COUNCIL OF EUROPE

EUROPEAN COMMISSION OF HUMAN RIGHTS

Application No. 5178/71

DE GEILLUSTREERDE PERS N.V.

against

THE NETHERLANDS

REPORT OF THE COMMISSION

(adopted on 6 July 1976)

STRASBOURG

45.863
06.2

TABLE OF CONTENTS

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I. INTRODUCTION

1. The following is an outline of the case as it has been submitted by the parties to the European Commission of Human Rights.

The substance of the applicant's claim

2. The applicant is a Netherlands company with its seat in Amsterdam. It is a publisher of so-called "general interest magazines" in the Netherlands, and also a member of the "Groep Publieksbladen", being an association of such publishers.

The applicant wishes to publish, in its weekly magazines, the complete radio and television programme data. It claims that it is prevented from doing so by law, i.e. by the Broadcasting Act (Omroep Wet) of 1967 and the Broadcasting Decree (Omroepbesluit) issued thereunder in 1969, as well as by the Copyright Act as interpreted by the Supreme Court, and that this constitutes an interference with the right freely to receive and impart information as guaranteed by Art. 10 of the Convention. It further claims that, insofar as under the legislation concerned the broadcasting organisations are allowed to publish complete programme information and the daily newspapers, newspapers appearing at least three times a week and foreign weekly magazines summaries thereof, the Dutch weekly "general interest magazines" are discriminated against, contrary to the provisions of Art. 14 of the Convention, read in conjunction with Art. 10.

Proceedings before the Commission

3. The present application was introduced on 24 September 1971 and registered on 27 September 1971.

On 12 October 1973, after having obtained written observations from the parties, the Commission found that the applicant's complaints under Arts. 10 and 14 of the Convention raised substantial issues under the Convention and were of such complexity that their determination should depend upon an examination of their merits. The Commission consequently decided to declare the application admissible.

Written observations on the merits were submitted by the applicant on 30 January 1974 and by the respondent Government on 29 April 1974.

In a letter of 15 May 1974 the applicant then requested the Commission that it should have a further opportunity of making written submissions. The respondent Government, in an oral communication with the Commission's Secretary did not think that further pleadings were necessary, but did not oppose the applicant's request.

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On 17 July 1974 the Commission considered its procedure and decided that the parties should have an opportunity of making further submissions in writing on the merits of the application.

The applicant submitted its further observations on the merits on 24 January 1975 and the respondent Government their observations in reply on 23 June 1975.

Throughout the proceedings it has been necessary to extend substantially the time limits fixed by the Commission for making submissions as each side had indicated that, owing to the complexity of the matters involved, it had not been possible for them to do so within the periods originally fixed. Nevertheless the Commission has repeatedly drawn the parties' attention to the fact that it was always much concerned at any substantial delay in the proceedings before it and had expressed the hope that the matter could be expedited.

The applicant has been represented before the Commission by Mr. S. K. Martens, then a lawyer practising at The Hague.

The respondent Government have been represented by Dr. C. W. van Santen, as Agent.

The present Report

4. The present Report has been drawn up by the Commission in pursuance of Art. 31 of the Convention after deliberations and votes in plenary session on 5 and 6 July 1976, the following members being present*:

MM. J.E.S. FAWCETT
G. SPERDUTI
C.A. NØRGAARD
E. BUSUTTIL
L. KELLBERG
T. OPSAHL
J. CUSTERS
C.H.F. POLAK
R.J. DUPUY
G. TENEKIDES
S. TRECHSEL
N. KLECKER

The Report was adopted by the Commission on 6 July 1976 and is now transmitted to the Committee of Ministers in accordance with para (2) of Art. 31.

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* MM. Sperduti and Klecker were not present on 5 July 1976.

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A friendly settlement of the case has not been reached and the purpose of the Commission in the present Report, as provided in Art. 31 (1), is accordingly,

(1) to establish the facts, and

(2) to state an opinion as to whether the facts found disclose a breach by the respondent Government of its obligations under the Convention.

A schedule setting out the history of proceedings before the Commission, the Commission's decision on the admissibility of the application, and the relevant domestic legislation are attached hereto as Annexes I, II and III. An account of the Commission's unsuccessful attempts to reach a friendly settlement has been produced as a separate document (Annex IV).

The full text of the pleadings of the parties together with the documents lodged as exhibits are held in the archives of the Commission and are available, if required.

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II. ESTABLISHMENT OF THE FACTS

The facts relating to the present case are generally not in dispute between the parties.

A. The Netherlands broadcasting system

1) Historical background

5. The foundations of the Netherlands broadcasting system were laid when, in the 1920s, organisations constituted under private law developed whose object was the transmission of wireless broadcasts. The organisations reflected the various cultural, political, spiritual and social sections of which Netherlands society was composed. The Government's responsibilities in this field were laid down in the Telecommunications Act 1904 (Telegraaf- en Telefoonwet 1904), as amended in 1928 to incorporate provisions on this subject. The existence of broadcasting organisations owing their origin to private initiatives was accepted in the Act. The transmission time available was to be shared equitably by the broadcasting organisations, provided they met specific requirements to be laid down by law.

During the Second World War the occupation authorities put an end to this type of broadcasting system, which was based on free, private-law organisations, and set up a State-owned enterprise, the State Radio Broadcasting Corporation (Staatsbedrijf Rijks Radio-Omroep).

After the war broadcasting became subject to the operation of temporary regulations, pending the introduction of new legislation governing the Netherlands broadcasting system. The private broadcasting organisations that had existed before the war returned and resumed their transmissions. The temporary regulations provided for, inter alia, the levying of a broadcasting contribution (radiolicence fee) to finance transmissions. For all their other expenses, the organisations had again to rely on contributions received from their members, either in the form of subscriptions to their weekly magazines or as simple contributions.

After long political debates, a Broadcasting Act (Omroep wet) was passed in 1967. It came into effect on 29 May 1969 and formalised to a large extent the previous situation. A Broadcasting Decree (omroepbesluit) containing complementary regulations to the provisions of the Broadcasting Act was issued on 1 April 1969. It also came into effect on 29 May 1969.

2) The present system

6. The present broadcasting system is thus based on a plurality of private broadcasting organisations, representative of different cultural, spiritual and social sections of the Netherlands society cooperating (together) in a coordinating body, the Netherlands Broadcasting Foundation (Nederlandse Omroep Stichting) hereinafter referred to as NOS.

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According to the Act, broadcasting organisations are legal persons whose principal object is to broadcast complete radio and television programmes, including, at least, elements of a cultural, informative, educational and entertaining nature in reasonable proportion. If they are to receive and retain an allocation of transmission time, they shall have at least 100,000 holders of radio or television licences registered with them as paying members or contributors. It should be noted that membership or contribution generally includes the supply of a programme magazine. However, any person paying the subscription in order to obtain a programme magazine, but having explicitly stated that he does not wish to be member of, or contribute to, the organisation, shall be disregarded for that purpose.

Apart from the broadcasting organisations, other institutions qualify for the allocation of transmission time (by the Executive), in particular prospective broadcasting organisations, the NOS as well as various churches, societies and political parties which aim at satisfying certain needs which are not adequately provided for by programmes of other institutions.

7. The competent Minister fixes the transmission time for radio and television respectively and distributes it among the broadcasting organisations, after deduction of the transmission time allocated to the NOS, the prospective broadcasting organisations and the above-mentioned institutions.

For the purpose of distributing transmission time, broadcasting organisations are classified in three groups according to number of holders of radio and televisions licences registered with them as members or contributors. This number is assessed by means of periodical official surveys. Organisations of the first group are allocated a transmission time which is superior to that of the second (proportion: 3:1) and of the third group (proportion: 5:1).

There are eight broadcasting organisations, at present representing the major sections of which Netherlands society is composed, viz: the General Radio Broadcasting Organisation (Algemeene Vereeniging "Radio Omroep"-AVRO), the Netherlands Protestant Radio Broadcasting Organisation (Nederlandse Christelijke Radio Vereniging-NCRV), the Roman Catholic Broadcasting Organisation (Katholieke Radio Omroep-KRO), the Workers' Radio Amateurs Broadcasting Organisation (Vereniging van Arbeiders Radio Amateurs-VARA), the Liberal Protestant Broadcasting Organisation (Vrijzinnige Protestantse Radio Omroep-VPRO), the Television and Radio Broadcasting Foundation (Televisie en Radio Omroep Stichting-TROS), the Evangelical Broadcasting Organisation (Evangelische Omroep-EO) and Radio Veronica.

The position they occupy in the broadcasting system is determined by their membership.

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8. Broadcasting organisations and prospective broadcasting organisations having been given transmission time cooperate within the Netherlands Broadcasting Foundation (NOS) The NOS is run by an executive committee consisting of one chairman nominated and appointed by the Crown and members whose number is to be determined by the Minister. Half (of) the members are selected by the broadcasting organisations. The others are appointed by the Crown or the Minister.

The N O S acts as a coordinating body, with the proviso that it shall not concern itself in any way with the preparation and composition of the programmes of the various organisations. Under the Broadcasting Act (Art. 10) the latter are authorised to determine the form and content of their transmissions themselves, responsibility for what has been broadcast resting entirely and solely with the organisations in question.

The N O S is also responsible for featuring joint programmes for which it is granted time of its own. It is likewise entrusted with, inter alia, exchanges with foreign countries, the establishment, maintenance, administration and regulation of the use of radio and television studios. In this connection, it should be noted that studios shall be established only insofar as the broadcasting organisations fail to provide them.

The N O S resources consist of an initial capital and various public subsidies.

9. Under Art. 58 of the Broadcasting Act, "institutions to which broadcasting time has been allocated will receive from (the) Minister an allowance that is equal to the total of their expenditure directly related to broadcasting, as far as this expenditure has been approved by him". Although no detailed submission was made by either parties on this point, it appears that broadcasting is not wholly financed by public funds deriving from the licence fees and from the yields of television advertising. Broadcasting organisations would therefore need the profits from the subscriptions to their programme magazines for their broadcasting activities.

3) Making-up and publication of lists of "Radio and Television Programme" data

10. Under Art. 23 of the Broadcasting Act, combined with Arts. 13 to 16 of the Broadcasting Decree, the broadcasting organisations are required to make available to the NOS lists of the programme which they propose to broadcast. Such lists are normally sent to the N OS about three weeks prior to the date of the broadcast in question. The NOS adds its own programme lists and sends the compilation to each of the broadcasting organisations, which are then entitled to publish it, though only in their programme magazines. The broadcasting

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organisations may not publish the complete programme as compiled by the NOS in any other paper. The NOS being the intermediary, may not grant the right of publication of the lists of the broadcasting organisations to anyone but the broadcasting organisations themselves. However, the NOS prepares a short summary of the lists submitted to it and sends it to the Netherlands Daily Newspaper Publishers' Association (Nederlandse Dagbladen) and to the Netherlands Newspaper Publishers' Association (Nederlandse Nieuwsbladen) for publication in the daily and other newspapers (i.e. those appearing at least three times a week) published in the Netherlands. Similar summaries, translated when necessary, are sent to a number of foreign broadcasting organisations on a basis of reciprocity, for publication in their programme magazines. They are also sent to editors of papers published abroad.

11. Art. 22 of the 1967 Broadcasting Act provides that any "reproduction or publication of lists or other statements of those programmes otherwise than on behalf or with the authorisation" of the NOS constitutes a breach of copyright and entails civil liability.

The law thus generally confirms the previous jurisprudence of the Supreme Court (Hoge Raad). In a decision of 25 June 1965, the court had held that, under the Copyright Act the Central Bureau (now NOS) but not the broadcasting corporation, owned a copyright in the compilations concerned although these were not of a personal character. The copyright to a text lacking 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 or by a reproduction of the text in a revised form, provided that the modifications made in the text were not too far-reaching. However, under Art. 22 of the 1967 Broadcasting Act the burden of proof is placed on the publisher that a particular publication is not derived from a protected work.

B. The particulars of the case

12. On 28 October 1969 the applicant petitioned the NOS with a request that either all programme date be made available for publication in its "general interest magazine", or, alternatively, that NOS should negotiate to permit the applicant to publish a "programme magazine" on behalf of NOS. By a letter of 9 December 1969 the NOS rejected the first request on the basis of Arts. 22 and 23 of the 1967 Act and dismissed the alternative as contrary to the spirit of Art. 23 of the Act read in conjunction with Art. 14 of the Royal Decree.

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The applicant regarding the NOS as "an administrative organ of the central Government" for the purposes of Arts. 1 and 2 of the Act for Appeal from Administrative Decrees (Wet Beroep Administratieve Beschikkingen), lodged an appeal with the Crown in conformity with the above Appeals Act. The appeal alleged that Art. 23 of the Broadcasting Act should not be construed as forbidding NOS to make available programme data to "general interest magazines", and that the provisions of the broadcasting legislation therefore violated Arts. 10 and 14 of the European Convention on Human Rights. The appeal was declared inadmissible by a Royal Decree dated 8 April 1971 on the grounds that the NOS could not be deemed to be "an administrative organ of the central Government" as it was not vested with any public authority but was the co-operation body of the broadcasting organisations which are independent legal persons created under private law.

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III. POINTS AT ISSUE

13. Issues arise under Arts. 10 and 14 of the Convention. These provisions have been invoked by the applicant company and form the subject matter of its application after the Commission's decision on admissibility of 12 October 1973.

The general points at issue are as follows:

Under Art. 10 of the Convention

- Whether or not any restrictions imposed by the relevant legislation in the Netherlands on the publication of radio and television programme data constitute an interference by a public authority with the right to freedom of expression, which includes freedom to receive and impart information, contrary to Art. 10 (1) of the Convention?

- If so, whether or not these restrictions are justified under para. (2) of this article as being formalities, conditions or restrictions prescribed by law and necessary in a democratic society for the protection of rights of others.

Under Art. 14, read in conjunction with Art. 10 of the Convention

- Whether or not any distinction is made in the relevant broadcasting legislation between Dutch "general interest magazines" on the one hand, and the broadcasting organisations, Dutch newspapers appearing daily or at least three times a week, as well as foreign "general interest magazines" on the other hand?

- If so, whether or not there is an objective and reasonable justification for such distinction in that:

  i. the distinction pursues a legitimate aim, and

  ii. the relationship of proportionality between the means employed and the aim to be realised is not unreasonable?

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IV. SUBMISSIONS OF THE PARTIES

A. As to Art. 10 (1) of the Convention

1) Original submissions by the applicant

14. The applicant first dealt with the question whether or not the complete radio and television programme data were "information" within the meaning of Art. 10 (1) of the Convention and replied to this question in the affirmative. It maintained that such data were clearly "information" within the ordinary meaning of the word and the Commission should so interpret the term taking it in its widest sense. Referring to the definition given to the term "information" by several legal authorities, the applicant submitted that programme data were news of a general interest to the public at large and of such a nature that the public should be in a position to receive, and the press to publish, this news freely.

15. The applicant next submitted that the alleged creation by law of an exclusive right to publish these data constituted "interference by public authority" with the right to receive and impart these data within the meaning of Art. 10 (1) of the Convention.

16. On the question of "interference" the applicant considered that the respondent Government had admitted that the relevant broadcasting legislation created, and conferred on the broadcasting organisations, an exclusive right to publish the complete programme data in their programme magazines. It maintained that the legislation therefore interfered with the freedom of the public to receive these data, as it could only inform itself fully and well in advance about such important "news" as radio and television programmes by subscribing to, or buying single copies of, a programme magazine published by one of the broadcasting organisations. Moreover, this prevented the public from being advised impartially on the forthcoming programmes.

17. The applicant further maintained that the legislation concerned also interfered with the freedom of the press to impart those data, meaning to transmit them by press publication. Indeed, the protection of the right to freedom of expression, including the freedom to "hold opinions", reflected the classical idea that in a truly democratic society every individual should be free to hold and express opinions without running the risk of being prosecuted on a criminal charge. From this had emerged another freedom, namely the freedom of the media to disseminate information.

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It had been recognised in the jurisprudence of the German Federal Constitutional Court that, for a democracy, free public discussion of subjects of general importance was an essential requirement and that it was a prerequisite for such discussion to make all relevant data freely and generally available (1). The same idea had been expressed by various participants at the Symposium of Human Rights and Mass Communications organised by the Consultative Assembly of the Council of Europe, with the assistance of the Federal Government of Austria, at Salzburg on 9 to 12 September 1968. The applicant company concluded that it was this fundamental freedom, particularly of the communication media, to disseminate information that was protected by the second sentence of para. (1) of Art. 10.

18. Among these media the press held a special position vis-à-vis radio and television whose powerful means of influencing the masses had to be counterweighed by a free and widely diversified press enjoying financial and economic independence. This difference between the press on the one hand and radio and television on the other was recognised by the last sentence of Art. 10 (1) of the Convention allowing a system of licensing by the State for radio and television but not for the press. It followed that an interference with the freedom of the press was all the more serious and disquieting when the information in question concerned radio and television programmes.

19. The applicant next dealt with the question whether such interference was "by public authority" within the meaning of Art. 10 (1) which it also answered in the affirmative. It suggested that both the wording and the spirit of that provision called for a broad construction of the term "public authority" in the sense that it comprised not only the executive branches of the government but also the judiciary and the legislative. The applicant submitted that, in the present case, the interference complained of had begun with the Supreme Court's interpretation of Art. 10 of the Netherlands Copyright Act and, at any rate, had been accomplished by the said broadcasting legislation of 1967 and 1969.

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(1) Decisions of the Federal Constitutional Court of 25 January 1961 and 3 October 1969, published in BVerfGE 12, p. 125 and VJW 1970, p. 235 respectively.

2) Further submissions by the applicant

20. In its further submissions of 21 January 1975, the applicant company repeated their original submissions and expanded on the argument quoting from various Dutch and other legal writings on the question of copyright and unfair competition. It also submitted various exhibits in support of their claim. In substance, the applicant company maintained that Art. 22 of the Broadcasting Act was meant to confer and indeed conferred on the Broadcasting Organisations an exclusive right to publish the programme data. Indeed Art. 22 not only prohibited publication of lists containing the programme data but condemned any publication of programme data as such. The special protection thus afforded to the programme magazines would go far beyond normal copyright data, and combined with the onus probandi provision, did in fact create an exclusive right of publication. Moreover this assertion might be proved from the parliamentary history of Art. 22 of the Broadcasting Act and from various statements by the Government.

21. The applicant next dealt with the question whether the freedom to receive information had been interfered with. It maintained its previous argument that the Dutch Public could only inform itself fully and well in advance about such important news, by subscribing to, or buying single copies of, a programme magazine.

22. Turning to the freedom to impart information, the applicant submitted that this included the right to transmit such information by press-publication. A serious interference with that freedom should be found in the present case, since the press was barred from publishing the complete radio and television programmes.

In this respect, the applicant added that the question whether Article 10 (1) included for anyone, or at least for the press, a right to obtain information or at least such basic information as programme data, was immaterial for the present case. It nevertheless maintained that the very fact that the broadcasting programme data were not only information within the meaning of Article 10 (1) but, moreover, news with a very high "news value", involved that to interfere with the freedom to receive and/or to impart these data did constitute a very serious infringement of the freedom set forth in the Convention, which, if ever, could only be justified by weighty reasons.

23. The applicant next refuted the Government's allegation that the impossibility to publish the data were not attributable to the Broadcasting Act but to the broadcasting organisations' refusal to give permission to publish these data, for which refusal the Government could not be held responsible. In this connection, it first maintained that Art. 22 of the Act seemed to imply that the authorisation to publish any programme data might only be given by the NOS and not by the individual broadcasting organisations. It would also follow from Art. 23, read in the light of its parliamentary history, that programme data may only be published in specialised programme magazines. Consequently, no one, neither the NOS, nor the corporations themselves

might give permission for publication elsewhere. In any event, the corporations did not, of course, want to communicate their programmes and had a very monopolistic attitude. Therefore, in switching the burden of proof as to the "free news-gathering", the Act had in fact granted them a more easily enforceable monopoly to programme data and curtailed the freedom to receive and impart information.

24. The applicant finally argued that the Act constituted an interference by the legislature, which should be seen as a "public authority" for the purpose of Article 10 (1).

3) Original submissions by the respondent Government

25. The respondent Government submitted in the first place that it could only be held to be involved insofar as the situation complained of was dependent on legislation now in force in the Netherlands. The legislation in question defined the limits within which those concerned had a certain latitude to decide for themselves. Thus the concrete situation complained of was decisively affected by the decisions which private organisations independent of the Government, such as the broadcasting organisations and the NOS, had taken. For these the Government could not be held responsible.

26. As regards the purpose of the application, the Government submitted that they failed to see the distinction drawn by the applicant when it maintained that it had not requested the Government in this application to take measures whereby the complete programme data were made available to the applicant for publication, but only to take such measures as would ensure that these data would become available to the applicant for publication. The Netherlands law did not say that publication of the complete programme data by parties other than the broadcasting organisations was unlawful, but only that copying of the lists containing the programme data without permission was unlawful. If each of the broadcasting organisations gave the applicant permission to publish its list of programme data, their publication by the applicant would not be unlawful, and the law did not prevent the broadcasting organisations from giving this permission. The applicant could therefore only mean that the respondent Government should take such measures as to require the broadcasting organisations or the NOS to give the lists of programme data to the applicant for publication. Consequently, the applicant seemed to read into Art. 10 of the Conventionthe right to obtain information from others who did not want to give it.

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27. However, the Convention did not establish such a right. The applicant, realising the difficulty of its argument was trying to make a distinction between different kinds of information and different kinds of persons or organisations seeking information by arguing that programme data were news of such considerable interest to the public that the public should be in a position to receive this news freely and that the press should be in a position to publish it freely. This argument again was based on the assumption that there was special information which was of such a nature that a person or organisation possessing it was obliged to impart it when asked to do so, and the press had the right to obtain this information upon request. This assumption certainly found no basis in the Convention which did not distinguish between information of a more or less general interest, nor did it confer special rights upon the press. Art. 10 (1) of the Convention secured the right to receive and impart information without interference by public authority which meant that public authority should not raise a barrier between one person who wished to impart information and another person who wished to receive it, unless para. (2) of Art. 10 permitted public authority to do so. The Convention, however, in no way infringed upon the freedom of expression of anyone possessing information, which included the right to non-expression, or to releasing the information as one saw fit.

28. The Netherlands Government added that they did not wish to deny the importance of the press in general, including weekly magazines, for the distribution of ideas and information to the public. This did not mean, however, that the press had a special right to obtain information from persons who, like the broadcasting organisations, did not wish to reveal it or who only wished to reveal it in the way and at the time of their own choosing.

29. Furthermore, the Government denied that the broadcasting organisations had been granted an exclusive right to publish the complete programme data. The applicant followed a rather simplistic reasoning when it deduced the granting of such exclusive right from the fact that it was in practice not in a position to publish the lists containing the complete programme data of the broadcasting organisations.

In this connection the Government submitted that the following three phases in the process of preparing and publishing the lists containing the complete programme data of the broadcasting organisations should be borne in mind:

During Phase I each broadcasting organisation prepared its own list of the programme items to be broadcast during a given week. Nothing prevented the broadcasting organisations from furnishing their own list containing their own programme to the press in general, or to the applicant in particular, either free of charge or against payment. But similarly neither Netherlands law nor any provision of the Convention including Art. 10 compelled the broadcasting organisations so to furnish these lists.

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During Phase II each broadcasting organisation sent its list of programme items to the NOS which collected these lists, added its own list, and sent the complete list to each of the broadcasting organisations for publication in their programme magazines, but only there. This exchange of lists had been initiated long before the enactment of the Broadcasting Act on a voluntary basis, i.e. by mutual agreement between the broadcasting organisations. The Broadcasting Act and the Decree had changed this situation to the extent that the broadcasting organisations were now obliged to exchange their lists through the medium of the NOS. This obligation had been created in order to give a better service to the public in a country with many broadcasting organisations. It enabled the public to obtain all the necessary information on forthcoming radio and television programmes by buying, or subscribing to, a single programme magazine published by one of the organisations. Furthermore, this obligation constituted a limitation on the right of each broadcasting organisation to dispose of its own list at its own volition. On the other hand, each organisation was entitled to publish the lists of the other organisations only in its programme magazine and not in any other paper, nor should it grant anyone else the right to publish the complete lists. The same restriction applied to the NOS with one exception, namely that it should issue a short summary of the lists to the daily newspapers and those appearing at least three times a week, and that it could also send abridged lists, for reproduction and publication, to foreign broadcasting organisations and to the editors of papers published abroad.

Phase III began when the broadcasting organisations had published their programme magazines. Once these had been published, everyone including the applicant had cognisance of the complete list of programme data for the week to come. However, nobody was allowed under the law to copy the lists for publication and reproduction. Section 22 of the Broadcasting Act protected the copyright of the broadcasting organisations to their compiled or published lists of programme data, and such protection was the normal protection afforded to the author against the exploitation of his work by others.

30. In this connection the Government maintained that the written list of programme data, compiled or published by a broadcasting organisation, was the final result of the creative effort of such organisation to compose an attractive sequence of a variety of items to be broadcast, taking into consideration the alternating broadcasting times and programmes of the other organisations; it was therefore entitled to copyright protection in the same way as any other protected work. It was improper for other persons to exploit for their own commercial gain and without consent these lists which were of great value to the broadcasting organisations, and the law justly prohibited it.

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In this respect it was immaterial whether the protection against copying and publication without the consent of the author of any writing, even though the writing was not a work of art in the sense of being the product of a creative intellect, was based (as in some countries) on the law of torts, or (as in the Netherlands) on the law of copyright. What was important was that, in one way or another, it had been generally accepted that nobody should profit from the results of another person's efforts without that person's consent.

31. The Government submitted that, for these reasons, there was, in the present case, clearly no interference with the right to freedom of expression within the meaning of Art. 10 (1) of the Convention.

4) Further submissions by the respondent Government

32. In their further submissions of 23 June 1975, the Government first took note of the explicit statement by the applicant that the purpose of the application was not to hold that Article 10 of the Convention imposed on the broadcasting organisations an obligation to make the complete programme data available to the editors of the general interest magazines.

33. They then argued that the applicant company wishing to publish the complete programme data of all the corporations could do so by four different methods listed below, and dealt with the question whether the applicant company was prevented by Netherlands law from publishing the data obtained by these methods and, if so, whether that would constitute a breach of the Convention.

34. Method a: The applicant company could ask the corporations to furnish it with the programme data of each of them and obtain from them permission to publish these data. However, the applicant had failed to show that he had tried this method: it had only asked permission from the NOS which eventually refused. Anyway, there could be no question of a breach of the Convention, since none of the corporations was obliged to furnish the applicant with the programme data.

35. Method b: The applicant company could publish a list of programme data by itself, from data obtained after intensive research by free newsgathering. There is no monopoly on data. The only thing that could be required of the applicant company by the corporations would be an explanation as to how the data had been obtained, proving that they had not been copied from a list or other statement of programmes compiled by, or on instruction from, any broadcasting organisation. Indeed the Act had not changed the protection of such writings without a personal character against the act of taking over their contents by mere copying; it had only shifted the burden of proof.

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In the Government's opinion, publication of lists of programme data, even when complete, were not unlawful, if these lists had been compiled by free newsgathering. Any other interpretation of Arts. 22 and 23 by the applicant company would not be correct and would find no support in any decision of a Dutch court, since the question had never been raised in court. The applicant company should have sought a decision by a Dutch court before petitioning the Commission.

36. Method c: The applicant company could obtain the lists of programme data against the wish of the corporations or the NOS and copy them. Having regard to the fact that the applicant did not allege a right to obtain the lists from the broadcasting organisations or the NOS against their wish, the Government felt it superfluous to argue at length that a domestic law declaring unlawful such a way of obtaining lists of programme data for the purpose of copying and publishing them, did not constitute a breach of Art. 10 of the Convention.

37. Method d: The applicant could copy the complete lists of programme data which have already been published in the programme magazines of the broadcasting organisations.

Such a method would fall within the orbit of Art. 22 of the Broadcasting Act which treats the matter as a matter of copyright.

The Government maintained that the written list of programme data embodied the creative effort of the broadcasting organisations concerned and deserved copyright protection. But even if this protection should not be termed copyright protection as that term is internationally understood, it was a valid form of protection of the results of the efforts of the broadcasting organisations against exploitation by others, in other words, a specific part of the law of torts.

38. The Government then submitted that the corporations had indeed an interest in retaining the right of publication of their lists of programme data in their own programme magazines. Since they had an interest in a large circulation of their magazines, they feared that this circulation would be considerably reduced if other weekly magazines were to publish their complete lists of programme data. In that case, these other weekly magazines would be preying on the efforts of the broadcasting organisations.

There was now a general idea, embodied in particular in national laws on unfair competition, that in certain circumstances it was undesirable that the fruits of the efforts of one should be turned into a profit by another.

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The products of the exertions of a person were protected against exploitation by others in those cases where the legislature judged the interests of the originator in exploiting the product of his exertions himself to outweigh the interests of others in using it for their own profit, and only in so far as the legislature judged this to be necessary for a sufficient protection of the interests of the originator. Thus the legislature struck a balance between the conflicting interests. The point of balance was not always the same in the different democratic societies. In the Government's opinion, the Convention did not attempt to prescribe how the national legislature should strike the balance, but referred to the protection of the "rights of others" as extended by the domestic law of the States Party to the Convention.

39. The Government maintained that the question whether the applicant company was allowed to publish the data could not be separated from the question how it would obtain these data. There were now two methods (a and b) whereby the applicant could obtain the data and publish them without any interference by the Dutch law. Methods c and d were indeed prevented by the law of the Netherlands but it had been demonstrated that this did not constitute a breach of the Convention.

B. As to Article 10 (2) of the Convention

1) Applicant's original submission

40. Turning to the question whether or not the restrictions imposed were justified under Art. 10 (2) of the Convention the applicant submitted that although the High Contracting Parties had a certain margin of appreciation in determining the limits of the rights protected by para. (1), the Commission had the duty to control whether these limits have been respected. In this connection the Commission should bear in mind not only the extent of such limits, but also their aim, since under Art. 18 of the Convention restrictions shall not be applied for any purpose other than those for which they have been prescribed (cf. application No. 753/60, Yearbook 3, p. 318). The applicant submitted that the common purpose of the restrictions under discussion was to prevent an abuse of the freedom of expression, but that in the present case, the purpose of the interference complained of was not to prevent such an abuse, but merely to strengthen the position of the broadcasting organisations by granting them a "monopoly" for publishing the programme data.

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41. In the applicant's submission, any restriction on the right to freedom of expression must, in accordance with para. (2) of Art. 10, be "prescribed by law". The term "law" was meant to be an enactment of the legislature having consciously and conscientiously balanced the right to freedom of expression against other interests. However, the Netherlands broadcasting legislation did not meet that requirement. The preparatory works showed that the legislature, far from consciously and conscientiously balancing the conflicting interests, persistently refused to acknowledge even the possibility that the provisions regarding the exclusive right to programme data might be conceived as a restriction on the right to freedom of expression within the meaning of Art. 10 of the Convention.

42. Furthermore, it was true that the right to freedom of expression under Art. 10 was limited by the necessity to protect the "rights of others", and the respondent Government had invoked this restriction by alleging that the provisions of the broadcasting legislation complained of were necessary for the protection of the rights of the broadcasting organisations. However, any such right of the broadcasting organisations had not previously existed but had only been created in the said legislation. What had existed before had been certain "interests" of the broadcasting organisations, namely to compete among themselves by means of their programme magazines without having to fear competition from the "general interest magazines", and this had been the reason for the Supreme Court's extensive interpretation of the Copyright Act of which the applicant was also complaining. Thus, the freedom to impart the complete radio and television programme data had not been restricted for the protection of the existing rights of the broadcasting organisations but an exclusive right had been created with the effect that the freedom of expression of anybody else, in particular of the editors of "general interest magazines", had been suppressed.

43. In this context the question arose whether under Art. 10 (2) of the Convention the legislature was at complete liberty to limit the freedom of expression protected by para. (1) by the necessity to protect any rights of others or only those which are so fundamental that they are also protected by the Convention. In the applicant's submission only the latter limitation was permitted under the Convention. It explained that, when including restrictions on the exercise of the rights and freedoms set forth in the Convention in order to protect the rights of others, the drafters probably had in mind conflicts of rights (cf. Fawcett, The Application of the European Convention on Human Rights, 1969, p. 26) and it was clear that in such conflicts the rights and freedoms set forth in the Convention could conceivably yield only to rights of the same rank and importance, namely to rights and freedoms which were equally protected by the Convention. Furthermore, to hold otherwise would open the door to the legislature arbitrarily to restrict the right to freedom of expression, the only limitation then having to be found in the words "necessary in a democratic society".

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44. As to the concept of "necessary in a democratic society", the applicant submitted that the granting of an absolute or exclusive right to "news" such as radio and television programme data to a limited group, or the creation of a legal situation which for all practical purposes was equal to the granting of such an exclusive right, amounted to granting an unjustified and unreasonable privilege contrary to the basic requirements of a democratic society. Moreover, considering the various discriminatory elements in the broadcasting legislation or the Supreme Court's jurisprudence complained of, it was clear that the restrictions imposed on the right to freedom of expression in the present case could not be regarded as being "necessary in a democratic society". It was inconceivable that discrimination could ever be regarded as necessary in a democratic society. In this connection the applicant also referred to its submissions under Art. 14 of the Convention.

45. The applicant concluded that, for these reasons, the respondent Government could not rely on Art. 10 (2) of the Convention as justification for the interference with the right to freedom of expression under Art. 10 (1).

2) Applicant's further submissions

46. The applicant repeated that the Government should not be allowed the protection of para. (2) of Art. 10 because the interference with the freedom of expression laid down in Arts. 22 and 23 of the Broadcasting Act had been passed by the legislature, under pressure of the broadcasting organisations, for the sole purpose of strengthening the numerical position of these organisations with regard to the allocation of broadcasting time.

47. The applicant company reproduced its previous argumentation as to the Broadcasting Act and its qualification as "law" under Art. 10(2)

It also reiterated its understanding of the concept of "rights of others" under that provision, namely that these rights only concern the rights and freedoms set forth in the Convention.

48. The applicant company further developed its submissions as to the concept of "necessary in a democratic society". It accepted that, in abstracto, the law of copyright and the law of unfair competition might be said to impose restrictions on the freedom of expression which are "necessary in a democratic society".

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In the present case, however, the unusual and exorbitant right awarded to the broadcasting organisations could not be deemed necessary in a democratic society. In this connection, the applicant company referred to its submissions under Art. 14 that the exclusive right or monopoly to the data conferred on the corporations could find no justification in either the principles of the law of copyright, or those of the law of unfair competition. It also maintained that such a right could not be justified by any of the alternative reasons put forward by the Government i.e. that the corporations would need the returns of their operation of programme magazines for their broadcasting activities and that they would need their programme magazines in order to recruit new members and to maintain their ties with their members.

49. The applicant company also drew attention to the fact that in none of the signatory States of the Convention there existed a right of a broadcasting organisation that might be compared with that which the Netherlands have conferred upon their broadcasting organisations. Everywhere, but in the United Kingdom and Cyprus, the Press were free to publish radio and television programme data. This mere fact proved, in the applicant's opinion, that even a limited protection of these data could not be said to be necessary in a democratic society.

50. The applicant company finally stressed that in view of the various discriminatory elements by which they were characterised Arts. 22 and 23 of the Broadcasting Act could even less be deemed necessary in a democratic society.

3) Original submissions by the respondent Government

51. The Government again submitted that there was, in the present case, no interference with the right to freedom of expression within the meaning of Art. 10 (1) of the Convention.

Nevertheless, even assuming that there had been such an interference it was in their opinion justified in accordance with the terms of para. (2) of Art. 10 as being prescribed by law and necessary in a democratic society for the protection of the rights of others.

52. The Government submitted that it was not true that the rights of others which might justify an interference with the freedom of expression under Art. 10 (2) of the Convention were only those fundamental rights which are also protected by the Convention.

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In contradistinction to Art. 17, Art. 10 (2) of the Convention did not specify these rights but left them to be defined by the domestic law of the Contracting States, and under the Commission's control as to whether or not a specific national law kept within the limits set by Art. 10 (2). In the Government's submission, the broadcasting legislation afforded protection to the broadcasting organisations against the exploitation by others of their lists containing the complete programme data of the broadcasts and clearly did not exceed the limits set by Art. 10 (2) of the Convention for the protection of rights of others.

53. Nor was there any merit in the applicant's argument that this protection was not "prescribed by law" in the sense of para. (2) of Art. 10 because Parliament when passing the Broadcasting Act had allegedly failed to balance the right of freedom of expression against the interests of the broadcasting organisations. In the first place, it was not for the Commission to supervise, or judge upon, the proper functioning of the legislature and to rule upon the question whether or not the legislature had duly considered all elements in a matter before passing legislation. The Commission was only concerned with the provisions of the Convention, and "law" within the meaning of Art. 10 (2) of the Convention was that which had been passed as such in accordance with the constitutional rules of the State in question.

54. In the second place, it was simply not true that Parliament had not balanced the respective rights and freedoms concerned. It had paid very much attention to these matters but had judged it right, and in no way inconsistent with Art. 10 of the Convention, that the broadcasting organisations should not be obliged to permit publication of the complete programme data by the press in general and the weekly magazines in particular owing to the importance attached by the broadcasting organisations to the publication of these data in their own programme magazines.

4) Further submissions by the respondent Government

55. The Government did not elaborate their arguments on this point in their further written submissions.

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C. As to Article 14, in conjunction with Article 10

1) Applicant's original submissions

56. The applicant submitted first that a distinction was made by the applicable law between the editors of "programme magazines" on the one hand, and the editors of "general interest magazines" on the other with regard to the publication of the complete programme data. This distinction had no objective and reasonable justification and was therefore contrary to Art. 14 of the Convention read in conjucntion with Art. 10.

57. In the applicant's opinion it emerged clearly, both from the preparatory works to the broadcasting legislation and from the text of that legislation itself, especially from Arts. 14 and 15 of the Broadcasting Decree, that the creation and bestowal upon the broadcasting organisations of the exclusive right to publish programme data was particularly aimed at the editors of "general interest magazines". The right of the publishers of "general interest magazines" to impart information had wilfully been suppressed by the respondent Government on no other ground than that their magazines were competitive with the "programme magazines". The Government had thus secured the enjoyment of the right to freedom of expression to one group at the expense of another group who for all material purposes were both in the same position. It was a fundamental rule of justice that equals should be treated equally, and the violation of this rule with respect to the protection of the rights and freedoms set forth in the Convention was discrimination within the meaning of Art. 14.

58. This differentiation could only be excused if it had an objective and reasonable justification, and it was incumbent on the respondent Government to establish the existence of any such justification. This the Government had failed to do. In particular, they had failed to show that there was a sufficient link between the factual inequality (on which the legal inequality was based) and the legal inequality itself which was alleged in the present case. If one compared the position of the editors of "general interest magazines" with that of the editors of "programme magazines" with respect to the publication of the complete programme data, the only difference was that for the former these data were those concerning the future activities of others while for the latter they were partly data concerning their own future activites.

59. This discrimination was the more serious because it had affected the respective competitive positions of the "programme magazines" and of the "general interest magazines". The Government had been fully aware of the detrimental effect

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produced by the fact that the "programme magazines" had taken on the character of "general interest magazines". Accordingly, it had incorporated in Art. 20 of the Statutes of the NOS a provision which was aimed at preventing the "programme magazines" from assuming the character of "general interest magazines", and this provision had almost literally been included in Art. 14 of the Broadcasting Decree as amended. In spite of these provisions the "programme magazines" had developed in contents and form of presentation into "general interest magazines" and were no longer the rather dull and colourless mere data compilations that they had been before 1969. This was clearly shown by the advertisements for "programme magazines" in the Netherlands which emphasised the interesting and varied contents of such magazines and referred, in addition, to the complete radio and television programme data. A further inequality was to be seen in such advertisements by reason of the fact that the broadcasting organisations could advertise in their allocated broadcasting time while the editors of "general interest magazines" had to pay huge sums to the Advertising Corporation.

60. Finally, it was discriminatory to allow for a short summary of the programme data to be published in the daily press, in accordance with the provisions of Section 15 of the Broadcasting Decree which had been carefully drafted so as to exclude the "general interest magazines" which as a rule were weeklies.

61. The applicant concluded that, for these reasons, the respondent Government failed to secure to it the right to freedom of expression without discrimination and was therefore in breach of Art. 14 read in conjunction with Art. 10 of the Convention.

2) Applicant's further submission

62. The applicant company maintained that the creation and conferring of an alleged exclusive right to the (complete) programme data was contrary to the duty of the Netherlands to secure the enjoyment of the right to freedom of expression without discrimination within the meaning of Art. 14.

In the applicant's opinion, broadcasting programme data were of public interest. It followed that they could not be kept secret but must be published. If these data must be published, there was no cogent reason why they should be published by the broadcasting organisations only. Indeed, when editing a programme magazine, the corporations did not act in their capacity of broadcasting organisations, but as other editors of weeklies, their normal and direct competitors. Further Art. 22 of the Broadcasting Act, editors of programme magazines had been secured a position with respect to programme data which differed essentially from that of their competitors, the editors of other weeklies and especially of general interest magazines. ./.

63. Unless the respondent Government showed sound reasons which would allow the conclusion that the difference was reasonable and justified, it should be qualified as discrimination under Art. 14 of the Convention.

In this connection, the applicant company submitted that the three "official" reasons put forward by the Government in order to justify the difference of treatment under review were not convincing.

64. a) It should be realised that the complete programme data were the reflection of manifold consultations within the various broadcasting organisations and within programme coordinating committees of the NOS. They were therefore not the final result of a creative effort. The creative effort, if any, was aimed at the composition of attractive sequences of interesting items to be broadcast. The list of programme data was no more than a necessary by-product which summarised that effort. It followed that the final (lists of) programme data did not qualify for any copyright protection and Section 22 of the Broadcasting Act did not embody, as the Government contended, the customary protection of the author against the exploitation of his work by others.

Neither was the protection granted by Section 22 of the Broadcasting Act justified under the "generally accepted principle" referred to by the Government, that "one should not profit without the other's consent from the results of the other's efforts". In the present case, the efforts which the Government keep invoking were the efforts aimed at the composition of a programme to be broadcast. In publishing the lists of programme data, the press would not be preying on those efforts. The only one who rightly could be said to prey on those efforts would be another broadcasting organisation that would take over or imitate a particular sequence of items to be broadcast by another corporation.

Furthermore one could not find in the law or practice of the vast majority of the signatory States of the Convention, any generally accepted principle that profiting from another's effort was unlawful. On the contrary, such a rule was only applicable under special circumstances. In support of this assertion, the applicant quoted several authorities on competition law in the Law of Torts.

65. b) The financial argument put forward by the Government was failing too. If it were true that the broadcasting organisations need the profits they are making on their programme magazines for their broadcasting activites, that would not justify the creation of an exclusive right in programme data, because this meant that part of the costs of

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broadcasting - an activity which was deemed to be of public interest - fell upon the editors of general interest magazines, which was contrary to the principle of "egalité devant les charges publiques". The Government failed to explain how it had been established that the corporations would not be able to find the means to cover the costs of their offices and administration, if their programme magazines were to compete on an equal footing with other weeklies; nor why, in that case, their deficits could not have been met out of public funds. The Government also failed to explain why the proposed arrangement to make the data available to all interested parties against reasonable retribution had not been adopted.

66. c) The shallowness of the last argument was evident. The exclusive right on data conferred on the corporations rendered affiliation to one of them compulsory for anybody who wanted to be informed on programmes. This was in full contradiction with a system built on private corporations, freely born out of private initiative and carried on through the free support of their members.

67. In fact, the true reason why the broadcasting organisations had pushed the exclusive right in programme data through Parliament was the adoption of the numerical criterion as a basis for allocation of broadcasting time together with the coupling of membership and subscription. That set-up made it all important for the corporations to get as many subscribers to their programme magazines as possible.

68. It was the applicant's submission that neither the "official" reasons nor the "true" reason put forward by the Government constituted an objective and reasonable justification for the difference in treatment between editors of general interest magazines and programme magazines.

3) Original submissions by the respondent Government

69. The respondent Government denied that the applicant had been discriminated against within the meaning of Art. 14 of the Convention by reason of the fact that it was not free to publish the complete programme data while the broadcasting organisations were free to do so.

70. The Government submitted that the applicant did not belong to any of the groups characterised in Art. 14, or otherwise, but shared with any other person or organisation the position of being, in fact, prevented from publishing the complete programme data of the broadcasting organisations. In a similar way, everyone but the author was prevented from publishing his work. Besides, the rule of the Broadcasting Decree which distinguished between the broadcasting organisations

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on the one hand and everyone else on the other insofar as the publication of these data was concerned, served a reasonable purpose. That purpose was to let the broadcasting organisations enjoy the fruits of their efforts for their own maintenance, and this purpose was realised by a reasonable method. It was therefore not discriminatory within the meaning of Art. 14 of the Convention.

71. On the other hand, it was true that under Art. 15 of the Broadcasting Decree daily newspapers and newspapers appearing at least three times a week, received from the NOS a summary of the lists of programme data for publication in their papers. This situation had already existed before the broadcasting legislation had come into force and had been agreed with the broadcasting organisations. It had then been incorporated in the broadcasting legislation for the purpose of serving the public by making accessible the programme data by means other than weekly magazines. From the point of view of public interest, it was not however necessary to limit the right of the broadcasting organisation more than was necessary and to include also an exception in favour of weekly magazines, particularly "general interest magazines".

72. Finally, insofar as foreign weekly magazines were concerned, Section 16 of the Broadcasting Decree simply ensured that programme data could be exchanged with broadcasting organisations abroad on a reciprocal basis.

73. In no way, therefore, were the "general interest magazines" in the Netherlands treated in a discriminatory way contrary to the provisions of Art. 14 of the Convention read in conjunction with Art. 10.

4) Further submissions by the respondent Government

74. The Government submitted that the applicant's reasoning concerning discrimination relied on the wrongful assertion that the broadcasting organisations and the applicant company were nothing but competitive publishers of weekly magazines of general interest. In fact, the broadcasting organisations were not (mere) publishers of weekly magazines but published their programme magazines in close connection with and in the interest of their principal activities of broadcasting. Moreover the applicant's reasoning disregarded the fact that the broadcasting organisations generated the information contained in the lists while the applicant did not.

75. Therefore the position of the corporations was not similar to that of the applicant company, so that there was no question of discrimination in the meaning of Art. 14.

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V. OPINION OF THE COMMISSION

1. As to Article 10 of the Convention

76. Art. 10 of the Convention provides:

> "1. Everyone has the right to freedom of expression. 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 Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties 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 prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

77. The applicant company has claimed that it was prevented by the relevant Netherlands broadcasting legislation from publishing in its weekly magazines the complete programme data of television and radio broadcasts and that this constituted an unjustified interference with the right freely to receive and impart information as guaranteed by Art. 10 of the Convention.

78. The respondent Government have denied that the legislation in question interfered in any way with the applicant company's rights under Art. 10. In the alternative, they have submitted that any such interference was justified, under the terms of para. (2) of that provision, as being necessary in a democratic society for the protection of the rights of others.

79. The information which the applicant company seeks to impart in its weekly magazines, are the complete lists of television and radio programme data, compiled for each week by the Netherlands Broadcasting Foundation (NOS) on information supplied by the various broadcasting organisations.

However, Article 22 of the Broadcasting Act 1967 provides:

> "Any reproduction or publication of lists or other statements of programme other than on behalf or with consent of the Foundation shall, for the purpose

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> of liability under civil law, likewise be regarded as infringements of the copyright to any written work containing the programmes for radio or television transmissions compiled by, or on instructions from, broadcasting organisations, prospective broalcasting organisations, the Foundation or any other institution having obtained transmission time, unless it is proved that the information contained in such lists or other statements has not been obtained directly or indirectly from any written work as referred to earlier in this Article."

Furthermore, Art. 23 of the Broadcasting Act provides that:

> "The institutions having obtained transmission time shall undertake to make available to the Foundation lists of the programmes they propose to transmit, and to allow reproduction and publication thereof, in accordance with rules to be laid down by general Administrative Order, it being understood that the Foundation shall make available exclusively to the broadcasting organisations and the prospective broadcasting organisations having obtained transmission time the complete lists for reproduction and publication."

80. It is clear from these provisions that the reproduction and publication of the lists referred to is reserved exclusively to the established or prospective broadcasting organisations, or to the Foundation, and that anyone else is prevented from publishing these lists without the consent of the Foundation, unless it can be shown that the information so published has not been obtained directly or indirectly from any written work containing the programme data concerned. It is this exclusive right on publication which the applicant also calls a "monopoly" that is challenged in the present application.

81. The Commission has first considered the nature of the particular matter which the applicant company is seeking to impart. It is true that in the ordinary sense of the word, information includes the expression of facts and of news and that television and radio programme data can be regarded as being either of them. The Commission considers therefore that the lists of programme data in question constitute "information", as opposed to "opinions" or "idées" within the meaning of Art. 10 of the Convention. Indeed, this point is not in dispute between the parties.

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82. However, in the opinion of the Commission, there are various special features concerning these programme data which must be taken into account when determining whether or not any restrictions imposed on their publication amount to an interference with the rights of the applicant under Art. 10 of the Convention.

83. In the first place, such lists of programme data are not simple facts, or news in the proper sense of the word. They are rather a compilation of facts and they are news in the sense that they provide an orientation guide for television viewers or radio listeners prior to or during a particular week with a view to assisting them in the selection of forthcoming programmes. The characteristic feature of such information is that it can only be produced and provided by the broadcasting organisations being charged with the production of the programmes themselves and that it is organised by the Foundation being the coordinating body of these organisations.

84. The Commission considers that the freedom under Art.10 to impart information of the kind described above is only granted to the person or body who produces,provides or organises it. In other words the freedom to impart such information is limited to information produced, provided or organised by the person claiming that freedom, being the author, the originator or otherwise the intellectual owner of the information concerned. It follows that any right which the applicant company itself may have under Art. 10 of the Convention has not been interfered with where it is prevented from publishing information not yet in its possession.

85. Furthermore, in the area of "information", i.e. in the area of facts and news as opposed to "ideas" and "opinions" the protection which Art. 10 of the Convention seeks to secure concerns the free flow of such information to the public in general.

86. However, there can be no question in the present case that the freedom of the press in general is threatened in the sense that the public is deprived of any specific information, i.e. in the present case, the programme data, by censorship or otherwise by reason of any undue State monopoly on news. On the contrary, every person in the Netherlands may inform himself about the forthcoming radio and television programmes through a variety of mass media representing various sections and tendencies of society. To that extent there is, in the Commission's opinion, no merit in the applicant company's claim that the public is prevented from receiving unbiased information about these programmes owing to the fact that it can only obtain such information by reading the broadcasting organisations' own magazines.

87. Of course, the Commission does not ignore that the applicant company might suffer considerable commercial disadvantages by reason of the fact that it is prevented from

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publishing these lists of programme data. The Commission has noted the applicant company's submissions that, although the legislation in question imposed various restrictions on the contents and presentation of the "programme magazines" so as to prevent them from being competitive with the "general interest magazines", these legislative restrictions were in fact not complied with, and that consequently the "programme magazines" were real competitors of the "general interest magazines". According to the applicant company this had considerably affected the financial position of "general interest magazines", and had reduced sales.

88. Be that as it may, the Commission considers that the protection of the commercial interests of particular newspapers or groups of newspapers is not as such contemplated by the terms of Art. 10 of the Convention. These matters might perhaps raise an issue under this provision where a State fails in its duty to protect against excessive press-concentrations, but this obviously is not the position in the present case.

89. It follows that there has been, in the circumstances, no interference with any of the rights protected by Art. 10 (1) of the Convention, and that the Commission is therefore not required to examine the applicant company's complaints in the light of Art. 10 (2).

Conclusion

90. The Commission is of the opinion by eleven votes in favour and one abstention that there has not been, in the present case, a breach of Art. 10 of the Convention.

2. As to Article 14, read in conjunction with Article 10 of the Convention

91. Art. 14 of the Convention provides:

> "The enjoyment of the rights and freedoms set forth in the Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

92. The applicant company has complained that the Netherlands Broadcasting legislation, bestowing an exclusive right on the broadcasting organisations to publish the complete lists of television and radio programme data in their "programme magazines" and providing that a summary of such lists should be sent to daily newspapers, newspapers appearing at least

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three times a week and foreign magazines was discriminatory against its own magazines and therefore in breach of Art. 14 of the Convention, read in conjunction with Art. 10.

93. The respondent Government have denied that the legislation concerned made any distinction between the applicant company and any other person or organisation. Indeed everyone was prevented from publishing the complete programme data except the broadcasting organisations or the Foundation being the authors or organisers of the information concerned. Besides, any distinction, which was made between the broadcasting organisations, on the one hand and the publishers of newspapers and foreign magazines on the other, had a legitimate aim in that it had an objective and reasonable justification and was not out of proportion to the aims to be realised.

94. In accordance with the jurisprudence of the Commission and the Court of Human Rights, discrimination under Art. 14, which must always be read in conjunction with another Article in Section I, is established where three elements are found to exist in the case concerned, namely

(a) the facts found disclose a differential treatment;

(b) the distinction does not have a legitimate aim, i.e. it has no objective and reasonable justification having regard to the aim and effects of the measure under consideration; and

(c) there is no reasonable proportionality between the means employed and the aim sought to be realised.

95. Furthermore, in the terms of the judgment of the Court in the Belgian Linguistics Case, "while it is true that this guarantee has no independent existence in the sense that under the terms of Art. 14 it relates solely to the rights and freedoms set forth in the Convention, a measure which is in itself in conformity with the requirements of the Article enshrining the right or freedom in question may however infringe this Article when read in conjunction with Article 14 for the reason that it is of a discriminatory nature"(1).

96. It follows from this case-law, which was confirmed by the Court in its judgments in the so-called "Trade Union Cases" (2), that despite finding no breach of Art. 10 (1),

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(1) Eur. Court of Human Rights, Case "relating to certain aspects of the laws on the use of languages in education in Belgium" (merits), Judgment of 23 July 1976, p. 33).

(2) Case of the National Union of Belgian Police, Judgment of 27 October 1975; Case of the Swedish Engine Drivers' Union, Judgment of 6 February 1976; Case of Schmidt and Dahlström, Judgment of 6 February 1976).

the Commission must ascertain whether any difference in treatment, characterised by the applicant company as discriminatory, infringed Arts. 10 and 14 taken together.

97. Concerning the facts of the present case it is true that, in accordance with Art. 15 of the 1969 Broadcasting Decree, the Foundation shall make a short summary of the lists of programmes once a week, and "shall issue this summary for publication to daily newspapers and other newspapers (i.e. those appearing at least three times a week) published in the Netherlands". Furthermore, under Art. 16 of the said Decree, "Lists of programmes, abridged and, where necessary, translated shall be sent for reproduction and publication to foreign broadcasting organisations to be designated by the Board of the Foundation, as also to the editors of papers published abroad to be designated by the Board".

98. It is therefore clear that, whilst the complete programme lists are communicated to the broadcasting organisations only, at least summaries or abridged versions of these lists are made available for publication in press organs other than the broadcasting organisations' own programme magazines. On the other hand, no prior information of any kind is given to the applicant company for publication in its magazines, and it is this situation which the applicant company alleges to be discriminatory.

99. The Commission has first considered the question whether the broadcasting legislation in the Netherlands discriminates between the applicant company on the one hand and the broadcasting organisations on the other hand in that it prevents the former from publishing in its magazines the complete list of programme data while it allows such publication in the programme magazines of the latter.

100. Having examined samples of both the programme magazines and of the applicant company's magazines the Commission is satisfied that they are comparable publications and that consequently the facts disclose differential treatment between them. However, such distinction is not discriminatory on any ground, including their status, within the meaning of Art. 14 of the Convention in conjunction with Art. 10, as it pursues a legitimate aim.

101. Under the Netherlands system broadcasting organisations, whilst performing a public service, are companies created under private law. Broadcasting time is allocated to them according to their membership and an indication of membership is given by the number of subscriptions to the broadcasting organisations' programme magazines. Furthermore, the profits from the subscriptions to the programme magazines contribute to the financing of the broadcasting activities of the organisations, although it appears that they are mainly financed by public funds deriving from television and radio licence fees and the yields of advertising.

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102. In this situation, the Commission considers that, apart from any other considerations, there are objective and reasonable grounds justifying the protection granted to programme magazines against competition from the general interest magazines.

103. Considering next the position of the magazines published by the applicant company in relation to the daily papers or newspapers appearing at least three times a week, the Commission had regard to certain factual features which must be taken into account in the determination of the question whether or not there has been any differential treatment at all. For in order to find the existence of any differential treatment it is necessary that the party alleging that a distinction is made between himself and another is in a position comparable to that of the other who is allegedly favoured.

104. In the case of the daily press, compared with weekly magazines, the main common feature seems to be that they both belong to the printed press. Otherwise, there are substantial differences between them as regards contents, presentation and purpose as well as regards the functions they fulfil. It is therefore difficult to say that they are comparable press products.

105. Moreover the publication of the programme is different in the daily and the weekly press. The daily press is provided with a summary of the lists of programme data and simply lists them on a day to day or weekly basis indicating the hour and title of the programmes concerned. On the other hand, the applicant company is seeking to publish the complete list of programme data, not merely a summary, possibly adding details and comment. Again, from this point of view, it is therefore difficult to find comparable features in these two kinds of press publications.

106. Finally, as regards the question whether or not there is discrimination within the meaning of Art. 14 of the Convention by reason of the fact that foreign weekly magazines may publish the summary of the lists of programme data with which they are supplied by the NOS, but not those published in the Netherlands, the Commission has again considered in the first place whether both are comparable publications. Given that foreign weeklies have a rather limited circulation in the Netherlands, either because they are published in a foreign language or because they provoke little interest, it is again difficult to compare them with Dutch weekly magazines such as those published by the applicant company.

107. However, even assuming that such a comparison can be made and that consequently inequality exists in fact between them, such inequality has an objective and reasonable justification having regard to the aim and the effect of the measure concerned. For it is clear that the only purpose of this measure is to allow, on a reciprocal basis, for an exchange of programme information with broadcasting organisations abroad in order to serve those segments of the public who are interested in foreign broadcasts.

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108. It follows that the measures concerned cannot in any way be regarded as discriminating against the applicant company.

Conclusion

109. The Commission is of the opinion by nine votes in favour and three abstentions that there has not been, in the present case, a breach of Art. 14, read in conjunction with Art. 10 of the Convention.

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