

## COLOMBIA

The following comments were received through a communication from the Permanent Mission of Colombia. The communication contained the following wording: “The Permanent Mission of Colombia to the United Nations and International Organizations in Geneva presents its compliments to the Secretariat of the World Intellectual Property Organization and has the honor to submit to it the comments made by Colombia (National Copyright Directorate) on the wording of the proposed “Draft Policy Objectives and Core Principles for the Protection of Expressions of Folklore”, as agreed at the 7<sup>th</sup> Session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore.”

### 1. GENERAL REMARKS

The protection of traditional cultural expressions and expressions of folklore does not encompass the prospects for promotion, preservation and enjoyment of the rights which may be held by indigenous, regional or local communities. We therefore reiterate the initiative to produce an international instrument which defines and protects in *suigeneris* terms the subject of traditional cultural expressions and expressions of folklore.

Such a proposal is to be found, or almost, in document WIPO/GRTKF/IC/7/3 in particular, where both the policy interests inherent in protecting TCEs/EoF, and the substantive portion implying to some extent the great experience gained in the IP sphere, especially as regards copyright, are given definite form.

In section (xii) of the Policy Objectives, “preclude the grant of invalid IP rights”, the following is established:

(xii) curtail the grant, exercise and enforcement of invalid intellectual property rights acquired by unauthorized parties over TCEs/EoF, and derivatives thereof.

In our opinion, this article should be revised again; to that end, we propose the following wording: “Establish enforcement measures for the protection of acquired rights over TCEs/EoF, and the works derived therefrom”. The above allow each State to establish measures to avoid the illegal use of the TCEs/EoF which are relevant, in accordance with its organization.

In turn, as regards the General Guidelines, we agree with the content and wording of the articles submitted, especially since they provide the possibility of interpreting the way in which TCEs/EoF are to be protected.

Since we consider the substantive part of document WIPO/GRTKF/IC/7/3 to be of great importance, we have submitted the relevant comments in a separate section.

### 2. SPECIFIC SUBSTANTIVE PRINCIPLES

As regards the specific substantive principles, we have the following observations:

1. We believe that it would be expedient to produce a glossary in order to make the terms used easier to understand and to achieve a unified understanding of the articles, as well as to review the subject of the moral rights of communities.

2.2 Article B.2, "Protection criteria", states that:

*TCEs/EoF are protectable, whatever the mode or form of their expression, provided they are:*

- (i) the products of creative intellectual activity, including collective and cumulative creativity; and*
- (ii) characteristic of a community's distinctive cultural identity and traditional heritage developed and maintained by it.*

In that regard, we consider that two criteria should be added:

- (a) "The protection of TCEs/EoF does not require any kind of prior formality constituting rights",
- (b) "The protection of TCEs/EoF will be achieved only within the traditional or customary context of creative indigenous communities",

As regards the existing sections, it is suggested that:

TCEs/EoF may be protected, whatever the mode or form of their expression, provided that they are:

- (i) the products of creative activity, provided that they are collective and cumulative", and
- (ii) is deleted. This is the case because a heavy burden of proof would be imposed for the exercise of rights.

3. Article B.4, which relates to the subject of "Rights management", states:

*(a) To ensure the effectiveness of protection of TCEs/EoF, a responsible authority, which may be an existing office or agency, should be tasked with awareness-raising, education, advice and guidance, monitoring, dispute resolution and other functions.*

*(b) Authorizations required to exploit TCEs/EoF should be obtained either directly from the community concerned or the authority acting on behalf of and in the interests of the community. Where authorizations are granted by the authority:*

*(i) such authorizations should be granted only after appropriate consultations with the relevant indigenous people or traditional or other community/ies, in accordance with their traditional decision-making and governance processes;*

*(ii) such authorizations should comply with the scope of protection provided for the TCEs/EoF concerned and should in particular provide for the equitable sharing of benefits from their use;*

*(iii) uncertainties or disputes as to which communities are concerned should be resolved as far as possible with reference to customary laws and practices;*

*(iv) any monetary or non-monetary benefits collected by the authority for the use of the TCEs/EoF should be provided directly by the authority to the indigenous people or traditional or other community concerned;*

*(v) enabling legislation, regulations or administrative measures should provide guidance on matters such as procedures for applications for authorization; fees, if any, that the authority may charge for its services; public notification procedures; the resolution of disputes; and the terms and conditions upon which authorizations may be granted by the authority.*

We consider that this article should be deleted from the documents so that it may be regulated internally by each country. In the Colombian Constitution, the indigenous territories, formed by indigenous communities, have complete autonomy to act as well as legal recognition (Articles 286 and 287 of the Political Constitution of Colombia). To that extent, the State or responsible authority cannot be more than a facilitator and in no case a player who gets involved at the time the use of a traditional cultural expression or expression of folklore is authorized.

It is important to distinguish these functions from the beginning in order to avoid possible conflicts or confusion at a later date. As owners of their folklore, indigenous communities must be the only ones authorized to allow a third party to use such folklore. It is they who have direct contact with the folklore and, to that extent, also have the authority to recognize their historical, cultural and heritage value. It is clear that the State or competent authority could advise the indigenous communities, if they so request at a particular time, but it must always be taken into consideration that the only parties entitled to take decisions on folklore are the communities themselves.

4. Article B.5, "Scope of protection" states that:

*There shall be adequate measures to ensure:*

*(i) the prevention of: the reproduction, adaptation, public communication and others such forms of exploitation of; any distortion, mutilation or other modification of, or other derogatory action in relation to; and the acquisition by third parties of IP rights over, TCEs/EoF of particular cultural or spiritual value or significance (such as sacred TCEs/EoF), and derivative thereof;*

*(ii) the prevention of the unauthorized disclosure and subsequent use of and acquisition by third parties of IP rights over secret TCEs/EoF;*

*(iii) in respect of performances of TCEs/EoF, the protection of moral and economic rights as required by the WIPO Performances and Phonograms Treaty, 1996; and*

*(iv) that, in the case of the use and exploitation of other TCEs/EoF:*

*-the relevant indigenous, traditional or other cultural communities are identified as the source of any work derived from or inspired by the TCEs/EoF;*

*-any distortion, mutilation or other modification of, or other derogatory action in relation to a TCE/EoF, which would offend against or be prejudicial to the reputation, customary values or cultural identity or integrity of the community, can be prevented and/or is subject to civil or criminal sanctions;*

*-any false, confusing or misleading indications or allegations in the course of trade and contrary to honest business practices, as to the origin, the nature, the manufacturing process, the characteristics, the suitability for their purpose, the quantity, endorsement by or linkage with the community of goods or services that refer to, draw upon or evoke TCEs/EoF can be prevented and/or is subject to civil or criminal sanctions; and*

*-where the exploitation is for gainful intent, there should be equitable remuneration or benefit-sharing on terms determined by a competent authority and the relevant community.*

In this regard, we consider that a distinction should be made between moral rights and economic rights as the subject matter of protection. In relation to (iii), the wording used is not very felicitous. We therefore propose the following text: “There shall be adequate measures to ensure: (iii) protection for TCEs/EoF, without prejudice to the WIPO Performances and Phonograms Treaty (WPPT)”.

5. Article B.6, “Exceptions and limitations” states:

*Measures for the protection of TCEs/EoF should:*

- (i) not restrict or hinder the normal use, transmission, exchange and development of TCEs/EoF within the traditional and customary context by members of the relevant community as determined by customary laws and practices;*
- (ii) extend only to utilization of TCEs/EoF outside the traditional or customary context, whether or not for commercial gain;*
- (iii) be subject to the same kind of limitations as are permitted with respect to the protection of literary and artistic works, designs, trademarks and other IP, as relevant and as the case may be. Such limitations should not, however, permit the use of TCEs/EoF in ways that would be offensive to the relevant community.*

We believe that each Member State should establish those which it considers relevant to TCEs/EoF and therefore only a small number of foundations should be established from which the relevant regulation emerges. For example, cultural interest and/or the existence or otherwise of gainful intent.

6. Article B.7, “Term of protection” states:

- (a) Protection of any TCE/EoF should endure for as long as the TCE/EoF continues to be maintained and used by, and is characteristic of, the cultural identity and traditional heritage of the relevant indigenous people or traditional or cultural community.*
- (b) Measures for the protection of TCEs/EoF could specify circumstances in which an expression will be deemed no longer to be characteristic of a relevant people or community.*

It is our opinion that (b) should be deleted, given that if it were adopted a void would be created in protection which would be uncertain.

7. Article B.8, “Formalities”, refers to:

- (a) The protection of TCEs/EoF should not be subject to any formalities.*
- (b) In the interests of transparency and certainty, measures for the protection of TCEs/EoF may require that certain categories of TCEs/EoF for which protection is sought should be*

*notified to a competent authority, including TCEs/EoF of particular cultural or spiritual value or significance such as sacred TCEs/EoF. Such notification would have a declaratory function, would not in itself constitute rights, and could contribute towards 'positive' and/or 'defensive' forms of protection. It should not involve or require the documentation, recordal or public disclosure of the TCEs/EoF.*

The following text is proposed (taken from the Andean Decision, Articles 52 and 53):

“The protection granted to TCEs/EoF and the works derived therefrom shall not be subject to any kind of formality. Consequently, the omission of recordal does not prevent the enjoyment or exercise of the rights recognized. Recordal is declaratory and does not constitute rights. Without prejudice thereto, entry in the register presumes that the facts and acts recorded therein are true, unless proven otherwise. Any entry does not affect the rights of third parties.

As regards document WIPO/GRTKF/IC/7/4, which contains specific cases of *suigeneris* regulation of the protection of TCEs/EoF and their application, we note the different systems of protection that are recorded as examples of future regulations on the subject. This document allows specific comments to be made on the text proposed in document WIPO/GRTKF/IC/7/3.