

THE EUROPEAN COMMUNITY AND ITS MEMBER STATES

The following comments were received through a communication from the European Community and its Member States

At the Seventh session of the Intergovernmental Committee on Genetic Resources, Traditional Knowledge and Folklore, the Committee called for “further comments on the draft objectives and core principles, including specific suggestions for wording before 25 February, 2005”.

The European Community and its Member States would like to confirm their support for the work of this Committee and thank the WIPO secretariat for providing this opportunity for further constructive collaboration. Support is also given to the flexible approach being used and the understanding that the decision to apply measures concerning the protection of traditional cultural expressions lies with the individual contracting parties.

The European Community and its Member States would like to reiterate that it would seem important that assistance be given on a national basis to those countries so wishing, to set up and use as much as possible legal instruments, including those relating to intellectual property, that are already in place and recognised by the international community. In this respect, the European Community and its Member States would refer members of the Intergovernmental Committee to its submission made to the 3rd meeting of the Committee (WIPO/GRTKF/IC/3/11). Attempts to protect traditional cultural expressions should not undermine current international obligations nor interfere with the current rights and obligations found in copyright. The European Community and its Member States consider the document containing the draft Policy Objectives and Core Principles constitutes a possible basis for guidelines to be established by national authorities.

Moreover, it appears that to have an effective national system for the protection of traditional cultural expressions is a prerequisite for any extension or reciprocity of this protection to third countries.

The European Community and its Member States would like to make the following comments on the text.

GENERAL

International protection should not be presupposed at this stage and a certain confusion in this direction could be interpreted in the document. There is an underlying suggestion that what is being proposed in the text is equivalent to the protection of copyright works despite fundamental differences which expose basic problems such as the definition of rightholder, the term of protection and the definition and originality of the subject matter to be protected. It is important that the principles do not conflict with copyright protection.

CORE PRINCIPLE – RECOGNITION OF THE SPECIFIC NATURE, CHARACTERISTICS AND TRADITIONAL FORMS OF CULTURAL EXPRESSION

There are fundamental difficulties laid out in this core principle such as the “constantly evolving character” and the non-uniqueness of the origin of a traditional cultural expression and the lack of identifiability of the community involved.

B1 Scope of subject matter

It is submitted that the definition of the scope of subject matter is too wide and not specific enough to be able to achieve the level of legal certainty required.

B2 Criteria for protection

The criteria should be more precise in order to be more predictable and transparent.

B3 Beneficiaries

A clearer definition of who the beneficiaries should be is necessary, especially in relation to local communities, territoriality and cross-border jurisdiction.

B4 Management of rights

The EC and its Member States support the setting up of public or private national authorities, who represent the rightholders, for the management of their rights. However, rightholders should not be obliged to have recourse to these authorities for the management of his or her rights if they choose not to do so. Moreover, it should be ensured that the original beneficiaries should be the recipients of the remuneration collected on their behalf by these authorities.

The legal meaning of “authorisation” and forms of protection requires further discussion.

B5 Scope of protection

There is concern about the potential abuse and extended protection related to the situation of rights of third parties and secret forms of TCEs. It is imperative that this should not interfere with the current intellectual property system. The notion of benefit sharing requires further discussion.

B6 Exceptions and limitations

It would appear that there is a close correlation between certain elements of B5 and B6 which require further analysis.

B7 Term of protection

Point a) would appear to be too vague. Copyright is characterised by the limitation in time of the author’s exclusive right to exploit the work in question. Most expressions of folklore undoubtedly go back much further in time than the term of legal protection granted by the Berne Convention or most national or regional laws. Assimilating any protection of Traditional Cultural Expressions via copyright law would not be compatible with this lack of defined term of protection. A defined term of protection is inherent to the balance of rights accepted for copyright.

B8 Formalities

It is suggested that certain formalities would indeed be required for the protection of traditional cultural expressions in order to ensure legal certainty.

B9 Sanctions, remedies and enforcement

Any national authority setup for the handling of Traditional Cultural Expressions should not be the same as the national authority for settling disputes.

B10 Application in time

It is feared that any retroactive effect may lead to inequitable circumstances concerning third parties. Moreover, the text as it stands would be in conflict with rules on copyright and rules which apply to works which have already fallen into the public domain.

B11 Relationship with IP protection

It is important that nothing in the present principles should be interpreted to derogate from existing obligations under current international agreements on intellectual property. Double protections should be avoided.

B12 International and regional protection

It would appear premature to be considering any international protection when coherent national systems have not yet been setup and considered to be providing insufficient protection.