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Taming the cookie monster with Dutch law – A tale of regulatory failure

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ABSTRACT

Profiling the online behaviour of Internet users has become a defining feature of the Internet. Individual surfing behaviour is tracked by many enterprises for statistical purposes, but also for behavioural advertising and other personalisation services. Profiling implies the processing of personal data often facilitated by cookies and other markers placed on the terminal equipment of Internet users. The European rules for the regulation of cookies and similar technologies were modified in 2009 requiring prior consent of the user, in order to guarantee that the user has some control over the processing of their information. In 2013 the Netherlands introduced probably the strictest implementation of the European rules concerning the installation of cookies. However, in practice the new legal requirements resulted in neglect of the obligations regarding user information on the one hand and in the widespread deployment of annoying banners, popup screens and 'cookie walls' on the other. Not only the advertising industry, but also web publishers and even ordinary Internet users opposed the regulation. Furthermore, the regulation, certainly initially, did not lead to increased user control. These and other factors support the conclusion that the Dutch cookie regulation is a case of regulatory failure. This paper discusses the practices that were deployed in the Netherlands and assesses them based on a multi-site study that examined the practices of 100 Dutch websites with regard to the installation of cookies. It further reflects on the response of the Dutch regulator, who –under the pressure of industry and consumers outcry- amended the relevant provisions of the Dutch Telecommunications Act in 2014.

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1. Introduction

What started as a simple fix¹ to compensate for the lack of information about the state of interactions between web-browsers and websites, has become one of the most invasive

tracking instruments in the information society: cookies. While cookies serve numerous invaluable uses, such as for keeping track of items added to an online shopping cart, or for storing user preferences, they are also, and maybe primarily, used to track users online. Cookies allow websites to recognize returning visitors, but also to recognise them across

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¹ See for instance David M. Kristol, HTTP Cookies: Standards, privacy and politics, in: ACM Transactions on Internet Technologies (TOIT), vol 1 issue 2, November 2001; <http://tools.ietf.org/html/rfc6265> (last accessed 09 November 2014). <http://dx.doi.org/10.1016/j.clsr.2015.01.004>

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websites. They have given rise to fierce debates between privacy advocates, service providers, the ad-industry and regulators, and have inspired a significant body of literature on both sides of the Atlantic.²

Within the US, the use of cookies for behavioural tracking is largely unregulated, although the Federal Trade Commission, in view of regulating “unfair and deceptive trade practices” pursuant to Section 5 of the Federal Trade Commission Act, is currently taking actions.³ The FTC, in line with the US approach to privacy online, relies on a self-regulatory “notice and choice” model. Websites are required to incorporate detailed privacy policies that contain information on the ways how they collect and use information about users via cookies, while non-adherence to the obligations stipulated in the privacy policy could be treated “as a ‘deceptive trade practice’ actionable by the FTC”.⁴ Website users, in the “notice and choice” model, are supposed to decide whether or not to use a website on the basis of assessing its privacy policy. Given that most people do not read privacy policies,⁵ it is questionable whether US netizens are fully aware of the extensive tracking of their online behaviour by websites and their affiliates. The US “notice and choice” mechanism is based on action by the user to get informed and act on it.

Within the European Union, online tracking and the use of cookies is regulated under the Data Protection Directive,⁶ as well as the ePrivacy⁷ one. The ePrivacy Directive was amended in 2009 and brought about a number of implementation issues deriving from the introduction of new requirements for the

installation of and access to cookies. More concretely, the Data Protection Directive contains the basic data protection principles, in accordance with which the processing of personal data should take place. The ePrivacy Directive lays down specific requirements for the legitimate use of cookies, requiring that the user or the subscriber is properly informed about the use of cookies and that the consent of the user or the subscriber is provided before their installation and use. Aim of the European legislator when requiring the consent of the user was to guarantee that the user gains control over the processing of their information. The European model is based on websites proactively informing users and offering them immediate choice.

This paper is going to present the new legal requirements relating to the use of cookies and will discuss the difficulties that arose in practice, which resulted in a public outcry not only from the advertising industry, but also from web publishers and Internet users, presenting the Dutch experiences as a prominent example. The paper will assess the practices that were deployed in the Netherlands based on a multi-site study that examined the practices of 100 Dutch websites with regard to the installation of cookies. It will further reflect on the response of the Dutch regulator, who –under the pressure of industry and consumers outcry– amended the relevant provisions of the Dutch Telecommunications Act in 2014.

2. Short introduction to the world of cookies

2.1. Types of cookies

A cookie is a small amount of information containing the address of the cookie provider and some additional data in the form of the name of an attribute and its value, as well as an expiry date that can be stored by a website in the user's webbrowser.^{8,9} Because cookies can be read back by the website that placed it, they can be used to store information such as the last time the site was visited by the browser, the user's language preference, window size or preferences as provided by the user during the interaction. They are also (or mainly) used to store unique identifiers on the user's terminal equipment (the webbrowser).¹⁰ Cookies can be read by the

² For instance, Eleni Kosta, Peeking into the cookie jar: The European approach towards the regulation of cookies, *International journal of law and information technology*, 2013, vol. 21, p. 27; Omer Tene & Jules Polonetsky, To Track or ‘Do Not Track’: Advancing Transparency and Individual Control in Online Behavioral Advertising, 13 *Minn. J. L. Sci. & Tech.* 281 (2012) available at <http://ssrn.com/abstract=1920505> (last accessed 09 November 2014). Frederik Zuiderveen Borgesius, Behavioral Targeting, a European Legal Perspective, *IEEE Security & Privacy*, vol. 11, no. 1, pp. 82–85, Jan.–Feb. 2013.

³ Omer Tene & Jules Polonetsky, To Track or ‘Do Not Track’: Advancing Transparency and Individual Control in Online Behavioral Advertising, 13 *Minn. J. L. Sci. & Tech.* 281 (2012) available at <http://ssrn.com/abstract=1920505>. (last accessed 09 November 2014).

⁴ Omer Tene & Jules Polonetsky, To Track or ‘Do Not Track’: Advancing Transparency and Individual Control in Online Behavioral Advertising, 13 *Minn. J. L. Sci. & Tech.* 281 (2012) available at <http://ssrn.com/abstract=1920505>, p. 23 (last accessed 09 November 2014).

⁵ See, for instance Chris Jay Hoofnagle, Jennifer M. Urban and Su Li, Privacy and Advertising Mail (December 3, 2012). Berkeley Center for Law & Technology Research Paper, available at <http://ssrn.com/abstract=2183417> (last accessed 09 November 2014).

⁶ European Parliament and the Council of the European Union, Directive 95/46/EC 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 [1995] OJ L281/31 (23.11.1995).

⁷ European Parliament and the Council of the European Union, Directive 2002/58/EC 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) [2002] OJ L201/37 (31.07.2002). The ePrivacy Directive contains provisions on the processing of personal data and the protection of privacy of in the electronic communications sector.

⁸ “The cookie is a short alphanumeric text which is stored (and later retrieved) on the data subject's terminal equipment by a network provider.”: Article 29 Data Protection Working Party, ‘Opinion 2/2010 on online behavioural advertising, WP171’ (2010), p. 6.

⁹ Information provided by a server can also be stored outside the user's browser. Adobe Flash, for instance, can store information on the user's computer in so called ‘flash-cookies’.

¹⁰ When the lifetime of the cookie is limited to a short period, they are generally used for the purpose of maintaining state information regarding the user's visit (for instance to link a shopping cart's contents on the server to a particular visitor). These temporary cookies are called session-cookies. Another temporary use is to record the fact that the user is successfully authenticated for accessing a site (authentication cookies).

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