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Smart TV and the online media sector: User privacy in view of changing market realities

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ABSTRACT

Smart TV and online media enable precise monitoring of online media consumption, which also forms the basis for personalised recommendations. This new practice challenges EU policy in two respects. Firstly, the legality of monitoring individual media consumption and using personal data of users is primarily addressed under data protection law. Secondly, tracking of viewing behaviour and personalisation of media content can also affect individuals' freedom to receive information, as well as the realisation of media policy objectives such as media freedom and pluralism, implications that so far are not reflected in media law and policy, or only marginally. This article addresses the increasing reliance on personal data and personalised services in the audiovisual and online media sector and queries the appropriateness of the legal status quo in light of implementation and enforcement actions in Germany and the Netherlands. The analysis concludes with a call for media policy makers and regulators to pay more attention to the issue of 'smart surveillance' of media users, and develops a number of concrete recommendations on how to accommodate the specific privacy concerns of media users.

1. Introduction

Television sets used to be standalone devices with the main purpose of receiving TV channels. Convergence, i.e. "the progressive merger of traditional broadcast services and the internet" (European Commission, 2013), has overhauled this situation dramatically. According to Ofcom, connected TVs or 'smart TVs' are rapidly diffusing throughout Western European countries, reaching market shares above or close to 40 per cent (Ofcom, 2015a).

One fundamental difference between traditional TV viewing and today's consumption of television and other audiovisual content – via smart TVs as well as mobile phones and tablets (Nielson, 2015) – is that these devices are connected to the internet. Connected devices enable the collection of very detailed information about individual users' media consumption and behaviour. Such information can be used to create detailed user profiles, which in turn can feed into not only personalised services and recommendations, but also behaviourally targeted advertising.

In doing so, smart TVs, like other connected devices, trigger privacy and data protection issues (Walden & Woods, 2011). Unlike other connected devices, we will show that the collection of information about users' viewing behaviour can provide very detailed and sensitive insights into what users think, know, and believe. Therefore, we argue, the issue of privacy requires special attention, not only from the perspective of data protection law, but also media law and policy. Studying the examples set by cases from Germany and the Netherlands, in which regulatory authorities have started to define the contours of a special privacy regime for media users, we will develop suggestions for more effectively accommodating specific privacy concerns in the audiovisual media sector.

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At present, these issues sit squarely in EU law, which provides for distinct regulatory regimes for audiovisual media services, electronic communications and data protection. The traditional focus of the EU's media policy is on the supply of television and television-like content, i.e. what used to be broadcasting. Walden and Woods (2011) observed that “broadcasting was diffuse, with no identifiable pathways to individual viewers, whose consumption of particular programming was therefore effectively anonymous.” For that matter, there is currently very little recognition in EU policy of particular privacy concerns about the extent to which users’ consumption of media content is monitored.

This article sets out to challenge the isolation of media policy from specific concerns about citizens’ and users’ privacy and data protection at the EU level, as related to audiovisual and online content. On the one hand, the objective of EU data protection law is to protect individuals’ fundamental right to privacy and the protection of their personal data. It is not concerned with upholding the values of an EU media policy, such as ensuring the freedom of EU citizens to freely receive information, including from audiovisual and online media, while not being exposed to monitoring and tracking. On the other hand, EU media policy oddly avoids the emerging issues of monitoring and tracking users’ media consumption, the role of targeted advertising, and how media personalisation strategies could affect media pluralism for better or worse.¹ This seems wholly inadequate in view of the important role of television and online media in pluralistic and democratic societies, both in member states and in the EU as a whole.

The policy issues surrounding privacy, data protection and personalisation with smart TVs and in the online media sector are still relatively recent and have thus been only sporadically addressed in the literature. German legal literature has flagged legal challenges involving connected TV, however, primarily concerned with application of German law (Ladeur & Gostomzyk, 2014), and associated privacy risks have been discussed in light of German legal requirements (Ghiglieri, Hansen, Nebel, Pörschke, & Fhom, 2016; Schmidtman & Schwiering, 2014). The European Audiovisual Observatory recently published a report (2016) on “Smart TV and data protection”, applying EU sectoral regulation to the smart TV ecosystem.² The article by Walden and Woods (2011) is one of the first to have taken up the topic of broadcasting privacy more explicitly. The authors argue for a more cognizant policy on broadcasting privacy, albeit from the perspective of the challenges that convergence poses for upholding the traditional legal distinction between ‘broadcasting’ and ‘communications services’ in relation to the privacy safeguards pertaining to electronic communications. In addition, there are a number of more technical contributions discussing facets of personal data-intensive content services and threats to privacy and security (Ghiglieri, Oswald, & Tews, 2013; Michéle & Karpow, 2014, 2014); however, these are mostly focused on the technology, and less concerned with the legal and policy aspects.

Building on Walden and Woods (2011) critique, the article argues that monitoring and tracking of users of interactive audiovisual media services should be a concern of EU and national media policy in view of changing market realities. This article’s specific contribution lies in presenting facts from implementation and enforcement actions in two EU member states, Germany and the Netherlands, and demonstrating how a new approach to acknowledging and protecting the specific privacy interests of media users is emerging here. It places these initiatives within the broader context of an emerging body of literature that argues in favour of protecting privacy in order to preserve the freedom to receive information and hold opinions (Cohen, 1996; Krotoszynski, 2016; Richards, 2008; Rössler, 2005; Solove, 2010). It is also the first article to draw possible lessons for an adequate media policy approach to protecting users’ privacy in relation to smart TV and media content, also at the EU level.

The reason for covering Germany and the Netherlands in particular is that both countries have set enforcement priorities for the protection of users’ privacy and personal data in relation to smart TV and interactive television services. Germany provides a good case study on turning a sectoral investigation into concrete policy guidance for stakeholders of the smart TV and interconnected television services’ ecosystem. The Netherlands have seen three enforcement actions by the Dutch Data Protection Authority against leading providers of interactive television services. Thus, it is not about offering a complete comparative review across member states; rather, the aim is to focus on Germany and the Netherlands, where local data protection authorities have made the most progress in advancing their legal assessment.

This article is structured as follows. It starts by fact-finding, providing the necessary background on smart and connected TV, audiovisual and online media, and the collection and use of personal data in this field. The second section offers a brief overview of EU data protection law, already incorporating the new General Data Protection Directive (GDPR), and the challenges of monitoring and tracking users’ viewing habits and other new purposes for which personal data is being processed. The third section presents implementation activities in Germany and enforcement actions in the Netherlands in relation to smart TV and interactive media services. The fourth section explores the missing link between users’ viewing privacy and media policy and offers some arguments as to why the latter could be falling short, given the central role of the media in democracies and users’ rights to freely receive information. The final section draws conclusions, in which we will also reflect on lessons to be learned from the initiatives in the Netherlands and Germany and how they can inform EU and national law and policy.

2. Personal data processing via smart TVs: A fact-finding mission

Recently, the connective capabilities of smart TVs made headlines in several European countries for divulging users’ privacy in a variety of ways. In 2013, the media reported that a smart TV was found to transfer information about what users are viewing and the filenames on an external storage device to the equipment manufacturer (Arthur, 2013). In 2015, the voice control of a smart TV made headlines for incidentally eavesdropping on private conversations which were transmitted online to a specialised voice

¹ For example, Netflix claims it is investing \$150m (approx. €120m) in improving personalised recommendation services per year (Roettgers, 2014).

² Please note that Kristina Irion is a contributing author to this report.

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