

Submission from the European Community and its Member States on Traditional Cultural Expressions

Answers to the Questionnaire in Annex I of the Decisions of the Tenth Session of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore Committee

The European Community and its Member States welcome the approach chosen at the last session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore to pursue the discussion in the next session on the basis of a questionnaire, as this approach allows for a focus on the substantive issues at stake. The purpose of this submission is to contribute constructively to the dialog among the WIPO members, taking into account the interests voiced by some WIPO members to protect the spiritual and commercial value attached to traditional cultural expressions and expressions of folklore, highlighting their importance as shared heritage. The European Community and its Member States recognize the general and specific value that indigenous and local communities attach to their Traditional Cultural Expressions (TCE's) and acknowledge that these communities deserve respect.

1. The European Community and its Member States remain of the view that further discussion in the IGC should be based on the following general principles, as we reiterated in the tenth session of the IGC (November 30 to December 8, 2006).

"General Guiding Principles:

a) Recognizing the importance of the aspirations and expectations of indigenous communities as regards their TCE's, we however believe that enabling these communities to use the current Intellectual Property system, where appropriate, both nationally and internationally, is a practical first step. Unless part of a working legal framework, it is difficult to identify illicit acts.

b) The very nature of Intellectual Property protection has always been based on a delicate balance of interests between the creators and those wanting to enjoy or use these creations. For uses that are considered offensive other areas of law, such as blasphemy or unfair competition rules, can be of use.

c) We agree that the current international Intellectual Property system of rights and obligations should not be interfered with and double protection should be avoided.

d) In view of the great variety in indigenous communities and the different attitudes and needs expressed by them during the past years of the Intergovernmental Committee, it appears that it will not be possible to develop a single system as a solution.

e) The characteristics of TCE's set out in this section mean that protection via copyright is not satisfactory. Indeed, the notions of their evolving character, the difficulty in identifying the creator and time of creation, their lack of uniqueness and the indefinite term of protection being sought are problematic when compared to the strict criteria (regarding the identity of the creator, the originality of the work, the time and length of protection) required to qualify for copyright protection.

f) We are in favour of continuing to discuss TCE's separately from issues under the heading of Traditional Knowledge.

g) The work of this committee should not interfere with the internationally recognised agreements on the subject of human rights.

h) It appears that there is a certain overlap with indications already contained in subparagraph a). In our jurisdictions, TCE's are in the public domain and therefore open for free use by everyone, including, of course, those persons belonging to the original community.

i) Whatever systems are introduced to administer rights attached to indigenous communities should not prevent those wanting to be inspired by such TCE's to create."

2. Further to the above general principles, the European Community and its Member States would also like to support the endeavour of the IGC to further clarify the intended object of protection. A clear definition of the object of protection is a prerequisite to engaging further in discussions in this area.

3. As far as the question to what extent existing IPRs already afford protection, the European Community and its Member States would like to quote the remarks included in our previous submission WIPO/GRTKF/IC/3/11:

"Some, albeit limited, protection can be offered already by existing intellectual property rules. However, it should be clear that when talking about protecting expressions of folklore by intellectual property, the latter is, and in fact can only be usefully applied with respect to the economic and not the purely ethnic or religious aspects of folklore. Indeed, endeavouring to protect ethnic or religious issues by intellectual property would stretch intellectual property beyond its recognized objectives of fostering creativity and investments.

To some extent, *Trademark law* can be used to protect certain expressions of folklore, such as designs or symbols. The advantage of this protection is that it makes no novelty requirement and that it can be renewed without limitation, but protection relates only to actual or intended use for certain categories of products or services.

The laws on *industrial designs* provide protection for certain expressions of folklore such as graphical marks on any surface and three-dimensional plastic forms. However, the novelty and originality criteria, ownership and the limited duration of protection are difficult to reconcile with the nature of expressions of folklore.

The laws on *geographical indications* could be applied to certain tangible folklore products (such as carpets, textiles or figures) as protection can be assigned to a territory rather than a natural or legal person. However, this protection does not grant exclusive rights as regards the actual good or service itself and will only prevent others from using the indicator: the same folklore could still be reproduced or performed under a different name. The concepts of *unfair competition or unfair trade practice* may provide, where they exist, protection against wrongful commercial use and their scope could be used against industries, which profit from folklore but disregard its traditional nature.

Moreover, some intellectual property protection is already offered to performers of expressions of folklore via Article 2(a) of the WIPO Performances and Phonograms Treaty of 1996. This same Treaty extends moral rights, economic rights in their unfixed performances, a right of reproduction, of distribution, of rental and a right of making available to the same performers. The fact that expressions of folklore are included in the WPPT confirms the fact that expressions of folklore are not works however, and protection is given to performers of expressions of folklore under the concept of neighbouring rights."
