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Dear Wend Wendland,

DRAFT Gap Analysis on the protection of traditional cultural expressions/expressions of folklore: IPA Comments

The International Publishers Association (IPA) appreciates the opportunity to comment on the WIPO Draft Gap Analysis on the protection of traditional cultural expressions/expressions of folklore (the "Consultation Document").

We carefully studied the Consultation Document and commend the WIPO Secretariat on the thoroughness of its analysis. We believe that a finalised version of the Consultation Document will greatly assist the discussions of the Intergovernmental Committee (IGC) with regard to the protection of traditional cultural expressions/expressions of folklore (TCEs/EoF), provided it takes comments from IPA and other relevant international NGOs into account.

The discussions of the IGC impact directly on the role of publishers as promoters and preservers of TCEs/EoF. For example:

- Local publishers of children's books and school books often make reference in their works to the cultural context of their readers.
- Academic publishers publish works of scientists describing ethnological observations, or historical events.
- Many fiction writers are inspired by the local customs, traditions, and the cultural environment in which they were raised.

We are therefore grateful for the opportunity to make the attached submission which essentially complements our comments submitted in previous consultations. We hope that our remarks, including those critical of certain proposals, are accepted as a constructive contribution to an important debate which hopefully facilitates the international recognition of TCEs/EoF, and raises awareness for the needs of indigenous people.

Yours sincerely,

Jens Bammel
Secretary General

DRAFT Gap Analysis on the protection of traditional cultural expressions/expressions of folklore (TCEs/EoF)
Comments of the International Publishers Association (IPA)

By and large, IPA agrees with the way in which the Consultation Document presents the working definitions and other bases upon which the gap analysis is conducted (part III). The Consultation Document accurately sets out the existing regulatory framework for the protection of TCEs/EoF at international level (para. IV – erroneously labelled III – section A), correctly identifies the gaps which exist at international level (IV.B), and makes very helpful recommendations on what considerations are relevant to determining whether those gaps need to be addressed (IV.C).

Generally, we believe that existing IP laws, and copyright in particular, provide adequate protection for literary and artistic TCEs/EoF. IP laws provide creators with certain exclusive rights over their intellectual property and hence control over their creation; IP laws also serve as a vehicle for the commercialisation of creations. IP laws and copyright are therefore suitable to address those within indigenous communities asking users of their creation to share the benefits deriving from the use. Copyright laws can easily be adapted to cater for some of the needs of communities (your paras 82, 83, possibly also the adaptation right in para. 97).

As correctly set out in the Consultation Document, IP laws do not address all needs of indigenous peoples. The needs left unaddressed by IP laws are in most cases needs difficult to regulate, as they are obligations of a moral rather than legal nature and the ambiguity of many concepts clashes with the need for certainty in legal terms. Codes of conduct and other soft law mechanisms (as suggested in your paras 99-100) are best suitable to address these.

Orphan works are a case in point. Here collaboration of all stakeholders has been instrumental in finding practical solutions, without the need for legislation.

As a strong supporter of freedom of expression, and freedom to publish, IPA opposes any option involving the creation of an administrative body which must be involved before a literary work can be published: the additional costs of maintaining this administrative body are likely to be borne by the originator of the new creation, her commercial partners and, ultimately, by the user. Moreover, there is the potential for abuse and corruption whenever the publication date or overall approval is dependent on any authority. The impact on freedom of expression is particularly worrying in the area of TCEs/EoF as restrictions in this area would directly impact on the social, cultural and political dialogue and interaction within and outside of the local, national, regional, or international community. We would therefore reject the options outlined in paras 101-102, and 103.

In this context we also would like to voice our severe concerns with regard to the option suggesting the introduction of a *domaine public payant* (para. 89). The Consultation Document rightly states that this system does not prevent outsiders from using TCEs. Moreover, it creates the need for a separate administration (probably paid out of the collected funds), often without the creators being able to influence the way in which the money thus collected is used. In practice, a *domaine public payant* amounts to an eternal copyright, thereby largely excluding a work in the *domaine public* from the creative cycle.

IPA would be happy to further elaborate and explain its concerns. Please do not hesitate to contact Jens Bammel bammel@internationalpublishers.org for more.