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## THE RIGHT TO READ ALONE

### A dimension of privacy and a democratic challenge

Cédric GOBLET  
*Lawyer at the Brussels Bar*

*«In solitary reading, the man in search of himself has some chance of finding what he seeks.»*  
(G. Duhamel, extract from *Défense des Lettres*)

**ABSTRACT:** Information and communications technologies provide means to monitor individuals' reading habits in an unprecedented way. In an age of e-books, tablets and e-libraries, the reader comfortably seated in his armchair is no longer alone; and it becomes almost impossible to select reading material anonymously. Digital content publishers and retailers are now able to collect and process very detailed information about readers: the search terms we use to find books, the amount of time we spend on a given page, what we have read in the past, how we engage with particular works, and when we get bored. Even annotations and highlights are analysed. All these data open a window into the reader's thoughts, opinions and feelings.

In this paper, I propose to define the right to read alone as the freedom to access, select and assimilate written materials without any kind of scrutiny or any form of surveillance from the State or private companies. I argue that this right is a dimension of privacy.

For a long time, people could ensure this right was respected by carving out for themselves an intimate space in which to read. Now, as the online environment has led to the disappearance of the frontier between private and public spaces, we will see how personal data protection principles may operate to ensure this essential freedom. The data protection regulation currently in force at both European Union and Council of Europe levels will be examined.

This study will also give us the opportunity to explore how the right to read alone interacts with the right to receive information, as well as with freedom of expression and of thought. I will demonstrate that there is a close interdependence of these fundamental rights, and conclude that the protection of readers has an impact not only on the ability to exchange information in a society, but also on our intellectual freedom and creativity.

**KEYWORDS:** Right to read alone, Reading activity, Readers, E-books, E-libraries, Privacy, Personal data protection, Freedom of expression, Freedom of thought, Right to receive information, Directive 95/46/EC.

## 1. PROTECTING READERS' FREEDOM: AN INCREASING CHALLENGE FOR DEMOCRACY IN THE 21<sup>ST</sup> CENTURY

States and religious authorities have always sought to control the information available to the public, and especially the circulation of written materials, be they books,

newspapers or pamphlets. The level of restriction and of respect for freedom to access information depend on the nature of the political regime in place. Undoubtedly, this control differs between a democratic country and an authoritarian one, in intensity as well as in the methods employed. However, in both situations, the control operates in two ways. Firstly, information flow can be restricted by acting at the level of the *transmitter*, in other words when the idea or the opinion is expressed, recorded in some medium and disseminated. The second way consists of monitoring and repressing the *receiver*, and especially the reader when it comes to written content.

Traditionally, those holding power have almost entirely concentrated their efforts on the *transmitter*. We are all aware of the long list of authors arrested and sentenced by judicial authorities, as well as the number of works censored, blacklisted or burned throughout history. The *receiver*, on the other hand, largely escaped the wrath of the authorities, since the technical means to control their intellectual activity were rather limited. This is not to say that readers enjoyed more freedom or that they were free from scrutiny. Various cases may indeed be found in the past where readers were prosecuted and sometimes sentenced to death<sup>1</sup>. However, the number of *receivers* upon whom sanctions were imposed is certainly less significant than the corresponding number for *transmitters*.

Today, the development of information and communication technologies has progressively led towards a reversal of this situation. A trend is emerging whereby information is controlled by taking steps directly against the *receiver*. Where formerly the control of readers was marginal, it will gradually become pervasive. Several factors explain this tendency.

To begin with, we should keep in mind that, for centuries, the majority of the population was illiterate and that books were luxury objects. As Martyn Lyons explains, significant advances towards general literacy were made in the Age of Enlightenment. They continued later on, so that the end of the 19<sup>th</sup> century was «*the golden age of the book in the West*»<sup>2</sup>.

In addition, the Internet has considerably reduced the possibility of restricting freedom of expression and of having any practical effect on the *transmitter*. The reason is that thanks to this new medium, information can be duplicated easily, and shared quickly with a broad user community, as well as transferred from one location to any other on the planet in just a few clicks. While censors are generally only able to operate within national borders, the Internet has a worldwide dimension.

By contrast, new technologies - including naturally the web - provide means to monitor individuals' reading habits and intellectual activity in an unprecedented way. Tota-

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1 See, e.g., Ginzburg, C. (1980). *The Cheese and the Worms - The Cosmos of a Sixteenth-Century Miller*. Baltimore : The Johns Hopkins University Press.

2 Lyons, M. (1999). *New Readers in the Nineteenth Century : Women, Children, Workers*. In Cavallo, G. & Chartier (dir.), R. *A History of Reading in the West*. Amherst: University of Massachusetts Press, p.313.

litarian regimes may now repress political dissidents and track unconventional thoughts with a fearsome efficiency. Private companies in the electronic book sector use technical means that would have been beyond the grasp of even the craziest dictator a short time ago. They collect very detailed information about our tastes, desires, emotions and opinions in gigantic databases. As all this data is available, State authorities may be tempted to request access to it for various purposes. This poses a severe threat to our fundamental rights and individual freedoms.

It should not be thought that such violations never occur in advanced democracies. «*Not only totalitarian governments fear reading*», observes Alberto Manguel. «*Almost everywhere, the community of readers has an ambiguous reputation that comes from its acquired authority and perceived power*»<sup>3</sup>.

Americans remember the McCarthy hearings in the 1950s, where people were questioned on whether they had read Marx or Lenin; and whether their friends, spouses or associates had books about Stalin on their bookshelves<sup>4</sup>. «*Imagine if social readers had existed during the McCarthy era*», observes M. Kaminsky: «*the government would have been able to check each person's virtual bookshelf for blacklisted material*»<sup>5</sup>.

More recently, in the years since September 11, the FBI has used its expanded power under the USA Patriot Act to request libraries' records on their users. The American Library Association estimates that between 2001 and 2005, more than 200 libraries were contacted by law enforcement agencies seeking information on reading habits and books borrowed<sup>6</sup>.

Given this new surveillance environment, it becomes vitally important to examine the way our legal system ensures free access to information, as well as the development of independent and critical thought. When defining safeguard mechanisms, particular attention must be drawn to the rights of *receivers*, and especially to the protection of their privacy and personal data.

In this research, I propose to define the right to read alone as the freedom to access, select and assimilate written materials without any kind of scrutiny or any form of surveillance from the State or private companies. I argue that this right constitutes a dimension of privacy. We will see why and how data protection rules may today play a decisive role in its protection.

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3 Manguel, A. (1996). *A History of Reading*. London: HarperCollins, p.21.

4 Senate Permanent Subcommittee on Investigations of the Committee on Government Operations, Vol. 2, 964 (1953) - reference quoted by Ozer, N. A. (American Civil Liberties Union). *Digital Books: A new chapter for reader privacy* (March 2010). Retrieved September, 3<sup>rd</sup>, 2013 from [https://www.aclunc.org/issues/technology/asset\\_upload\\_file295\\_9047.pdf](https://www.aclunc.org/issues/technology/asset_upload_file295_9047.pdf), p.6.

5 Kaminsky, M. (2012). Reading over your shoulder: social readers and privacy law. *Wake Forest Law Review*, p.17.

6 Lichtblau, E. (2005). F.B.I. Using Patriot Act, Demands Library's Records. *The New York Times* (August 26).

## 2. READING DATA: AN OPEN WINDOW INTO OUR INTELLECTUAL ACTIVITY

Reading data corresponds with a particular expression of our thoughts and their materialisation in real life, in a specific context and at a given point in time. As a result, they are not an exact mirror, but only a blurred reflection of our ideas. While it is true that a fairly clear picture of our inner life may be extracted from this type of data, the knowledge it provides never entirely corresponds to what really happens in our minds. Furthermore, this type of data is a record of behaviour which sometimes corresponds with a rational choice by the reader, but may also depend on his mood and his whim.

The interpretation of reading data is therefore always uncertain; yet such data is in most cases used by public authorities and companies to predict the intentions of a specific reader, to anticipate his thoughts and to assign a profile to him. Depending on the cases, it can be for example a political or consumer profile. The ultimate goal of this data processing is generally the taking of decisions about the reader.

For this reason, the processing of reading data represents a serious risk to the reader's fundamental rights and liberties. There is an increased likelihood that arbitrary and incorrect decisions will be made about him.

A case which occurred in Britain in 2008 gives an insight into the threat we face. After downloading an al-Qaeda training manual from a US government website, a person was suspected of terrorism by the British police. He was then arrested and detained for seven days. Finally, police realised it was an error and apologised: in fact, he was just a student at Nottingham University who needed this document for research into terrorist tactics<sup>7</sup>.

Interestingly, American case law provides us with two examples where reading habits and materials have been introduced as evidence to prove intent in criminal trials<sup>8</sup>. In the case of *United States v. Curtin*<sup>9</sup>, the defendant was convicted of the felony crimes of travelling across state lines with intent to engage in a sexual act with a minor and using an interstate facility to attempt to persuade a minor to engage in sexual acts. To prove the specific subjective intent these crimes require, the government successfully used as evidence a number of stories describing sexual acts between adults and children. This lawful<sup>10</sup> reading material was contained in the defendant's personal digital assistant

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7 Curtis, P. & Hodgson, M. (2008). Student researching al-Qaeda tactics held for six days. *The Guardian* (May 24).

Jones, S. (2011). Student in al-Qaeda raid paid £20,000 by police. *The Guardian* (September 14).

8 Richards, N. M. (2008). Intellectual Privacy. *Texas Law Review*, pp.441-442.

9 *United States v. Curtin*, 305. 489F.3d935 (9<sup>th</sup> Cir. 2007).

10 See Richards, N. M., *op. cit.*, p.442.

when arrested. In another case, *United States v. Brand*<sup>11</sup>, the US Court of Appeal for the Second Circuit allowed the introduction of child pornography found on the defendant's computer to show his predisposition to molest children.

### 3. FROM PRIVATE SPACES IN WHICH TO READ, TO THE «LIQUID SURVEILLANCE»<sup>12</sup> OF READERS

For a long time, people were able to ensure that their right to read alone was respected by carving out for themselves a private space in which to read. Readers' freedom and autonomy were guaranteed by the existence of private spaces where they could isolate themselves, well away from any form of surveillance. With the paper book, the reader could be sure that nobody could intrude into his reading without his consent. He was the only one to know the content of the book he was leafing through or carefully studying.

Now, as the online environment has led to the disappearance of the frontier between private and public spaces, the reader comfortably seated in his armchair is no longer alone; and it becomes almost impossible to select reading material anonymously. In an age of e-books, tablets and e-libraries, digital content publishers and retailers use advances in technology to collect and process very detailed information on our reading activity.

#### 3.1. The right to read alone, as a dimension of privacy

Traditionally, there are several places dedicated to the consultation of books, to reading and to study. We have specific expectations for each of these as regards privacy. Depending on the status of the room or the place where we are, we can be confident of enjoying a certain level of intimacy and anonymity. These well-defined spaces ensure our control of information relating to our intellectual activity. We can choose to share some aspects with those around us, and to keep others secret.

Of all these places, our private library is without doubt the most intimate. In his *History of Reading*, Alberto Manguel recounts his experience as a reader in his father's library, when he was a teenager: «*I had begun to look up in the elephantine Espasa-Calpe Spanish encyclopaedia, the entries that somehow I imagined related to sex (...) I was curled up in one of the big armchairs, engrossed in an article on the devastating effects of gonorrhoea, when my father came in and settled himself at his desk. For a moment I was terrified that he would notice what it was I was reading, but when I realize that no one (...) could enter my reading-space, could make*

11 *United-States v. Brand*, 467 F.3d 179, 189 (2d Cir. 2006).

12 This expression is used by Lyon, D. & Bauman, Z. (2013) in their book *Liquid Surveillance: A Conversation*. Cambridge: Polity Press.

*out what I was being lewdly told by the book I held in my hands, and that nothing except my own will could enable anyone else to know. The small miracle was a silent one, known only to myself*<sup>13</sup>.

«*There was privacy not only in my reading*», explains A. Manguel, «*but also in determining what I would read, in choosing my books in those long-vanished bookstores*»<sup>14</sup>. Our local bookseller could certainly form an idea of our literary tastes by keeping an eye on our purchases, and possibly he judged us accordingly. However he always kept this limited information about our intellectual consumption strictly to himself, and if he kept a record of it, it was in his memory alone.

Public libraries also strive for a balance between control of the reader and the protection of privacy. On the one hand, books must be protected from theft and damage; on the other, readers must be able to gain access to books easily, and concentrate on their research without being disturbed. Our libraries are not only public spaces, but also places of silence and concentration.

Historians agree that the existence of private space for reading and study has played an essential part in the development of a free society, and particularly in the emancipation of women and the working class. The possibility of determining your destiny unhindered, and of questioning the established order, can come only from access to knowledge and learning through books.

Martyn Lyons explains the extent to which this quest for knowledge was difficult for self-taught workers: «*Poverty, lack of time and lack of privacy made study impossible for all except the most dedicated. Cramped housing conditions forced many working-class readers to take to the woods and fields*»<sup>15</sup>.

On the question of the emancipation of women, it is particularly instructive to make a detour via painting. In the 18<sup>th</sup> century, the woman reader was a recurrent theme in French painting<sup>16</sup>. Paintings produced by Jean-Honoré Fragonard<sup>17</sup>, François Boucher<sup>18</sup>, Jean Raoux<sup>19</sup>, Alexis Grimou<sup>20</sup> and Jean-François de Troy<sup>21</sup> portray women absorbed in reading. Their posture and attitude evoke the private nature of the spaces

13 Manguel, A. (1996). *A History of Reading, op. cit.*, p.13.

14 *Ibid.*

15 Lyons, M., *op. cit.*, p. 339.

16 Parot, J.-F. *La lecture et la recherche de l'intimité*. Retrieved September, 19<sup>th</sup>, 2013 from <http://www.nicolaslefloch.fr/Vie-Paris/l-intimite-au-18e-siecle-2.html>.

17 *La liseuse* (c. 1770). National Gallery of Art (Washington).

18 *Mme de Pompadour* (1756). Alte Pinakothek (Munich).

19 *La liseuse*, (c. 1716) Musée du Louvre (Paris).

20 First half of the 18<sup>th</sup> century. Musée des Augustins (Toulouse).

21 *La Liseuse* (1723). Gemäldegalerie (Berlin).



around them. «Domestic Pleasures», a painting by Jean-Siméon Chardin, was entitled «Amusements de la vie privée» in the original French<sup>22</sup>. Standing before each of these works, we feel as we are intruding in a scene that we should not have witnessed. Jean-François Parot considers these paintings of woman readers to be «*a scale by which we can measure the individualisation of leisure during the Age of Enlightenment.*» The theme recurs in «*Woman in Blue reading a Letter*», painted by Johannes Vermeer in 1663-64. It met with further success, for example in «*Interrupted Reading*» by Jean-Baptiste Corot<sup>23</sup>.

In literature, one could cite «My Mother's House» (originally entitled «La Maison de Claudine») in which Colette tells us that she used to go into the garden with certain books by Emile Zola that her mother had carefully kept her from reading<sup>24</sup>. «Manchester Fourteen Miles» by Margaret Penn is another enlightening testimonial. The writer evokes her youth in the Manchester area. Her illiterate Methodist parents were opposed to all reading except of the Bible and books from Sunday school. Through the intervention of the vicar, her parents finally accepted that she might borrow other books from the Co-op library. Her mother still continued, though, to distrust books which she did not read aloud<sup>25</sup>.

This example shows how reading aloud could be used as a way of controlling the reader. In the 19<sup>th</sup> century, it was not unusual in some Catholic families that «*women were forbidden to read the newspaper. More frequently, a male would read it aloud. This was a task which sometimes implied a moral superiority and a duty to select or censor material*»<sup>26</sup>.

Silent and solitary reading, on the other hand, confers an incomparable independence of spirit. The reader can absorb the content at his own pace, without any intermediary, without outside control. He can re-read any passages he wants to; and giving free rein to his imagination, he can develop new ideas while comparing his position with that of the author, questioning it, even refuting it.

The unrestricted physical provision of written material is a prerequisite, without which it is difficult to imagine free access to knowledge. However, it is not enough on its own for the development of independent thinking based on ideas contained in the material. The manner as well as the context in which reading and the study of text take place are crucial factors in this.

22 (1746). Nationalmuseum (Stockholm).

23 (1865-1870). Art Institute of Chicago.

24 Colette (1922). *La Maison de Claudine*. Paris: J. Ferenczi & fils, see chapter «Ma mère et les livres».

25 Penn, M. (1947). *Manchester Fourteen Miles*. Sussex: Caliban Books.

26 Lyons, M., *op. cit.*, p.320.

### 3.2. Reading in an age of e-books, tablets and e-libraries

With the emergence of new technologies for information and communication, silent and solitary reading no longer confers the desired autonomy as it did in the past. The frontiers between private and public spaces have disappeared, leaving surveillance which has become «liquid».

Technical advances can be used to penetrate the inner life of readers and to collect information hitherto known to them alone. Digital content publishers and retailers are now able to collect and process information such as: the search terms we use to find books; the amount of time we spend on a given page; what we have read in the past; how we engage with particular works; and when we get bored<sup>27</sup>.

An author recounts that he knows with precision the age, the zip codes, gender and other interests of the people who bought his books. «Now», he said, «you can throw on top of that the fact that a certain number of them quit reading at Page 45»<sup>28</sup>. Kobo Inc established that the average reader needs just seven hours to read the final book in S. Collins's «Hunger Games» trilogy on the e-reader they produce<sup>29</sup>. Companies active in this sector can also monitor where you read your book or newspaper, thanks to the geolocalisation system with which e-readers are generally equipped. And not only that, they even analyse annotations and highlights.

Amazon, leading company in the e-book market, explains on its website that «the Amazon Kindle and the Kindle Apps provide a very simple mechanism for adding highlights. Every month, Kindle customers highlight millions of book passages that are meaningful to them. We combine the highlights of all Kindle customers and identify the passages with the most highlights»<sup>30</sup>. This way, Amazon knows that the two «most highlighted book of all time» are the Bible and just after that W. Isaacson's book about Steve Jobs.

The Kobo e-reader's homepage presents «a dashboard for your literary life» that is «a comprehensive overview of all your key reading related activities; your recent reads, personalized recommendations, and Featured Collections all live in one dynamic view»<sup>31</sup>.

27 Alter, A. (2012). Your E-Book Is Reading You. *The Wall Street Journal* (July 19).

Kaste, M. (2010). Is Your E-Book Reading Up On You? Retrieved October, 4<sup>th</sup>, 2013 from <http://www.npr.org/2010/12/15/132058735/is-your-e-book-reading-up-on-you>.

Glandville, J. (2012). Readers' privacy is under threat in the digital age. *The Guardian* (August 31).

28 Kaste, M. *Ibid.*

29 Alter, A. *Idem.*

30 Retrieved March, 5<sup>th</sup>, 2014 from [https://kindle.amazon.com/most\\_popular](https://kindle.amazon.com/most_popular).

31 Retrieved March, 5<sup>th</sup>, 2014 from <http://www.kobo.com/koboarc7hd#readinglife>.



In March 2013, Amazon bought Goodreads, a social media site launched in 2007 the aim of which is «*to help people find and share books they love*»<sup>32</sup>. Its 16 million members can add books to their personal bookshelves, see what their friends are reading, add a comment on friends' pages and get suggestions for future reading choices<sup>33</sup>.

With social networking we are witnesses to a frenetic exchange and collection of data about intellectual consumption. Trove<sup>34</sup>, an application for mobile devices developed by The Graham Holdings Company, is a perfect illustration<sup>35</sup>. Thanks to it, «*you can easily see stories picked by your friends or people you follow*» and get suggestions for contents «*that might interest you based on links you've shared and other Facebook or Twitter activity*»<sup>36</sup>.

#### 4. READING, INTELLECTUAL FREEDOM & CREATIVITY

There is a complex relationship between the right to read alone and freedom of expression, including the right to receive information and freedom of thought. In this section of the study, I will demonstrate the close interdependence of these fundamental rights, and conclude that the protection of readers has an impact not only on the ability to exchange information in a society, but also on our intellectual freedom and creativity.

##### 4.1. Role of the reader in the communication process

According to article 10 of the European Convention on Human Rights<sup>37</sup>, «*everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas*». From the wording of this provision, the rights to communicate and receive information appear as two inseparable aspects of the same freedom. The judgments of the European Court of Human Rights frequently refer to the importance of these two aspects.<sup>38</sup>

Freedom of expression must be viewed as part of the process of communication between the *transmitter* and the *receiver*. The protection of the *transmitter*, in other words

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32 Retrieved March, 5<sup>th</sup>, 2014 from <http://www.goodreads.com/about/us>.

33 Retrieved March, 5<sup>th</sup>, 2014 from <http://en.wikipedia.org/wiki/Goodreads>.

34 This application was formerly known as the Washington Post Social Reader.

35 See [www.trove.com](http://www.trove.com).

36 Retrieved March, 5<sup>th</sup>, 2014 from <http://info.trove.com/faq>.

37 signed in Rome by the Member States of the Council of Europe on 4 November 1950.

38 ECHR, *Sunday Times (No. 1) v. the United Kingdom*, judgment of 26 April 1979, §65. See also case of *Lingens v. Austria*, judgement of 8 July 1986, §41 (All the case-law is available at the Court website, at <http://cmiskp.echr.coe.int>).

the person who expresses the idea, has aroused a good deal of interest in legal circles. On the other hand, the liberty of the *receiver* appears to be a question largely ignored. The reason for this situation is that national authorities have for a very long time limited access to information by means of action almost exclusively against the *transmitter*. However, as we know, control will focus more and more directly on the *receiver*. Therefore, it is essential to examine the mechanisms for the protection of the fundamental rights of this vital player in the communication process.

In the exchange of written information, this *receiver* is simply the reader. As Michel de Certeau emphasises, « *the text has a meaning only through its readers*»<sup>39</sup>. In the same sense, Guglielmo Cavallo and Roger Chartier remind us that «*no text exists outside of the physical framework that offers it for reading (or hearing) or outside of the circumstance in which it is read (or heard)*»<sup>40</sup>. In other words, no written communication has any effect without a reader.

The right to read alone allows an idea expressed in writing to reach its public. To this end, it ensures that conditions exist which guarantee both access and the ability to assimilate this information freely. In other words, it facilitates the right to receive information.

Moreover, reading is an intellectual activity. Accordingly, it occupies a privileged position alongside freedom of thought, which is itself at the heart of the concept of the freedom of expression. However the reader cannot develop independent thinking through the study of written works unless he is guaranteed effective protection of his privacy and his personal data. This is precisely what Michael Chabon highlighted in his novel *The Yiddish Policemen's Union*, when he wrote that: «*If there is no privacy of thought –which includes implicitly the right to read what one wants, without the approval, consent or knowledge of others– then there is no privacy, period*»<sup>41</sup>.

Based on all this, one can formulate this proposition: The protection of privacy and personal data –including the right to read alone– would appear to be a precondition for the effective exercise of freedom of thought and freedom of expression.

#### 4.2. Readers' freedom and creativity

Reading books, articles and newspapers stimulates our thinking and our imagination, such that new ideas and opinions can emerge. In some cases, these new ideas may

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39 de Certeau, M. (1990 – 1<sup>st</sup> ed. 1980). *L'invention du quotidien - Vol.1: Arts de faire*. Paris: Gallimard, p.251.

40 Cavallo, G. & Chartier, R. (1999). *Histoire de la lecture dans le monde occidental*. Paris: Editions du Seuil, p.5 (Introduction).

41 Chabon, M. (2007). *The Yiddish Policemen's Union*. New York: HarperCollins.

lead to the creation of original written works, whether in the fields of literature, science or art.

It seems to be universally accepted that creation *ex nihilo* (out of nothing) does not exist. In reality, every creative spirit is inspired by things he already knows or experiences he has already had. The works of the past have always fostered the thinking of authors. From this point of view, free exchange of and access to ample information contributes to the development of a fertile creativity. This allows us to appreciate the impact of reading –and the right to read alone– on creativity.

Furthermore, the conception of a new work also depends on the possibility of withdrawing into solitude, into silence, into a space sheltered from the gaze of others. It was precisely this conclusion that Virginia Woolf reached in *A Room of One's Own* when she wrote that «*A woman must have money and a room of her own if she is to write*»<sup>42</sup>. She considers that «*five hundred a year stands for the power to contemplate*» and that «*a lock on the door means the power to think for oneself*»<sup>43</sup>.

The words of John Clare also make it possible to examine the relationship between privacy and creativity. This English 19<sup>th</sup> century poet, who came from the working class, explained that he «*worked outdoors, composing his work secretly in the fields. He would hide behind hedges and dykes, to scribble down his thoughts on the crown of his hat*»<sup>44</sup>.

Finally, the communication to the public of new ideas or new works can be encouraged by some degree of anonymity for the writer. The use of pen names is widespread in the world of literature, as is the use of pseudonyms on the Internet<sup>45</sup>.

#### 4.3. How readers' surveillance by companies puts intellectual freedom and creativity in danger

Let's return now to the use made by digital publishers and retailers of data about reading. We still have to identify the purposes of data processing operations carried out by such businesses. In other words, the question is: What is this data for? We are going to show how the pursuit of these aims puts at risk not only the privacy of readers, their right to the protection of personal data, and in particular their right to read alone; but also the two components of their freedom of expression, which are the right to communicate and the right to receive information.

42 Woolf, V. (2004 - 1<sup>st</sup> ed. 1928). *A Room of One's Own*. London: Penguin Books, p.4.

43 *Idem*, p.123.

44 Clare, J. (1951). *The Autobiography: 1793-1824*. In Tibble J.W. & Tibble, A. (eds) *The Prose of John Clare*. London : Routledge & Kegan Paul, p.32.

45 See: Council of Europe. Declaration on Freedom of communication on the Internet, adopted by the Committee of Ministers on 28 May 2003 at the 840<sup>th</sup> meeting of the Ministers' Deputies.

Online bookstores pretend to know us better than we know ourselves: they anticipate our wants before we even have time to formulate them. The books you are offered have been automatically selected for you, on the basis of your reading data and in particular of your search history and past purchases. This is from kobo.com: «*Get more of what you love. Kobo Picks analyzes your reading activity and feedback and sends you recommendations based on your personal interests*»<sup>46</sup>.

In this case, reading data are processed for the purpose of making individualised contact with consumers so as to offer to sell them products adapted to their purchasing habits. This purpose shows the intrusion of one-to-one marketing into our daily lives.

The personalised bookshop has a serious risk: our choice of written content no longer depends upon our free will. Quite the contrary, it is guided by economic considerations or even the opinions of businesses in the publishing industry. We have therefore abandoned, although we may not realise it, part of our intellectual liberty.

The risk we run is even greater because online bookstores are in no sense sheltered from censorship. It is no longer necessary, as in the past, to withdraw certain works from the shelves or to destroy them. It is enough to simply remove them from the catalogue, so that they still exist but can't be found. In 2009 the de-ranking of gay literature on the Amazon sales site made a lot of waves. Tens of thousands of adult gay and lesbian titles simply disappeared from the ranking system in an attempt to make the «*bestseller lists more family friendly*»<sup>47</sup>.

A bookshop which is personalised on the basis of our previous purchases directs us into a deepening groove. One-to-one marketing confines our choices as readers to fixed profiles, when the selection of reading material ought to enable us to develop by discovering new ideas and by contact with opinions different from our own.

Readers' data is also used to produce tailor-made content which matches our expectations. As is often the case, the initial intention seems praiseworthy. «*Better understanding when people stop reading or stop engaging with your content would help you create better products*»<sup>48</sup>, explains a publishing consultant. The following sentence, taken from the website of a company specialising in the automatic production of content, could not be clearer about its purpose: «*Imagine creating multiple versions of the same story, with*

46 Retrieved March, 5<sup>th</sup>, 2014 from <http://www.kobo.com/koboaura#readinglife>.

47 Flood, A. (2009). Amazon apologises for 'ham-fisted' error that made gay books 'disappear'. *The Guardian* (April 14).  
See also: Ashlyn D (2009). *Why We're Not Buying Amazon's Gay Book 'Glitch'*. Retrieved April, 3<sup>rd</sup>, 2014 from <http://www.queerty.com/amazon-says-sorry-for-delisting-gay-books-twitter-doesnt-care-20090413>.

48 Kaste, M. (2010). *Cfr. supra*.

*each story's content customized for different audiences and tailored to fit a particular voice, style and tone.»*<sup>49</sup>

This sort of personalisation of content carries with it, however, an increased risk of conformity and cultural impoverishment. The goal here is to appeal to clearly-identified readers and to produce content which fits in with their ideas. In this universe dominated by marketing, there seems to be little place for the development of original ideas and opposing opinions.

## 5. DATA PROTECTION MECHANISMS TO ENSURE READERS' FREEDOM

The aim of the right to the protection of personal data is to give individuals control over information related to them, processed by public authorities and businesses. In this section, we shall see how the legal mechanisms put in place to achieve this purpose enable readers to take back control of their data in the digital environment, just as in the world of paper books and physical libraries.

In the European Union, the processing of personal data is mainly regulated by Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (hereinafter «Directive 95/46/EC»). This text is under revision, since the European Commission has drafted a Regulation proposal 2012/11 (COD) on 25 January 2012<sup>50</sup>. The legislative procedure is still ongoing. Note that the basic principles contained in this directive may also be found in Convention no. 108, adopted by the Council of Europe on 28 January 1981<sup>51</sup>. A reform of this instrument is also under way<sup>52</sup>.

Undoubtedly, the purpose principle constitutes one of the most crucial data protection mechanisms. Directive 95/46/EC puts it as follows: «*personal data must be collected for specified, explicit and legitimate purposes*»<sup>53</sup>. This principle permits us to delimit the power of the company or public authority responsible for the processing. The various operations performed on the data must fit within the framework of the purposes

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49 See Narrative Science's website. Retrieved January, 29<sup>th</sup>, 2013 from <http://www.narrativescience.com/services>.

50 Hereinafter the «Regulation proposal».

51 Convention no. 108 for the Protection of Individuals with regard to Automatic Processing of Personal Data, adopted by the Council of Europe on 28 January 1981 (hereinafter «Convention n°108»).

52 Modernisation proposals adopted by the 29<sup>th</sup> Plenary meeting, 27-30 November 2012 (T-PD(2012)4Rev3).

53 Article 6, 1°, b) Directive 95/46/EC. See article 5, b) Regulation proposal ; and also art 5, b) Convention n°108.

defined. This principle enables one to re-establish in the digital world those frontiers which delimited the various spaces for reading that I mention above. Data processing confined by precise purposes comes to replace these spaces.

Of course, it is not possible to analyse in this article all the purposes cited by players in the public and private sectors as reasons for processing personal data about reading. Each relevant data protection principle should be examined separately for each purpose that is envisaged.

As for businesses which operate in the electronic book sector, we have already mentioned the following purposes: (a) the personalised selection of written content offered for sale, in line with the reader's profile; (b) the creation of written content that is personalised with the targeted readership. For the rest of this study, I will focus my analysis solely on these two purposes.

Let's turn to the principle of proportionality set out in article 6(c) of Directive 95/46/EC, according to which the data must be *«adequate, relevant and not excessive in relation to the purposes for which they are collected and / or further processed»*<sup>54</sup>. Regulation proposal 2012/11 (COD) goes much further in its requirements by including the obligation of data minimisation<sup>55</sup> in the formulation of the principle of proportionality. Its article 5(c) states that the personal data must be *«adequate, relevant, and limited to the minimum necessary in relation to the purposes for which they are processed; they shall only be processed if, and as long as, the purposes could not be fulfilled by processing information that does not involve personal data»*.

In practice, the principle of proportionality is implemented by balancing the relevant interests: on the one hand, the privacy of readers; on the other the desire of digital content publishers and retailers to identify the preferences of their public. In the quest for balance, it is appropriate also to take into account the impact on other fundamental rights of the purpose pursued, in this case the freedom of expression and its constituent parts.

On this basis, the processing of data which has anything to do with political, philosophic or religious opinions should be forbidden and considered a breach of the principle of proportionality, even if the reader has consented to the processing of such data. When collecting information about reading, it is difficult to see how businesses operating online bookshops can be sure that they never hold this sort of data about readers. In general, the bulk collection of reading data carried out by businesses in the electronic book sector appears to be inconsistent with the principle of data minimisation.

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54 See article 5, c) Convention n°108.

55 This principle has already been highlighted in the International Standards on the Protection of Personal Data and Privacy (The Madrid Resolution), adopted at the International Conference of Data Protection and Privacy Commissioners, on 5<sup>th</sup> November 2009.



Moreover, the consent of readers should be obtained prior to any processing of their data for the two purposes mentioned above, in accordance with article 7 of the Directive<sup>56</sup>. It is prudent to ensure that this consent is specific, as required by article 2(h)<sup>57</sup>. In practical terms, consent with regard to these data purposes should be obtained separately to the customer's acceptance of the contract for sale of books. The reader should be able to buy books in online bookstores, and take advantage of services offered, but still be able to refuse to have his personal data processed for the two above mentioned purposes.

To be effective, consent must also be informed<sup>58</sup>. However, what emerges from an analysis of the standard conditions of the online bookstores most used by European consumers is a lack of transparency. It is very difficult (if not impossible) to establish exactly what data is collected or what use is made of it.

Digital publishers and retailers are generally located in the United States of America; and it is therefore questionable to what extent the current European data protection legislation is and should be applicable when such companies process data related to European readers. Could this contribute to explaining the rather poor level of privacy protection we can observe at the moment in the e-book sector? If so, article 3, §2 of the Regulation proposal 2012/11 (COD) provides an adequate solution. This provision sets the conditions under which the Regulation applies to a controller not established on the European Union territory. The Regulation applies if the processing activities are related to the offering of goods or services to data subjects residing in the European Union, or the monitoring of their behaviour.

In this regard, the Regulation proposal improves the current legislation significantly. Indeed, the national provisions adopted pursuant to Directive 95/46/EC can only be applicable if such a controller makes use of equipment, automated or otherwise, situated on the territory of a member State, and unless such equipment is used only for purposes of transit through the European Union territory<sup>59</sup>.

Furthermore, the obligation to process accurate data<sup>60</sup> should contribute to a particularly effective protection for readers. This applies equally to processing carried out by businesses and by public authorities, for whatever purpose it is being done. In fact, we have seen that reading data must in most cases be subjected to interpretation before it yields any really useful data (preferences, opinions, interests, intentions).

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56 See article 6, c) Regulation proposal.

57 See article 4, (8) Regulation proposal.

58 Article 2, h) Directive 95/46/EC.

59 Article 4, §1, c) Directive 95/46/EC.

60 article 6, d) Directive 95/46/EC. See: article 5, d) Regulation proposal ; article 5, d) Convention n°108.

And we know that information produced by interpretation of reading data has a very low level of reliability. In the case of a reader who is a natural person, this information is personal data within the meaning of directive 95/46/EC. Therefore it must be accurate.

Of particular interest is also the article 20 of the Regulation proposal, which deals specifically with profiling. Its first paragraph enshrines the right, for every natural person, «*not to be subject to a measure which produces legal effects concerning this natural person or significantly affects this natural person, and which is based solely on automated processing intended to evaluate certain personal aspects relating to this natural person or to analyse or predict in particular the natural person's performance at work, economic situation, location, health, personal preferences, reliability or behaviour*».

The second paragraph states that, «*subject to the other provisions of this Regulation, a person may be subjected to a measure of the kind referred to in paragraph 1 only if the processing: (a) is carried out in the course of the entering into, or performance of, a contract (...); or (b) is expressly authorized by a Union or Member State law which also lays down suitable measures to safeguard the data subject's legitimate interests; or (c) is based on the data subject's consent*».

This provision, although innovative, can be criticised on a number of points. The first relates to the methodology used. Before considering the right not to be subject to a measure based on profiling, it appears more logical to set out the conditions under which profiling is authorised. We can also regret the imprecision of the terms «significantly affects», «to evaluate certain personal aspects» and «personal preference»<sup>61</sup>. This lack of clarity may present difficulties when it comes to apply this text. Furthermore, it is unfortunate that this provision does not cover partly automated processing methods<sup>62</sup>.

Several lines of thought may be suggested in order to improve this provision. There is no doubt that the creation of profiles raises fundamental rights concerns, as profiles are used to take decisions that may affect individuals whose data are processed. Nevertheless, when seeking adequate protection mechanisms, decision making should be considered separately from the creation of profiles. These two aspects should be understood as distinct parts of a single process.

Following on from this, it becomes clear that the manual, automated or partially automated character of the processing concerns the decision making aspect, and not the elaboration of profiles per se. Moreover, I think that specific rules should be applicable to profiling mechanisms.

61 See : Article 29 Working Party. Opinion 01/2012 on the data protection reform proposals, adopted on 23 March 2012.

62 *Ibid.*

In this research, we have already observed that sensitive data may be used to build profiles which do not concern important aspects of our identity, and on the other hand, that apparently innocuous data may be processed to create highly sensible profiles (for example, related to political opinions).

Article 20, §3 of the Regulation proposal does not take in account this reality. It stipulates that «*automated processing of personal data intended to evaluate certain personal aspects relating to a natural person shall not be based solely on the special categories of personal data referred to in Article 9*», in other words on sensitive data. Note the use of the expression «solely», which reduces considerably the scope of this provision.

In my opinion, the regime applicable to the processing of sensitive data<sup>63</sup> should provide a satisfactory response to the question of processing sensitive data in order to create a profile. It may also be opportune to consider data related to intellectual activity and consumption (such as data about reading) as new category of sensitive data, and to protect it as such.

Profiles should be considered as sensitive when they formulate a judgement about individuals or label them as regards their opinions, health, sexual orientation or other sensitive aspects.

In order to avoid the creation of profiles inconsistent with the information processed or arbitrary judgments being made about the individual concerned, two requirements should be respected: (a) the category of data processed to establish a profile should be reliable; (b) there should be a logical relationship between the data (or set of data) processed, and the information or knowledge that the profile claims to reveal about the individual.

## 6. CONCLUSION

Digitalisation of the world of books can be a source of considerable progress, giving easier and faster access to an almost unlimited amount of written material. On the other hand it can also lead to increased monitoring of readers to the point where it threatens free access to information, the possibility of developing independent thought, and creativity.

The use of new technologies for information and communication will not sit well with the development of democracy unless two conditions are met. First, the fundamental rights and liberties of readers online must be given at least as much respect as they are in the world of paper books and physical bookshops. Second, technical progress should be for the benefit of the greatest number, and not only be for the benefit of public authorities and a few businesses.

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<sup>63</sup> Article 8, Directive 95/46/EC ; article 9 Regulation proposal.

The mechanisms applicable to the protection of personal data can help ensure that these two conditions are met. They guarantee the right to read alone, while giving readers control over their personal data, in an environment where the frontiers between reading spaces have disappeared.

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