

Sanoma Uitgevers v. Netherlands: The European Court of Human Rights Forges New Ground for the Right of Journalists To Protect Their Sources

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I. OVERVIEW

Police in the town of Hoorn, the Netherlands, demanded the release of photographs taken by journalists from the magazine *Autoweek*, which police believed identified a car used as a getaway vehicle in a series of armed burglaries of automated teller machines.¹ A few weeks prior to the burglary, journalists and photographers from *Autoweek* were invited by organizers of an illegal street race in Hoorn, to photograph and write about the race, on the condition that the article and photographs would not disclose the identities of the participants.² *Autoweek* intended to publish the article on February 6, 2002, with the photographs edited to ensure the anonymity of the participants.³ On February 1, 2002, however, police contacted the editors of *Autoweek* and demanded the release of the unedited photographs of the street race. The police officers witnessed a driver involved in the burglaries climb into an Audi RS4, which they recognized as having participated in the same January 12 street race covered by *Autoweek*.⁴ The editors declined to release the photographs, claiming they had guaranteed the anonymity of the participants. As members of the press, the editors asserted that they were protected from being forced to release the pictures to protect the identity of their confidential sources.⁵ The police tried multiple times, both over the phone and by going to Sanoma Uitgevers, the publishing company, in

1. Sanoma Uitgevers B.V. v. Netherlands, App. No. 38224/03, paras. 10-11, 14-15 (Eur. Ct. H.R. Sept. 14, 2010), <http://echr.coe.int/echr/en/hudoc> (follow “HUDOC Database” hyperlink; search Application Number “38224/03”).

2. *Id.* paras. 10-11.

3. *Id.* para. 13.

4. *Id.* paras. 14-15, 28-29.

5. *Id.* para. 15.

person, to secure the release of the photographs.⁶ Ultimately, police arrested the editor in chief of *Autoweek* for failure to comply with a court order to disclose the photographs and threatened that an extensive search would result from a failure to comply with the order, possibly delaying the publication of the magazine.⁷ Given the arrest and that such a search would delay the release of all the publications of the company, including those covering the wedding of the Crown Prince of the Netherlands, Sanoma Uitgevers contacted its attorneys.⁸ The attorneys and prosecutors brought the matter before an Amsterdam Regional Court judge, who ruled that the needs of the criminal investigation outweighed the journalistic privilege and ordered the release of the CD-ROM containing the photographs from the street race.⁹

Sanoma Uitgevers then filed a complaint with the Dutch Regional Court on April 15, 2002, and the judge ordered the release of the CD-ROM back to the publishing company, but held the investigation was justified and refused to enjoin the police from using the photographs in their investigation and prosecution.¹⁰ Sanoma Uitgevers appealed to the Supreme Court of the Netherlands, but the Court denied their claim as inadmissible because no domestic provision of the Code of Criminal Procedure allowed an injunction against using photographs after the CD-ROM had been returned.¹¹ It also did not consider the acts of police officers to have violated the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights).¹² Sanoma Uitgevers then applied to the European Court of Human Rights for relief and the Third Section of the Chamber ruled that the Dutch Code of Criminal Procedure provided an adequate base in domestic law for the protection of journalists' sources.¹³ Further, given the active role of the investigating judge, the chamber held that the compelled release of the CD-ROM did not amount to a violation of the Convention.¹⁴ On appeal, however, the Grand Chamber of the European Court of Human Rights *held* that the order forcing journalists to release photographs of their confidential sources in an effort to assist the

6. *Id.* paras. 15-16.

7. *Id.* paras. 18-19.

8. *Id.* paras. 18-20.

9. *Id.* paras. 21-22.

10. *Id.* paras. 23-25.

11. *Id.* paras. 21-22.

12. *Id.* paras. 25-26. The Supreme Court of the Netherlands upheld the regional court's ruling that "protection of journalist sources should yield to general investigation interests." *Id.*

13. *Id.* paras. 4, 52.

14. *Id.* paras. 4, 73.

criminal prosecution of the same source in an unrelated proceeding violated article 10 of the European Convention on Human Rights. *Sanoma Uitgevers B.V. v. Netherlands*, App. No. 38224/03, para. 101 (Eur. Ct. H.R. Sept. 14, 2010), <http://www.echr.coe.int/echr/en/hudoc> (follow “HUDOC Database” hyperlink; search Application Number “38224/03”).

II. BACKGROUND

The grant of legal protection to journalists in order to secure the confidentiality of their sources is unlike other evidentiary privileges. It reflects both a duty to protect the privacy of the source individually,¹⁵ and ensures a free and informed press by guaranteeing that sources approaching the journalists with sensitive information will be kept confidential.¹⁶ It has been widely recognized that the absence of legal protections carries significant implications for journalists trying to access sources, as the United Kingdom Court of Appeals’ Judge Denning wrote:

[I]f [journalists] were compelled to disclose their sources, they would soon be bereft of information which they ought to have. Their sources would dry up. Wrongdoing would not be disclosed. Charlatans would not be exposed. Unfairness would go unremedied. Misdeeds in the corridors of power—in companies or in government departments—would never be known.¹⁷

Article 10 of the European Convention on Human Rights governs the right to freedom of expression and a free press. It states in relevant part: “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.”¹⁸

15. See Carl C. Monk, *Evidentiary Privilege for Journalists’ Sources: Theory and Statutory Protection*, 51 MO. L. REV. 1, 2-4 (1986) (describing the theoretical relationship between journalist and source that gives rise to an evidentiary privilege and duty of confidentiality).

16. Stuart Wallace, *The Journalist-Source Relationship in Context: A Comparative Review of US and English Law*, 38 COMMON L. WORLD REV. 268, 269 (2009) (“[The journalist-source relationship] warrants special protection because of its relationship to freedom of the press. The public expects the press to keep it informed; if journalists cannot ensure the confidentiality of their sources . . . , the sources are less likely to volunteer information and as a result the public does not receive it.”).

17. *British Steel Corp. v. Granada Television Ltd.*, [1981] A.C. 1096 (H.L.) 1129 (appeal taken from Eng.).

18. European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 10(1), Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention on Human Rights].

The European Court of Human Rights (ECHR) has recognized that within article 10 the press has a particularly important role, observing both that “freedom of expression constitutes one of the essential foundations of a democratic society and that the safeguards to be afforded to the press are of particular importance.”¹⁹ Along with this function, the right to protection of sources also reflects certain duties that reveal the relationship between journalists and the public: “[I]t is nevertheless incumbent on [the press] to impart information and ideas on matters of public interest. . . . [T]he public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of ‘public watchdog.’”²⁰ As such, the ECHR seeks to safeguard this important function of the press by expanding its scrutiny in matters involving the freedom of the press to include protection for journalists’ anonymous sources.²¹

The ECHR extended the protection of article 10 of the European Convention on Human Rights to journalists seeking to protect the confidentiality of their sources in the seminal case of *Goodwin v. United Kingdom*.²² Prior to this case, the European Convention on Human Rights did not protect the rights of journalists to protect their sources, leaving any protection to the respective Member States.²³ Nevertheless, the ECHR in *Goodwin* held that the police could not require a journalist who received unsolicited information regarding the financial problems of a publicly traded company to reveal the anonymous source, despite allegations that the source stole the relevant documents from the company.²⁴ The ECHR reasoned:

Protection of journalistic sources is one of the basic conditions for press freedom Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined and

19. *Goodwin v. United Kingdom*, App. No. 17488/90, para. 39 (Eur. Ct. H.R. Feb. 22, 1996), <http://www.echr.coe.int/echr/en/hudoc> (follow “HUDOC Database” hyperlink; search Application Number “17488/90”).

20. *Observer v. United Kingdom*, App. No. 13585/88, para. 59(b) (Eur. Ct. H.R. Nov. 26, 1991), <http://www.echr.coe.int/echr/en/hudoc> (follow “HUDOC Database” hyperlink; search Application Number “13585/88”).

21. *Goodwin*, App. No. 17488/90, para. 39.

22. *Id.* para. 46.

23. See ARTICLE 19 & INTERIGHTS, WRITTEN COMMENTS IN THE CASE OF *GOODWIN V. UNITED KINGDOM*, APPLICATION NO. 17488/90, paras. 6-40 (Mar. 1995) (providing a comparative survey of Member States’ approaches to protection of journalistic sources to encourage the ECHR to adopt a standard for protection); OPEN SOCIETY JUSTICE INITIATIVE ET AL., WRITTEN COMMENTS IN THE CASE OF *SANOMA UITGGEVERS B.V. V. NETHERLANDS*, APPLICATION NO. 38224/03, 1-3 (Nov. 2009).

24. *Goodwin*, App. No. 17488/90, paras. 45-46.

the ability of the press to provide accurate and reliable information may be adversely affected.²⁵

Thus, the ECHR in *Goodwin* opened its doorways to journalists who were previously unprotected under article 10.

Since the recognition of the right to protection of sources in *Goodwin*, the ECHR has construed this right rather broadly in favor of journalists. The ECHR acknowledged the importance of this protection, noting that “[l]imitations on the confidentiality of journalistic sources call for the most careful scrutiny by the Court.”²⁶ The ECHR has even recognized a violation where the interference of the Convention right was merely hypothetical. In this respect, it found that, although it appeared that the order for disclosure would not be enforced, the fact that the order remained in place and was capable of being enforced was sufficient to amount to a violation of article 10.²⁷ The ECHR also held that the right of a journalist to protect a source extends even to situations where there is a substantial likelihood that the source committed a crime, or acted *mala fide*, in obtaining the reported information.²⁸

Moreover, in *Voskuil v. Netherlands*, the ECHR held that a journalist need not disclose the name of a source where the source has exculpatory information in a criminal trial, if other witnesses, although unable to replicate the substance of the anonymous source’s testimony, could support the defense on that issue.²⁹ The source in *Voskuil* claimed that police fabricated evidence of a crime, which would have been highly damaging to the police investigating the alleged crime.³⁰ The journalist was detained for failing to reveal the source, after the source was called to testify at the criminal trial of those whom the police were investigating.³¹ Although the evidence was not identical to the information coming from the source, the defense had the testimony of

25. *Id.* para 39.

26. *Roemen v. Luxembourg*, App. No. 51772/99, H.R. para. 46 (Eur. Ct. H.R. Feb. 25, 2003), <http://www.echr.coe.int/echr/en/hudoc> (follow “HUDOC Database” hyperlink; search Application Number “51772/99”).

27. *Fin. Times Ltd. v. United Kingdom*, App. No. 821/03, para. 56 (Eur. Ct. H.R. Dec. 15, 2009), <http://www.echr.coe.int/echr/en/hudoc> (follow “HUDOC Database” hyperlink; search Application Number “821/03”).

28. *See Roemen*, App. No. 51772/99, paras. 55-56; *see also Fin. Times*, App. No. 821/03, para. 66 (rejecting the government’s argument that because the release of secret financial information was for an improper purpose the ECHR should have relevant and sufficient reason to order disclosure).

29. *Voskuil v. Netherlands*, App. No. 64752/01, para. 67 (Eur. Ct. H.R. Nov. 22, 2007), <http://www.echr.coe.int/echr/en/hudoc> (follow “HUDOC Database” hyperlink; search Application Number “64752/01”).

30. *Id.* para. 10.

31. *Id.* paras. 10-14.

other witnesses, such as the plumbers who arrived on the scene and supported the prosecution's assertion that evidence was not fabricated. Given the availability of these other witnesses, the ECHR ultimately found a violation of article 10 because disclosure was unnecessary.³² In nearly all of the protection of journalist source cases, the ECHR has held that the alleged interference with the journalists' rights to keep their sources confidential were violations of article 10, thus giving a broad construction of this right generally in favor of applicant-journalists.³³

However, the right of freedom of expression and protection of journalists' sources is not an absolute right under the European Convention on Human Rights, and the Convention contains express exceptions under which the ECHR may find that an interference with that right is permissible. Article 10(2) states in part:

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to . . . conditions . . . as are prescribed by law and are necessary in a democratic society . . . for the prevention of disorder or crime, . . . for the protection of the reputation or rights of others, . . . or for maintaining the authority and impartiality of the judiciary.³⁴

The ECHR has read these exceptions to require a three part test: an interference must be (1) prescribed by law, (2) in pursuit of a legitimate aim, and (3) necessary in a democratic society—meaning both that the grounds for derogating from this right are relevant and sufficient and that the interference is proportional to the aim pursued.³⁵ In parity with the broad construction of the right under article 10(1), the ECHR has construed the exceptions from that right under 10(2) quite narrowly, giving great weight to the interest of the public and journalists in keeping the identity of sources confidential.

First, the ECHR requires that an interference with the Convention right be prescribed by law, meaning that the Member State alleged to have violated the right must have some basis for doing so under its national legal system. The ECHR requires that the national law be formulated with adequate precision to allow those persons to which the law applies to foresee if legal consequences may arise from their actions.³⁶ Relative to the other exceptions under article 10(2), the ECHR

32. *Id.* paras. 26, 67.

33. *Goodwin v. United Kingdom*, App. No. 17488/90, para. 46 (Eur. Ct. H.R. Feb. 22, 1996), <http://www.echr.coe.int/echr/en/hudoc> (follow "HUDOC Database" hyperlink; search Application Number "17488/90"); *Voskuil*, App. No. 64752/01, para. 74; *Fin. Times*, App. No. 821/03, paras. 71, 73; *Roemen*, App. No. 51772/99, para. 60.

34. European Convention on Human Rights, *supra* note 18, art 10(2).

35. *E.g.*, *Goodwin*, App. No. 17488/90, paras. 29-46.

36. *See id.* paras. 29-31.

gives national authorities the most deference to determine the legal basis for the prescription.³⁷

In the protection of journalist source cases, the ECHR has found that a national law that allows searches to recover “anything which may assist in establishing the truth” in an investigation was a sufficient legal prescription.³⁸ The court held that a subsequent search of a journalist’s office and home in an effort to uncover his source was thus prescribed by law. For example, in *Voskuil*, the ECHR looked to Dutch domestic law and found that Article 294(1) of the Dutch Code of Criminal Procedure, which states “[i]f during the interrogation the witness refuses, for no lawful reason, to answer the questions put to him or to take the required oath or affirmation, the court shall, if the investigation urgently so requires, order his detention,” was a sufficient prescription of law.³⁹ In *Voskuil*, the journalist had been detained for failure to disclose a source and argued that the domestic court ignored his journalistic privilege and the government failed to assert a legal reason for his detention.⁴⁰ The ECHR deferred this argument and expressly found the prescription in domestic law “adequate.”⁴¹

Additionally, in two cases against the United Kingdom, the ECHR found that the measures to compel disclosure of confidential sources were prescribed by law under the 1981 Act.⁴² The Act provided a general bar to the disclosure of journalistic sources with a few narrowly defined exceptions.⁴³ In *Goodwin*, the ECHR rejected a journalist’s argument that the Act was insufficiently precise and therefore not prescribed by law because it provided that disclosure could be mandated “in the interests of justice.”⁴⁴ The ECHR held that because the U.K. courts had defined and applied this exception in previous case law, it provided an adequate prescription under U.K. law.⁴⁵

37. See, e.g., *Voskuil*, App. No. 64752/01, paras. 50-53 (finding that where applicant’s detention was mandated under domestic law by reason of refusing to give evidence despite taking no account of journalistic privilege, it was prescribed by law).

38. *Roemen*, App. No. 51772/99, paras. 40-41, 49.

39. *Voskuil*, App. No. 64752/01, para. 34 (quoting Wetboek van Strafvordering [Sv], art. 294(1) (Neth.) [court’s translation]).

40. *Id.* para. 51.

41. *Id.* paras. 52-53.

42. *Goodwin v. United Kingdom*, App. No. 17488/90, para. 29 (Eur. Ct. H.R. Feb. 22, 1996), <http://www.echr.coe.int/echr/en/hudoc> (follow “HUDOC Database” hyperlink; search Application Number “17488/90”); *Fin. Times Ltd. v. United Kingdom*, App. No. 821/03 para. 57 (Eur. Ct. H.R. Dec. 15, 2009), <http://www.echr.coe.int/echr/en/hudoc> (follow “HUDOC Database” hyperlink; search Application Number “821/03”).

43. *Goodwin*, App. No. 17488/90, paras. 33-34.

44. *Id.*

45. *Id.* para. 34.

In the second case, the ECHR similarly rejected a journalist's argument that the 1981 Act was insufficiently precise and failed to account for public interest against orders for disclosure.⁴⁶ The ECHR held that although the narrow interest of the party seeking disclosure led to a violation of article 10 in this case, the disclosure was nonetheless adequately prescribed by law under the 1981 Act and its subsequent case law.⁴⁷

Second, the European Convention on Human Rights requires that an interference pursue a legitimate aim in order for the ECHR to find there was no violation of that right. The ECHR does not grant interpretive leeway to Member States under this prong, as these legitimate aims are limited to those express aims stated in article 10(2), including the prevention of disorder and crime, the protection of the rights of others, and the maintenance of the authority of the judiciary.⁴⁸ The aims found in article 10(2) however, are quite broad. In *Goodwin*, for example, the ECHR found that by ordering the disclosure of the confidential source who had given information regarding the financial turmoil of a company from documents that he or she had allegedly stolen from the office, the government pursued a legitimate aim of protecting the rights of others, namely the company affected by the release of such information.⁴⁹ The ECHR has also found a legitimate aim in the prevention of disorder and crime where the disclosure of confidential financial information of a government minister was given to a journalist by an anonymous source.⁵⁰ The prevention of crime was a sufficiently legitimate aim, as obtaining such information would have involved a violation of domestic law.⁵¹ Therefore, where a crime has already been committed and the disclosure has been ordered during trial, the prevention of disorder and crime is a legitimate aim pursued by the government.⁵²

Third, the European Convention on Human Rights requires an interference with the article 10 right to be necessary in a democratic society. The ECHR has noted that it will defer to national governments

46. *Fin. Times*, App. No. 821/03, paras. 46, 57.

47. *Id.*

48. European Convention on Human Rights, *supra* note 18, art 10(2).

49. *Goodwin*, App. No. 17488/90, para. 35.

50. *Roemen v. Luxembourg*, App. No. 51772/99, paras. 9-10, 50 (Eur. Ct. H.R. Feb. 25, 2003), <http://www.echr.coe.int/echr/en/hudoc> (follow "HUDOC Database" hyperlink; search Application Number "51772/99").

51. *Id.*

52. *Voskuil v. Netherlands*, App. No. 64752/01, para. 56 (Eur. Ct. H.R. Nov. 22, 2007), <http://www.echr.coe.int/echr/en/hudoc> (follow "HUDOC Database" hyperlink; search Application Number "64752/01").

to determine whether the restriction of the right is designed to meet a “pressing social need” as required under the Convention. Thus each Member State enjoys a certain margin of appreciation to determine their own distinct or singular approach to the law allowing for interference.⁵³ The ECHR weighs this pressing need against the interest in the journalist’s right to ensure confidentiality of sources and the public interest in accurate information.⁵⁴ In this inquiry, the ECHR has recognized that it will look to whether the reasons given by authorities for the interference with the right to protect sources are “relevant and sufficient.”⁵⁵

Despite the apparent deference the ECHR purports to give to national governments under this exception to article 10, the ECHR has found violations most often on the ground that a measure was not necessary in a democratic society.⁵⁶ In *Goodwin*, the ECHR held that the government’s disclosure order did not satisfy this test.⁵⁷ It reasoned that the authorities had already obtained an injunction and notified all national newspapers and journals that they were prohibited from publishing the information obtained from the stolen document revealing the company’s fragile financial position. Thus the reasons given for the disclosure of the confidential source’s identity were insufficient.⁵⁸ In later cases, the ECHR interpreted the *Goodwin* holding to require the government to show that no other means are available to achieve the same legitimate aim requiring disclosure of the confidential source.⁵⁹

Finally, the ECHR has read this test to require the government to show that the measures interfering with the right of confidential sources are proportional to the legitimate aim being pursued.⁶⁰ For example, in *Roemen*, the Dutch police conducted a warrantless search of a journalist’s home and office, as well as the office of the lawyer

53. *E.g.*, *Fin. Times Ltd. v. United Kingdom*, App. No. 821/03, paras. 60-61 (Eur. Ct. H.R. Dec. 15, 2009), <http://www.echr.coe.int/echr/en/hudoc> (follow “HUDOC Database” hyperlink; search Application Number “821/03”).

54. *Id.* para. 59.

55. *E.g.*, *Goodwin*, App. No. 17488/90, para. 40.

56. *See, e.g., id.* para. 42.

57. *Id.*

58. *Id.*

59. *See, e.g., Fin. Times*, App. No. 821/03, para. 69 (“[T]he aim of preventing further leaks will only justify an order for disclosure of a source in exceptional circumstances where no reasonable and less invasive alternative means of averting the risk posed are available and where the risk threatened is sufficiently serious and defined to render such an order necessary within the meaning of Article 10 § 2.”).

60. *E.g., Goodwin*, App. No. 17488/90, para. 40; *Roemen v. Luxembourg*, App. No. 51772/99, para. 60 (Eur. Ct. H.R. Feb. 25, 2003), <http://www.echr.coe.int/echr/en/hudoc> (follow “HUDOC Database” hyperlink; search Application Number “51772/99”).

representing the journalist, looking for papers revealing the identity of a source who had alleged that a government minister was delinquent on his tax payments.⁶¹ The ECHR held that such measures were disproportionate to the aims of preventing crime and protecting the rights of others and were thus not necessary in a democratic society.⁶²

III. THE COURT'S DECISION

In the noted case, the Grand Chamber of the European Court of Human Rights expanded the right to protection of journalist sources under article 10, now requiring the article 10(2) exception to an interference of the right as prescribed by law to include analysis of certain relevant factors. These factors include review by an independent magistrate, granting an automatic violation where such factors are absent.⁶³ Initially, the ECHR looked to the right to freedom of expression generally, noting the unique importance of preserving the vital role of the press as “public watchdog.”⁶⁴ The ECHR held that the police officers’ order to turn over the CD-ROM containing pictures of anonymous sources, and their threats to search the publishing company if it failed to comply, constituted a violation of article 10.⁶⁵ The ECHR based its holding on the “chilling effect” of discouraging sources from relying on journalists to guarantee anonymity, which occurs even when journalists are seen as merely aiding in the identification process.⁶⁶ Subsequently, the ECHR looked to Dutch domestic law that provided a basis for the orders requiring disclosure of confidential sources and held that this domestic law was insufficient because it did not provide for review by an independent magistrate before such orders were made.⁶⁷ Thus, in finding that the Dutch Criminal Code provision did not meet the standard for exception under article 10(2), the ECHR held that the government violated the applicant company’s right to protection of confidential sources under the European Convention on Human Rights.⁶⁸

61. *Roemen*, App. No. 51772/99, paras. 8-10.

62. *Id.* paras. 58-60.

63. *Sanoma Uitgevers B.V. v. Netherlands*, App. No. 38224/03, para. 100 (Eur. Ct. H.R. Sept. 14, 2010); <http://www.echr.coe.int/echr/en/hudoc> (follow “HUDOC Database” hyperlink; search Application Number “38224/03”).

64. *Id.* paras. 50-51.

65. *Id.* para. 100.

66. *Id.* para. 71.

67. *Id.* paras. 91-100.

68. *Id.* paras. 100, 113. Judge Myjer also wrote a concurring opinion to this decision regarding the provision of Protocol No. 11, which created a permanent Grand Chamber and did not provide a mechanism for recusal. Thus, Judge Myjer, who participated in the Chamber’s

The ECHR noted at the outset of the judgment that the press has a vital role to play in society and that protection of “their sources is part of the[ir] freedom to receive and impart information and ideas without interference by public authorities.”⁶⁹ The ECHR reasoned that the effect of a lack of protection creates distrust and deters the source from approaching journalists on the condition of anonymity. This in turn, affects the quality of the news and information provided to the public by the press as a result.⁷⁰

The ECHR also noted three relevant factors of the noted case that distinguishes it from previous cases. First, the ECHR recognized that this case differs from previous cases in which government authorities had ordered a search of the journalist’s home or office, which the ECHR admitted was a much more serious interference with the article 10 right due to the government’s broad investigatory powers.⁷¹ Unlike these cases, here the authorities ordered Sonoma Uitgevers to turn over photographs. Second, the ECHR differentiated the noted case from previous cases in which the sources were directly relevant to the criminal case. Here, however, the charges were brought for crimes unrelated to the actual events covered by the journalists.⁷² Finally, the ECHR found relevant the fact that the police only ordered Sonoma Uitgevers to turn over the photographs, which may have led to the identification of the sources, rather requiring the company to name the source.⁷³

Despite the three distinctions, however, the ECHR held that the order for Sanoma Uitgevers to release the CD-ROM to police and the brief detention of the Sanoma Uitgevers editor in chief constituted a violation of article 10. Given the threat of a search, the ECHR also held that the search was still capable of being carried out and therefore also a violation of article 10.⁷⁴ Indeed, for safeguarding the purposes of the article 10 right to confidential sources, the ECHR found that the “chilling effect will arise wherever journalists are seen to assist in the identification of anonymous sources.”⁷⁵ Thus the order for the surrender

decision, also sat in the Grand Chamber on this case. *Sanoma Uitgevers*, App. No. 38224/03, paras. 1-5 (Myjer, J., concurring).

69. *Id.* para. 50 (majority opinion) (internal quotation marks omitted).

70. *Id.*

71. *Id.* paras. 61, 67.

72. *Id.* para. 66.

73. *Id.* para. 65.

74. *Id.* para. 70 (“[T]he Court must take [the threat] as seriously as it would have taken the authorities’ actions had the threat been carried out.”).

75. *Id.* paras. 71-72.

of the CD-ROM and the threat of an impending search constituted an interference with the Convention right.⁷⁶

Next, the ECHR addressed the exceptions under article 10(2) to determine whether the interference was nonetheless permissible under the European Convention on Human Rights. Beginning with the statutory basis for the action, the ECHR focused on article 96(a) of the Dutch Code of Criminal Procedure⁷⁷ to determine whether the interference was prescribed by law.⁷⁸ The ECHR accepted Sanoma Uitgevers' argument that the relevant Dutch statute was "silent on the subject of interferences with the journalistic privilege of source protection."⁷⁹ Although the ECHR found that article 96(a) provided a legal basis for the interference at issue in the noted case, the Convention article 10(2) further mandates that the law must be sufficiently accessible and foreseeable.⁸⁰ To be foreseeable, the ECHR explained, the law should be "formulated with sufficient precision to enable the individual . . . to regulate his conduct."⁸¹ The ECHR ruled that article 96(a), alongside an instruction by the Ministry of Justice on obtaining a ruling by a local judge before seizure of journalistic material, was sufficiently accessible and precise.⁸²

The ECHR then looked to the legal safeguards providing for a judge or neutral magistrate (as opposed to the prosecutors themselves) to determine whether there existed an issue involving confidential sources *prior* to any disclosure.⁸³ Further, the ECHR inquired whether a public

76. *Id.*

77. Article 96(a) of the Dutch Code of Criminal Procedure states in relevant part:

1. If it is suspected that a crime within the meaning of Article 67 § 1 [which includes offenses for which imprisonment may be ordered, including theft] has been committed, the investigating officer may order a person to surrender an object if it is reasonable to suspect that the person has an object subject to seizure in his possession.

. . . .

3. By virtue of their right to decline to give evidence, the following persons are not obliged to comply with an order of this nature:

. . . .

b. the persons described in Article 218, insofar as surrender for seizure would violate their duty of confidentiality.

Id. para. 30 (quoting Sv art. 96(2) (Neth.) (court's translation)). Dutch courts consider Article 218 which describes persons "bound to secrecy" to include "doctors, advocates, clergy and notaries."

Id. para. 33.

78. *Id.* paras. 74-100.

79. *Id.* para. 75.

80. *Id.* para. 81.

81. *Id.*

82. *Id.* paras. 84-87.

83. *Id.* paras. 90-93.

interest presented by the prosecutors outweighed the interest in anonymity, and whether less intrusive measures would suffice to serve that interest.⁸⁴ Because the Dutch law lacked such safeguards, the ECHR held the law was deficient.⁸⁵

In holding that article 96(a) did not provide a sufficient prescription by law, the Grand Chamber departed from the court's prior jurisprudence on this prong of the article 10(2) test, and it substantially broadened the right of protection of confidential journalist sources by granting an automatic violation in all cases where these safeguards are lacking in the domestic law of a Member State.⁸⁶ This departure is evidenced by both *Voskuil* and *Roemen*, where the ECHR previously held that laws lacking these safeguards were sufficient to provide that interferences were "prescribed by law." In *Roemen*, the ECHR held that the domestic law provision was sufficient to ensure that the search of the journalist's and lawyer's homes and offices was prescribed by law.⁸⁷ The law in that case however provided only that "[t]he investigating judge shall carry out the seizure of all objects, documents, effects and other items [that are necessary for the investigation]."⁸⁸ Additionally, in *Voskuil*, the ECHR looked again to Dutch domestic law, and held that article 294(1) of the Dutch Code of Criminal Procedure was sufficient to make the arrest of journalists at the failure to identify their source, prescribed by law.⁸⁹ Although the relevant statutes in both cases provide that a judge has the authority to order the detention, the statutes make no provision for whether a judge must determine that an issue of confidential sources exists, that there must be public interests weighed against the interest in confidentiality, or that a judge should look to less intrusive measures.

In the noted case, the ECHR changed the requirements for an interference to be prescribed by law. The Grand Chamber also overturned the Third Chamber's judgment which held that due to the actual efforts taken by the investigating judge to enjoin the prosecution from using the CD-ROM and order its return thereafter, the lack of statutory prescription was not relevant.⁹⁰ Therefore, the Grand Chamber

84. *Id.*

85. *Id.* para. 100.

86. *See id.* paras. 90-94, 98-100.

87. *Roemen v. Luxembourg*, App. No. 51772/99, paras. 40-41, 48 (Eur. Ct. H.R. Feb. 25, 2003), <http://www.echr.coe.int/echr/en/hudoc> (follow "HUDOC Database" hyperlink; search Application Number "51772/99") (citing Luxembourg Criminal Investigation Code arts. 65-66).

88. *Id.* para. 41.

89. *Voskuil v. Netherlands*, App. No. 64752/01, paras. 34, 53 (Eur. Ct. H.R. Nov. 22, 2007), <http://www.echr.coe.int/echr/en/hudoc> (follow "HUDOC Database" hyperlink; search Application Number "64752/01") (citing Sv. art. 294 (Neth.)).

90. *Sanoma Uitgevers*, App. No. 38224/03, paras. 4, 52, 100.

in the noted case, by finding new relevant factors for assessing the basis in domestic law for a particular interference, substantially narrowed the exception under article 10(2), thus broadening the scope of the right.

IV. ANALYSIS

The Grand Chamber has created a more predictable test for Member States to determine if their actions violate article 10. It held that absent a basis in national law allowing a judge to review claims that a right to journalistic sources may be breached *before* disclosure is ordered, the order constitutes a violation of the applicant's article 10 rights. In finding an interference with the right to confidential sources, the ECHR has shifted the primary focus for assessing a violation of article 10 from whether the interference was necessary in a democratic society⁹¹ to instead looking primarily at the national law of the Member State.⁹² There are good reasons for not upholding the Third Chamber's decision. First, when it failed to look to the basis in law for the purposes of this case, given the active role of the Dutch Regional Court judge, it left future applicants from the Netherlands unprotected from similar violations. Second, by shifting the analysis to the inquiry of the investigating judge who may order disclosure, Member States may more easily anticipate whether their actions amount to a violation of the article 10 right. Previous jurisprudence depended heavily on the unique factual circumstances of the order for disclosure and whether the measures were "relevant and sufficient,"⁹³ or "disproportionate" to the aim pursued.⁹⁴ Because this analysis was contingent on particular circumstances, Member States were unable to accurately predict which mandates for disclosure would violate article 10.

The ECHR, moreover, did not take account of the government's competing interests in the noted case. The ECHR held that where an applicant's claims are not evaluated by a neutral magistrate, disclosure measures that actually constitute an interference with the applicant's article 10 right are automatically a violation, regardless of the competing

91. *E.g.*, *Goodwin v. United Kingdom*, App. No. 17488/90, paras. 40-46 (Eur. Ct. H.R. Feb. 22, 1996), <http://www.echr.coe.int/echr/en/hudoc> (follow "HUDOC Database" hyperlink; search Application Number "17488/90"); *Fin. Times Ltd. v. United Kingdom*, App. No. 821/03, paras. 59-63 (Eur. Ct. H.R. Dec. 15, 2009), <http://www.echr.coe.int/echr/en/hudoc> (follow "HUDOC Database" hyperlink; search Application Number "821/03").

92. *Sanoma Uitgevers*, App. No. 38224/03, paras. 90-100.

93. *See, e.g.*, *Goodwin*, App. No. 17488/90, para 40.

94. *See, e.g.*, *Roemen v. Luxembourg*, App. No. 51772/99, paras. 59-60 (Eur. Ct. H.R. Feb. 25, 2003), <http://www.echr.coe.int/echr/en/hudoc> (follow "HUDOC Database" hyperlink; search Application Number "51772/99").

interest involved.⁹⁵ Such a strong-handed approach by the ECHR suggests not only a shift away from the factual inquiries of particular disclosure orders, but an effort to unify national laws under the European Convention on Human Rights in line with the recommendations of the Committee of Ministers of the Council of Europe.⁹⁶ Further, allowing Member States to address issues of confidentiality prior to issuing a disclosure order, and determining whether less intrusive measures suffice to the same end, the ECHR eliminates unnecessary violations of this right that may have been avoided.⁹⁷

The ECHR has not eliminated the opaque inquiry of balancing interests put forth by the government against the interests in confidentiality, but instead has shifted it to the investigating judge to weigh before disclosure is ordered. A definite law that allows not judges, but *journalists* to predict when their sources will remain confidential is preferable to a weighing of competing inferences in these types of cases. In *Goodwin*, the applicant made precisely this argument regarding the definiteness of the English law that allowed interferences with the journalist's right to anonymous sources in cases where the interests of justice so require, saying:

[T]he journalist . . . could not assess with any degree of certainty the public interest in the information [and] would not be able to predict how the courts would view the matter. The law, as it stood, was no more than a mandate to the judiciary to order journalists to disclose sources if they were "moved" by the complaint of an aggrieved party.⁹⁸

Thus, the applicant alleged, the balancing test failed to meet the Convention requirement that the interference be prescribed by law and the law be "formulated with sufficient precision to enable the persons concerned . . . to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail."⁹⁹ The balancing exercise put forth in the noted case requiring the investigating judge to address issues of confidentiality and weigh competing public interests is subject to the same criticism.¹⁰⁰

In this sense, a law that is definite, although it may be imprecise, is preferable to the indefinite balancing test, because the balancing process

95. *Sanoma Uitgevers*, App. No. 38224/03, para. 100.

96. *Id.* para. 77; see Comm. of Ministers, *Recommendation No. R. (2007) 7, On the Right of Journalists Not To Disclose Their Sources of Information*, COUNCIL OF EUROPE (Mar. 8, 2000), <https://wed.coe.int/wed/ViewDoc.jsp?id=342907&site.cm>.

97. *See Sanoma Uitgevers*, App. No. 38224/03, paras. 91-92.

98. *Goodwin*, App. No. 17488/90, para. 32.

99. *Id.* para. 31.

100. *Sanoma Uitgevers*, App. No. 38224/03, paras. 91-92.

itself risks the very harm the ECHR fears in eliminating the right to a protection of sources. As soon as the ECHR or domestic courts enter a subjective inquiry, the exercise becomes problematic. In balancing the relative interests and reaching a different result particular to each case depending on how the information was acquired, the conduct of government officials, or the weight of the public's interest in the information—the ECHR gives the same uncertainty to journalists, and more importantly, their sources, as to whether they will be protected. In order for journalists and sources to use this protection in practice to foster a free exchange of ideas and open media, they must be able to predict the outcome of their actions as either sources or reporters.

The ECHR in *Goodwin* rejected the applicant's argument for greater certainty in favor of allowing the domestic courts to develop their own law to determine what particular interferences are necessary given the purported competing interests.¹⁰¹ However, such an approach leaves too much discretion to the courts. Although it may be over- and under-inclusive, if a court were to say, for example, that for the defense of serious crimes such as felonies, journalistic sources would not be protected. But both the journalist and the source will know the likelihood of compelled disclosure and be able to foresee the result of such reports.¹⁰² On the other hand, as the law exists now, both journalist

101. *Goodwin*, App. No. 17488/90, para. 33.

102. The approach of other jurisdictions noted by the ECHR does not provide much guidance on this issue. *Sanoma Uitgevers*, App. No. 38224/03, para. 45 (citing OPEN SOCIETY JUSTICE INITIATIVE ET AL., *supra* note 23). In the United States, for example, whether a journalist will be forced to disclose his or her source is even more difficult to foresee, because it depends on the jurisdiction where the request is being made. In criminal cases in federal courts, the Supreme Court decision in *Branzburg v. Hayes* limited the right of reporters' privilege to cases where a grand jury does not act in good faith in issuing a subpoena for journalist testimony. 408 U.S. 665, 691 (1972). The Court held where journalists' sources are implicated in a crime or possess information on criminal activity, it does not "exempt the newsman from . . . furnishing information relevant to the grand jury's task." *Id.* The federal circuit courts have taken differing approaches. However, none have held that the privilege outweighs a defendant's competing Sixth Amendment concern in a fair trial. James Thomas Tucker & Stephen Wermiel, *Enacting a Reasonable Federal Shield Law: A Reply to Professors Clymer and Eliason*, 57 AM. U. L. REV. 1291, 1308-10 (2007); Karl H. Schmid, *Journalist's Privilege in Criminal Proceedings: An Analysis of United States Courts of Appeals Decisions from 1973 to 1999*, 39 AM. CRIM. L. REV. 1441, 1453-54, 1466-80 (2002). Senate Bill 448, a federal shield law that would create a uniform qualified privilege for reporters in civil and criminal cases is active in the Senate. See *Shields and Subpoenas: The Reporter's Privilege in Federal Courts*, REP. COMMITTEE FOR FREEDOM PRESS, http://www.rcfp.org/shields_and_subpoenas.html (last updated Nov. 19, 2009). The states, however, have enacted radically different measures, ranging from some states finding some form of qualified reporter's privilege in their own state constitutions, others through the common law, thirty-one states enacting statutory protection, *Reporter's Privilege Compendium: An Introduction*, REP. COMMITTEE FOR FREEDOM PRESS, <http://www.rcfp.org/privilege/item.php?pg=intro> (last visited Jan. 16, 2011), and thirteen states with no protection in the form of qualified

and source must guess whether the information, given the government's competing interest (which may not be foreseeable as in the noted case where the journalist could not have known the pictures would be needed for a wholly unrelated crime), sufficiently outweighs their interest and society's interest in confidentiality. One can imagine that many sources will be unwilling to take that risk.

V. CONCLUSION

Despite the theoretical appeal of achieving the correct result through an intensive balancing inquiry where deference is given to the local judge to determine whether a particular interference of the journalist's right may be warranted, such an inquiry may inhibit the enjoyment of this right in practice. The ECHR's broad construction of article 10 rights to protect journalistic sources expanded in the noted case, with their recognition that domestic law should provide safeguards to applicants to prevent such violations. In this light, the ECHR emphasized concreteness, brevity, and clarity of domestic law providing for a journalist's right to protection of sources to enable both journalists and sources to make full use of this right in practice.

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privilege at all. *Shield Laws and Protection of Sources by State*, REPORTER'S COMMITTEE FOR FREEDOM PRESS, <http://www.rcfp.org/privilege/shieldmap.html> (last visited Jan. 25, 2011).

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