

**Contribution by the European Community and its Member States
to the draft gap analysis carried out by the WIPO Secretariat
on the protection of traditional cultural expressions or expressions of folklore**

On behalf of the European Community and its Member States, France thanks the WIPO Secretariat for preparing the draft gap analysis on the protection of traditional cultural expressions or expressions of folklore, and for the invitation to delegations and observers to provide their comments.

The European Community and its Member States welcome this draft, which shows that the requests made by indigenous communities concern a wide variety of problems, a large number of which do not fall within the sphere of copyright, but rather within that of secrecy, of unfair competition or of the preservation and promotion of the intangible cultural heritage.

The European Community and its Member States would recall the positions they have already expressed, notably in their contribution to the questionnaire drawn up with a view to the 11th session of the Intergovernmental Committee.

The European Community and its Member States endorse the analysis in this document that there is a wide variety of possibilities, which do not necessarily come within the sphere of literary and artistic property. In line with the position already expressed by the European Community and its Member States, they also welcome the fact that the draft document clearly emphasises that the solutions may be found at national, or even regional, level and that it shows, moreover, that the existing instruments could provide responses to a large number of the requests made by indigenous communities. The European Community and its Member States consider that views should continue to be exchanged on experience hitherto.

The European Community and its Member States would point out that before considering any solutions for conferring protection on traditional cultural expressions, it is essential for the sake of legal security to define that concept, and thus the scope of the protection to be provided.

Besides these aspects of its position, the Community and its Member States would like to make more specific comments on the draft technical analysis carried out by the WIPO Secretariat, and particularly on the following points:

- the general features of copyright protection (points 15 et seq.) should be defined more clearly, as regards both economic rights and moral rights;
 - the document shows that it is virtually impossible to identify a creator for traditional cultural expressions (points 33(b) and 34, in particular); it should indicate which persons or communities might be the holders of rights to traditional cultural expressions. It is, in fact, not possible to consider the protection of TCEs without having first identified precisely the persons or entities that might benefit from it;
 - regarding the aspects relating to originality (point 55, in particular), the concept of "originality" does not in fact seem best suited to traditional cultural expressions. [...] Thought should be given to the matter, and a criterion suited to the object of the protection should be selected;
 - the section on solutions that exist or might be developed should be more detailed and refined, particularly with regard to developments concerning orphan works (point 90) and resale rights (point 92). It is very difficult to draw a parallel between, on the one hand, the protection of traditional cultural expressions and, on the other, orphan works and resale rights, which concern works protected by copyright.
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