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INTERGOVERNMENTAL COMMITTEE ON INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE

Third Session
Geneva, June 13 to 21, 2002

EXPRESSIONS OF FOLKLORE

Documents submitted by the European Community and its Member States

1. In a letter dated May 2, 2002, the Permanent Delegation of the European Commission to the International Organizations in Geneva submitted a document on behalf of the European Community and its Member States to the third session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore.
2. The document is entitled "Expressions of Folklore." The document is reproduced in the form received and published in the Annex.
3. The above-mentioned letter included, in the name of the European Community and its Member States, the following paragraphs:

"Please find enclosed a written submission from the European Community and its member States on folklore. The purpose of this contribution is to share some reflections with other WIPO members on the relation between expressions of folklore and the protection offered by intellectual property rights. We believe we have taken a balanced approach, taking into account the interests voiced by certain WIPO members to protect the value attached to expressions of folklore, highlighting the role of folklore as shared heritage, and analyzing the somewhat limited scope of protection under today's IP regimes. Finally, the document offers some guidelines that could direct our future work. The communication is submitted for discussion at the next meeting of the Intergovernmental Committee in June. To allow for a thorough preparation, we would

appreciate it if the document could be circulated in due course. Please note that there are no other language versions available on our side.”

4. The Intergovernmental Committee is invited to take note of this document and the Annex to it.

[Annex follows]

ANNEX

Expressions of Folklore
Communication from the European Community and its Member States
for the 3rd WIPO Intergovernmental Committee on Genetic Resources, Traditional
Knowledge and Folklore
Geneva, 13 to 21 June, 2002

Introduction

The European Community and its Member States are sympathetic to certain countries' anxiousness to protect the value which has been attached to what they consider to be their expressions of folklore and the identity of their ethnic groups (as found in some answers to the questionnaire on national experiences WIPO/GRTKF/IC/2/7). In the framework of the discussions in the third Intergovernmental Committee on Genetic Resources, Traditional Knowledge and Folklore, the European Community and its Member States would like to share, in a constructive spirit, some reflections on the relation between expressions of folklore and the protection offered by intellectual property.

Folklore as a Shared Heritage

The notion of folklore is found in the various cultural groups as belonging to the community as a whole and much is done to preserve and promote it. Of course, individuals in each community may stand out as, being particularly gifted artistically, they can produce or reproduce the group's folklore for the benefit of all. However, although they may generate some income from their labor, what they offer is considered as not belonging to them as a person, but represents rather their contribution to the life of the community they belong to. This is true for all the different expressions of folklore be they verbal, musical, portrayed via physical movement or tangible. Shared within the community in this manner ensures folklore's perpetuity.

In Europe, many different cultures have naturally co-existed and have managed to preserve and develop their cultural distinctness. As a result of Europe's multifaceted history, different cultures have mingled and imposed their mark on neighbours and communities in the vicinity. Despite this movement and influence, each culture's folklore has survived and developed. The expressions of folklore of Europe's various regions are part of the public domain. The free access to and movement of folklore within these various European societies has been encouraged deliberately and the picture of today demonstrates that folklore is alive and well.

The exploitation of expressions of folklore, even on a commercial scale, by persons outside the region where the folklore originates, has not been seen to have a negative impact. On the contrary, it has stimulated cultural exchange and fostered regional identities. As a consequence, authentic expressions of folklore have become inherently better known and of higher economic value. However, those who advocate intellectual property protection for their own expressions of folklore would create monopolies of exploitation and would naturally then be faced with monopoly claims from other regions. Exchange or interaction could thus be made more difficult, if not impossible. Indeed, intellectual property protection should only be used where appropriate and beneficial to society in that it stimulates creativity and investment while respecting the interests of others and of society at large. If expressions of folklore were fully protected, this could almost have the effect of casting it in concrete.

Folklore may thus not be able to evolve and may risk its very existence as it would lose one of its main features: its dynamics.

There is a point where a line must be drawn between the public domain and protected intellectual property. As has been exposed by the European Community and its Member States on previous occasions, and notably in WIPO at the two previous meetings of the Intergovernmental Committee on Genetic Resources, Traditional Knowledge and Folklore, the realm of intellectual property protection should not be extended to a point where it becomes diffuse and legal certainty diluted.

Folklore and Current Intellectual Property Regimes

Some, albeit limited, protection can be afforded 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, endeavoring 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 novelty a 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 law 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 law 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.

It is when one tries to protect expressions of folklore via copyright or a new separate intellectual property instrument that problems appear both in number and difficulty. Certain characteristics of copyright (as of intellectual property in general) conflict with the very nature of folklore:

- copyright is based on the identification of the person originating the work, whereas folklore is distinguished by the anonymity of the originator or the tradition or by the fact that the tradition is the attribute of a community;
- copyright confers a monopoly of exploitation on the person originating the work, which is difficult to reconcile with the diffuse nature of folklore within an indeterminate population;
- in order to be protected, a work has to be original. Even if the expression of folklore was once creative and original, it is now the result of traditional behaviour, based on repetition from one generation to another or on imitation;
- 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.

The Berne Convention can be seen to offer some protection to expressions of folklore in an indirect way via its Article 15(4) (unpublished works whose author is unknown but who can be presumed to be a national of a signatory state) and Article 7 (term of protection of an anonymous work running from the time the work is made available to the public). It is stated, however, that signatory countries are not required to protect anonymous works in respect of which it is reasonable to presume that their author has been dead for fifty years, which is certainly the case in expressions of folklore.

The Appropriate Way Forward

It is imperative that discussions in the Intergovernmental Committee on Genetic Resources, Traditional Knowledge and Folklore are based on the understanding that important interests and fundamental principles of cultural exchange are at stake.

When looking ahead, we should be guided by:

- the conclusions of previous WIPO discussions;
- the replies to the Questionnaire;
- the need to draw a clear line between intellectual property protection and the public domain;
- the need not to dilute intellectual property protection.

The European Community and its Member States are ready to share experiences with all countries and regions who already apply folklore protection, are preoccupied by it, or who take a different approach. We reiterate our commitment to trying to find a suitable, effective and balanced solution agreeable to all and hope that this submission will contribute constructively to developing an acceptable outcome to the work of the Intergovernmental Committee on Genetic Resources, Traditional Knowledge and Folklore.

[End of Annex and of document]