NOTE

from: Italian delegation  
to : Working Party on Intellectual Property (Copyright)  
No. prev. doc.: 5509/92 PI 33 CULTURE 21  
Subject: Proposal for a Council Directive harmonizing the term of protection of copyright and certain related rights  

As intimated at the ad hoc Working Party's first meeting on 22 June 1992, the Italian delegation is here submitting a number of comments on Articles 8 and 9 of the above proposal.

Under Article 8(1) Member States are required to notify the Commission of any draft national legislation introducing new related rights. The purpose of this provision - as in a similar case (Directive 83/189/EEC) - is clearly to avoid the adoption of national laws at variance with the approach of the draft Directive under discussion which could lead to disruption of the internal market. The notification requirement is one of the forms of collaboration incumbent on the Member States under the Treaty (Article 5 in particular): the proposal on this point can be regarded as necessary and perfectly legitimate save that the
requirement needs to be clarified (i.e. whether notification concerns only that part of the draft legislation dealing with the term of the new related rights, or all the rules governing such rights, and so on).

Article 8(2) requires Member States to refrain from adopting legislation on new related rights once the Commission has been notified under paragraph 1.

The minimum stay on adopting legislation is three months from the date of notification, and the maximum is twelve months, where the Commission informs the Member State that it intends to propose a Directive on the subject.

This provision reproduces Article 9 of Council Directive 83/189/EEC laying down a procedure for the provision of information in the field of technical standards and regulations; that Article requires Member States to refrain from adopting technical regulations during the said period, i.e. "technical specifications (...) the observance of which is compulsory (...) in the case of marketing or use [of goods] in a Member State" (Article 1(5) of Directive 83/189/EEC). That provision applies then to the adoption stage of highly technical, detailed rules, which may be simple administrative acts and may not necessarily be enacted as formal laws.

The proposed Article 8(2) on the other hand opens the way to unacceptable interference in the legislative process, the procedures of which are the sole prerogative of national parliaments.
In substance, a condition is being placed on the national legislative process (advance notification of the Commission, requirement to await the expiry of the period for the Commission to reply); any failure to comply with that condition could automatically invalidate the law in question, even though it conformed in every respect with current Community rules and with those which the Commission had at that stage merely announced.

Article 8(2), by being so categorical, could also result in the 'premature' removal from the national legislator's sphere of competence (a competence deriving from Article 36 of the Treaty and repeatedly confirmed by Court of Justice case-law, to which the Court of First Instance recently referred in its ruling in Case 69/89 of 10 July 1991) of a subject on which the Community legislator has not yet taken a decision. This is a further reason for considering Article 8(2) unacceptable.

Admittedly, under Article 5 of the Treaty the obligations arising out of a Directive apply to all the organs of the Member States (for a recent example of a Court of Justice ruling in this sense, see Judgment in Case 31/87, dealing specifically with the obligations of national courts) and consequently to the body designated by the constitution to produce legislation, nevertheless, the obligation concerns the result to be achieved by the Directive and not the way in which that result is to be achieved under national procedures, especially if the procedures involve the exercise of sovereign functions of the individual Member States.
The Commission's aim is to avoid discrepancies in legislation on related rights as it develops hereafter and also to pre-empt conflict with future Community measures which have yet to reach the stage of actual proposals; while this is understandable in itself, it seems here to produce something of an overkill effect by introducing a blocking mechanism on the basis of no more than the Commission's stated intention of proposing a Directive on the subject.

That aim could be more easily achieved through the effective use of the reciprocal information procedure provided for in Article 8(1).

Moreover, the difficulties foreseen by the Commission can be solved through common measures provided for in the Treaty and even by national judges refraining from applying internal laws which are incompatible with a Community Directive covering the same subject.

With regard to Article 9, the Italian delegation reiterates its concern at seeing the Commission, instead of the Member States, vested with substantial powers to negotiate with third countries on the matters and terms set out in Article 4(4), through a dubious reference to Article 113 of the Treaty, which concerns commercial policy.

This point needs to be looked at more closely by all delegations.