EUROPEAN LAW: A CASE STUDY OF CHANGES IN NATIONAL BROADCASTING

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I. INTRODUCTION

The liberal revolution that took place across Europe in 1848 also affected the political and social situation in the Netherlands. The German poet Heinrich Heine is supposed to have said that in the Netherlands, everything happens fifty years later than elsewhere. But the revolutionary year of 1848 gave the Netherlands a constitutional monarchy, limiting the powers of the King and expanding the influence of parliament. These developments took place without bloodshed. The King, a Hero of Waterloo, observed the violent revolutionary developments in neighboring countries and decided that his country should enter the liberal era peacefully.[1]

The Dutch have never liked physical confrontations, always preferring to solve problems in a sphere of harmony and peace. During the First World War, the Netherlands maintained a policy of neutrality. A similar policy failed some twenty years later: on May 10, 1940, Nazi Germany terminated an era of 127 years of Dutch independence, hoping that its neighbors would be willing to join the Germanic Empire as brothers. This never worked out, of course: you cannot make friends with the Dutch by brutal force. The events of the Second World War, however, did put an end to the desire of the Dutch to be a non-committed, neutral country. The Netherlands became a loyal member of most of the international organizations created after the War.

The Dutch have also always attempted to remain independent in broadcasting. For many years, radio and television in the Netherlands were organized in a typically Dutch manner, characterized by pluralism, balance, and harmony. The broadcasting system was thus able to resist encroachment by commercial and foreign influences. A combination of events, including the emer-

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[1] *See generally* E.H. KOSSMANN, THE LOW COUNTRIES: 1780-1940 (1978).

gence of new technology and developments in European law and policy, seriously threaten this special position. This article will give a brief overview of Dutch broadcasting history, and will then focus on developments in the European Community and the Council of Europe that, combined with the increased use of satellite and cable, are substantially changing the national broadcasting system of the Netherlands.

II. History of Freedom of Expression

Perhaps the liberalization of 1848 occurred peacefully in the Netherlands due to the country's long tradition of respect for basic liberties such as freedom of expression. Censorship was unknown there in the 17th and 18th centuries.[2] Dutch companies printed books and other publications that had been banned abroad, and subsequently smuggled them into neighboring countries. This is said to be one of the reasons why Louis XIV attacked the Dutch Republic in 1672.[3] Thus, a relatively free press already existed in the Republic of the Seven United Netherlands in the decades preceding the French occupation (1795-1813).[4]

Article 227 of the chapter on *Education and the Administration of the Poor* in the Constitution of the Kingdom of the Netherlands (in effect from 1815 to 1848) declared:

> Every citizen is permitted to publish his thoughts and feelings by way of the printing press, as an effective means of developing knowledge and continuing enlightenment, without any form of prior consent, although the citizen remains responsible to society and to individual persons for what he writes, prints, publishes or distributes, to the extent that the rights of others may have been offended.[5]

The constitutional amendment of 1848 simplified this statement of policy and gave it a more prominent position in the Constitution under Article 7: "No citizen shall be required to obtain prior

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[2] *See generally* J.M. de Meij, Overheid en uitingsvrijheid [Parliament and Free Speech] (1982).

[3] *Id.* at 23.

[4] *See, e.g.*, C.W. van der Pot & A.M. Donner, Handboek van het Nederlandse Staatsrecht [Handbook of Dutch Law] 242 (1983), and Willem F. Korthals Altes, *Rapport néerlandais sur la vérité et la liberté d'expression [Netherlands Report on Truth and Freedom of Expression], in* La vérité et le droit, Travaux de l'Association Henri Capitant des Amis de la Culture Française [The Truth and the Law, Works of the Friends of Henri Capitant Association of French Culture] 343 (1987).

[5] Grondwet [Grw. Ned.] art. 227 [Translation by author]. *See also* Van der Pot & Donner, *supra* note 4, at 242.

consent for the publication of thoughts and feelings by way of the printing press, subject to his responsibility according to the law."[6]

At first, courts interpreted Article 7 rather narrowly.[7] They readily permitted restrictions which would be inconceivable today. Until 1869, for instance, the publication of daily newspapers was subject to a stamp tax, making it possible for only the wealthy to subscribe.[8] The abolition of the stamp tax gave rise to a rapid increase in the number of dailies, from nine in 1869 to thirty in 1900.[9]

Article 7 was interpreted narrowly in other respects as well. It was not until 1892 that the *Hoge Raad* (the Dutch Supreme Court) held that freedom of expression included the freedom to distribute thoughts and feelings in addition to the right to be exempt from prior government consent for making them public.[10] In other words, there should be no impediments to the distribution of newspapers and other publications.

The recent technological advances in the areas of publishing and distributing information have engendered interpretational problems with regard to Article 7. Unlike the First Amendment to the United States Constitution, Article 7 addressed only the printing press, and did not mention speech or any other form of expression. Although the *Hoge Raad* was willing to grant a political statement expressed in a neon sign the same protection as an expression on paper,[11] there was little doubt that such protections could not be extended to film, radio, or television because these forms of communication did not have enough in common with printing.

III. The Amendment of 1983

The narrow scope of the language in Article 7 prompted the legislature to modify the Constitution of 1983 by adding three new paragraphs to the existing text. Article 7 now reads as follows:

1. No citizen shall be required to obtain prior consent for the

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6 Grw. Ned. art. 7 [Translation by author].

7 *See, e.g.*, van der Pot & Donner, *supra* note 4, at 243.

8 De Meij, *supra* note 2, at 27.

9 *Id. See also* A.J. Nieuwenhuis, *Media Policy in the Netherlands: Beyond the Market?*, 7 Eur. J. of Comm. 195, 196 (1992).

10 Judgment of Nov. 7, 1892, Hoge Raad der Nederlen [HR], Weekblad van het Recht [W.] 6259.

11 Judgment of Jan. 24, 1967, HR, 167 Nederlandse Jurisprudentie [NJ] 270.

publication of thoughts and feelings by way of the printing press, subject to his responsibility according to the law.
2. The legislature shall create special legislation for radio and television. There shall be no prior restraint of a radio or television broadcast based on content.
3. No citizen shall be required to obtain prior consent based on content for the publication of thoughts or feelings by means other than those of the preceding paragraphs, subject to his responsibility according to the law. The legislature can create special legislation for public performances accessible to persons under 16 years of age, with the purpose of protecting common decency.
4. The preceding paragraphs do not apply to commercial advertising.[12]

On its face, the new version of Article 7 seemed to give Dutch citizens rights they lacked in the period before 1983. A closer look at the text, however, shows that certain means of publishing and distributing information became subject to limitations that did not formerly exist with regard to written expressions. The most notable of these limitations are incorporated in the second paragraph, which enables the legislature to regulate broadcasting, and in the fourth paragraph, which carves out an exception for commercial advertising. Broadcasting and commercial advertising are presently the most hotly debated communications issues in the Netherlands.[13]

IV. THE DUTCH BROADCASTING SYSTEM

The broadcasting system in the Netherlands developed in the 1920s and the 1930s. In the early 1920s, broadcasting by radio, which started as a private unregulated initiative,[14] was the exclusive domain of a privately organized association, called *Algemene Vereniging voor Radio Omroep* ("AVRO"), or General Association for Broadcasting by Radio. AVRO was a product of the nineteenth century Dutch liberal tradition; its founders wanted broadcasting to remain independent from existing political and

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12 GRW. NED. art. 7 [Translation by author].

13 This is evidenced by the large number of publications in periodicals, on radio, and on television, and by frequent debates concerning such issues in Parliament.

14 An engineer by the name of H.H. Schotanus à Steringa Idzerda built facilities and began broadcasting music programs. He also sold radio equipment. His activities were soon taken over by an association, which was more capable of handling the medium as it grew. *See generally* A.A.M. ENSERINCK, DE NEDERLANDSCHE RADIOWETGEVING GESCHIEDKUNDIG ONTWIKKELD [THE HISTORICAL DEVELOPMENT OF DUTCH RADIO BROADCASTING LAWS] (1933) and C.G. GRUTZNER, ORDENING VAN DEN OMROEP IN EUROPA [THE ORGANIZATION OF EUROPEAN BROADCASTING] (1936).

social controls.[15]

This independence did not last long, however. All aspects of Dutch society were organized (pillarized, as it is called) along political and religious lines. Political parties, trade unions, sports associations, stamp collecting organizations, and newspapers were all either Protestant or Catholic, socialist or liberal.[16] The same pillarization inevitably affected broadcasting. In the middle of the 1920s, Protestant, Catholic, and socialist broadcasting associations were founded.[17] The associations demanded and obtained equal broadcasting time. AVRO had to share the available radio frequencies with these newcomers.[18] Consequently, AVRO became more or less associated with the liberal parties despite its preference to remain (or become) a Dutch version of the BBC (i.e., a non-aligned general broadcasting association rather than an organization associated with one of the political currents of society).[19]

The associations founded in these early days of radio kept their exclusive positions for approximately forty years. They also controlled television broadcasting, which began in 1951.[20] Broadcasting time for both radio and television was allotted according to the number of subscribers.[21] The grouping of subscribers tended to follow the pillarized structure of Dutch society. As was to be expected, the associations broadcast the programs that conformed to their own political or religious character. Members received the program guide, which listed, among other things, all radio and television programs.[22]

In 1967, the financial position of the broadcasting associations was strengthened when an amendment to the Broadcasting

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15 *See generally* ENSERINCK, *supra* note 14.

16 DE MEIJ, *supra* note 2, at 21. 'Liberal' refers to the 19th century political trends in Europe and should not be confused with 'liberal' as used in the United States today.

17 A. WOUTER HINS & P. BERNT HUGENHOLTZ, THE LAW OF INTERNATIONAL TELECOMMUNICATIONS IN THE NETHERLANDS 23 (1988).

18 DE MEIJ, *supra* note 2, at 23.

19 *See, e.g.*, K.A.M. Duyvelaar, *De bewogen geschiedenis van het Nederlandse omroepbestel*, 32 AA 43, 44 (1983).

20 *Id.* at 47.

21 Currently, there are three categories of broadcasting associations which are distinguished by the number of members. Category A associations must have 450,000 members, Category B associations range from 300,000 to 450,000 members, and Category C associations vary from 150,000 to 300,000 members. Broadcasting time is divided on a ratio of 5:3:1. *See* Mediawet [Media Act] art. 34, 1987 Stb. 249 (containing rules concerning radio and television programs, the broadcasting fee, and subsidies to press institutions).

22 Until 1967, membership always included a subscription to the program guide. Since 1967, broadcasting associations have had members who do not subscribe to the guide. Media Act art. 14, ¶ 2, 1987 Stb. 249.

Act allowed for the introduction of commercial advertising. Previously, broadcasting had been subsidized by a fund financed from a contribution paid by every household that owned a radio or television set. The amended Act created an independent foundation (Stichting Ether Reclame (STER) [Foundation for Broadcast Advertising]) that administered the commercials, which were broadcast in five-minute blocks before and after the national news.[23] STER then transferred the proceeds from the sale of advertising time to the broadcasting fund.[24]

V. THE 'DEPILLARIZATION'

The overall depillarization of society in the 1960s had an inevitable effect on radio and television. At first, the challenge to the existing broadcasting system came from outside the system itself. Several organizations that were independent of political or religious "pillars" started broadcasting from beyond Dutch territorial waters.[25] Two of these, TROS and Veronica, became very popular and were eventually admitted to the family of broadcasting organizations. They became part of the system, but, significantly had no connection to any of the traditional political or social institutions.[26]

The admission of these outsiders to the exclusive club of broadcasters did not go unchallenged. Veronica had to appeal to the highest administrative court in the Netherlands.[27] In refusing to grant Veronica broadcasting time, the government contended that the organization failed to comply with the law by not "sufficiently address[ing] society's cultural, religious or spiritual needs,"[28] as required by Article 13 of the Broadcasting Act. The court held, however, that the mere existence of Veronica's 150,000 members indicated that society's needs were being ad-

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[23] Omroepwet [Broadcasting Act] of 1967, art. 50, 1967 Stb. 176, is the predecessor of the current Media Act. *See also* HINS & HUGENHOLTZ, *supra* note 17, at 94.

[24] Broadcasting Act art. 58. The proceeds from advertising were used in part to compensate newspapers and other periodicals for the loss of advertising income due to the introduction of commercials on radio and television. Wet Voorziening Perswezen [Act on the Provision of Facilities for Press Institutions] of 1951, 1951 Stb. 130, *as amended* 1971 Stb. 52. The Wet Voorziening Perswezen was incorporated into the Media Act of 1987 and repealed when the Media Act came into force. Media Act art. 166, 1987 Stb. 249.

[25] Duyvelaar, *supra* note 19, at 48.

[26] *Id.*

[27] Judgment of Aug. 26, 1975, Koninklijk Besluit [KB], 1977 Administratiefrechtelijke Beslissingen [ARB] 29.

[28] Broadcasting Act art. 13, 1967 Stb. 176. Currently, Media Act art. 14, 1987 Stb. 249.

dressed sufficiently.[29] Contrary to the government's position, the court found that the law did not require Veronica to offer substantially different programs from those offered by the existing broadcasting organizations.[30] The family of broadcasting associations was therefore required to accept Veronica as a new member. The government's position in the Veronica case was typical of the Dutch government's stance on broadcasting issues. Due to the traditionally close connections between the broadcasting associations and the political parties, the government is under pressure whenever the established broadcasting system is threatened. Although the government was unable to exclude Veronica, it sought to prevent similar invasions by amending the Broadcasting Act to require future applicants to be substantially different from the existing associations. By the middle of the 1970s, however, the traditional broadcasting organizations began adapting to developments in society. The loss of subscribers to TROS and Veronica convinced the older organizations that the public no longer wanted programs to be distinctly Catholic or Protestant, socialist or liberal.[31] Consequently, their programs gradually became less characteristic of such distinctions.

Even if these developments had not occurred, the amendment to the Broadcasting Act could not have forestalled the inevitable changes to come. The development of cable and satellite technologies created new challenges to the Dutch broadcasting system. While a substantial part of the country was already able to receive broadcast programming from abroad, the installation of local cable systems around 1980 expanded the penetration of foreign programming to those living further from the Dutch borders.[32] The Dutch broadcasting associations did not perceive this developmemt as a threat because only a very small portion of the population watched the foreign language programs. STER's commercial revenues were not seriously affected,[33] as Dutch companies continued to buy advertising time on Dutch radio and television.[34]

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[29] Interestingly, Veronica is currently the largest broadcasting association, with about one million members.

[30] Judgment of Aug. 26, 1975, 1977 ARB 29.

[31] Duyvelaar, *supra* note 19, at 47.

[32] *See, e.g.*, HINS & HUGENHOLTZ, *supra* note 17, at 99.

[33] The annual income to STER increased steadily in the 1970s. In 1970, the total income was Dfl. 111 million (at that time, approximately $27 million). In 1979, it was about Dfl. 219 million (approximately $55 million). *25 jaar STER, een leeuw van een medium* [*25th year STER, the lion/heart of the media*], STER ANNUAL REPORTS (1990).

[34] In the years following 1979, the income to STER continued to rise: in 1980, Dfl. 238 million; in 1981, Dfl. 254 million; in 1982, Dfl. 288 million. In 1988, the income

VI. The Cable Regulations

The threat to the existing broadcasting system became more significant when foreign-based organizations began broadcasting Dutch language programs and advertisements by satellite and cable.[35] The Dutch government responded quickly by issuing the so-called *Cable Regulations*.[36] These regulations prohibited Dutch cable networks from distributing foreign programs if they contained commercial advertisements specifically directed at the Dutch market, or if they contained Dutch language subtitles. Those who received permission to broadcast from the Minister of Cultural Affairs were excepted.[37]

Obviously, these restrictions were meant to protect the broadcasting status quo. Some of the controls that applied to Dutch broadcasters, however, were actually beneficial to their foreign competitors. For example, the Dutch broadcasters were obliged to offer a schedule with a well-balanced variety of information, culture, education, and sports. Therefore, foreign broadcasters could easily attract large audiences, and consequently Dutch advertisers, by broadcasting "popular" programs only. Such limitations inevitably had the effect of attracting Dutch advertisers.

It was Dutch advertisers, however, who challenged the Cable Regulations. They filed two suits; the first attacked the regulations on the basis of Article 7 of the Dutch Constitution,[38] the second was based on European Community law.[39] Both cases were resolved in favor of the plaintiffs. In *VEA v. Netherlands*, the *Hoge Raad* held that the provision prohibiting programs with Dutch language subtitles violated the second sentence of Article 7, paragraph 2 of the Dutch Constitution.[40] The court reasoned that the Cable Regulations allowed the Minister of Cultural Affairs to ban programs on the basis of content. The Government claimed that because it would refuse permission to broadcast in cases of commercial advertisements only, the statute should be

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exceeded the Dfl. 500 million mark for the first time. In 1988 and 1989 the income was Dfl. 522 million and Dfl. 572 million, respectively. *Id.*

35 Hins & Hugenholtz, *supra* note 17, at 101.

36 Ministerial Regulations of July 27, 1984, 1984 Staatscourant 145 (concerning the use of antenna installations for the transmission of radio and television programs).

37 *Id.* art. 4.

38 Judgment of Dec. 11, 1987 (Vereniging van Erkende Reclam-adviesbureaux (VEA) v. Netherlands), HR, 1987 Rechtspraak van de Week.

39 Case 352/85, Bond van Adverteerders (BvA), 1988 E.C.R. 2085. This is also known as the *Kabelregeling* [*Cable Regulations*] *Case*, and was predicated on Articles 59 and 60 of the Treaty of Rome. *See infra* notes 43-53 and accompanying text.

40 Judgment of Dec. 11, 1987, 1987 RvdW 237.

upheld. The court, rejecting this argument, held that the provision was overbroad because it gave the government the power to withhold its consent in other instances as well.

As it turned out, the *Hoge Raad*'s opinion was issued only three weeks prior to the replacement of the Broadcasting Act of 1967 and the Cable Regulations by a new Media Act.[41] The Court of Justice of the European Communities, which had jurisdiction over the second suit, did not render its decision until after this change took place. Its decision, however, was not rendered moot by virtue of the statutory change.[42]

VII. The European Court and the Cable Regulations

In the second Cable Regulations lawsuit,[43] the European Court was asked to respond to several questions. The primary issue that was to be adjudicated was whether the Cable Regulations infringed upon the freedom to provide services as expressed in Articles 59 and 60 of the Treaty Establishing the European Community ("EEC Treaty").[44] Under the Treaty,

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41 1987 Stb. 249 (containing rules concerning radio and television programs, the broadcasting fee, and subsidies to press institutions).

42 *See generally* Dr. I.E. Schwartz (DG III, EC), *The Kabelregeling Judgment of the Court of Justice*, *in* I.E. Schwartz et al., Omroep zonder grenzen [Broadcasting Without Frontiers] 11-21 (1988) (commenting on Case 352/85, BvA v. Netherlands, 1988 E.C.R. 2085).

43 Case 352/85, BvA v. Netherlands, 1988 E.C.R. 2085 (hereinafter *Cable Regulations Case*).

44 *Id.* at 2130-2131. Article 59 of the Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC Treaty], states:

> Within the framework of the provisions set out below, restrictions on the free supply of services within the Community shall be progressively abolished in the course of the transitional period in respect of nationals of Member States who are established in a State of the Community other than that of the person to whom the services are supplied.
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> The Council, acting by means of a unanimous vote on a proposal of the Commission, may extend the benefit of the provisions of this Chapter to cover services supplied by nationals of any third country who are established within the Community.

Id. art. 59, at 40-41.

Article 60 of the EEC Treaty provides:

> Services . . . shall be deemed to be services normally supplied for remuneration, to the extent that they are not governed by the provisions relating to the free movement of goods, capital and persons.
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> Services shall include, in particular:
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> (a) activities of an industrial character;
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> (b) activities of a commercial character;
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> (c) artisan activities; and
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> (d) activities of the liberal professions.
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> Without prejudice to the provisions of the Chapter relating to the right of establishment, a person supplying a service may, in order to carry out that service, temporarily exercise his activity in the State where the service is supplied, under the same conditions as are imposed by that State on its own nationals.

these articles were applicable to cross-frontier service only. The Dutch government contended that the EEC Treaty did not apply because the service provided by the cable company to its subscribers was purely a national one.[45]

The court held, however, that at least two transnational services were implicated.[46] The first was the service that the cable network operators provided to the foreign broadcasting companies. The other was the one that broadcasters offered to their advertisers. The court found that the Cable Regulations created a two-fold restriction on the cable company's freedom to provide these services.[47] Although the regulations precluded cable companies from transmitting programs offered by foreign broadcasting organizations, and broadcasters in foreign countries were prohibited from broadcasting programs with Dutch advertisements to the Dutch audience, the Dutch STER was allowed to do so. The court held that this scheme was discriminatory.[48]

Such discrimination could only be justified on grounds of public policy, public security, or public health.[49] Obviously, neither public security nor public health were at issue. With regard to the public policy argument, the court did not rule directly on the subject. It noted, however, that the Dutch Government had conceded other less restrictive and non-discriminatory means of providing for varied and non-commercial broadcasting were available. Such means included possible restrictions on the kinds of products advertised, the times when advertising would be permitted, and the duration and frequency of advertisements.[50]

Given that less intrusive means to encourage socially responsible broadcasting were available, the court found that the discriminatory provisions of the Cable Regulations violated the principle of proportionality, and therefore could not be justified on grounds of public policy.[51] The court cited *Procureur du Roi v. Marc J.V.C. Debauve et al.*,[52] in which the European Court held that

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Id. art. 60, at 41.

45 *Cable Regulatins Case*, at 2109.

46 *Id.* at 2131.

47 *Id.* at 2134.

48 *Id.* at 2135.

49 *Id. See* EEC Treaty, *supra* note 44, art. 36, at 29.

50 *Cable Regulations Case*, at 2135.

51 *Id.* at 2136.

52 Case 52/79, Procureur du Roi v. Marc J.V.C. Debauve, 1980 E.C.R. 833, 2 C.M.L.R. 362 (1980) (establishing the "proportionality" principle; that member states in justifying restricting the free movement of services must do so by the least restrictive means available).

commercial advertising on television can be regulated, limited, or even totally prohibited, as long as all advertisers are treated in a like manner.[53]

At the time the European Court issued its opinion in *BvA v. Netherlands* [*Cable Regulations* case], the Dutch broadcasting system was not actually threatened by intruders, as it had been fifteen years earlier by Veronica. The advertisers' actions challenging the Media Act and the Cable Regulations are best interpreted as attempts to force the government to expand opportunities for advertising under the auspices of STER. This seems logical, as it was not in the advertisers' interest that viewers turn to programs other than those brought by the public broadcasters. The government probably could have avoided the various lawsuits, and perhaps even the events that followed, if it had responded more favorably to the advertisers' pleas. As it turned out, the train could no longer be stopped when the European Court's decision was published in 1988. Nonetheless, the government kept trying.

VIII. Article 66 of the Media Act

When the European Court issued its decision in *BvA v. Netherlands*, the new Media Act had been in effect for almost five months. The contested section of the Cable Regulations was now incorporated in Article 66 of the Media Act,[54] but the text had been somewhat altered. Article 66 stated that Dutch cable network operators were free to provide their subscribers with foreign programs that were broadcast in a foreign country in accordance with the law of that country.[55] If such programs contained advertisements, a number of conditions applied:

(1) advertisements must be provided by an independent legal person (i.e. not the broadcaster or the cable operator);
(2) advertisements must be recognizable and clearly distinct from other programs;
(3) there can be no advertising on Sundays;
(4) advertising time should not exceed 5% of the total broadcasting time;
(5) the broadcasting association may not contribute to the profits of other organizations.[56]

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53 *Id.* at 857.
54 Media Act art. 66, 1987 Stb. 249.
55 *Id.*
56 *Id.*

These conditions were void if the advertisements were not directed at the Dutch market. It should be noted, however, that commercial messages were considered to be directed at Dutch audiences if a program immediately preceding or following them was either partly in Dutch or subtitled in Dutch.[57]

IX. ARTICLE 66 AND EC LAW

The Dutch Government obviously tried to anticipate the European Court's decision in the *Cable Regulations* case by amending the law so that it would continue to protect the existing broadcasting system without violating the EEC Treaty. The applicable treaty provisions were, of course, Articles 59 and 60.[58] In the *Cable Regulations* case, however, the Court of Justice had implicitly rejected economic restrictions such as the first and the fifth conditions of Article 66, quoted above.[59] In this respect, it was evident that the court was indirectly addressing Article 66 when it issued its *Cable Regulations* decision. Eventually, the Court of Justice dealt with Article 66 directly after the European Commission brought a complaint against the Dutch Government that challenged Article 66 as inconsistent with European Community law.

In the summer of 1991, the court gave its opinion on Article 66.[60] The court's decision appeared to be consistent with the *Cable Regulations* case.[61] The court found that provisions regulating time, duration, frequency, and content of advertisements (the so-called objective restrictions) could be justified by compelling reasons of public interest, such as the need to maintain a certain quality of programming and the need to protect consumers

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57 *Id.* ¶ 2.

58 *See supra* note 44 for the text of Articles 59 and 60 of the EEC Treaty.

59 *Cable Regulations Case*, at 2135.

60 The Court issued a combined opinion in two separate cases: Case C-353/89, Commission v. Netherlands, 3 MEDIAFORUM (BIJLAGEN) [SUPPLEMENT] 77 (1991) and Case C-288/89, Stichting Collectieve Antennevoorziening Gouda [Foundation of broadcast transmissions - Gouda] v. Commissariaat voor de Media, 3 MEDIAFORUM (BIJLAGEN) 81 (1991).

In Commission v. Netherlands, the European Commission filed a complaint against the Dutch government alleging that both Article 66 of the Media Act and the obligation of Dutch broadcasters to use one specific organization for most of their facilities were inconsistent with the freedom to provide services guaranteed by Articles 59 and 60 of the EEC Treaty. *See* HINS & HUGENHOLTZ, *supra* note 17, at 101. The *Stichting Collectieve* case came to the Court of Justice when the Afdeling Rechtspraak Raad van State [Afd. Rechtspr.], currently the highest administrative court in the Netherlands, requested that the European Court answer questions of European Community law with regard to a Dutch case in which a local cable operator claimed the right to distribute television programs that violated Article 66 of the Media Act.

61 *See* Willem F. Korthals Altes, *Van Kerstbeschikking tot Pinksternotitie: De Hemelvaart van de Publieke Omroep? [From Christmas Settlement to the Pentecostal Proposal: The Ascension Day of Public Broadcasting?] in* DE OMROEP EEN ZORG 125-140 (H.B.M. Wijfjes et al. eds., 1991).

against excessive commercial advertising.[62] Nonetheless, the court found Article 66 to be unacceptably discriminatory because its restrictions only applied to advertisements that originated from abroad and were directed at the Dutch audience.[63] The court also found that Article 66 violated the freedom to provide services by requiring foreign broadcasting organizations to have a structure similar to that of the Dutch broadcasting associations. Such economic restrictions protected the national advertising organization STER at the expense of foreign institutions.[64]

The immediate effects of the court's decision will be very limited. Shortly before it was issued, the Second Chamber of the Dutch Parliament adopted a government proposal to amend the Media Act.[65] Part of the proposal was a revision of Article 66 that eliminated the restrictions in the older text.[66] Under the new text, Dutch cable network operators are permitted to provide their subscribers with programs of foreign broadcasting organizations that are broadcast in a foreign country in accordance with the law of that country. On December 18, 1991, the proposal became law after the First Chamber of the Dutch Parliament accepted it.[67]

X. NEW THREATS TO THE SYSTEM: RTL-4

Although the restrictions mentioned above have been removed, there will still be legal battles over the interpretation of Article 66. Such has been the case in the years since the Media Act came into force.[68] By taking advantage of the opportunity presented by the former version of Article 66, a new broadcasting organization was able to enter the Dutch market, with advertisements directed at the Dutch audience and with programs in the Dutch language. This organization, first called RTL-Véronique, and now called RTL-4, has succeeded in attracting large numbers of viewers and a substantial share of the Dutch advertising market by broadcasting highly popular programs; it thus poses a significant threat to the traditional broadcasting system.

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62 Case C-288/89, Stichting Collective, 3 MEDIAFORUM (BIJLAGEN) 81, 927.

63 *Id.* 929.

64 *Id.* ¶¶ 24, 25.

65 Act of May 29, 1991, Nr. 21,554, Tweede Kamer 1990-1991. *See also* 3 MEDIAFORUM 83 (1991).

66 *Id.*, Nr. 1, art. I. *See also* 1 MEDIAFORUM (BIJLAGEN) 2 (1989).

67 Act of December 18, 1991, 1991 Stb. 769 (containing amendments to provisions of the Media Act with a view to the introduction of nationwide commercial broadcasting). This Act is also known under its short title of Commercial Broadcasting Act. *See* 4 MEDIAFORUM 28 (1992).

68 *See supra* text accompanying notes 43-67.

In 1991, RTL-4's revenue from commercials was Dfl. 330 million, while the income to the STER had fallen to only Dfl. 340 million (from Dfl. 572 million in 1989).[69]

As was the case with Veronica in the 1970s, RTL-Véronique was challenged by the Dutch Government.[70] Interestingly, the challenge did not concern the conditions set for advertising. RTL-Véronique had no problem complying with those conditions. The main issue in the suits opposing RTL-Véronique was whether it was a "foreign broadcasting organization."[71] RTL-Véronique was able to prove that it was such an organization since it was part of CLT, a Luxembourg-based broadcasting corporation. The programs broadcast by RTL-Véronique are created in studios in Hilversum (the traditional center of Dutch broadcasting), transmitted to Luxembourg, uplinked to the Astra satellite, and downlinked to the reception stations of the Dutch cable network operators.[72] More than eighty-five percent of the Dutch population can watch these broadcasts.[73] Dutch households not connected to a cable network can receive the broadcasts by a dish antenna.

The Dutch legislature obviously would have drafted Article 66 of the Media Act differently had it realized that an organization such as RTL-Véronique would be able to enter the market. RTL-Véronique employed a low-key approach and made intelligent use of the loopholes offered by the Media Act. The *Afdeling Rechtspraak Raad van State* (the highest administrative court) had no choice but to rule in favor of RTL-Véronique, despite its

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69 Vereniging van Erkende, Een eerste verslag: reclamebestedingen in Nederland 1991 [The First Report: Advertising Expenditures in the Netherlands 1991] (1992 unpublished manuscript, on file with *Cardozo Arts & Entertainment Law Journal*).

70 Or, more precisely, the *Commissariaat voor de Media* (CvdM), a government agency created by the Media Act of 1987. One of CvdM's tasks is to ensure that all broadcasting organizations comply with the Media Act. Media Act art. 9, 1987 Stb. 249. The similarity in names between Veronica and Véronique is not coincidental. Although Véronique pretended to be a new, independent, and (above all) foreign organization, several high-ranked Veronica employees had helped to establish it. In the spring of 1990, it became known that Veronica had invested large amounts of money in Véronique. Such investments violate the Media Act, which prohibits activities not directly related to broadcasting within the system. *Id.* art. 57. Although Veronica sold its interest in Véronique at a high profit, the CvdM imposed severe sanctions on Veronica in the Summer of 1990. 2 MEDIAFORUM 95 (1990). The sanctions were later suspended by the Chairman of the *Afdeling Rechtspraak van de Raad van State* (Afd. Rechtspr.), the highest administrative court, pending Veronica's appeal. Judgment of Sept. 25, 1990, Afdeling Rechtspraak van de Raad van State (Afd. Rechtspr.) RO1.90.5155/S324. *See* 2 MEDIAFORUM (BIJLAGEN) 107 (1990).

71 RTL-Véronique v. CvdM, Afd. Rechtspr., 2 MEDIAFORUM (BIJLAGEN) 107 (1990).

72 *Id.* at 109.

73 *See* Altes, *supra* note 61, at 127.

awareness of the predominantly Dutch characteristics of this broadcasting organization.

XI. The Legislative Response

The administrative court was also mindful of the fact that any attempt by the Dutch government to change the law so as to prevent cable network operators from transmitting RTL-4 programs to their subscribers would almost certainly run afoul of European Community law (including the EC Broadcasting Directive, which was adopted on October 3, 1989, and came into force on October 3, 1991).[74] The only way the Dutch Government could protect the traditional broadcasting organizations was to allow them to engage in what RTL-4 was doing. This intention was embodied in the 1991 amendments to the Media Act, which purport to create new opportunities for broadcasting on a commercial basis absent the traditional restrictions on organization, programming, and advertising.[75]

At the same time, the traditional broadcasting associations made plans to reorganize themselves to improve their ability to compete with outsiders. Part of this planned reorganization involved allocating one of the three frequencies available for national television to two associations that would be permitted to operate on a more commercial basis, but without the requirements of balanced programming. The purpose of establishing these two associations was to recapture the advertisers who had defected to RTL-4 and, at least in part, to finance the other broadcasting associations, which would continue to use the remaining two frequencies.

These plans, which involved the former "pirates" TROS and Veronica, never materialized, nor did similar plans made by Veronica, the socialist-oriented Vara, or TROS. For the time being, it seems that none of the traditional public broadcasting associations will leave the system.[76] One factor inhibiting this may be

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[74] Council Directive 89/552 of 3 October 1989, on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Pursuit of Television Broadcasting Activities, 1989 O.J. (L 298) 23 [hereinafter EC Broadcasting Directive]. *See* Rebecca Wallace & David Goldberg, *The EEC Directive on Television Broadcasting*, 1989 Y.B. of Eur. L. 175 (1989); Fred H. Cate, *The First Amendment and the International 'Free Flow' of Information*, 30 Va. J. of Int'l L. 371, 402 (1990); Timothy M. Lupinacci, Note, *The Pursuit of Television Broadcasting Activities in the European Community: Cultural Preservation or Economic Protectionism?*, 24 Vand. J. of Transnat'l L. 113 (1991).

[75] Media Act art. 71, *added by* the Commercial Broadcasting Act of 1991, 1991 Stb. 769.

[76] NRC Handelsblad, Mar. 13, 1992, at 5.

the provisions on the freedom to provide services in the EEC Treaty. In January of 1992, a committee of experts on European law advised the Dutch Government that European Community law probably prohibits exclusively allocating one of the three available broadcast frequencies available to former public broadcasting associations without giving other organizations an opportunity to compete for such facilities.[77] Under the amended Media Act, commercial broadcasters have access to the cable networks only, allowing them to reach not more than eighty-five percent of the Dutch audience.[78] RTL-4 could well be one of the challengers to this provision.

XII. European Law as a Catalyst for Change

It is European law that opened the Dutch broadcasting system. The guarantees of the freedom to provide services embodied in Articles 59 and 60 of the EEC Treaty have proven stronger than Dutch broadcasting law, which was held to be discriminatory in light of the Treaty's policy of creating an open market.[79]

One may still wonder whether the European Community should deal with broadcasting, but the question has essentially become moot. The European Court decided in 1974 that broadcasting by television is a service of the kind covered by the freedom to provide services in the EEC Treaty.[80] The recently adopted Broadcasting Directive may be considered as one of the consequences of the court's decision.[81]

The Broadcasting Directive covers a wide variety of topics. It purports to remove, or at least limit as much as possible, the current national restrictions on transnational broadcasting.[82] Such restrictions stem from national laws concerning obscenity, protection of national language and culture, copyright, protection of minors, and commercial advertising.[83] The Directive creates minimum standards that must be met by every broadcasting system. The transmission of foreign programs that comply with

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77 J.P.H. Donner, J.M. de Meij and K.J.M. Mortelmans, Verdeel de frequenties, Verander de omroep [Division of Frequencies, Division of Broadcast Companies] (January 27, 1992) (unpublished manuscript on file with *Cardozo Arts & Entertainment Law Journal*).

78 Media Act art. 71b, ¶ 1, *added by* the Commercial Broadcasting Act of 1991, 1991 Stb. 769.

79 Case 352/85, BvA v. Netherlands, 1988 E.C.R. 2085; Case 288/89, Stichting Antennevoorziening Gouda v. Commissariaat voor de Media, 1989 E.C.R. 697.

80 Case 155/73, Sacchi v. Italy, 1974 E.C.R. 409-46.

81 *See* Altes, *supra* note 61.

82 EC Broadcasting Directive, *supra* note 74, art. 2, ¶ 2.

83 *Id.* preamble.

these standards cannot be prohibited.[84] The Directive is obviously meant to prevent national governments from using economic means to protect their own broadcasting systems.

Meanwhile, a document almost identical to the EEC Directive on Broadcasting was adopted by another European organization, the Council of Europe. The Council of Europe has its main offices in Strasbourg. It has twenty-three member states, including all twelve members of the European Economic Community. The Council of Europe's basic regulation is the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") of 1950.[85] Article 10 of this Convention addresses freedom of expression, and therefore also plays a major part in broadcasting.[86]

On May 5, 1989, the Council of Ministers of the Council of Europe signed the final text of the European Convention on Transfrontier Television, which deals with the same issues as the EEC Directive on Broadcasting and is intended to create similar standards.[87] One may wonder why it is necessary to create two regulations with almost identical texts. This question had been raised frequently during the negotiations preceding adoption of the two documents. The Council of Europe would seem more authorized than the European Community to deal with broadcasting. No mention of broadcasting is made in the EEC Treaty, whereas Article 10 of the ECHR, the foundation of the Council of Europe, explicitly mentions television broadcasting.[88]

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[84] *Id.* art. 2, ¶ 2.

[85] European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221 (1950) [hereinafter ECHR].

[86] The text of Article 10 of the ECHR 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.

Id. art. 10, at 230.

[87] European Convention on Transfrontier Television, Council of Europe, Strasbourg, May 5, 1989, 1 MEDIAFORUM (BIJLAGEN) 5 (1989). *See* Frits W. Hondius, *Regulating Transfrontier Television. The Strasbourg Option*, 1988 Y.B. OF EUR. L. 41 (1988).

[88] For the text of Article 10 of the ECHR *see supra* note 86.

XIII. The Third Sentence of Article Ten, Section One

In the Netherlands, the debate on the meaning and scope of Article 10 of the ECHR was particularly fierce in 1983 during the Dutch Parliament's discussions of government proposals introducing the present version of Article 7, paragraph 2 of the Constitution, and in 1987 during discussions of the Media Act.[89] Several legal scholars were of the opinion that radio and television, mentioned only in the last sentence of the first section of Article 10, were not subject to the second section.[90] This interpretation implied that radio and television could be subject to greater regulation than the print media, not only with respect to organizational and technical aspects, but also with respect to content.

This reading of the provision, which did not go unopposed, had profound implications for Dutch broadcasting regulation. Article 7, section 2 of the Dutch Constitution prohibits the government from imposing content-based prior restraints on broadcasts.[91] Otherwise, the government has a free reign in broadcast regulation. Therefore, if not for the restrictions in Article 10, section 2 of the ECHR, which is directly applicable in Dutch law, the government's power to regulate broadcasting would be almost unlimited.

The legal debate over whether only Article 10, section 1 governed broadcast regulation came to an end on March 28, 1990, when the European Court of Human Rights issued its opinion in the *Groppera Radio AG and Others*.[92] The court held that broadcast regulation is also subject to the restrictions contained in the second section of Article 10 section 2 of the ECHR.[93] The court held that the last sentence of section 1 addressed only technical regulation of broadcasting.[94] Fortunately, the court's decision limits the authority of national legislatures to restrict the broadcasters' freedom (and, therefore, that of the viewers). Although technical elements will still play a role, the disparity between freedom of expression for radio and television journalists and for their colleagues in the print media will be much less than in the

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89 *See* Hins & Hugenholtz, *supra* note 17, at 147.

90 *Id. See also* Hondius, *supra* note 87, at 161; I.E. Schwartz, *Europe and the Media: EEC Report*, Report for 11th Congress of FIDE, The Hague, 1984, at 26 and 27. For the text of Article 10 of the ECHR see *supra* note 86.

91 *See* Grw. Ned art. 7, *amended by* 1983 Stb. 70, and as translated *supra* text accompanying note 12.

92 Case of Groppera Radio AG and Others, 173 Eur. Ct. H.R. (ser. A) (1990).

93 *Id.* at 24.

94 *Id.*

past. In countries with a high cable density, such as Belgium and the Netherlands, both categories should essentially be treated the same.

In several cases, the issue was whether the manner in which the Dutch Government attempted to preserve the established broadcasting system (under the Cable Regulations) violated the public's freedom of reception under Article 10, section 1 of the ECHR.[95] Such a violation was likely if the government prohibited or limited the reception of terrestrially broadcasted programs. The Cable Regulations, however, regulated the activities of the sender (i.e., the cable network operators). The right to receive information regardless of frontiers was not at issue.[96] This shows an obvious flaw in Article 10, which should in all elements be applicable to both transnational and national situations, irrespective of whether broadcasting or cablecasting is at issue.

XIV. Recent Developments

On July 10, 1991, the Court of First Instance of the European Communities issued three combined opinions, known as the *Magill* cases, that may have a significant effect on Dutch broadcasting.[97] These cases involved limitations on the publication of program listings in the United Kingdom and Ireland. Under the British and Irish Copyright Acts, program listings are protected by copyright;[98] third parties are prevented from publishing them. Only newspapers are permitted to carry the listings, but, even then, not more than twenty-four hours in advance of the broadcast (forty-eight hours on weekends and holidays).[99] Consequently, there were no comprehensive program guides in either the United Kingdom or Ireland. The issue in these cases was whether this implied a violation of Article 86 of the EEC

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95 *See, e.g.*, VEA v. Netherlands, 1987 RvdW 237 (discussed *supra* text accompanying note 40).

96 *Cf.* Hins & Hugenholtz, *supra* note 17, at 149.

97 Case T-69/89, Radio Telesis Eireann [RTE] v. Commission, 4 C.M.L.R. 586 (Ct. First Instance 1991); Case T-70/89, British Broadcasting System [BBC] v. Commission, 4 C.M.L.R. 669 (Ct. First Instance 1991); and Case T-76/89, Independant Television Productions Ltd. [ITP] v. Commission, 4 C.M.L.R. 745 (Ct. First Instance 1991) [known collectively and hereinafter as the *Magill Cases*]. *See* M.A. Fierstra et. al., Vrij Verkeer van informatie in Europa [Free Flow of Information within Europe] (1991) (discussing the *Magill Cases*).

98 RTE v. Commission, 4 C.M.L.R. 586, ¶ 2. In the United Kingdom, the Copyright Act of 1956 was replaced by the Copyright, Designs and Patents Act 1988, § 303, ¶ 2. *See* G. Dworkin & R.D. Taylor, Blackstone's Guide to the Copyright, Designs and Patents Act 1988 5 (1989); Butterworths Intellectual Property Law Handbook 183-306 (Jeremy Phillips ed. 1990).

99 RTE v. Commission, 4 C.M.L.R. 586, ¶ 62.

Treaty.[100] The court held that it did.[101]

First, the court found that two relevant product markets were involved, namely, the market for weekly listings and the market for television magazines. Both constituted submarkets within the general market for information about television programs.[102] Second, the court found that the broadcasting organizations had a monopoly over the publication of the weekly listings in their own guide, thus hindering the emergence of any effective competition.[103]

Third, the court found that the potential abuse of the dominant market position violated copyright laws. Article 36 of the EEC Treaty permits restrictions on the free movement of goods justified by the need to protect intellectual property.[104] But such regulation may not operate as "a means of arbitrary discrimination or a disguised restriction on trade between Member States."[105]

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100 Case T-69/89. Article 86 of the EEC Treaty provides as follows:

> To the extent to which trade between any Member State may be affected thereby, action by one or more enterprises to take improper advantage of a dominant position within the Common Market or within a substantial part of it shall be deemed to be incompatible with the Common Market and shall hereby be prohibited [in so far as it may affect trade between Member States].
>
> Such improper practices may, in particular, consist in:
> (a) the direct or indirect imposition of any inequitable purchase or selling prices or other inequitable trading conditions;
> (b) the limitation of production, markets or technical development to the prejudice of consumers;
> (c) the application to parties to transactions of unequal terms in respect of equivalent supplies, thereby placing them at a competitive disadvantage; or
> (d) subjecting of the conclusion of a contract to the acceptance, by a party, of additional supplies which, either by their nature or according to commercial usage, have no connection with the subject of such contract.

EEC Treaty, *supra* note 44, art. 86, at 48-49.

101 RTE v. Commission, 4 C.M.L.R. 586, ¶ 75. The broadcasting companies contended that there was no relevant product market on which they held an abusive dominant position. *Id.* ¶ 77. That would mean that Article 86 did not apply. The European Court disagreed with this position on all counts.

102 *Id.* ¶ 77.

103 *Id.* ¶ 63.

104 Article 36 of the EEC Treaty provides as follows:

> The provisions of Articles 30 to 34 inclusive shall not be an obstacle to prohibitions or restrictions in respect of importation, exportation or transit which are justified on grounds of public morality, public order or public safety, the protection of human or animal life or health, the preservation of plant life, the protection of national treasures of artistic, historical or archaeological value or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute either a means of arbitrary discrimination or a disguised restriction on trade between Member States.

EEC Treaty, *supra* note 44, art. 36, at 29.

105 *Id.*

In 1971, the Court of Justice held in *Deutsche Grammophon v. Metro*[106] that only those restrictions on the free movement of goods which are necessary for the protection of the essential function of intellectual property rights are permitted under European Community law.

In the *Magill* cases,[107] the court emphasized that the essential function of copyright is "to protect moral rights in the work and ensure a reward for the creative effort."[108] It found that the broadcasting organizations used their copyright in the program listings to secure a monopoly in the market for weekly television guides. Such conduct, said the court, was unjustified either by the specific needs of the broadcasting sector or by those peculiar to the activity of publishing television magazines,[109] and was therefore abusive within the meaning of Article 86. The decision of the Court of First Instance is presently under appeal to the Court of Justice.

XV. Implications for the Dutch Broadcasting System

There are some differences between the English and Irish situations and the circumstances in the Netherlands. Most importantly, in the Netherlands there are comprehensive television guides. They can be published, however, only by the traditional broadcasting associations.[110] The basis for this monopoly is a provision in the Media Act affording these associations far-reaching copyright protection.[111]

Contrary to traditional copyright principles, this copyright law also protects "works of fact" in addition to works requiring some originality.[112] Article 59 also requires the alleged infringer to prove that he did not derive the information from the broadcasting association. Finally, unlike other instances of copyright in factual information, Article 59 protects unpublished information whether or not publication is intended.[113]

If challenged, the Dutch Government may be unable to show that the monopoly granted to the broadcasting associations

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106 Case 78/70, Deutsche Grammophon Gesellschaft MbH v. Metro-SB-Gromarkte GMbH & Co-KG, 1971 E.C.R. 487, 1971 C.M.L.R. 631, ¶ 11.

107 For a discussion of the *Magill Ccases*, see *supra* note 97 and accompanying text.

108 Case 78/70, Deutsche Grammophon Gesellschaft MbH v. Metro-SB-Gromarkte GmbH & Co.-kG, 1971 E.C.R. 487, 1971 C.M.L.R. 631, ¶ 71.

109 *Id.* ¶ 73.

110 Media Act art. 58, 1987 Stb. 249.

111 *Id.* art. 59.

112 *See also* Protecting Works of Fact: Copyright, Freedom of Expression and Information Law (Egbert J. Dommering & P. Bernt Hugenholtz eds., 1991).

113 Media Act art. 59, 1987 Stb. 249.

under Article 59 serves the essential function of copyright, namely "to protect moral rights in a work and ensure a reward for the creative effort."[114]

If Article 59 was found to violate Article 86 of the EEC Treaty, the foundation of the Dutch broadcasting system would be in jeopardy. It should be kept in mind that the allocation of broadcasting time to the traditional broadcasting associations is based on membership,[115] and most members subscribe to program guides. If the program schedules were freely published, the incentive to become a member would disappear.

The question is whether the the decision of the Court of First Instance in the *Magill* cases will have a very strong impact. Some Dutch broadcasting associations have started negotiating with major publishing companies to merge their program guides.[116] By making the publishers join their cause, the broadcasters would succeed in eliminating their potentially fiercest competitors. Nonetheless, the current situation illustrates once again that artificial methods of protecting broadcasting systems and organizations will, in the end, not withstand the pressure of policies to create an open, non-protective market.

Until the 1970s, the Dutch broadcasting system was able to fight and subsequently incorporate intruders into the system without suffering serious harm. It may be that RTL-4, the most recent threat to the system, will eventually become part of it. However, such a step would probably not bring back the advertising money RTL-4 was able to draw away from the STER and the established broadcasters. Even the recently adopted more lenient advertising rules will not prevent RTL-4 from effectively competing with the public system.

The inevitable conclusion is that the Dutch Government lost control when it failed to anticipate the rapid technical and legal developments of the late 1980s, and instead only reacted to them. Although the relatively small size of the Dutch broadcasting market makes it unlikely that another organization like RTL-4 will emerge soon, changing circumstances and viewer demands

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114 Nonetheless, the President of the *Rechtbank* (District Court) of Amsterdam was not willing to permit a Sunday paper (the *Krant op Zondag*) to publish the program listings of the broadcasting associations. In a suit for a temporary restraining order instituted by the broadcasting associations against the *Krant op Zondag*, the President upheld the copyright protection afforded by Article 59 of the Media Act. The President also saw no reason for referring the case to the European Court of Justice. President Rechtbank Amsterdam, April 16, 1992, 4 MEDIAFORUM (BIJLAGEN) 35 (1992). The *Krant op Zondag* was forced to stop publishing the program listings and went out of business.

115 *See supra* notes 14-24 and accompanying text.

116 NRC HANDELSBLAD, May 12, 1992, at 5.

could necessitate further flexibility by the Dutch broadcasting system.

XVI. Conclusion

There are not many countries in which audiences have available such a wide variety of international programs as in the Netherlands. The Dutch broadcasting associations show programs from all parts of the world in their original languages with subtitles. In contrast, most European countries dub foreign movies, documentaries, and soap operas.

Additionally, Dutch viewers receive television broadcasts from many different countries. At first, this was only the case for homes near the borders. Today, approximately eighty-five percent of the Dutch audience is connected to a cable system.[117] Most cable networks that are organized on a local or regional basis provide their subscribers with programming from countries such as Belgium, France, Germany, England, Italy, and the United States.

Accordingly, it seems incongruous to challenge the Dutch broadcasting system under European law because of its lack of openness. The challenges, however, do not come from abroad, but are internal. Véronique or RTL-4 is only titularly foreign. Every viewer knows that RTL-4 is in fact as Dutch as any of the traditional broadcasting associations. The law does not always accord with reality, however, especially in broadcasting.

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117 *See* Altes, *supra* note 61.