COUNCIL OF EUROPE

EUROPEAN COMMISSION OF HUMAN RIGHTS

DECISION OF THE COMMISSION

AS TO THE ADMISSIBILITY

of Application No. 2690/65
by N. V. Televizier
against the Netherlands

The European Commission of Human Rights sitting in private on 15th December, 1966, under the presidency of Mr. C.Th. EUSTATHIADES, and the following members being present:

MM. A. SUSTERHENN
M. SØRENSEN
F. ERMACORA
F. CASTBERG
J. E. S. FAWCETT
F. WELTER
T. BALTA
P. P. O'DONOGHUE
P. DELAHAYE

Mr. A. B. McNULTY, Secretary to the Commission

Having regard to the Application lodged on 17th December, 1965 by N. V. Televizier against the Netherlands and registered on 20th December, 1965 under file No. 2690/65;

Having regard to the observations on the admissibility submitted by the Netherlands Government and the Applicant;

Having regard to the report provided for in Rule 45, paragraph 1, of the Rules of Procedure of the Commission;

Having deliberated,

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THE FACTS

Whereas the facts as presented by the Applicant may be summarised as follows:

The Applicant, a Netherlands company with its seat at Leyden, is represented by Mr. A.G. Maris, a lawyer practising in The Hague.

The Applicant publishes in the Netherlands a weekly magazine "Televizier" which contains information and comments on the forthcoming radio and television programmes of the different Dutch broadcasting corporations Algemene Vereniging Radio Omroep (AVRO), Katholieke Radio Omroep (KRO), Nederlandse Christelijke Radio Vereniging (NCRV), Omroepvereniging VARA and Vrijzinnig Protestantse Radio Omroep (VPRO).

The Centraal Bureau voor de Omroep in Nederland is an organisation which periodically makes compilations in French of the programmes of the above broadcasting corporations; these compilations are intended for publication outside the Netherlands.

The broadcasting corporations and the Centraal Bureau instituted legal proceedings against the Applicant, alleging that the latter, when publishing information about forthcoming radio and television programmes, had made use of the compilations of the Centraal Bureau in violation of the Dutch Copyright Act (Auteurswet). Reference was made to Article 10 of this Act which confers protection even on works in writing which are not of a distinctive or personal nature.

On 22nd January, 1963, the District Court (Arrondissements-Rechtbank) gave its judgment in the case. The Court stated that the compilations concerned, although not being of a personal character, were protected by the Copyright Act. The Centraal Bureau was the author of these compilations and the broadcasting corporations also had an interest which was protected by the Copyright Act. Before deciding, however, whether or not there had been a violation of copyright in the present case, the Court invited the broadcasting corporations and the Centraal Bureau to submit evidence in support of their allegation that the compilations had been reproduced by the Applicant company.

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The Applicant appealed to the Court of Appeal (Gerechtshof) of The Hague which, on 26th March, 1964, dismissed the claims of the broadcasting corporations and the Centraal Bureau as being inadmissible on the grounds that the Centraal Bureau had no interest which was protected by the Copyright Act since it did not publish its compilations in the Netherlands and that the broadcasting corporations did not have any copyright to compilations produced by the Centraal Bureau.

A further appeal (beroep in cassatie) was lodged by the broadcasting corporations and the Centraal Bureau and, subsidiarily, by the Applicant. In its decision of 25th June, 1965, the Supreme Court (Hoge Raad) held that, under the Copyright Act, the Centraal Bureau (but not the boradcasting corporations) owned a copyright in the compilations concerned although these were not of a personal character. The copyright to a text lacking a personal character could, in the opinion of the Supreme Court, be violated not only by a literal reproduction of the text but also by a translation of that text (even if such translation was not literal) or by a reproduction of the text in a revised form, provided that the modifications made in the text were not too far-reaching. The question whether or not the Applicant had violated the copyright of the Centraal Bureau could only be answered after an examination of the evidence in the case and the Centraal Bureau was, therefore, permitted to introduce such evidence to prove its allegations.

In their decisions, the Court of Appeal and the Supreme Court also examined the question whether it would be a violation of the Convention on Human Rights to forbid the Applicant to publish information about the radio and television programmes concerned; this had been alleged by the Applicant who invoked before the Supreme Court Articles 1, 2, 9, 10, 13, 14 and 18 of the Convention. The Court of Appeal stated in this respect that the freedom of expression, including the freedom to hold opinions and to receive and impart information and ideas (Article 10 of the Convention), did not imply a freedom to act unlawfully or to violate the provisions of the Copyright Act. The Supreme Court stated that, in the present case, there was no contradiction between the Copyright Act and Article 10 of the Convention as complete weekly radio programmes were not information which everyone has the right to receive or impart within the meaning of Article 10.

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The Applicant now submits that, according to the decision of the Supreme Court, the compilations made by the Centraal Bureau are protected by the Dutch Copyright Act despite the fact that they are not a literary, scientific or artistic work, that they have no distinctive or personal character and that they are not protected by the Berne Convention on the protection of literary and artistic works or by the copyright acts of the countries in which the compilations concerned are published. The Applicant observes that, in the opinion of the Supreme Court, such protection also extends to translations into Dutch of a French original text even though these translations are not literal and some parts of the text are omitted and new parts added as is the case with the publication of radio and television programmes in the Applicant's magazine.

The Applicant further states that the consequence in the present case is that the broadcasting corporations, which also publish weekly magazines or have a financial interest in such magazines, have an unjustifiable monopoly of the news services in the Netherlands regarding forthcoming radio and television programmes. This amounts, in the Applicant's opinion, to a violation of Articles 10 and 14 of the Convention. The Applicant company alleges itself to be a victim of this violation of the Convention irrespective of the question whether the Centraal Bureau succeeds in proving that the Applicant company has already systematically reproduced the compilations of the Centraal Bureau; the Applicant company points out that, in any case, it is in its interest to be able to publish lawfully information based on the compilations of the Centraal Bureau.

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SUBMISSIONS OF THE PARTIES

Whereas the submissions of the Parties have been summarised below; whereas in this summary the Commission has considered it desirable to adhere, as far as possible, to the exact terms of the Parties' submissions:

1. Is the Applicant a victim within the meaning of Article 25 of the Convention?

The Government submitted that the decision of the Supreme Court did not make the Applicant company a "victim" within the meaning of Article 25 of the Convention. The Applicant company could only claim to be a victim if, and when, it was ordered by a final decision of the courts to desist from publication. In the present case, there was still a possibility that the courts, in the subsequent proceedings, would decide that the publications by Televizier did not infringe the copyright of the Centraal Bureau.

The Government added that it realised that the decision of the Supreme Court made it impossible for the Applicant to publish any reproduction of the compilations, by way of either a literal reproduction or a translation, or a reproduction in a revised form where the modifications made in the text were not too far-reaching. Although the Applicant company had stated that it wished to reproduce the texts in this form, this could not make the Applicant a victim under the Convention. In the Government's opinion, the situation was such that, if the law prohibited some act - in this case the reproduction of a text in which someone else has a copyright - a court decision simply stating this legal rule did not add anything to the legal prohibition if it did not contain an order to desist from certain specific acts. In other words, the Applicant did not complain about a decision of the Court prohibiting the exercise of a right protected by the Convention but about a legal rule which might, according to the Applicant, in certain cases conflict with the Convention. The Application of Televizier showed this plainly. The Government did not deny that, in principle, it was possible to submit a complaint to the Commission about a provision of national law but it submitted that this only applied in the case of a specific action based on that law having been taken against the Applicant. Such was not the case or at least was not yet the case.

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The Applicant company did not accept this opinion stated by the Government. It agreed that it was correct that the Supreme Court had not ordered the Applicant to desist from any action. The Supreme Court had referred the case back to the District Court for a decision, after submission of evidence, on the question whether the Applicant had used the compilations for its publication of the programmes.

However, the Supreme Court had given a final decision, at the highest instance and not subject to any national legal remedy, in the legal proceedings between the Centraal Bureau and the broadcasting corporations, on the one side, and the Applicant on the other side. The Court had held that the use by the Applicant of the compilations of the Centraal Bureau for the publication of programmes would, according to the Copyright Act and notwithstanding Article 10 of the Convention, be a violation of the copyright of the Centraal Bureau. Consequently, the Applicant was a victim of a violation by the Government of the rights set forth in the Convention.

In this Applicant's opinion, this situation was confirmed by the fact that the Government had itself admitted that the decision of the Supreme Court made it impossible for the Applicant to publish a reproduction of the texts of the compilations of the Centraal Bureau.

It was not correct that the Applicant complained not about a decision of the Court prohibiting the exercise of a right protected by the Convention but about a legal rule. The Applicant complained about the decision of the Supreme Court insofar as it confirmed the decisions of the District Court and the Court of Appeal and insofar as it confirmed the copyright held by the Centraal Bureau on the compilations, by which the Applicant was refused the exercise of the rights set forth in Article 10 of the Convention. This was a case of a specific action taken against the Applicant and based on a provision of national law.

The Applicant stated that it was apparently the point of view of the Government that the Application was admissible only after the judge, who was determining the issues of facts, had decided the question whether the Applicant company had used the compilations for its publication of programmes.

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However, the decision to be taken by the judge on that question had nothing to do with the questions decided by the Supreme Court, namely the nature and extent of the copyright belonging to the Centraal Bureau according to the Copyright Act and secondly, the effect thereon of the provisions of the Convention. The question whether the Applicant company had used the compilations for its publication of programmes was only relevant to the further question whether there was any reason to order the Applicant, under the threat of a penalty, to desist from using the compilations for its publication of programmes. If Televizier had used the compilations in the past, this would provide a ground for a court order backed by the possibility of a penalty, not to do so again. This had nothing to do with the question whether the Copyright Act forbids the Applicant to use the compilations for its publication of the programmes. This question had been decided, at highest instance and without any further domestic legal remedies, in the decision of the Supreme Court of 25th June, 1965. The question still to be decided by the District Court and the evidence required from the Centraal Bureau did not relate to the legal question whether use of the compilations violates the Copyright Act, but only to the question whether there is a reason, on the ground of previous acts of the Applicant, to enforce the prohibition by threat of a penalty.

The judge of the lower court, who would have to decide this question, would moreover have to follow the decision of the Supreme Court (Article 424 of the Netherlands Code of Civil Procedure) whose decision he would be unable to change in any respect.

Furthermore, it might take some time before there was a final decision at highest instance, on the question at present before the District Court. The decision of the Supreme Court was dated 25th June, 1965. The hearing of witnesses on the remaining question had been held. The next step in the proceedings would probably be the presentation of written pleadings to be followed by oral pleadings. Only after that would the decision of the District Court be rendered and this decision would be subject to appeal, while the decision of the Court of Appeal was subject to further appeal. It should be taken into account that the final court decision at highest instance on the said question of facts would be given some years after the decision of the Supreme Court of 25th June, 1965. Consequently, an order of the Court to desist from a certain specific act would only then be given, if indeed it was given at all.

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Considering these circumstances it would, in the Applicant's opinion, be contrary to the text and the purpose of the Convention not to consider the Applicant, under the present circumstances, a victim within the meaning of the Convention. If the Applicant company had delayed its complaint regarding the contents of the decision of the Supreme Court of 25th June, 1965 until the judge at highest instance had, at a much later date, decided the said question of fact and until an order to desist from such publications as had been made by the Applicant had been given (if ever), then the Application would have been declared inadmissible because of failure to observe the time-limit of six months mentioned in Article 26 of the Convention.

In general it should be considered of great importance that measures to end violations by High Contracting Parties of the rights mentioned in the Convention, were taken as soon as possible.

This applied also to the present case because the Netherlands broadcasting corporations, which founded the Centraal Bureau tried to acquire a monopoly for the publication of broadcasting programmes and to make it impossible for the Applicant to publish these programmes. This was contrary to the rights mentioned in Articles 10 and 14 of the Convention.

2. Does the Application concern the right to freedom of expression as guaranteed by Article 10, paragraph (1), of the Convention?

The Government submitted that the Application was inadmissible as it did not concern the right guaranteed by Article 10, paragraph (1), of the Convention. In this regard the Government stated that the Applicant company claimed the freedom to publish in the magazine Televizier reproductions of the texts of compilations in French of the programmes of the Dutch broadcasting organisations; such texts were drafted by the Centraal Bureau and sent by it to about one hundred specific addressees for their use and for publication by them. The Applicant obtained these texts against the express wishes of the Centraal Bureau and the organisation or person who forwarded the texts to the Applicant did so in violation of an obligation to the contrary.

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In other words, the Applicant claimed, according to the Government, the right to publish texts which had been drafted by someone else and which, being not yet published in any form, had the character of private letters to a specific number of addressees; furthermore, the author did not wish these texts to come into the hands of the Applicant. The Applicant company had been careful not to divulge the source from which it obtained these texts but, in the present context, it must be assumed that at least one of the addressees had been induced by the Applicant company to send it the texts. The Applicant company was a private corporation, publishing a magazine for profit and in competition with the magazines of the Dutch broadcasting organisations. For reasons of commercial competition the Applicant wished to publish the full weekly programmes in Televizier before, or at any rate at the same time as, the other magazines.

The Government stated that it was convinced that the present case was in no way covered by the Convention. Article 10 stated that everyone has the right to freedom of expression and this alone was the right protected under the Convention. By way of implementation, the second sentence of Article 10, paragraph (1), stated that this right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This second sentence had been included in Article 10 as, without this additional rule, the right to freedom of expression might not be fully realisable. But the second sentence should not be read out of context. The meaning of Article 10, paragraph (1), was that, if information was offered or ideas were expressed, public authority should not prevent a person from receiving that information or taking cognisance of those ideas. The Convention did not, however, confer upon any person a right to obtain any information which another person might be able to give. The Convention did not affect the freedom of any person, having certain information at his disposal, to make such information public or not as he wished, or to determine the time or mode of publication or to impart that information to some persons but not to others. A rule obliging a person (whether private or public) to reveal information which he did not wish to reveal would evidently constitute a grave violation of the freedom of expression of

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that person: the freedom of expression included freedom of non-expression. The Convention was intended to prevent public authorities from raising a barrier between a person who wished to impart certain information or ideas and a person who wished to receive that information or these ideas; it did not give a person access to a source of information or ideas which the owner wished to reserve to himself or to make accessible only to certain persons of his choice.

The Government stated that the Applicant was trying to read into the Convention the meaning thus rejected. The Applicant company complained that a provision of Dutch law prevented it from publishing information that the Centraal Bureau, being the source of that information, had not intended for the Applicant, did not wish to impart to the Applicant and did not wish to be published by the Applicant, but wished to be published at a time and in a way determined by the Centraal Bureau itself. A petition to this effect was inadmissible under the Convention because there was no question of any violation of freedom of expression.

The Convention did not touch on any rule of domestic law declaring illegal the obtaining, and publishing, of information against the will of the source of that information. It was immaterial whether the domestic law construed this rule as a violation of copyright or in any other way. Therefore, the Commission need not examine whether the Dutch copyright law, as interpreted by the Supreme Court, might conceivably result in some cases in a conflict with the Convention; in the case at issue there certainly was no such conflict. For the same reason it was also immaterial whether a complete weekly radio programme constituted information within the meaning of Article 10 of the Convention or not.

The Dutch public was in no way denied information about radio and television programmes. The programme editions of the broadcasting organisations (AVRO, KRO, NCRV, VARA and VPRO) were distributed in hundreds of thousands of copies and were available to the public at a moderate price. In addition an abbreviated programme was issued weekly to the newspapers and published therein. Therefore the public could in fact obtain all the information which they wanted about the forthcoming programmes.

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The Government was of the opinion that the provision of Article 10, paragraph (1), of the Convention served, on the one hand, the interests of those who wished to express their opinion or to impart information and, on the other hand, the interests of the public who wished to obtain such opinions or information.

Article 10, paragraph (1) was not meant to serve the commercial interests of the editors of newspapers or magazines. The Government was not concerned (nor was the legislator) with the questions whether such editors were able to obtain the information which they wished to publish or to what extent and at what price they would obtain it, so long as the public could get the information which they desired.

The present case concerned the commercial interests of the Applicant in competition with other information media and nothing but that.

The Government then dealt with the question as to whether the Dutch Copyright Act could in any way be considered to be contrary to the Convention. The Government pointed out that the Copyright Act extended copyright protection to books, pamphlets, newspapers, magazines and all other writings (Article 10 sub 1° of the Copyright Act).

According to the literal meaning of the words, the history of the Copyright Act and constant rulings of the Supreme Court, "all other writings" meant writings without any artistic or scientific value including writings such as directories, railway timetables, catalogues of trade commodities, programmes, etc. Article 15 of the Copyright Act limited the copyright on "all other writings" as follows: "The copying of articles, reports or other writings, with one exception as to novels and short stories, published in newspapers or magazines by another newspaper or magazine without the consent of the author or his successor in title is not regarded as a violation of the copyright on the first-mentioned newspaper or magazine, provided that the newspaper or magazine from which the copy has been taken be clearly named and provided that the copyright has not been explicitly reserved" ..... "Regarding articles concerning political points of view, news bulletins and miscellaneous news, copyright can not be reserved."

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In a series of decisions the Supreme Court had ruled that the copyright on writings without a personal character had a limited scope. The copyright regarding these writings was based solely on the composition of the writing, therefore only he who has actually done the writing could claim copyright. On historical grounds the Supreme Court had ruled that the tenor of the copyright on these writings was to grant exclusively to the writer the benefit of the publication of the writings, and had therefore denied other persons the power to publish and multiply the writings. In accordance with this purpose it had to be assumed that the law granted a copyright on writings without a personal character only if they had been published or were intended for publication. In a decision of 27th January, 1961 (Nederlandse Jurisprudentie 1962 No. 355) the Supreme Court had ruled in a case, also concerning the publication of radio programmes compiled by another, that "to the author of a piece of writing without a personal character no further protection is granted than against the copying of the contents of the piece of writing itself; in particular no copyright can be recognised on the factual substance contained in the piece of writing, apart from the piece of writing as such."

From this interpretation of the Copyright Act it appeared: 1°, that the rule did not raise any barrier to the obtaining of the information incorporated in the writings: the copyright was extended only to writings which had been or would be published anyway; 2°, that the rule did not imply a copyright as to information; the information which could be gleaned from the piece of writing was free and the only thing which was prohibited was the publication of the piece of writing in the form in which the author had written it down, or in a form so closely resembling the original piece of writing that it must be considered as a copy. It was in this context that one should understand the passage in the decision of the Supreme Court of 25th June, 1965, where the Court stated that a complete weekly radio programme was not "information" within the meaning of Article 10 of the Convention.

The Applicant was not prevented from publishing information about forthcoming radio programmes but only from publishing information in a form closely resembling, and copied from, writings by the Centraal Bureau as such. In other words, the Applicant company was barred not only from preventing the author of advance programmes, namely the Centraal Bureau, from enjoying the full benefit of the publication of these advance programmes but also from benefiting from the work of someone else. This benefit had been the Applicant's sole intention and this intention was in no way protected by the Convention.

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The Applicant company replied that, according to the decision of the Supreme Court, it did not have, under Dutch law, the freedom or the opportunity to take, transcribe, copy lawfully from, the compilations of the Centraal Bureau in order to produce in the weekly magazine Televizier the forthcoming radio and television programmes of the Dutch broadcasting corporations.

As a result the rights and freedoms defined in Article 10 of the Convention were violated. The right to freedom of expression, which everyone possessed, included freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

The Applicant submitted that the Government had based its argument on a number of assumptions which were incorrect and in no way supported by evidence. One particular issue was not agreed by the parties and had not been determined by the judge, namely, that the organisations or persons, which received the compilations of the Centraal Bureau had the obligation not to forward these compilations to Televizier, further, that one or more of the addresses had been induced by the Applicant to send it the compilations and, finally that this had in fact been done.

In the Applicant's opinion, the Government's conclusion that the Application should be declared inadmissible was apparently based on two different grounds: first, that the compilations had the character of private letters; secondly that Article 10 of the Convention did not impose any obligation to reveal information. Thus, the Government apparently argued that the complaint by Televizier implied that the fact of the Centraal Bureau not revealing information about the compilations would be a violation of Article 10 of the Convention.

In this respect, the Government misjudged the complaint by Televizier and the basis thereof. The compilations of the Centraal Bureau did not have the character of private letters. The Supreme Court had decided in its decision of 25th June, 1965, that the compilations were to be considered as pieces of writing which were meant by the Centraal Bureau for publication and that such publication was effected by mailing them to about one hundred foreign broadcasting organisations and newspapers. The Government alleged that Televizier had received the compilations from one or more of these broadcasting organisations and newspapers. Therefore the compilations did not have the character of private letters but of pieces of writing already published or at least meant for publication.

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Furthermore, according to the Applicant's submission, the Government had failed to appreciate that the point of view of the Applicant was not, that the Centraal Bureau had an obligation to reveal to Televizier information, in particular, as to the compilations. That problem had in fact been the subject of other legal proceedings but, in the present Application, those proceedings and the obligation to reveal were not involved. The present Application contained a complaint that it was forbidden to use the compilations, when, and if, they were available to the Applicant company, for the publication of programmes in its magazine.

The arguments of the Government as to the inadmissibility of the Application therefore failed and should be rejected.

As regards the situation in the Netherlands as to information given to the Dutch people on radio and television programmes, the Applicant submitted that the Dutch broadcasting corporations (AVRO, KRO, NCRV, VARA and VPRO), tried to acquire a monopoly with regard to the publication in print of radio and television programmes. One of their means was the Copyright Act. The Centraal Bureau was a corporation founded by the broadcasting corporations. There were two reasons why the broadcasting corporations wished to acquire this monopoly.

According to the Applicant, the first reason was the following: the right to be a broadcasting organisation and the number of hours of broadcasting time for a broadcasting organisation depended, according to the relevant legal provisions, on the number of members of a broadcasting organisation. Therefore, the broadcasting corporations had an interest to have as many members as possible. The broadcasting corporations each published a weekly magazine containing little more than the radio and television programmes. In actual practice one was at the same time member of the broadcasting corporation and subscriber to the magazine of the broadcasting corporation concerned. If other weekly magazines also published the broadcasting programmes, the broadcasting corporations feared that their members would end their subscription to their magazines and thereby the membership of the broadcasting corporations concerned, and would subscribe to those other weekly magazines. Therefore, the broadcasting corporations sought to acquire a monopoly in the weekly publication in print of the radio and television programmes and to prevent other weekly

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magazines from publishing the radio and television programmes. The Applicant was of the opinion that this reason was neither reasonable nor healthy. A broadcasting corporation should get and keep its members by virtue of the quality of its broadcasts and not by a monopoly in the news services on radio and television programmes.

The second reason why the broadcasting corporations wished to acquire a monopoly in the news services on radio and television programmes was that they desired the additional income which could be obtained by the exploitation of that monopoly. That motive was also unreasonable and unhealthy. The broadcasting corporations were in a position to create their radio and television programmes out of the income which they enjoyed from the fees collected, on the basis of legal provisions, by the Netherlands Government from the owners of radio and television sets. It was quite wrong that the broadcasting corporations, being corporate bodies according to private law, profited exclusively and for their own benefit from the news services on the programmes paid for by all Dutch people.

The information about radio and television programmes in the Netherlands could be divided into weekly information and daily information. As to daily information, the broadcasting corporations had permitted the daily papers to publish in an abbreviated and inconspicuous manner the broadcasting programmes for the following day or sometimes the following two days. The Dutch public, however, was mainly interested in information covering a full week. The public felt a need for weekly programmes with comments beforehand and afterwards. In that respect the broadcasting corporations actually had, by means of their weekly magazines, a monopoly which was broken only by Televizier. It was obvious that the broadcasting corporations did not give in their magazine a frank criticism of their own programmes. At this moment Televizier was the only weekly magazine in the Netherlands which reproduced the radio and television programmes and, in addition, a frank and independent critcism of these programmes. The broadcasting corporations did their best to suppress Televizier.

According to the broadcasting corporations and the Centraal Bureau, it was impossible to get knowledge of the broadcasting programmes in any other way than from pieces of writing protected by the Copyright Act, inter alia the compilations of the broadcasting corporations and the Centraal Bureau. The

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Applicant denied this. However, to get knowledge of the broadcasting programmes otherwise than from these compilations required a great deal of effort and so much money that all weekly magazines in the Netherlands except Televizier refrained from publishing the broadcasting programmes. This meant an illicit infringement of the freedom of expression.

The Applicant pointed out that, according to the Government, Article 10 of the Convention was not meant to serve the commercial interests of the editors of newspapers or magazines. When stating this, the Government failed to appreciate that everyone had the right to freedom of expression; furthermore, this right included freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. It was irrelevant for which reason, commercial or non-commercial, a person was moved to make use of the freedom of expression.

Furthermore, the Government had failed to appreciate that ultimately the interests and freedom of expression of the Dutch radio listeners and television watchers, of whom several hundreds of thousands were subscribers to the Applicant's weekly magazine, were involved. All these people were certainly not moved by commercial motives. In this connection it should be observed that the Applicant's weekly magazine was more expensive than both the membership of any of the broadcasting corporations and a subscription to its weekly magazine together.

In so far as the Government had stated that the Dutch Copyright Act was not contrary to the Convention, the Applicant replied that, according to the Supreme Court's interpretation of the Copyright Act, the Applicant was not allowed to take, transcribe or to publish in its magazine such radio and television programmes of the broadcasting corporations as were contained in the compilations. This restriction applied even to a non-verbal or non-literal reproduction or one with additions and deletions. The public had no need for just a few items of a programme but for the complete programme. According to the decision of the Supreme Court, the broadcasting corporations and the Centraal Bureau, by putting the programmes in writing, could monopolise the contents of that piece of writing. In this

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connection it should be considered, that these compilations, as had been ascertained by the Supreme Court, had no literary, scientific or artistic value and lacked a distinctive or personal nature; furthermore, such value or nature, if present, could be a ground for protection of these pieces of writing. It was the law of the nineteenth century, and before, in the Netherlands, which had influenced the Copyright Act of 1912, and had been the reason that this Act protected pieces of writing without a distinctive or personal nature.

The Applicant concluded that, in so far as the Copyright Act, as interpreted by the decision of the Supreme Court of 25th June, 1965, prevented Televizier from using the compilations for its publications of the programmes, there was a violation of Article 10 of the Convention.

3. Does the complaint fall under the limitation rule in Article 10, paragraph (2), of the Convention ?

The Government emphasised that its main submission was that the right to freedom of expression was not concerned in the present case. If, however, the Commission did not accept this argument, the Government maintained, in the alternative, that the case was covered by the limitation mentioned in Article 10, paragraph (2), of the Convention and that it was inadmissible on that ground. According to this provision, the exercise of the freedoms described in paragraph (1) of the same Article "may be subject to such .... restrictions .... as are prescribed by law and are necessary in a democratic society .... for the protection of the .... rights of others". If it was to be assumed that the publication of a copy of any piece of writing came under the term "to impart information", then any copyright law was, according to the Government, a restriction on the freedom of expression. Any scientific book or paper contained "information". Every copyright law prohibited the publication of such a book or paper without the consent of the author. The legislations of all Parties to the Convention included a copyright law which to a greater or lesser extent prohibited such publications. Therefore the copyright which a person held by virtue of the domestic law of one of the Parties to the Convention clearly came under the term "rights of others"

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in paragraph (2) of Article 10 although the Convention did not define this term. It obviously left the definition of these rights to the discretion of the Parties to the Convention. The words "necessary in a democratic society", imposing a certain restriction on the power to make laws, should be read in connection with the words "in the interests of national security, territorial integrity or public safety" as they did not make sense in the context of the protection of the "rights of others". At most it might be argued that the Convention prohibited a signatory State from curbing the freedom of expression in a way contrary to the demands of a democratic society, under the guise of a law conferring a "right" on some person or persons. Clearly this was not the case with the Dutch Copyright Act.

According to the Government, it was not relevant whether or not the Berne Convention on the protection of literary and artistic works extended protection to works lacking a distinctive or personal nature. The Berne Convention was not intended to replace the various Copyright Acts of the signatory States but obliged these States to give the same protection to authors of other signatory States and to works published for the first time in other signatory States as to their own subjects and to works published for the first time in their own countries. In addition the Berne Convention contained certain rules providing for the minimum of protection and the maximum of exceptions to, and of restrictions on, the protection to be given in the domestic laws of the signatory States. These States were not prohibited from extending the protection conferred in their own laws beyond the minima stated in the Berne Convention. The copyright laws of most of the States adhering to the Berne Convention differed to some extent from the Convention and from each other. None of this was contrary to the Berne Convention or to the European Convention for the protection of human rights and fundamental freedoms.

The Government also referred to its statement as quoted above regarding the limited scope of the protection granted by the Dutch Copyright Act to writings without a personal character. It granted the benefit of publication to the author of the piece of writing concerned and denied this advantage to the person who wished to publish for his own purposes the piece of writing of another. A cursory examination of the laws of other States signatories to the Convention revealed that the Netherlands was not the only State in which the acts for which the Applicant sought freedom from interference were considered unlawful. Sometimes this protection was given by copyright law and sometimes by the law regarding unfair competition.

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In any case, the Convention did not, in the Government's opinion, prohibit Dutch law from declaring these acts unlawful.

The Applicant company submitted that the copyright on weekly radio programmes did not fall under the exception of Article 10, paragraph (2), of the Convention. In particular, it did not come under the restrictions "... as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety ... for the protection of the reputation or rights of others". For, according to the decision of the Supreme Court, the compilations had no literary, scientific or artistic value and no distinctive or personal nature. They were not the result of creative work. If the compilations had had these qualities, there probably would have been no question of a violation of Article 10 of the Convention. Under the Copyright Act the protection of pieces of writing without distinctive or personal nature in the Netherlands was a consequence of the law in former times when democracy and the human rights here involved were not yet part of Netherlands law.

Contrary to the Government's submission, a copyright protection of pieces of writing without distinctive or personal nature could not be found in other democratic countries or, at any rate, only in very exceptional cases. Also the Berne Convention described the works to be protected as "oeuvres littéraires et artistiques", comprising "toutes les productions du domaine littéraire, scientifique et artistique". The fact that the signatory States could deviate from this Convention did not influence on the Applicant's reference to the Berne Convention.

It was also quite incorrect that the words "rights of others" left the definition of these rights to the discretion of the Parties to the Convention. If that were the case the freedom of expression and the securing of that freedom would not be effective. The words preceding "rights of others" in Article 10, paragraph (2), set out the relevant limitation. The words "necessary in a democratic society" did make sense in the context of the protection of the rights of others. One should also note the co-ordinating use of the words "reputation or rights of others". What was in issue was, according to the Applicant, "restrictions .... as are necessary in a democratic society ... for the protection of the reputation or rights of others". Restrictions in this sense were out of the question as regards the compilations.

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The Applicant also referred to the Government's statement that the protection in question was sometimes provided by copyright law and sometimes by the law on unfair competition. The Applicant considered that an incorrect suggestion had thereby been made. The Centraal Bureau was not a competitor of the Applicant and did not publish for the purpose of sale or for any commercial gain of its own. The broadcasting corporations, on the other hand, did publish for commercial gain. However, their action in court against the Applicant, based on tort and unfair competition, had been rejected by the Court of Appeal. Against this decision the broadcasting corporations and the Centraal Bureau had not appealed to the Supreme Court. Finally, the protection of pieces of writing without distinctive or personal nature in the Copyright Act had nothing to do with unfair competition.

4. Has there been discrimination contrary to Article 14 of the Convention?

The Government stated that the Applicant had not adequately explained in what way the complex of facts dealt with in the Application could be construed as discrimination within the meaning of Article 14. An explanation could not be given because the action taken by the Centraal Bureau would have had exactly the same result in relation to any other person or corporation acting as the Applicant had acted or wished to act.

In this respect, the Government pointed out that the Supreme Court of the Netherlands had, on 25th June, 1965, given another decision (No. 9836) in a case between the same Parties by which it determined a counter-claim entered by Televizier in the same proceedings as led to decision No. 9843 of which the Applicant complained in the present case. Article 14 of the Convention was the subject of this other decision. The Applicant had asked the Courts to rule that the broadcasting organisations and the Centraal Bureau should be obliged to impart to Televizier on demand the full contents of the forthcoming weekly radio programmes. This claim was based on the alleged right under, inter alia, Article 10 of the Convention to receive information as to the fixed but not yet published programmes of the broadcasting organisations and the Centraal Bureau. It was also based on the allegation that the broadcasting organisations and the

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Centraal Bureau practised discrimination within the meaning of Article 14 of the Convention by communicating this "news", albeit in abbreviated form, to the daily newspapers but not to Televizier. This claim was rejected in three instances. The translation of the relevant passages of the Supreme Court's decision is as follows:

"Considering, as to the second part, (of the 'means of cassation') that the Court of Appeal has established as fact, that Televizier, in respect of the publication of programme descriptions, must be regarded as a competitor of the broadcasting organisations and that this is not the case with the daily papers and the foreign papers which are concerned in the activities, described under a-e (viz. inter alia: imparting the programme - descriptions), of the broadcasting organisations and the Centraal Bureau acting in the interests of these organisations and that the broadcasting organisations have a substantial interest in the publication of the broadcasting magazines, the editors and publishers of which are also concerned in these activities;

that the Court of Appeal rightly concluded from the foregoing, regardless of whether the broadcasting organisations may be regarded as publishers of the broadcasting magazines, that the broadcasting organisations and the Centraal Bureau have reasonable grounds for the alleged unequal treatment of Televizier, and that they are not obliged to act towards Televizier in the same way as they do towards the aforementioned papers;

that it makes no difference that the general interest may be served, as the District Court has established, by Televizier also receiving for its own use the information imparted to others by the broadcasting organisations and the Centraal Bureau;

that the second part therefore is submitted in vain."

The Government concluded that the plea of unlawful discrimination had been rejected by the Supreme Court although Article 14 of the Convention had been cited explicitly, and that the Applicant did not complain of this decision in the present case. Therefore it was not necessary to go further into this matter.

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Finally, in referring to a statement made by the Applicant to the effect that the broadcasting corporations had "a wrongful, improper and unjust monopoly in the news services on forthcoming radio and television events in the Netherlands", the Government observed that every owner of an object, as every owner of a copyright, was a monopolist in as much as his right was exclusive. How far his monopoly extended and to what degree it should be limited in the common interest was a matter for domestic legislation. Regarding the free flow of information, the Dutch legislator had strictly limited the monopoly of anyone who might claim a copyright on information.

The Applicant replied that Article 14 of the Convention was at issue as the statutory prohibition for the Applicant company to use the compilations for its own publication had, as a consequence, not only that the broadcasting corporations and their magazines had available the data on the programmes while the Applicant not, but even that foreign weekly magazines, which were sold in the Netherlands, could freely publish the Dutch radio and television programmes (and did so) while the Applicant was not able to do so.

The Applicant considered that decision No. 9836 of the Supreme Court need not be discussed in connection with the present Application. This decision did not involve using the compilations for publication of programmes. In those proceedings the Applicant alleged that the broadcasting corporations and the Centraal Bureau had the obligation to communicate the compilations to Televizier at the same time as to the foreign addresees. The present complaint was not concerned with this question but only with the use of the compilations for publication of programmes mentioned therein.

As to the final remark of the Government, the Applicant observed that the question whether, as regards in particular the compilations, it was permissible to confer a copyright protection, was not one of domestic legislation but of freedom of expression within the meaning of Article 10 of the Convention.

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THE LAW

Whereas the Commission finds it necessary first to examine the Government's general objection to the Application's admissibility, based on the submission that the Applicant could not, at the present stage of the proceedings before the domestic courts, be considered a "victim" of an alleged violation of the Convention within the meaning of Article 25 of the Convention;

whereas, in this regard, the Commission observes that the Supreme Court's decision of 25th June, 1965 constitutes a final ruling on the legal question as to whether the compilations of the Centraal Bureau are protected under the Dutch Copyright Act; whereas, in particular, it follows from the Supreme Court's decision that the Applicant company could not publish the compilations concerned without contravening the Copyright Act;

whereas the subsequent proceedings before the domestic courts concern certain points of fact and do not affect the position taken by the Supreme Court on the legal point of principle;

whereas, therefore, the Commission is satisfied that the Applicant company, in respect of the alleged violation of the Convention resulting from the Supreme Court's decision, is to be considered a "victim" within the meaning of Article 25 of the Convention;

Whereas the Commission adds that, as a result of the proceedings before the Supreme Court, the Applicant company has, in respect of its complaint before the Commission, exhausted the domestic remedies within the meaning of Article 26 of the Convention; that this situation is not affected by further proceedings on certain points of fact which are still pending before the Dutch courts;

Whereas the Commission has carried out a preliminary examination of the Applicant's allegations in the light of the subsequent pleadings by both Parties; whereas the Commission

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considers that the Application gives rise to a number of important issues regarding the interpretation of the Convention; whereas these issues are of such complexity that the determination of the Application should depend upon an examination of the merits of the case; whereas it follows that the Application cannot be regarded as manifestly ill-founded within the meaning of Article 27, paragraph (2), of the Convention and cannot be declared inadmissible;

For these reasons and without in any way prejudging the merits of the case, the Commission

DECLARES ADMISSIBLE AND ACCEPTS THE APPLICATION

Secretary to the Commission — Vice-President of the Commission

(A. B. McNULTY) — (C. Th. EUSTATHIADES)