

## DIVERSITY LABEL: EXPLORING THE POTENTIAL AND LIMITS OF A TRANSPARENCY APPROACH TO MEDIA DIVERSITY

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With the rapid growth of digital content, meaningful media diversity depends on users and the choices they make. The challenge is no longer facilitating content, but capturing attention, which is not subject to regulatory control. Empowering users with information, as exemplified in consumer law, thus becomes a more important element in the regulatory toolbox. According to Professor Helberger, the informational approach to advancing the goals of media diversity needs more coherent and informed reflection. In particular, she suggests the usefulness of “diversity labels” in conjunction with self-regulation, an idea that deserves further exploration of its potential for stimulating the audience’s appetite for diverse media content.

### INTRODUCTION

Knowledge is power. Some policies take this statement quite literally. In consumer policy, “empowering” consumers through information has become a singularly important element in the regulatory toolbox.<sup>1</sup> Apart from protecting them, consumer information can turn consumers into active actors in consumer markets. Not only are informed consumers better able to protect their own interests by making autonomous, informed choices; they can also stimulate competition and socially responsible choices – thereby serving the general interest, as well as their own.<sup>2</sup>

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<sup>1</sup> Geraint G. Howells, “The Potential and Limits of Consumer Empowerment by Information,” *Journal of Law and Society* 32, no. 3 (2005): 352; Annette Nordhausen, “Information Requirements in the E-Commerce Directive and the Proposed Directive on Unfair Commercial Practices,” in *Information Rights and Obligations: A Challenge for Party Autonomy and Transaction Fairness*, ed. Geraint Howells, Andre Janssen, and Reiner Schulze (Ashgate, UK: Aldershot, 2005), 93-114.

<sup>2</sup> Compare with Howells, 355; Rene Barents, “The Image of the Consumer in the Case Law of the European Court,” *European Food Law Review* 1 (1990): 16; J.G.J. Rinkes, “Europees consumentenrecht,” in *Handboek Consumentenrecht: Een overzicht van de rechtspositie van de consument*, ed. E.H. Hondius and G.J. Rijken (Paris: Zutphen, 2006), 51; Thomas Whillelmsson, “Consumer Law and Social Justice,” in *Consumer Law in the Global Economy*, ed. Iain Ramsay (Ashgate, UK: Aldershot, 1997), 217-232. See also European Commission, Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee (2007), EU Consumer Policy Strategy 2007-2013: Empowering Consumers, Enhancing their Welfare, Effectively Protecting Them, COM(2007)99 final, Brussels, Mar. 2007, 2-6.

Finding ways of helping users to make autonomous, informed and socially responsible choices is also an increasingly important theme in media law and policy. With the multiplication of (digital) content, the commercialization and internationalization of audiovisual markets, and the resulting loss of control over the media content to which users are exposed, the call for more user autonomy and alternative, softer forms of paternalistic interference is getting louder.<sup>3</sup> Consumer information as a regulatory option also plays a part in audiovisual law. Content labeling schemes, for example, are already in place with the objective of helping users avoid potentially harmful content or being misled about the commercial character of a media message.<sup>4</sup> And the Council of Europe speaks more generally of the need for “empowering users” and encourages Member States, the private sector, and civil society to develop “common standards and strategies to promote transparency and the provision of information, guidance and assistance to the individual users.”<sup>5</sup>

Media transparency is also being discussed in the context of one of the core objectives of media law and policy: the realization of media pluralism. As in other areas of media law and policy, the realization of media pluralism as a policy goal depends increasingly upon users and the choices they make. While the amount of media content is growing, there is only a limited amount of time and attention that users are willing and able to invest in choosing and consuming media. A growing body of research demonstrates that the diversity that is being broadcast is not the diversity that is being consumed in people’s homes.<sup>6</sup> This “consumption” or audience-oriented aspect of media diversity<sup>7</sup>

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<sup>3</sup> European Commission, Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Provision of Audiovisual Media Services (Audiovisual Media Services Directive) (codified version), O.J. [2010] L95/1, Recital 81.

<sup>4</sup> *Ibid.*, Article 3e (a).

<sup>5</sup> Council of Europe, Recommendation Rec (2007) 11 of the Committee of Ministers to Member States on Promoting Freedom of Expression and Information in the New Information and Communications Environment, 26 September 2007.

<sup>6</sup> James G. Webster, “Diversity of Exposure,” in *Media Diversity and Localism: Meaning and Metrics*, ed. Philip M. Napoli (Mahwah, NJ: Lawrence Erlbaum Associates, 2006), 309-326; James G. Webster, “Beneath the Veneer of Fragmentation: Television Audience Polarization in a Multi-Channel World,” *Journal of Communication* 55 (2005): 366-382; Philip M. Napoli, “Deconstructing the Diversity Principle,” *Journal of Communication* 49, no. 4 (1999): 7-34; Markus Prior, “News vs. Entertainment: How Increasing Media Choice Widens the Gap in Political Knowledge and Turnout,” *American Journal of Political Science* 49, no. 3 (2005): 577-592; Richard van der Wurff, “Supplying and Viewing Diversity: The Role of Competition and Viewer Choice in Dutch Broadcasting,” *European Journal of Communication* 19, no. 2 (2004): 215-237; Roger Cooper and Tang Tang, “Predicting Audience Exposure to Television in Today’s Media Environment: An Empirical Integration of Active-Audience and Structural Theories,” *Journal of Broadcasting & Electronic Media* 53, no. 3 (2009): 400-418; Klaus Schönbach, “The Own in the Foreign: Reliable Surprise – An Important Function of the Media?” *Media, Culture & Society* 29 (2007): 344-353.

<sup>7</sup> The author will use in the context of this article the notion of “media diversity,” while in literal citations – especially in official documents (from the Council of Europe for example) – the notion of “media pluralism” may also appear. The precise delineation of both notions is ambiguous: compare Peggy Valcke, *Digitale Diversiteit – Convergentie van Media-, Telecommunicatie- en Mededingingsrecht [Digital Diversity – Convergence of Media, Telecommunications and Competition Law]* (Brussel: Larcier, 2004), 117-236; and Kari Karppinen, *Rethinking Media Pluralism: A Critique of Theories and Policy Discourses* (Dissertation: University of Helsinki, Department of Social Research, 2010), 13. Also within the notions of “diversity” and “pluralism” different sub-definitions are possible (for an overview, see Valcke). For instance, the Council of Europe further distinguishes “pluralism” into “political pluralism” and “cultural pluralism.” Council of Europe, Recommendation No. R(99)1 of the Committee of Ministers to Member States on Measures to Promote Media Pluralism, Explanatory Memorandum, 19 January 1999. The author follows Karppinen’s definition according to which “media diversity is understood in a more neutral, descriptive sense, as heterogeneity on the level of contents, outlets,

is commonly referred to as “exposure diversity.”<sup>8</sup> The aforementioned research further increases the pressure on policymakers to reconsider their existing media diversity strategies, and to think about alternative tools that are more effective. Guiding users through information could potentially be an attractive option, if one considers the delicate position of government. Responsible for creating the conditions for people to benefit from media diversity, governments must refrain from any unconstitutional interference with the freedoms of the media and its audience.

“Asymmetric” forms of paternalism, for example through disclosure requirements, are a potentially attractive way out of this dilemma. According to the Council of Europe, “transparency as regards the control of media enterprises, including content and service providers of the new communications services, can contribute to the existence of a pluralistic media landscape.”<sup>9</sup> The Council of Europe suggests providing users with a range of information about media content and its respective providers.<sup>10</sup> Following the example of the Council of Europe, the European Union also adopted a new transparency obligation in its recently amended Audiovisual Media Services Directive (AVMSD). According to the Directive, “[b]ecause of the specific nature of audiovisual media services, especially the impact of these services on the way people form their opinions, it is essential for users to know exactly who is responsible for the content of these services. It is therefore important for Member States to ensure that users have easy and direct access at any time to information about the media service provider.”<sup>11</sup> Having said that, neither the policy recommendations of the Council of Europe nor the Audiovisual Media Services Directive were based on a more comprehensive discussion of the potential, content, and limits of an informational approach to advancing the goals behind media diversity policies. This article is an attempt to initiate such a discussion. It argues that transparency and disclosure requirements, while potentially a useful regulatory tool, are too easily suggested without proper exploration of the principles and conditions that must guide their design.

The central question that this article explores is what role (better) information about the media can play in helping users make diverse choices. Taking the existing rules and policy recommendations, notably the transparency obligation in Article 5 of the Audiovisual Media Services Directive and the recommendations of the Council of Europe as points of departure, this article examines the potential and limits of a “user information approach” to media diversity. With its focus on European law, the perspective of the author is clearly Eurocentric. Having said that, many of the arguments here will probably also hold some validity in the US context. When developing the “user information approach,” the analysis draws from the experiences of consumer law and policy in which consumer information has traditionally been a pivotal element in promoting individual and public policy objectives. Looking at the experiences from consumer law, this article critically

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ownership or any other aspect of the media deemed relevant... while pluralism, as an ‘ism,’ refers more explicitly to a value orientation that considers multiplicity and diversity in ideas and institutions a virtue.” Karpinen, 13.

<sup>8</sup> Napoli, “Deconstructing the Diversity Principle.”

<sup>9</sup> Council of Europe, Recommendation No. R(99)1.

<sup>10</sup> 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.

<sup>11</sup> European Commission, Audiovisual Media Services Directive, Recital 45, Article 5.

evaluates the existing approach to media transparency for users, and elaborates on some conditions that would need to be fulfilled to make an informational approach a potentially viable option in principle. Not an issue of exploration in the context of this article, though certainly a question that merits more attention and research, is the question of how information would need to be designed to actually have an effect on the user and influence her behavior, taking into account the specific characteristics of digital information markets. As a final introductory remark, it is not the intention of this article to argue that an informational approach could replace (some of the) existing safeguards for media diversity. Media transparency, however, could become a complementary measure to empower people to make better and more diversified media choices. This article will conclude with some suggestions for a possible “diversity label.”

### **THEORETICAL BACKGROUND: CHANGING MARKETS, THE CALL FOR MORE CONSUMER AUTONOMY IN MEDIA POLICY, AND POSSIBLE JUSTIFICATIONS FOR AN ALTERNATIVE INFORMATION-BASED APPROACH**

For decades, the prime concern of European media laws and policies was the management of spectrum scarcity and the creation of a “healthy” public sphere. “Healthy” in this context referred at first to a “diverse” offering of media content.<sup>12</sup> A well-balanced diet of media content from different sources and reflecting different viewpoints, ideas, and ideals was (and still is) widely perceived as the matrix for cultural exchange, democratic participation, and personal self-deployment. Media laws and policies were designed to foster the openness of markets and platforms for anybody who wanted to speak up – the more the better. But more can become too much. The arrival of digital technologies, the end of scarcity, and ultimately the proliferation of the Internet created a new problem: people will not and cannot consume all the diverse content they are presented with. They have to make choices. But how will they choose? And probably even more importantly: will they choose diversely? The realization of media diversity depends more than ever on users and the choices they make.

When choosing media content, users do this in a more and more commercialized and interactive programming landscape. Some argue that under these circumstances, viewers enjoy a new power, as consumers, to influence program output.<sup>13</sup> More audiovisual content is offered by more commercial organizations. Suppliers must expect to be held accountable by consumers for the content they offer. Accordingly, it has been suggested that choice and competitive pressure empower viewers, in their capacity as consumers, to express specific preferences and demand programs that correspond

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<sup>12</sup> See for example Council of Europe, Recommendation No. R(99)1; Council of Europe, Declaration on Cultural Diversity, 7 December 2000; Council of Europe, Declaration of the Committee of Ministers on Protecting the Role of the Media in Democracy in the Context of Media Concentration, 31 January 2007; Council of Europe, Recommendation Rec (2007) 2 on Media Pluralism and Diversity of Media Content, adopted by the Committee of Ministers on 31 January 2007.

<sup>13</sup> Margaret Scammell, “The Internet and Civic Engagement: The Age of the Citizen-Consumer,” *Political Communication* 17 (2000): 351, 354.

to their civic interests.<sup>14</sup> The improved possibilities for consumers to control their media consumption and even influence the program offerings has been a reason for policymakers in Europe to argue for more consumer autonomy and less government involvement with media consumption. “Commercial and technological developments give users increased choice and responsibility in their use of audiovisual media services.”<sup>15</sup> In response, the Audiovisual Media Services Directive, while extending its scope to on-demand services, calls for more flexibility and user responsibility. Users must be able to take the protection of their interests into their own hands.<sup>16</sup> Similarly, the Council of Europe acknowledges that the audience, enabled through new technologies, can play an increasingly active role in program choice and protecting its interests.<sup>17</sup>

Having said that, in order to make choices, users need information. This is particularly true for media content as an “experience good.” For users (as consumers) it is often difficult, if not impossible, to anticipate the characteristics and value of a piece of media content before they have had the chance to experience it (experience good).<sup>18</sup> And while some information, such as the title or length of a film, may be relatively easy to find, other pieces of information, such as journalistic or artistic quality, are difficult to judge for most users, even after they have consumed a digital content product or service.<sup>19</sup> The need for pre-transactional information about digital content goods or services is further reinforced by the close link between digital content and the technical format in which it is provided. Aspects of technical standards and the compatibility of a piece of digital content with consumers’ equipment are critical for answering the question of whether users can actually access and play a particular piece of media content (this is particularly true in the cases of on-demand content and pay-TV which are commonly subject to technical protection measures).<sup>20</sup> The technological aspects, too, can be particularly difficult for users to see and grasp before they have a chance to experience them. The possible results are information asymmetries, namely in situations in which producers or vendors of digital content services and goods have more information about characteristics, functionality, licensing conditions, etc. than users. Information asymmetries can be one reason why individual members of the audience are not able to find the

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<sup>14</sup> Ibid. See also Heejo Keum, Narayan Devanathan, Sameer Deshpande, Michelle R. Nelson, and Dhavan V. Shah, “The Citizen-Consumer: Media Effects at the Intersection of Consumer and Civic Culture,” *Political Communication* 21 (2004): 370; and for a critical view see W. Lance Bennett, “Communication and Civic Engagement in Comparative Perspective,” *Political Communication* 17 (2000): 308-309.

<sup>15</sup> European Commission, Audiovisual Media Services Directive, Recital 81.

<sup>16</sup> Ibid., Recitals 47, 58.

<sup>17</sup> See for example Council of Europe, Recommendation Rec (2008) 6 of the Committee of Ministers to Member States on Measures to Promote the Respect for Freedom of Expression and Information with Regard to Internet Filters, 26 March 2008.

<sup>18</sup> Carl Shapiro and Hal R. Varian, *Information Rules: A Strategic Guide to the Network Economy* (Boston: Harvard Business Press, 1999), 5, 22; Phillip Nelson, “Information and Consumer Behavior,” *Journal of Political Economy* 78 (1970): 311-329; W.B.H.J. van de Donk, D.W.J. Broeders, and F.J.P.M. Hoefhagel, “Trends in het Medialandschap,” Report of the Scientific Council for Government Policy (Den Haag: WRR, 2005), accessed Oct. 13, 2011, <http://www.wrr.nl/dsc?c=getobject&s=obj&!sessionid=1gM35YuUCWRZ1zyOvofxaqys3h50uZxzY@p1K38LdWzmQW2wD1FEo9vhsUlyp3M0&objectid=2817&!dsname=default&isapidir=/gvisapi/>, 157.

<sup>19</sup> Manfred Kops, “Mängel einer marktlichen Bereitstellung,” in *Perspektiven der Gewährleistung freier öffentlicher Kommunikation*, ed. Wolfgang Schulz, Thorsten Held, and Manfred Kops (Baden-Baden: Nomos, 2002), 186.

<sup>20</sup> Natali Helberger, *Controlling Access to Content. Regulation Conditional Access in Digital Broadcasting* (Den Haag: Kluwer Law International, 2005), 34.

goods and services that match their preferences, or find it difficult to make truly informed or diversified choices.

A situation in which users are not able to identify media content based upon its value and whether it matches their preferences and technical possibilities, or if they are not able to distinguish high quality media content from content of a lower quality, can have negative effects on economic competition in digital content markets.<sup>21</sup> Maybe even more importantly for the given context, information asymmetries can affect ideological competition in the so-called marketplace of ideas. The marketplace of ideas model is one of the most popular and commonly advanced justifications behind media diversity as a policy goal.<sup>22</sup> The ability of users to make effective choices is affected if they lack the necessary information to make truly informed choices. Not only do users need “information about information” to be able to choose the “best” offers from all the information available in the marketplace, this information has to be delivered in a manageable format that allows comparison. Otherwise, the risk is that users will not be aware of the content that is relevant and valuable in advancing the goals that are commonly associated with media diversity, such as wiser political decision-making, the finding of truth, or democratic deliberation. Moreover, low quality media content may occupy the precious resource that user attention is, to the disadvantage of more valuable content.

Disclosure requirements and transparency-enhancing measures are a classic response to information asymmetries.<sup>23</sup> Providing consumers with information about the main characteristics, price, etc. of a product or service empowers them to make fair and advantageous bargains, while encouraging price and quality competition on the side of sellers.<sup>24</sup> To that extent, information rules also have an important role in promoting and facilitating functioning competition through making sure that the interaction between offer and demand results in a choice for consumers that reflects their needs and interests. This explains why in consumer law and policy, consumer information rules are widely acknowledged as one of the single most important tools to realize consumer policy objectives.<sup>25</sup> The primary goal of these rules is to improve consumer autonomy and freedom of choice.<sup>26</sup>

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<sup>21</sup> Kops, 185, arguing that the case of market failure may be stronger for some types of content (e.g. news or political commentary) than others (e.g. films and entertainment).

<sup>22</sup> Philip M. Napoli, “The Marketplace of Ideas Metaphor in Communications Regulation,” *Journal of Communication* 49, no. 4 (1999): 151-169; Frederick Schauer, *Free Speech: A Philosophical Enquiry* (Cambridge: Cambridge University Press, 1982), 15-34.

<sup>23</sup> Michael Fritsch, Thomas Wein, and Hans-Jürgen Ewers, *Marktversagen und Wirtschaftspolitik*, 3rd ed. (Munich: Verlag Vahlen, 1999), 294-295; Markus Rehberg, “Der Staatliche Umgang mit Information – Das europäische Informationsmodell im Lichte von Behavioural Economics,” in *Ökonomische Analyse der europäischen Zivilrechtsentwicklung*, ed. Thomas Eger and Hans-Bernd Schäfer (Tübingen: Mohr-Siebeck, 2007), 306.

<sup>24</sup> Howard Beales, Richard Craswell, and Steven Salop, “Information Remedies for Consumer Protection,” *The American Economic Review* 71 (1981): 410-413.

<sup>25</sup> Stefan Grundmann, “Information, Party Autonomy and Economic Agents in European Contract Law,” *Common Market Law Review* 39 (2002): 269; Gillian K. Hadfield, Robert Howse, and Michael J. Trebilcock, “Information-Based Principles for Rethinking Consumer Protection Policy,” *Journal of Consumer Policy* 21 (1998): 158; Rehberg, 298-371; Howells, 352-370.

<sup>26</sup> Norbert Reich, “Diverse Approaches to Consumer Protection Philosophy,” *Journal of Consumer Policy* 14 (1992): 258-259.

Beyond being a tool to empower users to make autonomous and satisfactory choices, consumer information is also increasingly being explored and employed as a means of steering or “nudging” users towards socially desirable choices. By providing consumers with “relevant” information about the nutrition content of food products, about the labor and economic conditions under which certain products are produced (fair trade), the safety of certain production methods for animals (e.g. tuna-friendly fishing techniques), or the environmental impact of their choices, users are assisted in making not only choices, but also choices that are socially and environmentally responsible.<sup>27</sup> The appeal of consumer information as a form of “asymmetrical paternalism”<sup>28</sup> derives from the fact that it enables governments to guide users towards the “right” choices, while leaving market mechanisms, the variety of products and services, and users’ autonomy intact.<sup>29</sup>

It has been argued that an informational approach is particularly promising for areas in which consumer preferences differ widely with respect to particular product characteristics, and there is a lack of political consensus on regulation.<sup>30</sup> In such situations, an informational approach as a form of “asymmetrical paternalism” is more likely to benefit those that may profit from some kind of government intervention, while imposing little harm or burdens on those who do not (for example, because they are politically or culturally interested in particular, and well-educated, and hence more likely to make well-informed choices).<sup>31</sup>

This observation is relevant in the context of diversity policies as well. Here the interests and preferences of the audience are as heterogeneous as the way they use the media. Moreover, because of the aforementioned constitutional constraints, the possible role of governments is very limited. Even if there were a consensus on which goals to pursue with respect to exposure diversity and how to achieve them, government intervention would tread dangerously close to the edge of prohibited interferences with the fundamental right to freedom of expression and other fundamental freedoms. In such a situation, an informational approach to promoting exposure to diverse content (“exposure diversity”) could potentially be attractive and may be one of the few options that are actually constitutionally feasible. Informing consumers about their choices (in the hope that they will make

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<sup>27</sup> Howells, 355; Elise Golan, Fred Kuchler, and Lorraine Mitchell, “Economics of Food Labelling,” *Journal of Consumer Policy* 24 (2001): 118; Iain Ramsay, “From Truth in Lending to Responsible Lending,” in *Information Rights and Obligations: A Challenge for Party Autonomy and Transaction Fairness*, ed. Geraint Howells, Andre Janssen, and Reiner Schulze (Ashgate, UK: Aldershot, 2005), 47; Caoimhín MacMaoláin, “Ethical Food Labelling: The Role of European Union Free Trade in Facilitating International Fair Trade,” *Common Market Law Review* 39 (2002): 295-314; Torsten Steinrücken and Sebastian Jaenichen, “The Fair Trade Idea: Towards an Economics of Social Labels,” *Journal of Consumer Policy* 30 (2006): 201-217. For more critical perspectives see Klaus G. Grunert and Josephine M. Wills, “A Review of European Research on Consumer Response to Nutrition Information on Food Labels,” *Journal of Public Health* 15 (2007): 385-399; Gabriele Jahn, Matthias Schramm, and Achim Spiller, “The Reliability of Certification: Quality Labels as a Consumer Policy Tool,” *Journal of Consumer Policy* 28 (2005): 53-73.

<sup>28</sup> Colin Camerer, Samuel Issacharoff, George Loewenstein, Ted O’Donoghue, and Matthew Rabin, “Regulation for Conservatives: Behavioral Economics and the Case for ‘Asymmetric Paternalism,’” *University of Pennsylvania Law Review* 151, no. 3 (2003): 1211-1254.

<sup>29</sup> Hanno Merkt, “Disclosure Rules as Primary Tool for Fostering Party Autonomy,” in *Party Autonomy and the Role of Information in the Internal Market*, ed. Stefan Grundmann, Wolfgang Kerber, and Stephen Weatherill (Berlin: De Gruyter, 2001), 234.

<sup>30</sup> Golan, Kuchler, and Mitchell, 145.

<sup>31</sup> Camerer, et al.

the right ones) has been repeatedly advanced as a preferable route to the traditional, paternalistic approach in media regulation – which regulates the offering and pre-defines choices.<sup>32</sup> Having said that, to the knowledge of the author, a more comprehensive discussion of the informational approach to exposure diversity is still missing.

Arguably, a transparency approach to exposure diversity fits rather smoothly in the marketplace of ideas. In the logic of the marketplace of ideas metaphor, consumer information and media transparency can be understood as a means to overcome information asymmetries. Compared to other forms of government intervention, consumer information is generally considered the least intrusive form of intervention, leaving plenty of room for individual autonomy.<sup>33</sup> But also in the deliberative conception of media diversity, the second of the grand theories to explain the objectives of media diversity as a policy goal,<sup>34</sup> a transparency approach could have its place. The deliberative conception of media diversity policies stresses the importance of democratic participation and deliberation as important functions and preconditions of media diversity. A necessary precondition for participation and deliberation is that citizens are accurately and properly informed about the diversity of topics and ideas relevant to a society. In an age when it is not content that is scarce, but users' time and attention, users moreover need information that enables them to make conscious and well-informed selection decisions out of the diversity of content offered.

## THE POTENTIAL AND LIMITS OF AN INFORMATIONAL APPROACH TO MEDIA DIVERSITY

This section explores what the realistic contribution of media transparency could be for the realization of (exposure) diversity as a policy goal. Taking the existing provisions and policy recommendations as a point of departure, it seeks to identify the types of information that users would be most likely to need in order to make diverse media consumption decisions. To what extent does the existing legal framework already cater for these informational needs? And what are the potential limits to an informational approach, taking into account experience from consumer law and policy?

Before these questions can be answered, however, another question needs answering first. What role does exposure to diverse content (“exposure diversity”) play in the realization of the policy goals

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<sup>32</sup> Beata Klimkiewicz, “Is the Clash of Rationalities Leading Nowhere? Media Pluralism in European Regulatory Policies,” in *Press Freedom and Pluralism in Europe: Concepts and Conditions*, ed. Andrea Czepek, Melanie Hellwig, and Eva Nowak (Bristol: Intellect, 2009), 68; Roger Silverstone, “Regulation, Media Literacy and Media Civics,” *Media, Culture & Society* 26 (2004): 447 (“very little critical attention has been given either to literacy or civics as an alternative to the blunderbuss of media regulation, or to the possibility of developing an ethical agenda which would inform such a project.”); Maria Sourbati, “Digital Television, Online Connectivity and Electronic Service Delivery: Implications for Communications Policy (and Research),” *Media, Culture Society* 26 (2004): 588; Cass R. Sunstein and Richard H. Thaler, “Libertarian Paternalism Is Not an Oxymoron,” *University of Chicago Law Review* 70 (2003): 1159-1202.

<sup>33</sup> Grundmann, 279; Howells, 355; Chris Willett, “Autonomy and Fairness: The Case of Public Statements,” in *Information Rights and Obligations: A Challenge for Party Autonomy and Transaction Fairness*, ed. Geraint Howells, Andre Janssen, and Reiner Schulze (Ashgate, UK: Aldershot, 2005), 1-16.

<sup>34</sup> Schauer, 35-59; Karppinen, 50-55.

behind media diversity? Why do we want people to choose diversely, and what characterizes a diverse choice? Informational needs, and also the potential of transparency to realize or at least promote exposure diversity, are closely linked to the understanding of exposure diversity as a potential goal for media law and policy. Although there is a considerable amount of literature describing the different rationales behind the protection and promotion of media diversity as a policy goal, there has been little discussion of the effects on the audience that media policymakers hope to achieve through exposure to diverse media. Based on the most common existing theories justifying the value of media diversity as a policy goal, as well as the role that the media play in this context, this section attempts a first conceptualization of exposure diversity as a policy goal and the possible role that information could play.<sup>35</sup>

***Different Conceptions of Exposure Diversity as a Media Policy Goal and the Possible Role that an Informational Approach Could Have in Realizing Those Goals***

There are at least two possible angles from which to approach exposure diversity as a policy goal. One is the *autonomous choice* approach. Central to the autonomous conception of exposure diversity is respect for personal autonomy and individual choice, which again flows from the acknowledgement of personal dignity and equality.<sup>36</sup> Thus, it can be argued that the primary goal behind a policy to realize exposure diversity according to the autonomous conception would be to enable or empower the individual to realize her personal freedom of choice and self-fulfillment through the media contents she decides to consume. This does not preclude (or negate) that the individual can be acting as a member of society and for reasons beyond the fulfillment of purely self-centered needs – in other words, acting as a citizen, not as a consumer. Still, it should be up to the individual to choose. The primary benchmark for assessing her choices should be whether they adequately reflect her personal preferences. Accordingly, the role of information about media content in this context must be first and foremost to provide users with the kinds of information needed to decide which content best matches their interests and preferences, and to counter potential information asymmetries. This corresponds to the classic understanding of consumer information as a means for healing information asymmetries and to enable consumers to make informed choices.

A number of possible conceptions of media diversity could be summarized under the header of “principled consumption.” Here, media diversity and the choice of diverse media content must not only serve the fulfillment of individual preferences and wishes. It also serves a higher democratic goal. Which goal this is depends on the underlying conception of media diversity. One possible conception could be the discovery of (political) truth and informed political decision-making, according to the marketplace of ideas conception of media diversity. From the perspective of cultural diversity, the goal of exposure to diverse cultural expressions would not be so much the identification of a single true, better, or more valuable culture. Instead, it could be the aspect of mutual enrichment, understanding, and bringing people together that is the reason why media

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<sup>35</sup> For a more elaborate conceptualization, see Natali Helberger, “Diversity by Design,” paper presented at the *Digital Diversity: Serving the Public Interest in the Age of Broadband* Workshop, Fordham University, New York, May 3-5, 2011 (in press at *Journal of Information Policy*).

<sup>36</sup> Schauer, 61.

policymakers wish people to choose diversely.<sup>37</sup> In a more *deliberative* conception of media diversity, one might argue that it is not truth, wise decision-making, or respect for different cultures that should be the benchmarks for “valuable” exposure, but also, and maybe even primarily, the contribution of diversity of exposure to democratic participation. Central to this conception could be exposure to a select number of quality outlets or general interest intermediaries, which function not only as sources of diverse information but also as “participatory spaces” of informed engagement in the democratic debate.<sup>38</sup> Common to all the different possible conceptions of exposure diversity discussed here as “principled consumption” is the aspect of guidance and leading users to “relevant” and “quality” content. Media transparency could have different roles to play in that context, ranging from the facilitation of comparison, assisting users in making qualitative assessments (which then again could influence [the diversity of] their choices), and the promotion of exposure to particular types of content – and to possibly helping consumers to choose the “right mix.”

**Facilitating comparison:** As mentioned above, a traditional task of information and transparency is to facilitate comparison. The element of comparison is inherent in the marketplace of ideas conception of media diversity, and an important driver behind economic and ideological competition.<sup>39</sup> In a more deliberative understanding of media diversity, however, the process of comparing and weighing is an important element of engagement with diverse content and democratic participation.<sup>40</sup> To that extent, one could argue that a role for media transparency could be to improve users’ ability to weigh and compare different content on their relevancy for democratic debate, understanding of different cultures, and contribution to the deliberation of matters of societal or political relevance.<sup>41</sup> An essential precondition is, of course, that users receive the necessary information and that the information is delivered in a format that allows for comparison.

**Enabling media users to assess media content on its value and possible contribution to a diverse media diet:** To the extent that media information has already been considered as a means for promoting media diversity more generally, it has been envisaged as a means to help users assess media content’s value and place it in a larger context. As early as 1994, the Council of Europe

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<sup>37</sup> Council of Europe, Recommendation Rec (2007) 2.

<sup>38</sup> Ibid.

<sup>39</sup> For example, compare with Schauer, 66 (“This appears to be a powerful argument for diversity of opinion as a valuable goal, because that diversity places before us for consideration a wide range of what may turn out to be more advantageous alternatives.”). See also Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government* (New York: Harper, 1948), 25 (“The voters, therefore, must be made as wise as possible. The welfare of the community requires that those who decide issues shall understand them... This in turn requires that so far as time allows, all facts and interests relevant to the problem shall be fully and fairly presented to the meeting. Both facts and interests must be given in such a way that all the alternative lines of action can be wisely measured in relation to one another.”).

<sup>40</sup> See Cass Sunstein, *Republic.com 2.0* (Princeton, NJ: Princeton University Press, 2007), 42 (“[T]o the extent that both citizens and representatives are acting on the basis of diverse encounters and experiences and benefiting from heterogeneity, they are behaving in accordance with the highest ideals of the constitutional design.”).

<sup>41</sup> Ibid., 199 (“In light of the possible aspirations of most viewers, the possible result of disclosure will be to improve the quality and quantity of both educational and civic programming in a way that promotes the goals of a well-functioning deliberative democracy.”).

stressed that “media transparency is necessary to enable members of the public to form an opinion on the value which they should give to the information, ideas, and opinions disseminated by the media.”<sup>42</sup> Though the audience’s valuation of particular kinds of content may not be directly related to the diversity of choices they make, one can argue that media diversity policies, in order to be effective in an age of digital abundance, would not only need to provide users with a diversity of media content, but also help them to actually make sense of that diversity, by enabling them to assess and choose content based on its potential value. Diversity of choices under conditions of abundance is the result of conscious selection decisions, which again are based on the overall valuation of particular contents. Transparency could also assist the audience in reaping the benefits of diverse media offerings. From this perspective, the Council of Europe suggested that the audience should have “access on an equitable and impartial basis to certain basic information on the media,” namely the information that enables the audience to judge the value of media content.<sup>43</sup> More generally, the Council calls on member states to “prompt the media to take any measures which could allow the public to make its own analysis of information, ideas and opinions expressed in the media.”<sup>44</sup> Also, the potential role of media information as an aid to judge media content has been acknowledged at the level of the European Union.<sup>45</sup>

A related consideration in this context is that enabling users to make informed and diverse decisions can also help them exercise a positive effect on media diversity. For example, as Sunstein hopefully suggests, “[i]f viewers know the nature of network policies in advance, they can impose market pressures by watching more or less; broadcasters are of course responsive to those pressures.”<sup>46</sup> This approach raises yet again the question of empowerment and of providing users with the appropriate tools that will allow them to hold the media accountable.

**Promoting exposure to particular types of content:** The role of consumer information as a means to signal particularly socially desirable choices has been discussed earlier in the context of food labeling and the advancement of fair trade, environmental, or other social policies. Similarly, one could also argue that in the area of media law and policy, consumer information could be a tool to draw the attention of users to different types of content they would normally not choose, that are less visible or that originate from suppliers who are particularly committed to media diversity, such as public broadcasters. By drawing the users’ attention to particular items of content, or characteristics of that content, media information can help to single out certain content and influence competition for the attention of users in favor of that content. This could be content from a particular provider (e.g. a public broadcaster) or of a particular kind (e.g. special events of

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<sup>42</sup> Council of Europe, Recommendation No. R(94)13.

<sup>43</sup> *Ibid.*, Appendix, Guideline No. 1. The Council further determines that any initiative to provide the audience with more information about the media is bound to the limits posed by economic rights and freedoms, as well as the requirements of data protection, commercial secrecy, the confidentiality of the sources of the media, and editorial secrecy.

<sup>44</sup> Council of Europe, Recommendation Rec (2007) 2.

<sup>45</sup> European Commission, Audiovisual Media Services Directive, Recital 43.

<sup>46</sup> Sunstein, *Republic.com 2.0*, 196. In this sense probably also Council of Europe, Recommendation No. R(99)1.

particular importance to the public agenda, contributions of cultural minorities, political programming, etc.).

**Choosing the right mix:** Occasionally, consumer information can be a means to not only inform users about a particular item, product, or service, but also to encourage “balanced consumption.” Probably the most well-known example is nutrition information in the form of so called “food pyramids” or “traffic lights.”<sup>47</sup> Based on scientific evidence about the proportions of meat, bread, grain and other starches, fats, fruit, and vegetables that characterize a healthy diet, food pyramids complement nutrition information and inform consumers about the “right mix” of the different items. The potential of consumer information to inform consumers about the right mix is of course potentially interesting from a media diversity policy perspective. Ultimately, it is the overall mix of content from different sources, categories, geographical areas, and topics that determines whether exposure to media content is diverse.<sup>48</sup>

### *Information Requirements According to the Different Roles that Media Transparency Could Play in the Realization of Exposure Diversity*

The section that follows makes suggestions of (types of) information users might need in order to be enabled to make “diverse” choices. It goes without saying that to truly identify concrete information needs and the effect of such information on exposure to diverse media content, empirical research into user decision-making behavior is needed. Such research exceeds the scope of this study. In this perspective, the suggestions made here cannot be more than a first informed guess, based on the requirements of the different conceptions of exposure diversity as a policy goal. Still, they could serve as a point of departure for such research. For the sake of clarity, this section assumes, somewhat simplistically, that users, when making autonomous choices from diverse media offerings act first and foremost in their capacity as sovereign consumers, while in the context of “principled consumption” they take on the added identity of citizens. Having said that, it is obvious that in reality those two identities of the user can overlap.

**Information requirements that enable autonomous choice of media content:** Wilhelmsson helpfully distinguishes between five different types of pre-contractual information that users (as consumers) need in order to make informed choices,<sup>49</sup> including information about the provider, the main characteristics, price, terms and conditions,<sup>50</sup> as well as legal information. Regarding the question of what the main characteristics of diverse media content are, useful guidance is provided

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<sup>47</sup> Livestrong.com, “Why Is a Balanced Diet Essential for Good Health?” accessed Oct. 13, 2011, <http://tinyurl.com/6ck65x6>.

<sup>48</sup> Compare with Wolfgang Hoffmann-Riem, “National Identity and Cultural Values: Broadcasting Safeguards,” *Journal of Broadcasting* 31, no. 1 (1987): 57-72, identifying four different dimensions of diversity: contents, formats or categories, sources, and geographical coverage.

<sup>49</sup> Thomas Wilhelmsson, “Private Law Remedies against the Breach of Information Requirements of EC Law,” in *Informationspflichten und Vertragsschluss im Acquis communautaire*, ed. Reiner Schulze, Martin Ebers, and Hans Cristoph Grigoleit (Tübingen: Mohr Siebek, 2004), 250.

<sup>50</sup> This can include information about the main characteristics of the goods and services; information on services and guarantees after sales; arrangements for payment, delivery, performance, and complaint handling; the commercial character of communications; clear identification of promotional offers; competitions; and games.

by the differentiation formulated by Hoffman-Riem, who identifies four dimensions of diversity: diversity of formats or categories (education, information, sports, entertainment, etc.), of sources, of geographical coverage, and of contents.<sup>51</sup> Accordingly, one could argue that users should at least be informed, in addition to information about the provider (source of the content), terms and conditions, prices, etc., about the format, geographical coverage, and content. In addition, information about the technical requirements and limitations is increasingly gaining practical importance (see the *Theoretical Background* section above).

Of all these aspects, only information about the provider has received some attention in the diversity policy discourse so far. As the European Commission phrased it, because of the “specific nature of audiovisual media services, especially the impact of these services on the way people form their opinions,”<sup>52</sup> the aforementioned Article 5 of the Audiovisual Media Services Directive (AVMSD) introduced the obligation to provide the user with certain information about the source of audiovisual content. Interestingly, an earlier version of the proposal emphasized that it was “essential for users to know exactly who is responsible for the content of these services. It is therefore important for Member States to ensure that media service providers make easily, directly, and permanently accessible the necessary information on who has editorial responsibility for the content.”<sup>53</sup> In the final version of the directive, the need to know who has editorial responsibility has been replaced by the more neutral (and vague) reference to the importance for users of having “easy and direct access at any time to information about the media service provider.” This resulted ultimately in the obligation to provide users with the name of the service provider, the geographical address at which the media service provider is established, its e-mail address or website (which allow it to be contacted rapidly in a direct and effective manner), and where applicable the competent regulatory or supervisory body.<sup>54</sup> This provision copied quite literally a comparable provision in the Electronic Commerce Directive.<sup>55</sup> This is interesting as it seems to suggest that despite the “specific nature of audiovisual media services,” the Directive seems to assume that the information obligations in general consumer law can be equally useful in advancing the interests of the

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<sup>51</sup> Hoffman-Riem, 57-72.

<sup>52</sup> European Commission, Audiovisual Media Services Directive, Recital 45.

<sup>53</sup> European Parliament and Council of the European Union, Proposal for a Directive Amending Council Directive 89/552/EEC on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Pursuit of Television Broadcasting Activities {SEC(2005) 1625} {SEC(2005) 1626}, COM/2005/0646 final - COD 2005/0260/, Recital 29.

<sup>54</sup> Compare *Ibid.*, Article 3c and European Parliament and Council of the European Union, Directive 2007/65/EC of 11 December 2007 amending Council Directive 89/552/EEC on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Pursuit of Television Broadcasting Activities (Text with EEA relevance) OJ L 332, 18.12.2007, 27–45, Art. 3a.

<sup>55</sup> Article 5 of the E-Commerce Directive requires service providers to provide consumers with information about the name of the service provider; the geographic address at which the service provider is established; the details of the service provider, including his electronic mail address, which allow him to be contacted rapidly and communicated with in a direct and effective manner; where the service provider is registered in a trade or similar public register; the trade register in which the service provider is entered and his registration number, or equivalent means of identification in that register; where the activity is subject to an authorization scheme; the particulars of the relevant supervisory authority; etc. European Parliament and Council of the European Union, Directive 2000/31/EC of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market (Directive on electronic commerce) OJ L 178/1 (17.07.2000).

audiovisual consumer. A less optimistic reading of Article 5 of the AVMSD would conclude, however, that the Directive has simply not dedicated much consideration to the actual informational needs of the audiovisual consumer, in light of the possible role of media information for the realization of media diversity. This latter interpretation is supported by the absence of a comprehensive discussion about the goals and wording of the provision in its preparatory phase, as well as by comparison with further-reaching suggestions, including those of the Council of Europe<sup>56</sup> (for more detail see the next subsection below).

Article 5 of the AVMSD is quite clearly a reference to the information obligations in the E-Commerce Directive, and thus to general consumer law; but unlike the relevant provision in the E-Commerce Directive or general consumer law, Article 5 does not require providers to furnish any information about eventual pricing, main characteristics,<sup>57</sup> or conditions of access. This omission can probably be partly explained by the fact that for a long time, the prominent business model for the provision of audiovisual content has been advertising-financed or publicly-funded services. In both cases, no direct commercial relationship exists between providers and users. Having said that, even in the case of advertising or publicly-funded broadcasters, users do pay a price for viewing. The currency for access to a diverse program offering can come in the form of euros or dollars like in the case of pay-TV or on-demand services, but also in the form of attention (arguably in commercial television, users pay a higher fee by being exposed to more advertising than in public television), a loss of autonomy (e.g. electronically enforced usage restrictions in exchange for lower pricing or as a precondition of access), or personal data – the new currency of the digital economy. Research has demonstrated that the need to pay for television influences users' choices and exposure more than the number of channels available to users.<sup>58</sup> In light of this, one could argue that in order for users to be truly empowered to make diverse programming decisions, they would also need to receive information about pricing and other possible conditions of delivery.<sup>59</sup>

Another question is to what extent users are already legally entitled to receive the aforementioned items of information, taking into account both audiovisual policy as well as consumer law. On the one hand, audiovisual services are commonly excluded from the application of general rules on consumer information (which stipulate, among others, that consumers must be provided with information about the price, main characteristics, eventual technical restrictions, etc.).<sup>60</sup> On the other hand, in situations where a direct commercial relationship between provider and user is missing, the "pre-contractual" information obligations under general consumer law will typically not apply. In other words, Article 5 of the AVMSD addresses the informational needs of audiovisual users as autonomous decision makers only very sporadically, as does existing consumer law. As a result, users

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<sup>56</sup> Council of Europe, Recommendation No. R(94)13.

<sup>57</sup> Which could be in the case of media content information about format, content, geographical origin, etc.

<sup>58</sup> Cooper and Tang.

<sup>59</sup> *Ibid.*, 410.

<sup>60</sup> For example audiovisual media services and radio broadcasting are excluded from the scope of application of the Service Directive, Art. 2(2)(g) Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on Services in the Internal Market ("Service Directive"), OJ L 376, (27.12.2006).

of media content experience a legislative gap – at least to the extent that the sector does not provide the necessary information voluntarily.<sup>61</sup>

In conclusion, at present audiovisual consumers are unlikely to receive the information they need to make well-informed and autonomous viewing decisions. Unlike consumers of any other service, audiovisual users can only expect limited information about the name and contact details of the provider of the services. It is difficult to imagine how this information can empower users to make autonomous and well-informed program choices.

**Information requirements at the level of principled choice:** At the level of principled choice, the potential role of media information shifts from empowering users as active market participants to more of a steering function: informing users about the broader implications of their choices, and possibly even encouraging the “right” choices. The previous section identified a number of ways in which media information could contribute to the realization of the goals behind exposure diversity as a potential policy objective, notably enabling users to assess media content based upon its value and possible contribution to a diverse media diet, promoting exposure to particular types of content, and, possibly, helping consumers choose the right mix.<sup>62</sup> The following section discusses the extent to which existing transparency policies already incorporate these elements, and how future transparency policies could be designed to do so. To this end, it also demonstrates the lessons that could be learnt from the user of consumer information in other policy areas, such as food or environmental policy.

*Enabling media users to assess media content upon its value and possible contribution to a diverse diet:* As both the Council of Europe and the European Commission have emphasized, an important element of making diverse choices is that users are able to assess media content upon its value. There is probably little doubt that knowledge about the source of information, as both the Council and the Commission advocate, is of crucial importance in this context.<sup>63</sup> In particular, the Council of Europe puts forward detailed suggestions as to what kinds of information are needed for this objective. More specifically, the Council distinguishes among three categories of information, which should be subjected to disclosure: 1) information concerning the persons or bodies participating in the structure which is to operate the service; 2) information on the nature and the extent of the interests

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<sup>61</sup> Note that some types of information are already traditionally provided to consumers, such as category or a brief description of content. Other information, such as information about technical characteristics and compatibility, geographical restrictions, or pricing is less commonly provided.

<sup>62</sup> The aspect of enabling comparison will be discussed in the context of the sub-section *Information Overload, and the Need to Inform Effectively* below, since it is essentially about the way information is being presented.

<sup>63</sup> For example, users can generally assume that content from the public broadcaster must comply with a particularly strict set of rules to provide consumers with a qualitative and diverse program offering. See for example Wolfgang Mühl-Benninghaus and Axel Zerdick, *Ökonomie der AV-Medien* (Berlin: Vistas, 2000), 20, speaking of “transparency of responsibility” (“Transparenz der Verantwortung”). In this context, the Council of Europe was particularly concerned that the tendency toward media concentration could make it more difficult for the public to recognize the identity and motives of a service provider. Council of Europe, Recommendation R(94)13.

held by the above persons and bodies; and 3) information on other persons or bodies likely to exercise a significant influence on programming policies.<sup>64</sup>

In later recommendations, the Council of Europe added information regarding support measures granted to the media.<sup>65</sup> Interestingly, for the press sector and the press sector only, the Council added an additional information requirement, which is defined as any information or statements of either editorial policy or political orientation.<sup>66</sup> It would seem that these are crucial types of information when trying to assess the value and trustworthiness of a piece of media content. Why should such information be reserved to users of press products only?

The question remains of the usefulness of the information suggested by the Council for users when assessing media content upon its value and whether additional or different information might be necessary. At this point, additional empirical research is probably needed. In this respect, it might be interesting to compare the Council's approach to informing users of other alternative approaches. An instructive example could be that of citizen journalism sites. The acceptance and popularity of citizen journalism sites depends quite critically upon their ability to help users make choices, and to provide users with the necessary information. Unlike the Council of Europe's suggestions, however, it is not so much structural factors that these sites choose to inform users about, but rather the status and experience of the author, whether he or she adheres to certain (acknowledged) quality standards or codes of conduct, the quality of the contribution itself, and also about the impact of the author's work, for example by displaying the number and content of comments.<sup>67</sup> In other words, information about the journalist behind a particular piece, her track record, earlier work, political attitude, etc. may be as useful as (or even more useful than) information about the operator of a broadcasting channel.

A last type of potentially useful information discussed here is information about the procedures in place to safeguard media diversity.<sup>68</sup> Again, this is an aspect that Article 5 of the AVMSD ignores. The further-reaching suggestion to inform users "about the ways in which editorial responsibility for the content is exercised and by whom,"<sup>69</sup> has not made it to the final version of that provision. The Council of Europe mentions in one of its later recommendations the need to provide users with

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<sup>64</sup> Council of Europe, Recommendation R(94)13.

<sup>65</sup> Council of Europe, Recommendation Rec (2007) 2.

<sup>66</sup> Council of Europe, Recommendation R(94)13.

<sup>67</sup> Natali Helberger, Andra Leurdijk, and Silvain de Munck, "User Generated Diversity: Some Reflections on How to Improve the Quality of Amateur Productions," *Communications & Strategies* 77 (2010): 71-72. For example, the citizen journalism site AgoraVox publishes for each citizen journalist a short biography and detailed statistics about the number of published articles, posted comments, received comments, acts of moderation and their results, and an overview of all previous articles. This way, a reader can get a fair impression of the expertise, background, and dedication of the author.

<sup>68</sup> Peggy Valcke, Robert Picard, Miklos Sükösd, Beata Klimkiewicz, Brankica Petkovic, Cinzia dal Zotto, and Robin Kerremans, "The European Media Pluralism Monitor: Bridging Law, Economics and Media Studies as a First Step towards Risk-Based Regulation in Media Markets," *Journal of Media Law* 2, no.1 (2010): 85-113.

<sup>69</sup> European Parliament and Council of the European Union, Committee on Culture and Education on the Proposal for a Directive amending Council Directive 89/552/EEC on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Pursuit of Television Broadcasting Activities (COM(2005)0646 – C6-0443/2005 – 2005/0260(COD)), PE 376.676v04-00, A6-0399/2006, 23 November 2006, Amendment 42.

information regarding the right of reply and complaint,<sup>70</sup> as well as transparency regarding the criteria according to which search results are selected, ranked, and prioritized or removed (which, according to the Council of Europe, can help to ensure “access to and pluralism and diversity of information and services”).<sup>71</sup> In a similar direction, suggestions have been put forward in the literature demanding disclosure about the way public issues are covered, and a diversity of views is being guaranteed<sup>72</sup> as well as information about the existence of structural and behavioral safeguards to prevent bias.<sup>73</sup>

*Promoting exposure to particular types of content:* Providing users with information about a particular type of media content can also be a way to draw users’ attention to that content and to signal relevance. Many of the labels that have been developed under food or environmental policy are designed to draw the attention of users to particularly valuable or socially desirable choices.<sup>74</sup> However, transferring this example to media law and policy obviously raises the difficult definitional question of what “relevant content” is. This could be the programs of public broadcasters, regional programs, or those of cultural and political minorities. It could be the so-called “important events”<sup>75</sup> as well as content of particular political or cultural importance. Finding an answer to this question is rendered more difficult by the fact that governments, when trying to determine relevance or quality of information, move close to the border of unconstitutionality, at least to the extent that they seek to influence the choice of viewers, or discriminate between particular types or categories of content.<sup>76</sup> Accordingly, in order to pursue this particular goal of media information, a related and at least as important question would need exploration first, namely who should be entitled to single out particularly noteworthy contents, and according to which criteria. For some preliminary thoughts on the institutional design of a labeling solution, the reader is referred to the *Diversity Label* section below.

*Consuming a diverse mix of information:* The same is probably true for the question of defining a sufficiently diverse mix of media content. According to the Council of Europe, “the notion of ‘media pluralism’ should be understood as diversity of media supply, reflected, for example, in the

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<sup>70</sup> Council of Europe, Recommendation Rec (2007) 2.

<sup>71</sup> Council of Europe, Committee of Experts on New Media, Draft Recommendation on the Protection of Human Rights with Regard to Search Engines, 11 March 2010.

<sup>72</sup> Sunstein, *Republic.Com 2.0*, 198.

<sup>73</sup> Valcke, et al., “The European Media Pluralism Monitor.”

<sup>74</sup> Golan, Kuchler, and Mitchell; Jahn, Schramm, and Spiller; Steinrücken and Jaenichen; Anke Möser, Christine Hoefkens, John van Camp, and Wim Verbeke, “Simplified Nutrient Labeling: Consumer’s Perceptions in Germany and Belgium,” *Journal für Verbraucherschutz und Lebensmittelsicherheit* 5 (2010): 169-180.

<sup>75</sup> At the European level, an attempt has been made to secure maybe not prominent but at least broad exposure to so-called “events of major importance for society.” These are defined as “outstanding events which are of interest to the general public in the Union or in a given Member State or in an important component part of a given Member State.” Member states are entitled to draw so-called lists of important events which must be widely available to the public (and therefore may not be shown exclusively on pay-TV). European Commission, Audiovisual Media Services Directive, Recital 52, Article 14. For a critical analysis, see Natali Helberger, “Brood en spelen - De implementatie van de evenementenlijst van artikel 3a van de Televisierichtlijn,” *Mediaforum* 3 (2002): 78-84.

<sup>76</sup> Peggy Valcke, *Digitale Diversiteit – Convergentie van Media-, Telecommunicatie- en Mededingingsrecht [Digital Diversity – Convergence of Media, Telecommunications and Competition Law]* (Brussel: Larcier, 2004), 200; Philip M. Napoli, “Rethinking Program Diversity Assessment: An Audience-Centered Approach,” *The Journal for Media Economics* 10 (1997): 66-67.

existence of a plurality of independent and autonomous media... as well as a diversity of media types and contents (views and opinions) made available to the public. Therefore both the structural/quantitative and qualitative aspects are central to the notion of media pluralism.” The Council, however, does not provide any guidelines on what these quantitative or qualitative aspects could be. Similarly, the European Commission contends that “[e]nsuring Media pluralism, in our understanding, implies all measures that ensure citizens’ access to a variety of information sources, opinion, voices etc. in order to form their opinion without the undue influence of one dominant opinion forming power.”<sup>77</sup> From this quote one can conclude at least that consuming information from one dominant source is not sufficient for a diverse program diet.

The aspect of “a right mix” with regard to a pluralistic offer has probably been discussed most extensively in the context of media concentration, and national media laws and regulatory policies have a tradition of setting minimum benchmarks regarding the number of different players in a market.<sup>78</sup> This still does not say anything about the “right” number of sources of media content consumers should ideally consume.<sup>79</sup> And while there are various attempts to measure the diversity of national media markets, these measurements do not automatically translate into guidance as to what a balanced media diet should be. It would be desirable to pursue more empirical research examining which types and proportions of content, categories, sources, etc. people need to consume in order to behave in accordance with the various goals that media diversity policies pursue, and it is important to acknowledge that the audience is heterogeneous not only in its interests and preferences, but also in the way it uses media and processes media content. Therefore even if it were possible to determine what the right mix is, translating it into a general approach to informing the user would be difficult, if not impossible, because the information needs of each viewer vary.

To conclude, at the level of principled choice, probably the most feasible and potentially useful contribution of media information to the realization of exposure diversity as a policy goal is to enable users to make better-informed judgments about the character and trustworthiness of a piece of media content and the commitment to media diversity of the provider of that content. In other words, the potential value of media information is probably reduced because it guides people towards consuming particular content or a particular mix of contents, rather than helping them to get a better grip on the diversity of the overall offering or assess individual content in that light, thereby hopefully increasing the chances of diverse exposure. Having said that, the importance of this aspect for the realization of effective media diversity policies must not be underestimated.

Though theoretically possible, as evidenced in other areas, using media information as a means to bring certain types of media content to the attention of users (the signaling effect of consumer

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<sup>77</sup> European Commission, Media Pluralism in the Member States of the European Union, Staff Working Document, SEC(2007)32, 16 January 2007, 5.

<sup>78</sup> Miriam van der Burg, Edmund Lauf, and Rini Negenborn, *Mediamonitor: The Dutch Media in 2010* (Hilversum: Commissariaat voor de Media, 2010), 22-32.

<sup>79</sup> Compare Council of Europe, Recommendation R(99)1; Council of Europe, Recommendation R (2007) 2.

information),<sup>80</sup> or creating an understanding of how diverse a diverse media choice should be, meets several serious obstacles, among them the question of who should decide, on the basis of which criteria, and according to which procedures. Particularly to the extent that government would be involved, such a situation would obviously raise serious concerns about undesirable levels of paternalism and unconstitutional interference with individual rights and freedoms.

Direct government involvement is of course not the only possible strategy (for a more extensive discussion about the institutional set-up, see the *Diversity Label* section below). At the autonomous individual level, it can be concluded that the lack of a more comprehensive discussion of media information has resulted in a situation in which users are informed only very incompletely. More generally, one could conclude that the existing European approach to media transparency lacks vision and more coherent and informed reflection on the possible goals, opportunities, and limits of an information approach to media diversity policies.

### *Potential Limits to an Informational Approach*

After having explored what the potential contribution of an informational approach to the realization of diverse exposure is, the next step must be to examine the potential limits of such an approach. Insights from experiences with an informational approach in consumer law will inform the analysis.

**Information overload, and the need to inform effectively:** The above discussion may lead to the conclusion that in order to make truly informed choices, users would need extensive information with regards to media content, including possibly the name, organizational structure, and financial independence of a content provider; information about the media content and the price and terms under which it is offered; information about the author or editor and their commitment to diverse representation, etc. The more information, however, the less likely it will actually be useful. Simply piling ever more information on the consumer will do nothing to further her interests, nor will it create incentives for providers to serve users with the highest quality of media content.<sup>81</sup> On the contrary, badly-designed consumer information can actually confuse or distract consumers, and can be costly and cause a competitive disadvantage for traders.<sup>82</sup> For this reason, an aspect that should be at the core of future information obligations for media content is the format and effectiveness of consumer information. Ideally, “effective” consumer information will not only inform users. It will

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<sup>80</sup> For example, this could be programs by providers that are particularly committed to media diversity, or programs that are considered important platforms for the realization of the policy objectives behind media diversity, such as the programs of public broadcasting.

<sup>81</sup> Rehberg, 40; Golan, Kuchler, and Mitchell, 117; Howells, 356; George A. Miller, “The Magical Number Seven, Plus or Minus Two: Some Limits on Our Capacity for Processing Information,” *Psychological Review* 63, no. 2 (1956): 81. See also European Commission, “Labelling: Competitiveness, Consumer Information and Better Regulation for the EU,” DG Sanco Consultative Document, Brussels: 2006, accessed Feb. 8, 2011, [http://ec.europa.eu/food/food/labellingnutrition/betterregulation/competitiveness\\_consumer\\_info.pdf](http://ec.europa.eu/food/food/labellingnutrition/betterregulation/competitiveness_consumer_info.pdf).

<sup>82</sup> Rehberg, 36.

also help them use that information and act upon it. Insights from behavioral economics further demonstrate the importance of presentational aspects.<sup>83</sup>

The contribution of Article 5 of the AVMSD to this question is again modest. According to Article 5, information shall be “easily, directly and permanently accessible,” though any reference to the form in which the information needs to be provided is missing. Similarly, the Council of Europe recommends that users should have access “on an equitable and impartial basis” to certain basic information on the media.<sup>84</sup>

Arguably, and leaning on experience from consumer law and policies, at least two important aspects in this context are missing. These are the aspects of information reduction and standardization. First, disclosure requirements, in order to be effective, need to respect the cognitive limitations of consumers as well as their restricted time and attention. Arguably, the problem of “information overload” is particularly critical in digital content markets. Here consumers are often confronted on a daily basis with an abundance of digital content from which to choose, but also with a variety of terms of use and privacy policies. Research suggests that users tend not to read lengthy documents, even if it would be in their interest to do so.<sup>85</sup> To be helpful to consumers, information needs to be reduced to the necessary minimum. Second, in order to enable users to compare different products, services, or types of media content, and make an informed choice, the information given would also need to be comparable, which again might require a certain level of standardization. In response to these challenges, consumer law and policy has experimented with simpler alternative ways of informing, for example through labeling. The *Diversity Label* section below will examine in more detail to what extent a labeling approach could also be fruitful in the context of media diversity policy.

### *Will They Follow? The Difficult Question of Incentives*

Information alone will have little or no effect on users’ decisions, if users do not have the capacity and will to use that information to make more diversified choices.<sup>86</sup> In this sense, there is a certain tension between, on the one hand, calling for consumer empowerment through information; and on the other hand, media law’s traditional perception of the user as a “passive viewer” or “consumer.” Consumers might act as some form of “anti-citizen” only interested in their narrow world and little

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<sup>83</sup> Rehberg; Golan, Kuchler, and Mitchell, 24; Beales, Craswell, and Salop; Omri Ben-Shahar and Carl E. Schneider, “The Failure of Mandated Disclosure,” John M. Olin Law & Economics Research Paper No. 516, University of Chicago Law School, 2010; Yannis Bakos, Florencia Marotta-Wurgler, and David R. Trossen, “Does Anyone Read the Fine Print? Testing a Law and Economics Approach to Standard Form Contracts,” Law & Economics Research Paper Series, Working Paper No. 09-40, New York University School of Law, NYU Center for Law, Economics and Organization, 2009; European Commission, *Consumer Behavior: The Road to Effective Policy-Making*, accessed Apr. 28, 2011, <http://ec.europa.eu/consumers/docs/1dg-sanco-brochure-consumer-behaviour-final.pdf>.

<sup>84</sup> Council of Europe, Recommendation No. R(94)13.

<sup>85</sup> Bakos, Marotta-Wurgler, and Trossen; Ben-Shahar and Schneider.

<sup>86</sup> Golan, Kuchler, and Mitchell, 146; Paul C. Stern, “Information, Incentives, and Pro-Environmental Consumer Behaviour,” *Journal of Consumer Policy* 22, no. 4 (1999): 461-478.

inclined to accept their civic responsibilities when zapping through programs – a discouraging prospect for media diversity indeed.<sup>87</sup>

In response, European media law and policy places much emphasis on the promotion of media literacy. Media literacy initiatives have the double task of improving the skills and abilities of individual users (including the ability to find diverse content) and to promote active citizenship by stimulating the audience's appetite for diverse media content. Some experts see here the most serious challenge for future diversity policies: “[a] provocative cultural policy task is far more difficult than creating a sound competitive economic basis for diversity in media market supply.”<sup>88</sup> One of the ultimate goals of media literacy initiatives must be, at least according to the European Commission, to enable users (as citizens) to make “diversified choices.”<sup>89</sup>

One may wonder whether the present focus on media literacy as the route to more responsible and media-wise decision-making places too much emphasis on the prospects of educating users, and too little on the importance of creating the right incentives for active engagement of users with the media. It is all very well to educate the user, but how realistic is it to assume that she has chosen certain programs simply because it made her a better citizen? What is really needed for an effective informational approach is a combination of information with the right incentives. Accordingly, maybe an even greater challenge than making the audience media literate is stimulating its enjoyment of the diverse and different. Schönbach touches on this point by reminding us of the importance of the “joy of new and unexpected information.”<sup>90</sup> In the same vein, Entman and Wildman suggest that it might be useful for communications policy to stress easy, speedy, yet playful access to a wealth of information and intellectual tools, rather than to a mere diversity of ideas.<sup>91</sup>

There is a growing body of research exploring the different options for supplementing traditional command and control measures with more incentive-based measures.<sup>92</sup> Examples include

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<sup>87</sup> According to Sunstein, “[c]itizens are not supposed merely to press their own self-interest, narrowly conceived, nor are they to insulate themselves from the judgment of others.” Sunstein, *Republic.com 2.0*, 37.

<sup>88</sup> Jan van Cuilenburg, “The Media Diversity Concept and European Perspectives,” paper presented at the *Media Economics, Content and Diversity Seminar*, Finnish Academy of Sciences, Helsinki, Dec. 16, 2002, 17.

<sup>89</sup> European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A European Approach to Media Literacy in the Digital Environment, Brussels, 20 December 2007, COM(2007) 833 final, Recital 10, 13, 15 (“Media literacy is today regarded as one of the key pre-requisites for an active and full citizenship in order to prevent and diminish risks of exclusion from community life.”) See also Council of Europe, Recommendation Rec (2007) 16 of the Committee of Ministers to Member States to Promote the Public Service Value of the Internet, 7 November 2007.

<sup>90</sup> Schönbach.

<sup>91</sup> Robert M. Entman and Steven S. Wildman, “Reconciling Economic and Non-Economic Perspectives on Media Policy: Transcending the ‘Marketplace of Ideas’,” *Journal of Communication* 42, no. 1 (1992): 5-19. See also Richard H. Thaler and Cass R. Sunstein, *Nudge: Improving Decisions about Health, Wealth, and Happiness* (New Haven: Yale University Press, 2008).

<sup>92</sup> Sunstein and Thaler; Thaler and Sunstein; Stern; Entman and Wildman; Wolfgang Schulz and Thorsten Held, *Regulierung durch Anreize: Optionen für eine anreizorientierte Regulierung der Leistungen privater Rundfunkveranstalter im Rundfunkstaatsvertrag* (Berlin: Vistas, 2011); Rebecca Balebako, Pedro G. Leon, Hazim Almuhiemedi, Patrick Gage Kelley, Jonathan Mugan, Alessandro Acquisti, Lorrie Faith Cranor, and Norman Sadeh, “Nudging Users Towards Privacy on Mobile Devices,” White Paper, Carnegie Mellon University, 2010, accessed Oct. 14, 2011, <http://www.andrew.cmu.edu/user/jmugan/Publications/chiworkshop.pdf>.

experiments with the addition of game elements, social elements, and technical solutions – for example “diversity by design.” The idea behind diversity by design is to design Electronic Programme Guides and search engines in a way that stimulates users’ sense for exploration and curiosity in the new and different.<sup>93</sup> And again, aspects of adequate presentation could form an additional trigger for users to act upon the information received. Labeling could have a potential role to play in this.

## DIVERSITY LABEL

Labels are a popular tool to steer the behavior of users towards socially desirable choices. Countless labels guide and inform consumers about the nutrition value of a product, whether it is fair trade or not; ecological, environmental, or animal-friendly; harmful; European or non-European; etc. There is broad agreement though that when designed properly, a label can reduce the costs of seeking information for consumers and can help them make more effective, better informed, socially desirable, and more diversified choices.<sup>94</sup> From the perspective of producers, labels have their advantages as well. They can signal quality and increase demand for particular products. Labels are a means to draw attention to one’s products, and even generate additional revenues.<sup>95</sup> Finally, from the perspective of governments, labels can be a useful instrument in the realization of particular policy objectives, improve market performance, and maybe most importantly for the given context, change the behavior of providers as well as of consumers.<sup>96</sup> This is not to say that labels are necessarily and always an optimal tool. The design of a good label is difficult and costly,<sup>97</sup> as is enforcement, especially if the producers are forced to disclose unfavorable information or information that would benefit competing products as well.<sup>98</sup> From the perspective of consumers, there is a danger of abuse and misinformation,<sup>99</sup> and bad labels can be confusing and add to the information overload, rather than reduce it.

Some labeling schemes are more successful than others, and a host of academic research is concerned with the question of how a successful labeling approach needs to be designed to actually influence behavior. Building on the experiences with labeling policies in other policy areas, this section considers the potential as well as the limits for a diversity label to help people in making more diversified choices. More specifically, it explores the diversity label as an alternative approach to informing users about the media service provider, and in a way that could help users to take diversity considerations into account when choosing media content.

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<sup>93</sup> Helberger, “Diversity by Design.”

<sup>94</sup> Golan, Kuchler, and Mitchell; Möser et al.; MacMaoláin.

<sup>95</sup> Möser et al.

<sup>96</sup> Golan, Kuchler, and Mitchell; MacMaoláin.

<sup>97</sup> Golan, Kuchler, and Mitchell, 119.

<sup>98</sup> Compare with Golan, Kuchler, and Mitchell, 142.

<sup>99</sup> John E. Calfee and Janis K. Pappalardo, “Public Policy Issues in Health Claims for Foods,” *Journal of Public Policy & Marketing* 10, no. 1 (1991): 33-53; European Commission, “Labelling: Competitiveness, Consumer Information and Better Regulation for the EU;” Wesley A. Magat and W. Kip Viscusi, *Informational Approaches to Regulation* (Cambridge: MIT Press, 1992); Golan, Kuchler, and Mitchell, 145.

**Intelligent information reduction:** A necessary precondition for an effective label, and user information more generally, is that the information provided be clear, concise, and informative. This is the aspect of intelligent information reduction, in which standardization certainly plays an important role. Providing users, as the Council of Europe suggests, with extensive information about the editorial structure, the extent of external influences that affect programming policies, or the details of the editorial guidelines is unlikely to have much effect on their viewing decisions. As Stern points out, it is not so much the accuracy or completeness of the information provided, but whether a label can capture the attention of the audience and convince them about its credibility and usefulness for the individual.<sup>100</sup> A symbol<sup>101</sup> that signaled the place of a particular item of content in a diverse media diet or the commitment of a particular outlet, editor, or author, to diversity would probably be more useful than providing users with detailed information on ownership structures and editorial policies.

The desirability of *quality* labels for editorial content has already been subjected to some debate, particularly in order to help users assess content upon its value amidst the digital abundance. For example, under German media law the Regulatory Authority for Broadcasting is entitled to issue quality labels for broadcasting as a means to further the interests of users.<sup>102</sup> A private initiative is the Swiss label “Q Publikation” of the Verband Schweizer Medien. Publications that comply with the quality requirements as developed by the Verband can use the “Q” label.<sup>103</sup> In order to qualify for the label, a publication must be issued with a certain frequency and professionalism, be transparent about the number and type of publications, and observe principles of editorial independence, professional competency, and the separation of editorial and commercial content. In the Netherlands, the introduction of a quality label for journalistic content has been vividly discussed, as well as whether there might be a role for government to play in that context.<sup>104</sup> It has been suggested that an (independent) government organization or the sector itself through self- or co-regulation would certify the correctness and quality of the information provided.<sup>105</sup> In the US, too, interest groups are lobbying for some mechanisms of certification or labeling of journalistic quality. Journalists who adhere to the “TAO of Journalism Pledge” commit themselves to the principles of transparency, accountability for mistakes, and openness to other points of view – the first and latter points arguably being of relevance also to the media diversity discourse.<sup>106</sup> Use of the “TAO” label is

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<sup>100</sup> Stern.

<sup>101</sup> Compare with James R. Bettman, John W. Payne, and Richard Staelin, “Cognitive Considerations in Designing Effective Labels for Presenting Risk Information,” *Journal of Public Policy & Marketing* 5 (1986): 15.

<sup>102</sup> Federal Republic of Germany, State of North Rhine-Westphalia, State Media Act, Zur Förderung der Belange der Mediennutzerinnen und – nutzer können Qualitätskennzeichen vergeben werden. Das Nähere regelt die Lmf durch Satzung, Article 41,

<sup>103</sup> For more information, see Q Publication, “Das Gütesiegel Q-Publikation,” accessed Sept. 10, 2011, <http://www.qpublikation.ch/>.

<sup>104</sup> Van de Donk, Broeders, and Hoefhagel, 51.

<sup>105</sup> Ibid.

<sup>106</sup> TAO of Journalism, “The TAO of Journalism Pledge,” accessed Oct. 14, 2011, <http://www.taoojournalism.org/>. “TAO” stands for “transparent, accountable, open.”

accompanied by a commitment to respect the relevant rules and standards. Certification and enforcement of the label and its conditions are performed by a group of experts.<sup>107</sup>

Having said that, most of the examples discussed here focus on signaling journalistic quality. Aspects of diversity of sources, content types, formats, and geographical coverage usually play no role or only a minor one. One notable exception is the Diversity Pledge of the UK Cultural Diversity Network. By signing the pledge and displaying the label, media producers signal their public commitment to take measurable steps to improve cultural diversity in four areas: recruitment of staff, output, the senior decision-making level, and participation or initiation of events that promote cultural diversity.<sup>108</sup> Again, however, the focus of the initiative is not so much on ensuring a commitment to media diversity more specifically, but rather on the promotion of cultural diversity in general.

At this point in time, the idea of a diversity label to signal adherence to a self- or co-regulatory code that is particularly committed to promoting media diversity (and exposure to diverse media) is rather new and has not much precedent to build on. What the aforementioned examples demonstrate, however, is that such a label would need to be accompanied by some sort of code of conduct, rules of certification, or other official commitment to diversity. The possible content of such a code could be the criteria formulated in the *Information Requirements at the Level of Principled Choice* subsection above: independence of the editor, editorial team or journalist; commitment to the representation of a diversity of viewpoints and contents within the program; or – depending on the underlying conception of diversity (external or internal) by reference to external offers (e.g. through linking to or otherwise referencing alternative views represented in other media) – the existence of structural and behavioral safeguards to prevent bias. This in itself would not be a guarantee that the audience would consume a diverse diet. At least, however, it could increase awareness that certain providers are more committed to diversity than others, and that by looking out for the programs of these particular providers, eventually the diet consumed would be more or less diverse (as opposed to, for example, persistently watching the offerings of a home cooking channel or a liberal news channel). And it would probably do so in a way that is more meaningful to users than the current version of Article 5 of the Audiovisual Media Services Directive.

**User-oriented design:** Form matters. Indeed, not only the content but also the presentation of the label determines its success or failure.<sup>109</sup> For example, Bettman, Payne, and Staelin have identified a number of aspects that are relevant in this context, such as color and type size, the usage of symbols, the organization of information on a label, and standardization and presentation in a comparative format.<sup>110</sup> In light of this, any design of a potential diversity label would need to be informed by extensive research in the information-seeking behavior of users: how they choose, which

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<sup>107</sup> For an example of such a group, see CeaseSPIN.org, “Let’s Fix Our News Before It Breaks Us!” accessed Oct. 14, 2011, <http://ceasespin.org/%20>.

<sup>108</sup> Cultural Diversity Network, *CDN Diversity Pledge*, accessed Oct. 14, 2011, [http://www.culturaldiversitynetwork.co.uk/pdfs/diversity\\_pledge\\_web.pdf](http://www.culturaldiversitynetwork.co.uk/pdfs/diversity_pledge_web.pdf).

<sup>109</sup> Bettman, Payne, and Staelin, 14; Magat and Viscusi, 108; Rehberg, 31-32.

<sup>110</sup> Bettman, Payne, and Staelin, 15-17.

presentational aspects affect their choices, how much information is enough, what role do cultural and linguistic differences play, etc.

**Institutional design:** Relevant aspects in this context are standardization and the appropriate infrastructure, in the form of (for example) the existence of marketing, certification, and enforcement services.<sup>111</sup> Standardization of the methods in which contents or services are labeled can improve user friendliness and help users to compare different offerings (see above). On the other hand, standardization, particularly when performed by private parties or groups of private parties, may lead to a situation in which standardization is used to exclude certain parties from economic competition, and even worse, the marketplace of ideas.<sup>112</sup> Such a situation would be detrimental to media diversity rather than promote it.

Closely related to the aspect of standardization is the question of the identity of the entity that should actually be commissioned to administer such a diversity label, to determine its content or even make selection decisions regarding the types of content or mix of contents that the audience should ideally be exposed to (see above). Any government involvement in influencing choices, and in shaping the preferences of users, is for obvious constitutional reasons very debatable, if not prohibited outright. Having said that, it must also be noted that there are already a number of situations in which governments did not shy away from promoting exposure to particular types of content. Examples are the aforementioned lists of important events,<sup>113</sup> the so-called must-carry rules,<sup>114</sup> which require preferential treatment of (for example) the programs of public broadcasting in Electronic Programme Guides,<sup>115</sup> and the mission statements of public broadcasting as codified in national media laws. In other words, government involvement with a diversity label would not be legally or constitutionally objectionable *per se* as long as it respects freedom of expression standards. Obviously, any concrete initiative would require careful legal and political scrutiny.

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<sup>111</sup> Golan, Kuchler, and Mitchell, 141; Florian Saurwein and Michael Latzer, "Regulatory Choice in Communications: The Case of Content-Rating Schemes in the Audiovisual Industry," *Journal of Broadcasting & Electronic Media* 54, no. 3 (2010): 463-484; Ton Wagemans, "An Introduction to the Labeling of Websites," paper presented at the DG Information Society conference *Quality Labels for Websites: Alternative Approaches to Content Rating*, Luxembourg, Feb. 27, 2003, 14-16.

<sup>112</sup> For an overview of the different exclusionary effects of standardization, particularly if the process involves private stakeholders, and the underlying economic mechanisms, see Peter Swann, "The Economics of Standardization: An Update," Report for the UK Department of Business, Innovation and Skills (BIS), May 27, 2010, accessed Sept. 15, 2011, <http://www.bis.gov.uk/assets/biscore/innovation/docs/e/10-1135-economics-of-standardization-update.pdf>. See also the case study by Paul Windrum, "Leveraging Technological Externalities in Complex Technologies: Microsoft's Exploitation of Standards in the Browser Wars," *Research Policy* 33, no. 3 (2004): 385-394.

<sup>113</sup> European Commission, Audiovisual Media Services Directive, Recital 52, Article 14; Helberger, "Brood en spelen - De implementatie van de evenementenlijst van artikel 3a van de Televisierichtlijn."

<sup>114</sup> Must-carry refers to legal obligations for operators of cable networks (and some other media services) to provide end-users with selected content that is deemed of particular public interest, such as public broadcasting or regional services.

<sup>115</sup> For the United Kingdom, see section 310 of the UK Communications Act and Sections 3 and 4 of the OFCOM Code of Conduct for EPGs. For Germany, see Artikel 53 of the Interstate Broadcasting Treaty (Staatsvertrag für Rundfunk und Telemedien – RStV), in the version of Apr. 1, 2010, in combination with Articles 13 and 14 of the *Satzung über die Zugangsfreiheit zu digitalen Diensten und zur Plattformregulierung*, although the focus of the German regulation is on equal prominence of public and private programs, rather than due prominence.

Possibly, the question is about who is better suited to advise on the contents or services that merit a diversity label and the criteria for their selection, and in particular what kind of information such a label would need to convey. Governments are not necessarily the entities that are most familiar with the way users choose and process information. They are more likely to adopt a political perspective toward the contents users should be exposed to. What is needed is an entity that can make more objective statements regarding the question of exposure to the content, services, mixes of content, or information that would be most beneficial for users, society, and the principles and values that the media serve. Arguably, making these kinds of judgments and selection decisions has traditionally been a task for the (professional) media. Why not argue that the traditional task of professional media, or particular professional media such as public broadcasting, could shift from providing the audience with diverse content towards also helping it find diverse content? Having said that, the aforementioned concerns about private capture of the standardization process are also valid in this context. Insofar, one would need to build in at least some independent influences into the process. A worthwhile alternative to consider could be the involvement of academia, which obviously could contribute useful knowledge regarding user behavior and selection criteria. Another alternative that merits attention is the involvement of representatives from civil society organizations, for example the viewer organizations that exist in some European countries. Across Europe, there is already a range of examples of active involvement of viewer organizations in media monitoring, representing viewer interests on a political level or within media companies, plus program guidance and viewer information.<sup>116</sup>

Another crucial aspect is certification and enforcement, which is again an aspect related to the trustworthiness and reliability of a label.<sup>117</sup> Governments or regulatory authorities might have a role to play here.<sup>118</sup> A somewhat different approach could be to involve users to a greater degree. Existing content rating schemes, for example, already rely on users to alert the responsible authorities to violations of the rating scheme.<sup>119</sup> An interesting combination of self-regulation of the profession and users is the “seal breaker” procedure of TAO for Journalism.<sup>120</sup> Here, no official oversight group, licensing body, or regulatory association is involved. Instead, the organization’s website includes a button that enables users or other journalists to report seal breaking. In case of repeated violations, a peer review group made up of other TAO pledgers will consider revocation of the seal.<sup>121</sup> A potential benefit of such an approach would be that it avoids difficult constitutional questions about the permissibility of government interference, although some safeguards might be needed to make sure that the scheme is not being abused, to exclude competitors for example. Finally, authors such as Wagemans, who performed a study into the labeling of websites, stress the importance of a marketing infrastructure so that the label gains critical mass, recognition, and

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<sup>116</sup> Uwe Hasebrink, Anja Herzog, and Christiane Eilders, “Media Users’ Participation in Europe from a Civil Society Perspective,” in *Broadcasters and Citizens in Europe: Trends in Media Accountability and Viewer Participation*, ed. Paolo Baldi and Uwe Hasebrink (Bristol: Intellect, 2006), 75-91.

<sup>117</sup> Golan, Kuchler, and Mitchell, 131; Saurwein and Latzer, 479; Jahn, Schramm, and Spiller.

<sup>118</sup> Compare with Golan, Kuchler, and Mitchell, 141

<sup>119</sup> Compare with Sauerwein and Latzer.

<sup>120</sup> TAO of Journalism, “The TAO of Journalism Pledge.”

<sup>121</sup> This process is known as “crowdsourcing ethics.” Ibid.

trust.<sup>122</sup> In other words, it is not enough that the label communicates information to users, but that the label itself must be communicated and brought prominently to the users' attention.

## CONCLUSIONS

Informing users about media content will probably not lead them to choose more diversely, at least in the absence of additional incentives. Still, media transparency could help users make better use of diverse media offerings. What information users need in order to do so depends on the underlying conception of (exposure) diversity as a policy goal and the role of media information in that context. If the primary goal of diversity policies is to help users make autonomous choices out of diverse media offerings, transparency obligations would need to take into account that modern users choose media content in an increasingly commercial environment and therefore require similar information as other consumers do, in addition to information about format, geographical location, content, and the technical requirements of that content. If the goal of media diversity policies goes beyond facilitating autonomous choices, an additional role for media information would be to guide users in their choices, for example by drawing their attention to normally underrepresented programs or the programs of providers that are particularly committed to media diversity.

Which aspects of media content users would exactly need to be informed about, and in which form, is a matter for further research in actual user behavior. This is also a major point of criticism that this article makes with regard to existing transparency obligations, notably Article 5 of the Audiovisual Media Services Directive, and the corresponding policy recommendations of the Council of Europe. These all seem to be poorly informed by the actual information needs of users, and do not seem to be based on a more comprehensive normative theory of the potential role of media information for the realization of media diversity policies. This article is a first attempt to trigger a wider-ranging discussion of media information as a form of “asymmetric paternalism,” and a possible response to challenges for media diversity policies in modern information markets. It suggests building on the considerable experience from consumer law and policy with an informational approach, and makes suggestions for a diversity label as an alternative to Article 5 of the AVMSD.

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<sup>122</sup> Wagemans, 2, 15 (“Successful labelling is about creating a brand.”).

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