Progress report

1. The German Presidency has viewed as a priority the proposal for a Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society. The objective of the proposal - to harmonise the rights of authors and of holders of related rights with regard to reproduction, communication to the public and distribution and thereby take into account in particular the possibilities offered by new technologies – is of considerable importance for the further development of the Information Society in the internal market. At the same time, the proposal is an imperative precondition for the accession of the Community to the two copyright agreements, WCT and WPPT, which were concluded within the framework of WIPO.
After the European Parliament approved the proposal for a Directive with amendments on 10 February 1999, it was possible for the discussions, which had already begun under the United Kingdom and Austrian Presidencies, to be pursued in the competent Council Working Party on the basis of the European Parliament’s decision and taking into account the Opinion delivered by the Commission in the parliamentary procedure. Thus, it was possible to incorporate into the discussions the content of the “amended proposal” even before the Commission had presented it on 21 May 1999, shortly before the conclusion of the discussions under the German Presidency.

2. The discussions concentrated on Article 5 of the proposal for a Directive. Article 5 is one of the key provisions of the proposal; it governs the limitations on rights of authors and of holders of related rights.

The Council Working Party examined in depth the Commission’s proposals and the decisions of the European Parliament and at the same time, on the basis of papers submitted by the Presidency and various delegations, also considered alternatives to the Commission proposal and possible additions.

(a) Under Article 5(1) temporary acts of reproduction which, as an integral part of a technological process, have no independent economic significance, are exempted from the right of reproduction. This is the only compulsory exemption which is of particular importance for the smooth functioning of the new services.

This exception to the rule, e.g., for cases of caching and browsing should only take effect, according to the European Parliament’s decision, if the acts of reproduction are carried out in connection with a permitted use.

In its “amended proposal” the Commission does not incorporate this addition to paragraph 1 decided by the European Parliament. However, several delegations have expressed support for this addition; they have taken the view that only in such a manner

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1 OJ C 150, 28.5.1999, p. 171.
can rightholders be given appropriate protection. Some delegations have declared
themselves expressly opposed to this addition with reference to the needs of the
Information Society. However, many delegations have at the same time made it clear
that they have not yet finalised their position in view of the complexity of the problems
involved. Furthermore, they consider that the basic connection with the rule on
responsibility, which is contained in the proposal for a Directive on certain legal aspects
of electronic commerce, should be borne in mind.

In an attempt to bring the different opinions into line by way of a compromise, it was
postulated that the European Parliament’s proposal for an addition be abandoned in
favour of stipulating expressly in Article 8 of the proposal (Sanctions and remedies) that
applications may be made for injunctions against service providers if they are or are
bound to be aware that copyright or related rights have been or are expected to be
infringed.

The delegations have acknowledged this proposal as an interesting approach which calls
for further examination.

In addition, Article 5(1) as amended was discussed.

(b) In connection with Article 5(2) and (3), which contains a list of possible limitations,
several issues of a fundamental nature were discussed, including the concept of a closed
list of limitations.

While there was broad agreement that the proposal for a Directive had to incorporate the
rules on limitations, several delegations called into question the approach of the
Commission proposal which made provision for a closed list, and pointed out inter alia
that a closed list was too inflexible. Furthermore, the subsidiarity principle had to be
observed.

Other delegations endorsed the closed list approach chosen by the Commission and –
with the Commission - pointed out that only such a list could ensure a minimum degree
of harmonisation.
(c) Moreover, the delegations commented on a number of individual questions concerning the proposed list of limitations.

Thus, some delegations criticised the concept – taken from the decision of the European Parliament and incorporated in the “amended proposal” – that the national legislator should only be able to make use of certain limitations when the rightholders receive “fair compensation”. Other delegations expressly welcomed this addition and were in favour not only of providing for “fair compensation” in general (“gerechter Ausgleich”), but also in specific cases (“angemessene Vergütung”).

In particular the limitation in favour of libraries and similar establishments in paragraph 2(c) was considered by many delegations as too narrow.

(d) On the basis of a Presidency paper, an extension of the list of limitations was discussed, in order to take account of various concerns of several delegations. All the delegations welcomed the proposal as a suitable basis for further deliberations, even if several delegations made clear their preference for widening the scope of the list still further, as proposed in a paper from the Danish delegation. Other delegations, on the other hand, expressed fear of too broad a scope.

The Presidency proposed in particular an additional general exemption which would allow the Member States to maintain limitations of minor importance in national law. Many delegations welcomed this, as it satisfied their wish for greater flexibility. One criticism was that this proposal refers only to analogue uses and, according to its wording, does not apply to digital uses.

Other delegations – and the Commission – regarded this proposed addition as the maximum limit possible if a meaningful harmonising effect were to be achieved, but also made it clear that the proposal could form a basis for further reflection.
3. To sum up, the discussion, conducted in a constructive manner by all the parties concerned, has brought further progress towards a solution for many of the difficult questions. The Presidency has the impression that on important issues positions have been brought closer together.

The Presidency asks the Council to take note of this progress report.