a client number entered, in order to allow the functioning of that particular website.⁵ Unlike the session cookies, the so-called tracking cookies can also be used by third parties, e.g. advertisers but also media enterprises, to follow parties across several websites. By observing the online behavior of users, in particular tracking cookies can help to establish fairly accurate profiles of the user, and are used for personalized advertising as well as targeting content at individual users. Particularly the later type of cookie, the tracking cookies, have triggered concerns regarding the privacy and personal autonomy of web-users, who will normally notice nothing or online little of the tracking activities on their computers, tablets or mobile phones.⁶

In response to the growing concerns about the proliferation of cookies, European law has introduced a provision that requires anyone who wishes to place a cookie in a users' browser to obtain informed consent prior to the placing of a cookie.⁷ The introduction of these provisions has been accompanied by many controversies. One of these controversies concerned the question of the form in which informed consent needed to be acquired: prior to entering a website, explicit or implicit? Notably the question of whether consent would need to be given explicitly, or implicitly, in the form of default settings or opt-out options was a question that caused heated discussions.⁸ One argument against explicit consent was that it would be cumbersome for users to receive pop-ups and be required to click "I accept" buttons each time they visited a website. After the implementation of the European rules into Dutch law in June 2012,⁹ Dutch websites decided to make a case in point. Before being able to access a website, users were presented with the aforementioned pop-ups and the choice to accept or to accept.¹⁰ While the cookie-walls for most types of commercial websites were considered by users first and foremost as nuisance, it was the cookie-walls from the newsmedia, and

⁵ Examples are cookies that help a website to remember the items in a shopping cart, the requested train times or whether a user has read and accepted terms of use so that the website can proceed in a purchase.

⁶ Compare Article 29 Data Protection Working Party, Opinion 2/2010 on online behavioural advertising, 22 June 2010, http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2010/wp171_en.pdf

⁷ Article 5(3) of Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), OJ L 201/37 (31.07.2002), as amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws OJ L 337/11 (18.12.2009).

⁸ N.A.N.M. van Eijk, N. Helberger, L. Kool, A. van der Plas and B. van der Sloot, Online tracking: questioning the power of informed consent, info, 2012-5, p. 57-73, p.60.

⁹ Artikel 11.7a of the Dutch Telecommunications Law (Telecommunicatiewet -Tw).

¹⁰ Not all Dutch websites or websites active in the Netherlands decided to use cookie-walls, which does not mean that they were not placing cookies. Some choose instead to simply inform users, or not inform them, and thereby essentially ignoring the new law.

from the public service media in particular, that led to a public outcry. "Public broadcaster blackmails the public with cookie walls",¹¹ "Taken hostage by a cookie",¹² "the websites of the public broadcaster go in hiding behind cookie-walls"¹³ were some of the headlines.

The Dutch public service media, in response, accused the Dutch legislator that it would actually force it to erect cookie-walls. According to Dutch media law,¹⁴ and a performance agreement between the public service media and the Dutch government, the Dutch service media were obliged to reach with their video services, including the website, on a weekly basis 85 % of all Dutch citizens. In order to measure compliance, so the public service media, the use of cookies was necessary.¹⁵ This still did not explain why the public service media also placed (a by far greater share) of cookies for targeted advertising and social media usage. Targeted advertising and social media usage were also the reasons mentioned by other Dutch broadcasters and news media, next to the cookies for functional and statistical purposes. Finally, some news media also admitted using cookies for the targeting of content. According to NRC, one of the leading newspapers of the country: "Our goal is it to provide visitors to our website with information that is as relevant as possible for him or her. This is why we try to adapt our website as much as possible to each individual user. We do this not only via the content of our website but also via the commercials that we show you." Ironically, the NRC referred to its information campaign as "cookie monster".¹⁶

The complaints about the cookie-walls grew louder. By the end of the year they had finally reached the ears of parliament, which decided that the current situation was not only user-unfriendly, but seduced users to mindless clicking of "I accept" buttons and thereby missing the entire point behind the law.¹⁷ Interestingly, 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 by exploring the possibilities for moving from an explicit to an implicit consent regime (which could be implemented, for example, in form of a bar that "warns" users that cookies are used and that by accepting but also by continuing to use the site she would accept the cookies¹⁸).¹⁹

One party that kept surprisingly silent during the entire debate was the Regulatory Authority for the broadcasting sector, which is, among others, responsible for monitoring compliance of the Dutch public service media with the law. It was in the end the Dutch Data Protection Authority that condemned the use of cookie-walls by the Dutch public service media. According to the authority, the websites of the public service media would need to be freely accessible for the public because they have been financed with public money. Refusing access to those users who do not accept cookies would, moreover, restrict the free choice of users, and thereby stand in the way of a truly

¹¹ <http://www.volkskrant.nl/vk/nl/3184/opinie/article/detail/3331966/2012/10/15/Publieke-omroep-chanteert-burgers-met-cookiemuur.dhtml>

¹² <http://www.cloudtools.nl/algemeen/gegijzeld-door-een-cookie/>

¹³ <http://tweakers.net/nieuws/84841/websites-publieke-omroep-gaan-achter-cookiemuur.html>

¹⁴ Artikel 2.22 of the Dutch Media law (Mediawet)

¹⁵ <http://cookies.publiekeomroep.nl/data/sites/uitzendinggemist.nl/reconsider/>

¹⁶ http://www.nrc.nl/cookies/?utm_campaign=cookiemonster&utm_source=nrc.nl

¹⁷ <http://www.nu.nl/internet/3192643/kamer-wil-einde-pop-ups-cookiewet.html>

¹⁸ Following the example of www.nu.nl

¹⁹ <http://www.nu.nl/internet/3199589/minister-kamp-beloof-aanpassing-cookieregels-.html> Note that it is far from clear how such proposals relate to the European framework that the Dutch legislator is required to implement.

free and informed consent.²⁰ The uncertainty regarding the authority of the media supervisor, respectively the Data Protection Authority may also explain why the Dutch public service media ignored the statement of the latter, and continues to use cookie-walls.

In the end, the cookie-walls begun to crumble, though not before the minister had announced the legal amendments. To be clear, the fact that the cookie-walls were removed does not mean that the news media stopped collecting cookies. The practice continues. What has changed or is changing is the way users are informed about these practices – the information has moved from pop-ups to tiny links at the very bottom of the page, information bars that inform users that either by clicking or continued use of the site the user would agree to cookies, or to the deeper layers of the website, almost invisible for users.

If the Dutch incident has shown one thing it is that the practice of tracking and targeting of information users is widespread and already firmly integrated into the daily routine of most media suppliers. It has also made very clear that access to and use of media content is not free, also or especially not online, and that users pay if not with money than with personal data and the permission of being tracked and profiled. The cookie-wall incident, moreover, demonstrated quite painfully that the move from public to personalized media has hit the responsible authorities quite unprepared, and raised complicate questions regarding the permissibility of such practices, particularly if performed by the public service media, as well as the responsibilities of the supervising authorities.

The reminder of this paper will highlight some of these more fundamental concerns not only about the placing of cookies by the media, but more generally the underlying practice of tracking and targeting the audience. One concerns the changing relationship between the audience and the media, possible concerns and the underlying norms and values that should govern this new, far more intimate relationship. Another one is the question of the conditions under which making access to media content conditional upon the acceptance of cookies is still acceptable. The third and final part of the paper will then zoom in on the particular relationship between the audience and the public service media.

3. Public, private, intimate - targeting and the changing relationship between the media and the audience

Gone seem the days that the media were broadcasting their programs to a nation of anonymous eyeballs, or send paperboys onto the streets to sell newspapers to grey man in suits. The Dutch case is another, maybe particular pertinent example of how the media is seeking to change its relationship with the audience. Instead of public agenda setting and general interest media, the trend is towards personalization, second screens and social interaction between the media and its audience.

User-driven personalization

When trying to understand the impact that personalization has on the relationship between the audience and the media, the question who is the driver behind personalization is an important one. User-driven personalization is generally considered as a means of giving the audience more autonomous control over their own media usage, as opposed to dutifully consuming pre-packaged blocks of information. It was for this reason, for example, that the arrival of on-demand television has been welcomed as a means of improving the media's responsiveness to individual consumer preferences:

²⁰ http://www.cbpreweb.nl/downloads_med/med_20130205-cookies-npo.pdf

“On a more fundamental level, programme choice might be usefully made more responsive to viewer welfare, and less responsive to the notions put forward by philanthropic institutions of what people “ought” to see.”²¹

The ability to choose individual channels or combinations of channels according to one’s own preferences was brought forward, particularly by economists, as an argument against government involvement with the media as well as ‘overly elitist patronizing behavior’.²²

Personalization has not only been seen as a means of safeguarding the autonomy of the audience vis-à-vis governments and public information policy, but also as an instrument to undermine the (commercial) influences of the media. When regulating Electronic Programme Guides (EPGs) - search and recommendation machines for video content - some member states in Europe insisted on EPGs offering the audience the opportunity to personalize the order in which channels would be represented.²³ This way, media suppliers were less free to influence viewing decisions in their favor. Allowing viewers to personalize the EPG was also a way to remedy anti-competitive behavior and counteract the temptation of EPG-suppliers to prioritize own or affiliated programmes above others.²⁴

At the same time, the ability for the audience to exercise greater influence about its own program consumption has always also caused unease in politicians and academics. Alan Peacock described the prevailing perception of viewers in traditional audiovisual policy once as follows: “while broadcasting is designed to benefit viewers and listeners, they neither know what they want nor where their interests lie”.²⁵ These concerns have not lost in force over time, and the present concerns about ‘egocasting’, echo chambers and filter bubbles are essentially a continuation of that line of thought.

Media-driven personalization

At the other end of the spectrum of the personalization debate is media-driven personalization. Here it is neither government, public information policy or users who adapt the media offer to individual preferences, but the media. The Dutch case demonstrated how widespread the practice of tracking and profiling of media users, which Turow described so aptly in his book “The daily you”, already is, and that media users are constantly being tracked for statistical and functional purposes, but also for personalized advertising and content presentation.

In this context it is important to realize that the issue is broader and that cookies are just one way of tracking and targeting the audience. The emergence of “smart TVs” or the so called “content aware TVs” further improve the possibilities for targeted recommendations. Smart TVs are able to recognize what users are watching, and can use that knowledge to provide them with contextual

²¹ B.M. Owen, *Economics and Freedom of Expression: Media Structure and the First Amendment*, Ballinger, Cambridge, 1975, p. 134.

²² D. Wentzel, *Medien im Systemvergleich. Eine ordnungsoekonomische Analyse des deutschen und amerikanischen Fernsehmarkets*, Schriften zu Ordnungsfragen der Wirtschaft, Lucius & Lucius, Stuttgart 2002, p. 57pp.

²³ See e.g. Art. 15(2) of the German Regulation regarding freedom of access to digital services and the regulation of platforms according to Art. 53 Interstate Broadcasting Treaty (Satzung über die Zugangsfreiheit zu digitalen Diensten und zur Plattformregulierung), online available (in German) at: http://www.mabb.de/fileadmin/user_upload/pdf/Rechtsgrundlagen_pdf/34-Zugangs-_und_Plattformsatzung.pdf

gemäß § 53 Rundfunkstaatsvertrag.

²⁴ Insofar, the discussion about EPGs resembled very much today’s controversies regarding search engines that are accused of giving undue preference to their own services.

²⁵ A. Peacock, ‘The Future of Public Service Broadcasting’, in: C. Veljanovski (ed.), *Freedom in Broadcasting*, Institute of Economic Affairs (iea), London, 1989, p. 53.

information or recommendations in relation to particular programs users are watching.²⁶ Not only are users offered additional contextual information or advertising, for example, via so-called second screen applications. The media also nudge people proactively to consume particular programs, as is being demonstrated by a growing variety of apps that offer next to personalized searches also personalized incentive systems to engage with particular programs,²⁷ including rewards for watching particular programs.²⁸

Personalized search is another important area in this regard.²⁹ Many of the existing EPGs and search tools, too, are more and more focused on helping users to find the content *they* are interested in, and optimizing the search for that content. An increasingly important element in this context is personalization of the search results and viewing recommendations.³⁰ The personalization of EPGs has been subject to extensive research and experimentation within the past years.³¹ Various personalized EPGs provide viewers with an offer of media content specifically for this person, based on personal interests or profiles. For example, the aforementioned iFanzzy EPG requests users to register and complete a profile, which will then be used as a point of departure for programming recommendations.³² The TV Genius recommendations engine monitors the usage of TV and EPG services and aggregates them in a so-called relevancy map that can be used for contextual or personalized recommendations.³³ Somewhat different is the approach of Tivo's Guru Guides. Here, users can choose different profiles or "gurus" (like the Los Angeles Times Critics Picks, "I am a News Junkie" or "I am a Pop Culture Nerd") and receive program information accordingly.³⁴

The media's relationship to the advertisement industry

One striking aspect about the cookie debate is that it is very difficult to pinpoint what exactly the concerns about tracking and targeting are, except the idea that there are people, companies out there that know, or believe to know more about us than some of our best friends do. In the area of the media, Turow gave one important reason to be at least concerned about tracking, profiling and personalization in the media, and that is his account of how the advertisement industry pressures the media into collecting ever more personal information about readers and listeners. This is to be

²⁶ For example, Apple filed for a patent on content aware on-screen widgets, see <http://www.geek.com/articles/apple/apple-files-for-patents-on-content-aware-tv-widgets-20110624/>.

²⁷ See for example GetGlue: <http://getglue.com/>; Miso ("we are changing the way people watch TV"): <http://gomiso.com/>; Watchpoints ("enables rich, second screen engagement by identifying what viewers are watching and syncing it, in real-time, with relevant, compelling and interactive experiences on your mobile phone or tablet."): <http://www.watchpoints.tv/audiothumbprinting.html>; or Tunerfish ("social discovery engine for TV"): <http://www.tunerfish.com/about>.

²⁸ See for example Loyalize ("Our solution combines the proven tactics of promotional rewards with real-time 'gamification' to motivate the audience behaviors that you choose."): <http://loyalize.com/overview.html>.

²⁹ See J. van Hoboken, Search Engine Freedom. On the implications of the Right to Freedom of Expression for the Legal Governance of Web Search Engines, Kluwer Law International, Den Haag, 2012, p. 323 subseq.

³⁰ According to Mathias Birkel of Goldmedia, author of a recent report on EPG development and deployment in Europe, "the EPG is becoming much more than a digital programme guide: it is evolving into an interactive, personalized and integrated entertainment guide."

³¹ Jeongyeon Lim, Sanggil Kang, and Munchurl Kim, "Automatic User Preference Learning for Personalized Electronic Program Guide Applications," *Journal of the American Society for Information Science and Technology* 58 (2007): 1346-1356; Cesar and Choriano Poplous; Smyth and Cotter.

³² Compare with Pieter Bellekens, Geert van Kerckhove, and Annalies Kaptein, "iFanzzy - A Ubiquitous Approach Towards a Personalized EPG," 2009, accessed Aug. 23, 2011, http://soc.kuleuven.be/com/mediac/euroitv2009/docs/adjunct_proceedings/demos/BELLEKENS,%20PIETER%20et%20al.%20-%20demo.pdf.

³³ See <http://www.tvgenius.net/resources/recommendations-engine/>.

³⁴ See <http://www3.tivo.com/tivo-tco/mix/index.do>.

better able to target advertisement but also to induce the media to present personalized content as the right frame for advertisement.³⁵

It is important to understand that the concerns about the influence of the advertisement industry on the editorial freedom of the media is not new. In fact it is as old as the practice of financing media content via advertisements. Media regulations, both in Europe and the US, have a long tradition in dealing with these issues. Probably the most prominent examples are the rules that oblige the media to be transparent about potential commercial influences on an organizational level (rules about media transparency)³⁶ as well as on a content level (rules that oblige the media to be transparent about sponsorship and product placement). The media are, moreover, obliged to clearly label commercial messages in order to avoid confusion with editorial content.³⁷ 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,³⁸ namely to avoid consumers being misled by “editorially camouflaged advertisement”.³⁹ An important question for further research that goes beyond the scope of this article is to what extent these rules are useful in controlling unwanted commercially-motivated personalization of media content. 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).

The obligation to separate commercial from editorial content is not the only example where media law and policy is concerned with commercial influences on the program. In certain situations, such influences are outright banned, at least in Europe. One example concerns the influence of sponsors on video programming.⁴⁰ Sponsoring is defined in this context ‘ as “any contribution made by public or private undertakings or natural persons not engaged in providing audiovisual media services or in the production of audiovisual works, to the financing of audiovisual media services or programmes with a view to promoting their name, trade mark, image, activities or products.” The definition does not exactly fit the example of personalization of content for commercial purposes because advertisers still pay essentially for the placing of the advertisement, and not for making a particular program (element) possible (in exchange for positive publicity).⁴¹ Yet, there are overlaps, as the example of “theme sponsoring” demonstrates. Here, it is not a program or even that is being sponsored, but rather a particular theme, which can create positive publicity for the sponsor. Theme sponsoring can be in conflict with the rules about editorial separation.⁴² Interestingly, the European Audiovisual Media Directive orders also a ban on the sponsoring of news and current affairs

³⁵ J. Turow, *The Daily You. How the New Advertising Industry is Defining Your Identity and Your Worth*, Yale University Press, New Haven, 2011, p. 118 subseq.

³⁶ See 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.

³⁷ 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.

³⁸ Kabel, J. (2008), Art. 17 TWFD, in: Castendyk, O., Dommering, E. and Scheuer, A. (eds.). *European Media Law*, Kluwer Law International, Den Haag, p. 621-640, 622.

³⁹ Schaar, O. (2008), *Television Advertising, Sponsorship and Teleshopping*, in: Castendyk, O., Dommering, E. and Scheuer, A. (eds.). *European Media Law*, Kluwer Law International, Den Haag, p. 489-540, 492 and 500.

⁴⁰ According to Art. 10 (1) (a) of the AVMSD “Audiovisual media services or programmes that are sponsored shall meet the following requirements: (a) their content and, in the case of television broadcasting, their scheduling shall in no circumstances be influenced in such a way as to affect the responsibility and editorial independence of the media service provider.”

⁴¹ Compare Castendyk, “Article 1 TWFD”, in O. Castendyk, E. Dommering, A. Scheuer, *European Media Law*, Kluwer Law International, Den Haag, 2008, p. 322.

⁴² Castendyk, “Article 1 TWFD”, in O. Castendyk, E. Dommering, A. Scheuer, *European Media Law*, Kluwer Law International, Den Haag, 2008, p. 329.

programs.⁴³ In other words, commercial influences on the editorial part of (news) media is a topic directly in the radar screen of (media) policy makers, and tools exist to address this influence, though more research is needed to what extent the existing tools cover personalized advertising.

Personalization as a means of making the media more responsive

Another question that European media law and policy but also data protection law so far has been rather silent about are more or less well-meant efforts to personalize programming to better respond to the needs and interests of the audience, and thereby to 'de-public' the relationship between the media and its audiences. This is, in its essence, a development that has been long phantasized about and wished for by thinkers and futurists. Already in 1930, B. Brecht suggested to for the radio to

"change this apparatus over from distribution to communication. The radio would be the finest possible communication apparatus in public life, a vast network of pipes. That is to say, it would be if it knew how to receive as well as to transmit, how to let the listener speak as well as hear, how to bring him into a relationship instead of isolating him."⁴⁴ Interactive communication instead of one-way broadcasting appeared to Brecht as a far more desirable relationship between the media and its listeners. Personalization of books and newspapers plays in N. Stephenson's novel "Diamond Age" a prominent role. One of his protagonists picked up a blank sheet of 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."⁴⁵

In his book Stephenson even develops the idea of a book that is not only personalized but that matures with its reader. In this case it is a book that guides a little girl to the different stages of her life and teaches but also triggers her to expand her horizon along the way. Also this is an aspect and also concern in the personalization debate: ideally, personalization is not based on a snapshot of an individuals' personality, but would take into account the dynamic changes that personalities undergo over time. This also means that where personal profiles are not continuously being updated, the audience remains stuck with a particular picture of itself from yesterday, last year or last decade.

A century earlier even, the writer and futurist Jules Verne's mused about the future of a press that would enter into personal communication with its audience (though he did not envisage this to happen before 2889):

"Instead of being printed, the Earth Chronicle is every morning spoken to subscribers, who, in interesting conversations with reporters, statesmen, and scientists, learn the news of the day."⁴⁶

Jules Verne's idea was that subscribers would be able to communicate directly with newspapers through what he calls "phonographs". In some ways, this was a far more personal way of targeting than today's remote practice of discovering personal preferences with the help of cookies and other tracking technologies. Interestingly, Jules Verne already then anticipated quite intuitively what

⁴³ Art. 10 (3) of the AMSD.

⁴⁴ B. Brecht, 'Der Rundfunk als Kommunikationsapparat, Rede über die Funktion des Rundfunks', in: B. Brecht, Werke, Berlin/Frankfurt/M: Suhrkamp 1992, Vol. 21, S. 553 (in German, the English translation is available at <http://home.freeuk.net/lemmaesthetics/brecht1.htm>).

⁴⁵ Neal Stephenson, *The Diamond Age* (New York: Bantam Books, 1995), 36.

⁴⁶ Jules Verne and Michel Verne, In The Year 2889, Forum, February, 1889, p. 262.

research would confirm several decades later, namely that this form of personal communication between the media and the audience can be very effective.

A growing body of research is dedicated to the effects of personalization on media consumption and valuation. It has been shown that personalized media news can have a positive effect on the persuasive character of the message and its perceived relevancy, but also on its relation to the source of more personalized information as it would give users a greater sense of ownership, involvement and positive association with the source of personalized content.⁴⁷ Personalization can also be used to increase citizens' political involvement.⁴⁸ Finally, personalization can be a means to bring people in contact with contents and information that they would have otherwise not sought for, or were not even aware that it existed (and is relevant to them).⁴⁹ Already, personalized search solutions exist that are able to filter out items that are too similar to the content a user has consumed earlier.⁵⁰ Another interesting example is Library Thing's "Unsuggester,"⁵¹ which analyzes what books other members own or have read. On the basis of this information it will make recommendations on books least likely to share a library with the book a user suggested. This way, the media is not only responsive to the users' perceived needs and interests, but even to his or her knowledge gaps and potential demand for additional, complementary information.

Even though personalization can have many positive effects, and be appreciated as such by users as a way to receive relevant information and manage the information overload problem, users are torn between convenience and the fear of sharing too much information. A recent study among consumers in 11 countries worldwide showed that 68% would seek a "Do not track" feature if it was easily available.⁵² Similarly, a study in the US found earlier that the majority of Americans (66%) would not want to receive tailored advertisement, and the percentages go even further up in case targeting involves profiling across websites or even monitoring offline use.⁵³ Interestingly, in a survey among Dutch consumers, also the Dutch users said that they were appalled and slightly freaked out by the idea of being targeted – until a point when the targeting would be done real well and present them with advertising that they find relevant.⁵⁴ In other words, users acknowledged that personalization can be a means to guide them through an increasingly complex and abundant world of information. And also the study by Turow et.al found that Americans are not categorically against targeted ads or news. Interestingly, a higher proportion across all age groups indicated that they

⁴⁷ S. Kalyanaraman & S. S. Sundar, Customised Web Portals, *Journal of Communication* 56 (2006) 110–132; R.E. Petty & J.T. Cacioppo, *Communication and persuasion: Central and peripheral routes to attitude change*, Springer Verlag, New York 1986; J. D. Jensen, A. J. King, N. Carcioppolo, L. Davis, Why are Tailored Messages More Effective? A Multiple Mediation Analysis of a Breast Cancer Screening Intervention, *Journal of Communication* 2012-62, 851–868.

⁴⁸ S. Kruikemeier, G. van Noort, R. Vliegthart and C. H de Vreese, Getting closer: The effects of personalized and interactive online political communication, *Journal of Communication*, February 2013; vol. 28, 1: pp. 53-66.

⁴⁹ For a more extensive discussion of this see N. Helberger, Diversity by Design, *Journal of Information Policy*, 2011-1, p. 441-469.

⁵⁰ L. Iaquinta, M. de Gemmis, et al., Introducing Serendipity in a Content-based Recommender System, paper presented at the Eighth International Conference on Hybrid Intelligent Systems, Barcelona, Spain, 2008, with a reference to DailyLearner.

⁵¹ <http://www.librarything.com/unsuggester>.

⁵² See Ovum, press release, 6 February 2013, http://ovum.com/press_releases/ovum-predicts-turbulence-for-the-internet-economy-as-more-than-two-thirds-of-consumers-say-no-to-internet-tracking/

⁵³ J. Turow, J. King, C.J. Hoofnagle, A. Bleakley, M. Hennessy, Americans Reject Tailored Advertising and Three Activities that Enable It, September 2009, online available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1478214

⁵⁴ L. Kool, A. van der Plas, N. Helberger, N.A.N.M. van Eijk & B. van der Sloot, A bite too big: Dilemma's bij de implementatie van de Cookiewet in Nederland, TNO-rapport nr. 35473, commissioned by OPTA, 28 February 2011, online available at http://www.ivir.nl/publicaties/vaneijk/A_bite_too_big.pdf, p. 50.

would consent to personalized news items than that they would like to receive tailored ads.⁵⁵ Much depends on the way their relationship with advertisers and media companies is given form. Users seemed to tolerate tracking by the original website they visited more than third party tracking, and demanded more transparency and rights to reject tracking and profiling activities.⁵⁶ In other words, the findings suggest that people want to be able to control their relationship with trackers and profilers and be able to manage the closeness – providing this does not require too much effort.

4. Managing closeness

For a long time, the question of how to keep the media on a distance and prevent it from getting too close with the audience has been rather theoretical. As mentioned earlier, programs were broadcasted into the air, and newspaper sold against anonymous coins. The traditional criticism of the media has therefore also been that the media was too far away from its audience, and too little responsive to its needs and interests.⁵⁷ The modern technologies of tracking and profiling seem to turn the situation upside down. The media is learning ever more about its audience and is in a position to offer carefully personalized content and advertisements. Webster calls this a “convergence of media supply with user demand”.⁵⁸ Apart from the question of what the new user-orientation of the media means for its traditional role of agenda setter, public forum and source of authoritative information (see section 6), the move from public to personal media also raises a number of important questions regarding the norms and values that should govern this new relationship (see below) as well as the price at which complete responsiveness comes (see section 5).

Being able to say no

One important cornerstone of any healthy relationship is that it is based on voluntariness and respect of personal autonomy. This should not be different for the relationship between the media and its audience. The aspect of being able to autonomously decide whether or not to consent to tracking and profiling has been an important aspect in the targeting debate in general.⁵⁹ Autonomous decision making is, arguably, of even greater importance in the context of media personalization because the consumption of media content is an important element of personal self-development and socialization. Personalization can have a self-enforcing effect in that context: through the consumption of media content the media get to know a particular user better according to the principle of “tell me what you read and I'll tell you who you are.”⁶⁰ Once the media is able to profile users and offer content that (the media thinks) corresponds to their personal preferences or intellectual disposition, this again influences the kinds of contents that are being presented.⁶¹ And to conclude the loop, the consumption of this content again re-enforces a certain idea users harbor about them: “I tell you what to read, and this is who you are.” Accordingly, accepting personalization requires not only a considerable level of trust into those that take the power to influence our minds. It also should be accompanied by some autonomy to decide whom (not) to give that extra chance to

⁵⁵ Turow et.al, 2009, p. 17.

⁵⁶ Turow et.all, 2009, p. 20.

⁵⁷ See R. Collins and Z. Sujon, UK Broadcasting Policy: The “long Wave” shift in conceptions of Accountability, in: P. Baldi, in: P. Baldi and U. Hasebrink, Broadcasters and Citizens in Europe, Trends in Media Accountability and Viewer Participation, p. 35 and 41 subsq.

⁵⁸ J. Webster, The Duality of Media: A Structural Theory of Public Attention, Communication Theory, 2011-21, p. 43-66; p. 17

⁵⁹ See Van Eijk, Helberger, Kool, Van der Plas and Van der Sloot, 2012, p. 60 subsq.

⁶⁰ Quote from Martin Heidegger.

⁶¹ J. Webster, Duality of media: A structural theory of public attention, Communication Theory 2011-21, p. 43–66, p. 51

<http://www.soc.northwestern.edu/webster/pubs/Webster%20%282011%29%20Duality%20of%20Media.pdf>

influence our minds. Also this is part of freedom of expression, namely the freedom not to listen and to refuse information, even if it may be beneficial, valuable and from an authoritative source.⁶²

The question is then: were the Dutch users able to say no? In other words, was the decision to accept or not accept cookies the expression of their free autonomous will or was the decision to 'not accept and leave' an act of force? This is a controversial question, even with respect to targeting outside the media context. The entire idea behind the original cookie rules (that subsequently triggered the Dutch cookie-walls), and more generally the requirement of consent to data processing was exactly that: to empower the user to exercise control over the way third parties are allowed to track and profile her behavior.⁶³ Accordingly, European data protection law defines consent as "any freely given specific and informed indication of his wishes by which the data subject signifies his agreement to personal data relating to him being processed."⁶⁴ The Article 29 Data Protection Working Party further elaborates on the conditions of when consent can be considered "freely" given: "Consent can only be valid if the data subject is able to exercise a real choice, and there is no risk of deception, intimidation, coercion or significant negative consequences if he/she does not consent. If the consequences of consenting undermine individuals' freedom of choice, consent would not be free."⁶⁵

Arguably, the cookie-walls were neither deceptive nor intimidating, nor did they force users into accepting cookies – users were after all free to leave or visit another website. But were they really free? One may already wonder whether a decision of 'take it or leave it' is indeed a real free choice.⁶⁶ In the context of the media, the question of when consent is given freely gains an additional dimension.⁶⁷ Informational content is arguably different from other services and products because its characteristics are closely associated with the person (or institution) of the speaker. Media is speech, and when consuming media content it does matter who the speaker is. Accordingly, turning away and/or listening to another speaker is not necessarily an option. Also, some media have a more central role than others, the public media being an example of the former (see also section 6). The public media are commissioned to serve the entire public with quality information, education and entertainment, and more generally content of public interest. This special mission is reflected in the fact that public service media are particularly strictly regulated, but also funded by public money. Insofar one could argue that at least the public service media has a

⁶² Jürgen Fenchel, *Negative Informationsfreiheit: zugleich ein Beitrag zur negativen Grundrechtsfreiheit* Duncker and Humblot, 1997.

⁶³ See Art. 29 Working Party, Opinion 15/2001 on Consent, 13 July 2011, p. 5. Note that consent is not the only legal grounds for data processing. Also, according to existing law certain so called functional cookies can be placed without consent, Art. 5(3) of the amended ePrivacy Directive. The discussion here focuses thus exclusively on the placing of cookies for purposes of targeted advertising or media targeting.

⁶⁴ Art. 2 (h) of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281, 23/11/1995 p. 0031-0050.

⁶⁵ Art. 29 Working Party, 2011, p. 12..

⁶⁶ Arguing against e.g. the Dutch Data Protection Authority (College Bescherming Persoonsgegevens – CBP), Letter to the State Secretary of Education, Culture and Science, 31 January 2013. European Parliament, Draft Report on the proposal for a regulation of the European Parliament and of the Council on the protection of individual with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), (COM(2012)0011 – C7-0025/2012 –2012/0011(COD)), 17 December 2012, Amendment 19. Online available at: http://www.europarl.europa.eu/meetdocs/2009_2014/documents/libe/pr/922/922387/922387en.pdf , arguing that the choice to accept pre-ticked boxes is not free.

⁶⁷ See also van Hoboken, 2012, p. 321 subsq. about the special position of the information user, in particular in the context of data protection law.

such a prominent role in the public information ecosystem that the choice not to use their services is a significant negative consequence.⁶⁸

The question of the conditions under which consent is still given freely is also a topic that has received particular attention in the context of the proposed European Data Protection Regulation. According to recital 33 of the text proposed by the European Commission, "[i]n order to ensure free consent, it should be clarified that consent does not provide a valid legal ground where the individual has no genuine and free choice and is subsequently not able to refuse or withdraw consent without detriment."⁶⁹ This formulation does not clarify much without a closer definition of what constitutes detriment. Not being able to use the site of the public service service media or other media is, arguably, an example of consumer detriment, but so is the choice to decline cookies with the consequence of less functionality. More useful is the reference to possible imbalances between someone who collects personal information and those whose data is being collected.⁷⁰ Examples that the proposed Data Regulation mentioned were the relationship between an employer and an employee, but also situations of market dominance and lock-ins. From the perspective of media users, it is not only economic dominance that can matter, but also ideological dominance in the market place of ideas. A clarification to this extent could help improving the situation of the information user.

About the importance of secrets

There are situations where asking for informed consent is not sufficient to protect the information user, either because the way consent is being asked is turning the entire concept meaningless (as in the case of the cookie-walls) or because the audience is in principal willing to share some information but not others. As mentioned earlier, there can be situations in which tracking and profiling is acceptable or even desirable from the perspective of the audience, e.g. because it helps them to manage the amount of information that is available to them or help them to find more information that is personally relevant. And still the audience can object to the personalization of particular types of contents.

One, maybe the most important means of managing personalized information streams is not sharing certain information. Not sharing information, or: having secrets is a critical condition also in the process of getting known to someone and establishing relationships, with other humans but also with institutions.⁷¹ As Simmel, an important thinker about the sociology of secrecy explains, "an ideal sphere surrounds every human being, different in various directions and toward different persons: a sphere varying in extent to which one may not venture to penetrate without disturbing the personal value of the individual."⁷² This personal sphere or "spiritual intellectual property" is according to Simmel about privacy, but also about honor, personal dignity and the human ego itself. Following this line of thought he continues to say that "[d]iscretion is nothing other than the sense

⁶⁸ In this sense e.g. the Dutch Data Protection Authority, *ibid*, speaking of a factual monopoly ("feitelijk situationeel monopolie").

⁶⁹ Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), Brussels, 25.1.2012, COM(2012) 11 final, Recital 33. Online available at: http://ec.europa.eu/justice/data-protection/document/review2012/com_2012_11_en.pdf

⁷⁰ Recital 34 of the Commissions proposal, *ibid*: "Consent should not provide a valid legal ground for the processing of personal data, where there is a clear imbalance between the data subject and the controller." The directive names as an example the situation of an employee in relation to its employer. The European Parliament added to this the example of market dominance and lock-in situations.

⁷¹ G. Simmel, The sociology of secrecy and of secret societies, *American Journal of Sociology*, 1906-11, p. 441-498.

⁷² G. Simmel, The sociology of secrecy and of secret societies, *American Journal of Sociology*, 1906-11, p. 441-498.

of justice with respects to the sphere o the intimate contents of life.”⁷³ Secrecy is also the basis for confidence and trust, and mutual enjoyment of the relationship – all aspects that are also important in the relationship between users and the media.

The importance of the protection of secrecy has already been firmly acknowledged in the context of freedom of expression, or more specifically in the context of the transport of information. The secrecy of letters and later of electronic communications and the obligation of the party that transport these forms of written or spoken communication to respect their secrecy is an important concept in e.g. in today’s communications law.⁷⁴ The normative foundations of communications secrecy can be found, in both the right to privacy as well as communication freedom.⁷⁵ As Steenbruggen explains, the right to communications secrecy protects an individual’s possibilities to self-expression and the exercise of personal autonomy, including the decision of which information to reveal or to keep secret.⁷⁶ Compared to the communications sector, secrecy in relation to the media (e.g. the providers, and not the distributors of content) has so far received little or even no attention. This can be explained by the point-to-multipoint communication model that dominated for a long time the mass media (as opposed to communications services that transport signals from one sender to one receiver (point to point)). To the extent the media, too, are personalizing their relationship with the audience and moving towards a point-to-point model, arguably, a better developed theory of ‘media secrecy’ in the relationship between the media and its audience is needed.

Julie Cohen did a first step into that direction by arguing in favor of a ‘right to read anonymously’.⁷⁷ Cohen developed the idea for a right to read anonymously in the context of the application of Digital Rights Management Technologies, which can also be used to track and control which types of (copyright protected) contents a user is consuming. Basing her argument on freedom of speech and the threat of chilling effects, Cohen suggested that the legislator should introduce “a right of anonymous access to reading material that is otherwise made available by willing distributors.”⁷⁸ Translated to the targeting and profiling debate that could mean that the audience should be at least given the choice to use the website of newspapers or broadcasters anonymously (even if that might result in lesser functionality and usability). Having said that, most parties using cookies will

⁷³ Simmel, p. 8. Simmel also contends that the question where the boundary lies is not an easy one to answer, and that it can depend on the individual as well as its social environment but also the proper balance of the right to know things of each other, and respect the desire to conceal certain information, naming a number of examples in which “the beauty of discretion – that is, of refraining of knowledge of everything which the other party does not voluntarily reveal to us – must yield to the demands of practical necessity.”, Simmel, p. 9.

⁷⁴ See Art. 5 of Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), OJ L 201/37 (31.07.2002): “Member States shall ensure the confidentiality of communications and the related traffic data by means of a public communications network and publicly available electronic communications services, through national legislation. In particular, they shall prohibit listening, tapping, storage or other kinds of interception or surveillance of communications and the related traffic data by persons other than users, without the consent of the users concerned.”

⁷⁵ Wilfred Steenbruggen, Dodo of feniks: het communicatiegeheim in het digitale tijdperk?, Mediaforum 2003-4, p. 118-128. See also Marx and Muschert about the close links between secrecy and privacy, Gary T. Marx & Glenn W. Muschert, Simmel on Secrecy. A Legacy and Inheritance for the Sociology of Information, *Soziologie als Möglichkeit*, Springer, 2009, pp 217-233. See also: <http://web.mit.edu/gtmarx/www/cenandsec.html>

⁷⁶ Steenbruggen, 2003, *ibid*.

⁷⁷ J. Cohen, A Right to Read Anonymously: A Closer Look at “Copyright Management” In *Cyberspace*, Conn. L. Rev 1996-28, p. 981 (1996).

⁷⁸ Cohen, 1996, p. 25.

claim that the information they collect is anonymous.⁷⁹ Having said that, in order to be truly able to manage information flows between users and the media, and to keep certain interests and preferences secret (but maybe not others because here personalization could be convenient) it is not so much or not only the anonymous access and the anonymity of the individual that is critical but rather (or also) *the anonymity of the consumption particular contents*.

Here is where a right to secrecy could come into play. Depending on the wishes of the user, it could concern certain or all categories of content, or content from particular media, authors or sources. The media could also follow out of its own initiative the example of many personalized news apps and offer the user particular categories or sources for which he would or would not like to receive personalized use. Many of these personalized media apps will allow users to indicate from which sources or about which topics they would like to receive information. In other words, they have included some build-in mechanisms to allow the audience to manage personalized information streams. Alternatively, and also to keep the right to secrecy manageable, the legislator could prohibit the tracking and profiling of users in relation to particular sensitive contents, such as in the context of news or religious programs, similar to the aforementioned prohibitions on sponsorship with regard to particular programs.

Knowing who is else out there

Personalization can also be a means to monopolize attention. A frequent complaint of users of EPGs or IPGs is that personalized program lists are not sufficiently updated once new programmes enter the market. As a result, users of personalized program guides would not, or would only by accident, learn of the existence of new channels, particularly if those are niche channels.⁸⁰ In a similar direction go the findings by Kalyanaraman & Sundar, who demonstrated that that users of personalized portals tended to use less search queries.⁸¹ Also this is an aspect of personalization or growing intimacy – the closer the link between a media provider and its audience gets, the more this can prevent users from searching for information from other, competing sources. One important driver behind media-driven personalization is, after all, to capture the precious resource that attention is, and to bind it to a particular brand. Of course the audience remains still free to listen to other speakers, and there is evidence that it does so.⁸² Having said that, the potential path-dependencies and disincentives to switch as the result of personalized media services, but also of personalization in EPGs, search engines or the selection of media apps on tablets or mobile phones are not yet sufficiently understood.

5. The price of access to media content

The goal of the cookie-walls was not to block entrance to the media's website, but to make it conditional upon the acceptance of tracking technologies. In this respect the cookie-walls resemble earlier attempts to make access to media content conditional upon a price, such as the use of conditional access technology in pay-TV. The difference with pay-TV is that in our case the price is not money but personal data and the permission to track and profile the user. In this section, two

⁷⁹ Which is, of course, only partly true because the linking of several items of anonymous information can still be used to trace back real individuals, which is also the reason why in the Netherlands cookies are considered personal data.

⁸⁰ This is known as the "cold start" problem, B. Stark, *Digitale Programmnavigation, Media Perspektiven* 2009-5, p. 233-245.

⁸¹ Kalyanaraman & Sundar, 2006.

⁸² See e.g. D.C. Trilling & K. Schoenbach, *Patterns of news consumption in Austria: How fragmented are they?* *International Journal of Communication*, 2013-7, 929-953; J. Webster and T. Ksiazek, *The Dynamics of Audience Fragmentation: Public Attention in an Age of Digital Media*, *Journal of Communication* 2012-62, p. 39-56.

arguments are made. The first is that – in particular for the area of broadcasting – a strong “right to free access” rhetoric exists, despite the fact that media content is not and has never been “for free”. Secondly, the popular idea of free access to media content has stood in the way of a more systematic analysis of the conditions and prices for access to the media that are still acceptable from an individual as well as public policy point of view. This section will then look into the question of whether making access to media content conditional upon the acceptance of cookies is too high a price to pay.

“Free media” rhetoric’s

The comparison with pay-TV is, also from a media political perspective, rather instructive. When pay-TV was introduced in the early 50ties of last century, it was met with fierce resistance, as the picture below may demonstrate:



The picture was part of the Citizens Committee for Free TV in the ‘Californian Crusade for Free TV’.⁸³ the picture depicts an unhappy boy in full football wear crying in front of a blank TV screen with the headline: ‘Darn that Pay TV! Pop says he don’t have any more Dollar and a halfs for me to watch each ball game!’ Below the picture was the text:

‘What kind of a monster would do this to your child—would come into your home and put a padlock on his TV fun? What kind of a monster would force you to feed your TV set bucketfuls of dollars—or suffer the humiliation of being labelled a “cheapskate” in the eyes of your children? There is such a monster. It’s a greedy thing called Pay TV’.⁸⁴

As the argument went, the audience had the privilege of receiving broadcasting free of charge. And indeed, at least officially, the competitors’ resistance to pay-TV was disguised as a fight against tolls or fees for broadcasting.⁸⁵ The idea of a right of the audience to receive media content ‘for free’ is deeply ingrained in the thinking about at least the audiovisual media.

In Europe, when the arrival of pay-TV triggered legislator action in form of the Conditional Access Directive, the EU Parliaments Committee on Legal Affairs and Citizens’ Rights suggested to include into the directive a recital saying that:

‘Whereas this Directive [the Conditional Access Directive] is without prejudice to the right of the viewer to have access to free-to-air channels within a conditional access service platform without being required to pay an additional fee beyond the normal charge for accessing the platform’.⁸⁶

This argument combines two different aspects. First it claims that there is a right of access to information and that it, seconds, includes the privilege to access particular contents without having to pay an additional fee. In addition, there were concerns about the exercise of exclusive control to media content, both from the perspective of the “right of access to information” as well as the free flow of services across national borders. These concerns were maybe most dramatically framed by

⁸³ For a thorough overview on the Californian Crusade for Free TV, see Gunzerath 2000.

⁸⁴ ‘Darn that pay-TV!’, Advertisement in Los Angeles Times, 12 October 1964, sec. 3, p. 5.

⁸⁵ For a critical analysis and more background information, see N. Helberger, Controlling Access To Content, Kluwer Law International, Den Haag, 2005, p. xii subsq.

⁸⁶ Recital 15a of European Parliament, Committee on Legal Affairs and Citizens’ Rights, Report on the proposal for a European Parliament and Council Directive on the legal protection of services based on, or consisting of, conditional access, Brussels, 21 April 1998, A4-0136/98 [hereinafter ‘Committee on Legal Affairs and Citizens’ Rights, Report on the Proposed Conditional Access Directive’].

the European Committee on Culture, Youth, Education and the Media of the European Communities, who warned that national services were beginning to vanish into the 'ghettos of encryption'.⁸⁷ The argument of the public's right to free access to media content was more recently again used in a decision of the European Court in Luxembourg in which the court emphasised once more the importance of the audience's unhindered access to (here) contents of public importance: "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."⁸⁸ 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 major parts of the public. Note that the court neither considered that broad accessibility could also be reached by regulating the price for access to the event, nor, more generally, the possibility that the audience might be willing to pay for access (instead of accepting e.g. advertising or only short snippets of the event).

The fact that the idea of "free access to media content" is by far not self-evident, and probably also somewhat misleading is being demonstrated by the "nothing is ever for free" language in the copyright discourse. To quote M. Barnier, responsible for the European Commission's Directorate General Internal Market: "We cannot give free rein to the illusion that everything is free."⁸⁹

Media content is never for free, but when is it too expansive?

Leaving for now the question aside of whether such a right of free access to media content indeed does exist as part of the constitutionally protected freedom of information, or should exist for e.g. reasons of public information policy,⁹⁰ the strong "for free" rhetoric in the media discourse has so far stood in the way of a far more mundane but practically very relevant question namely: what would be an adequate price for access to media content, and when is the price too high? If the audience has a build-in privilege of receiving content for free, the question of what an adequate price of access could be does not even arise, at least not directly. The reality is that media content is never for free, not even in free-TV, or on the internet. The price of access to media content can come in the form of Euros or Dollars, as in the case of pay-TV or on-demand services, but also in the form of attention (arguably in the case of advertisement financed services, users pay a higher fee by being exposed to more advertisement than on the websites of the public service media), a loss of autonomy (for example, electronically enforced usage restrictions in exchange for lower pricing or as a precondition of access) or personal information—the new currency of the digital economy.

But what is then an acceptable 'price' for access to media content, and how can it be benchmarked? In this respect it can be not only economic but also public information policy considerations that may matter. To come back to the earlier example of access to certain events of public importance, arguably one way to make such events affordable to the broader public is to regulate prices, similar

⁸⁷ European Parliament, Committee on Culture, Youth Education and the Media, Opinion on the Proposed Conditional Access Directive, section a). See also European Commission, Report from the European Commission on the application of Council Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, Brussels, 26 July 2002, COM(2002)430 final [hereinafter 'Report on the Application of the Cable and Satellite Directive'], p. 7-8, and section 2.2.4 of this chapter.

⁸⁸ 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.

⁸⁹ http://europa.eu/rapid/press-release_SPEECH-13-54_en.htm?locale=en

⁹⁰ See for an extensive discussion of this question N. Helberger, Controlling Access to Content, Kluwer Law International, 2005, p. 67-90.

to the way this is done e.g. in communications markets, but also with regard to the public broadcasting fee. Setting the 'right' price is getting more complicated if the required price is of a non-pecuniary kind. Even here, however, policy makers have found solutions to set benchmarks of acceptable 'pricing'. The existing restrictions in media law regarding the maximum amount of allowed advertising time per hour can be interpreted as a limitation of the amount of attention that users can be required to pay per hour in commercial broadcasting.⁹¹

Is acceptance of tracking and profiling too high a price to pay for access to media content? There have been several attempts to measure the commercial value of personal information or data for consumers.⁹² Apart from the fact that this author seriously doubts whether it is at all possible to set a price for personal information because, as Nissenbaum explains, personal valuation of privacy and personal data can be highly contextual and thus fluctuating, the more principal question is if the answer is a matter of numbers or rather of principle.⁹³

Based on what has been said earlier, there might be situations in which policymakers might decide that the acceptance of profiling and targeting is not an acceptable price at all, comparable e.g. to the existing prohibition on the sponsoring of news or religious programs. Taking e.g. into account the particular importance that news content has for political participation and democratic life, and argument could be made that in order to avoid chilling effects people should never be required to accept tracking of their news consumption. As opposed, tracking and profiling might be acceptable for e.g. lifestyle, health or professional news, as here personalisation could have even a certain added advantage. It could also make a difference of whether, as a result of accepting cookies, all the advertisements and contents that users receive are personalised, or only a proportion thereof, thereby leaving an opening for non-personalised content and a certain level of serendipity. Arguably, one idea that could be discussed is if we need maximum caps of tolerated personalisation, similar to the restrictions on the 20% of advertisement broadcasters are allowed to target at the audience per hour.

Another possible approach could be to weight the amount of tracking and profiling against the services delivered ('value for data'), and examine whether the amount or kind of cookies placed is in excess of what is ultimately offered to the consumer. Background to this consideration is the fact that currently there seems to be a trend to collect data for the sake of data collection (the Big Data discussion) without actually knowing beforehand whether that data is or will be of any practical value. For example, when accessing the site of the Dutch newspaper "De Telegraaf", more than 23 cookies alone are placed to register users' interests, some of them for duration of 10 years or even eternally!⁹⁴ The public service media places for reasons of targeted advertising alone 41 cookies, again with a duration between a couple of minutes up to 26 years.⁹⁵ In other words, 'cookie excess' can be a matter of the number of cookies, their duration but also the type. As mentioned earlier some cookies are used to improve the functioning of the site, so called functional cookies. While some users might prefer to have a less optimally functioning site as long as they are not forced to accept cookies, the privacy concerns concerning functional cookies are arguably much lower than

⁹¹ According to Art. 20(2) AVMSD, programs may be interrupted by television advertising once for each scheduled period of at least 30 minutes and the proportion of television advertising spots and tele-shopping spots within a given clock hour shall not exceed 20 %, Art. 23 of the AVMSD.

⁹² See e.g. S. Egelman, A. Porter Felt and D. Wagner, Choice Architecture and Smartphone Privacy: There's A Price for That, online available at: <http://www.guanotronic.com/~serge/papers/weis12.pdf> ; A. Acquisti, L. John and G. Loewenstein, What is privacy worth?, online available at: <http://www.heinz.cmu.edu/~acquisti/papers/acquisti-ISR-worth.pdf>

⁹³ H. Nissenbaum, Privacy in Context Privacy in Context Technology, Policy, and the Integrity of Social Life, Stanford University Press, 2009 304 pp; in this sense also Acquisti et.al, *ibid.*

⁹⁴ <http://tmgonlinemedia.nl/statement/nl/Telegraaf.nl#cat5>

⁹⁵ <http://cookies.publiekeomroep.nl/data/sites/nos.nl/cookielist/#tabs-ads>

those regarding the so called third party cookies that are often placed by third parties for purposes of targeted advertising. Accordingly, requiring users to accept functional cookies is arguably 'less expansive' than requiring users to accept third party cookies, flash cookies or html cookies.

Finally, it seems worth exploring to what extent it is justified and socially and economically acceptable to offer people the choice of currency. When purchasing (mobile) applications, for example, users are frequently offered a choice of a free version, which reserves the right to assess/collect all kinds of personal data about mobile usage, contact lists, etc. and a paid-for version that is more economic on people's personal data. As a result, some contents that were formerly offered "for free" would then, at least at the first sight, no longer be offered for free (a popular argument in favour of cookies). Having said that, as shown earlier, no media content is for free. Offering the choice of currency would insofar not only add to the overall transparency of the prices for information, it would also facilitate comparison. An interesting question for further research might be what a comparison of the remunerated apps via "free" apps that collect people's personal data could reveal about the 'adequate'/acceptable pricing of personal data from the perspective of a) users, b) the media industry and c) advertisers.

6. The role of public service media: from arbiter to buddy?

The relationship between the audience and public broadcasting has always been a special one, at least in Europe. This may explain why it were the cookie-walls from the public service media that earned most of the criticism. In Europe, "the system of public broadcasting ... is directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism."⁹⁶ The Council of Europe, an instance that has influenced to a considerable degree the media laws in the European Member States, defines the special role that public service media have to play 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."⁹⁷ Diverse quality programming with a mission; reference point for all members of the public; broadly (and freely) accessible to everyone, on multiple platforms, including the internet; responsive to the changing media usage patterns of the audience, but also more or less independent from commercial influences – these are some of the key requirements that have characterized the public service remit so far.⁹⁸

In the Netherlands, this has been translated into the following requirements: public service media must offer a program (including on the internet) that is

- a) balanced, plural, varied and qualitative, and characterized by a great diversity in form and content,
- b) sketches a balanced picture of society and the diversity of its societal, cultural and religious ideas, interests, convictions,
- c) aimed at and reaches a broad and general public as well as special interest groups,

⁹⁶ Protocol 29 On the System of Public Broadcasting in the Member States, Treaty of Amsterdam Amending the Treaty on European Union, the Treaties establishing the European Communities and Related Acts, Official Journal C 340, 10 November 1997.

⁹⁷ Recommendation CM/Rec(2007)3 of the Committee of Ministers to member states on the remit of public service media in the information society, 31 January 2007. See also European Parliament, Resolution of 25 November 2010 on public service broadcasting in the digital era: the future of the dual system: "has a specific mission to cultivate a public sphere by making high-quality media content of public interest universally accessible on all relevant platforms."

⁹⁸ Ibid.

- d) independent of commercial and government influences,
- e) corresponds to high journalistic and quality requirements, and
- f) accessible for everyone.⁹⁹

The cookie-walls of the Dutch public service media are potentially at odds with at least two of the aforementioned requirements. It is, first of all, at least questionable whether in a situation in which access to the website is made conditional upon the acceptance of cookies, the website is still accessible for everyone. Very much will depend on whether users will find this too high a price (see section 5), taking also into account that these contents have already been financed with public money.¹⁰⁰ Secondly, one may wonder to what extent the contents are still independent from commercial influences. As mentioned earlier, the public service media place or enable the placing of cookies also for purposes of targeted advertising, and allowed also third parties to place cookies, such as advertisement networks¹⁰¹ and platforms¹⁰² (despite the public service media's claim that it is only the public service media that benefit from targeted advertising, respectively the Ministry of Culture, Education and Research, which uses the money for the media budget).¹⁰³ If we believe Turow, personalization creates the very realistic chance that personal data is not only used to show users advertisements that correspond with their interests, but to also personalize the editorial framework for this advertisement. More research is needed to assess to what extent this is or will also be true for the programs of the public service media (taking, however, also into account the difficulty of proving causality), and if it was so, how this is compatible with the obligation of independence.

Apart from the question of whether cookie-walls are compatible with the current law, there is the more general question to what extent public service media should engage in or refrain from personalizing media content. As a note to the reader, at present the Dutch public service media claim that no content targeting is taking place, unlike some of the Dutch newspapers. Having said that, the public service media also admitted that its present account of its cookie policy is but a momentarily snapshot, and can change over time.¹⁰⁴

There is broad agreement among policy makers and academics that the public service media should adapt to changing user habits and new technologies.¹⁰⁵ Under the pressure from policy makers as well as (commercial) stakeholders, public service media are almost constantly in need of reinventing themselves, nowadays, in an age of digital abundance, maybe even more than ever. The Council of Europe, for example, suggest explicitly that "[i]n view of changing user habits, public service media should be able to offer both generalist and specialized contents and services, as well as personalized interactive and on-demand services."¹⁰⁶ Note, however, that the Council of Europe's argument in favor of more personalization is about user-driven personalization, through interactive and on-demand services, and not about media-driven personalization (regarding the difference, see section 3). Yet, one could argue that even media-driven personalization could be part of the public service

⁹⁹ Compare Art. 2(2) of the Dutch Media Law (Mediawet).

¹⁰⁰ Data Protection Authority (College Bescherming Persoonsgegevens – CBP), Letter to the State Secretary of Education, Culture and Science, 31 January 2013

¹⁰¹ <http://zanox.com>;

¹⁰² <http://smartadserver.com> (checking whether third party cookies are admitted), <http://doubleclick.com> or <http://ad-serverparc.nl>.

¹⁰³ <http://cookies.publiekeomroep.nl/data/sites/vpro.nl/cookielist/#tabs-ads>

¹⁰⁴ <http://cookies.publiekeomroep.nl/data/sites/vpro.nl/cookielist/#tabs-ads>

¹⁰⁵ European Parliament, *ibid*; Council of Europe, 2007; K. Jakubowicz, Public service broadcasting: a new beginning, or the beginning of the end?

http://www.coe.int/t/dghl/standardsetting/media/doc/PSB_Anewbeginning_KJ_en.pdf

¹⁰⁶ Council of Europe, 2007, Section II(a)(5).

media's task to educate the audience more effectively about e.g. citizenship and democracy,¹⁰⁷ and to confront it with quality and diverse programming. Personalization could also fall within the public service media's mission as a means of bonding and intensifying its relationships with an increasingly individualistic and self-confident audience.¹⁰⁸

A change towards a more personalized (individualised) or even intimate relationship between public broadcasting and the audience, however, also has some far-reaching implications for the traditional public service remit. One concerns the public service media's role as a general interest intermediary – presenting the audience with a diverse choice of contents that reflect the different ideas and interests in a heterogeneous society, thereby stimulating diverse exposure, active engagement and social cohesion. Some argue that the role of general interest intermediaries is even more important in an environment of fragmented audiences and a special interest culture.¹⁰⁹ As such, an important role of public service media is to introduce an element of serendipity, and to confront users with contents that they would have otherwise not chosen.¹¹⁰ While a growing body of research seems to suggest that the audience is not in danger of being encapsulated entirely in a myriad of personal interest bubbles, one reason why this is so is because the public tends to consume personalized and general interest media in parallel.¹¹¹ If public service media, as the prototype of general interest media, also moves towards more personalized relationships with its audience, and if personalized media/advertisement is the new financing model for media content, the question will quickly arise who else would be willing to play the role of general interest media.

General interest media bring to the fore what society has in common, while personalized media put the emphasis on individual differences. Accordingly, personalization would tilt the entire public mission towards a far more personalized approach to issues such as education, cultural, political and social information as well as media diversity. Possibly in some not too distant future not two viewers will receive the same contents. As explained earlier, personalization can be a more effective approach to informing users, but a stronger orientation on the user is potentially also a situation that would be at odds with media policies' strong focus on the shared experience as part of the public service remit. This shared experience is the reason why existing media law mandates, for example, that events of public interest ("common data on the national agenda") are shown on platforms that can reach the entire society, such as public broadcasting.¹¹² The aspect of shared experience is also part of the definition of the public broadcasting remit as an "a reference point for all members of the public, offering universal access" and "a factor for social cohesion and integration of all individuals, groups and communities".¹¹³

¹⁰⁷ Jakubowicz, *ibid.*, p. 15, 18. B. Grummell, *The Educational Character of Public Service Broadcasting: From Cultural Enrichment to Knowledge Society*, *European Journal of Communication* 2009-24, p. 267-282.

¹⁰⁸ See also R. Collins, A. Finn, S. McFadyen, C. Hopkins, *Public Service Broadcasting Beyond 2000: Is there a Future for Public Service Broadcasting?*, *Canadian Journal of Communication*, 2001-25, p. 3-15; I. Kearns, Ian, *A Mission to Empower: PSC. From Public Service Broadcasting to Public Service Communications*. Speech presented on behalf of the Institute for Public Policy Research, 2003, Westminster e-Forum, www.ippr.org/research/files/team25/project61/WMFspeech.doc

¹⁰⁹ K. Schönbach, Klaus, *The Own in the Foreign: Reliable Surprise –An Important Function of the Media?*, *Media, Culture & Society* 2007-29, p. 344-353; C. Sunstein, *Republic.com 2.0*. Princeton University Press, 2007.

¹¹⁰ Schönbach, 2007, *ibid.*; Zuckerman, Ethan, "The Architecture of Serendipity," Sept. 6, 2008. Accessed Nov. 25, 2011, <http://www.ethanzuckerman.com/blog/2008/06/09/the-architecture-of-serendipity/>

¹¹¹ Trilling & Schönbach, 2013, *ibid.*; Webster & Ksiazek, 2012, *ibid.*

¹¹² Examples are the aforementioned right to short reporting as well as the so-called list of important events, which allow member states to list events that are "common items on the public's agenda" that may not be shown exclusively on pay-TV, for a critical discussion, see N. Helberger, *Brood en Spelen - De implementatie van de evenementenlijst van artikel 3a van de Televisierichtlijn*, *Mediaforum* 2002-3, p. 78-84.

¹¹³ Council of Europe, 2007, para. I (1) (a) and (b).

Finally, there is the matter of authority. At present, the media, and public service media in particular, have an important agenda setting function, telling the audience what is worth knowing. To the extent that media supply and user demand converge,¹¹⁴ and it is the audience that tells the public service media, directly or indirectly, what to inform them about, this function is fading. This does not need to be a problem in itself, if at the offset the user is being informed more effectively, but it can mean that the public service media is not any longer able to play a guiding role in an increasingly complex information landscape.

7. Conclusions

Tracking and profiling has become everyday practice, also for the online media. The Dutch cookie incident was only one, albeit particularly pertinent example hereof. Tracking and profiling is also part of a more fundamental shift from public mass media to public personal media, together with technologies such as second screen, personalized search and recommendation and personalized apps.

The shift from public mass media to personalized media can potentially bring many attractive advantages for the audience: more responsiveness and sense of control of the audience's own information consumption, effective information, confrontation with information that really matters to the audience but also education. Personalized media can also raise serious concerns, however, for example with regards to matters of privacy, fair pricing of information and the integrity of journalistic content. A first, cursory analysis has demonstrated that traditional media law and policy are probably not prepared for this shift. Vice versa, the special position of the information user in, for example, data protection law is not yet sufficiently understood. This is an area that offers many interesting areas for multi-disciplinary research.

Public service media play a particularly controversial role in the personalization debate. A shift towards more personalized offers would, on the one hand, challenge their traditional role as general interest intermediary, source of authoritative information and orientation. On the other hand, some degree of personalization also offers opportunities for a, some would argue urgently needed, repositioning in an environment of digital abundance. Building cookie-walls around the public service media offer is not the right way, though. Navigating through this new terrain and developing a coherent vision on the future role of public service media requires foresight and a better understanding of the norms and values that should guide its relationship to the audience.

¹¹⁴ Webster, 2011, *ibid*, p. 17.