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**SPEECH BY JUDGE ARMY E. FERREIRA AT SESSION B
“PRESERVATION OF HUMANKIND’S CULTURAL HERITAGE”**

Dear colleagues and panellists, it is an honour for me to be able to discuss with you a topic of great relevance that resonates deeply across the American continent, a land where cultural diversity not only enriches our collective identity but also reflects centuries of resistance, cultural fusion and creativity.

In the Americas, intangible cultural heritage —such as indigenous traditions, musical expressions and community practices— has been shaped by unique experiences: from pre-Columbian civilisations to the fusion of African and European cultures. For example, UNESCO has recognised elements such as Awajún pottery in Peru, pasillo music and dance in Ecuador, merengue and bachata music and dance in the Dominican Republic, and traditions from Venezuela, Bolivia and Panama, which illustrate how our continent keeps its roots alive in a globalised world.

This leads us to two observations which, whilst appearing straightforward at first glance, have complex implications for the legal rights they seek to protect: Firstly, cultural heritage is not only tangible but also intangible; and, secondly, cultural heritage is not a thing of the past; it is **a living reality that is constantly being re-enacted** whilst strengthening the identity and social cohesion of communities.

It is precisely because of its dynamic and ever-changing nature that cultural heritage — particularly intangible heritage— is difficult to protect under current legal mechanisms, as it requires flexible and prudent tools rather than rigid legal frameworks.

For this reason, I would like to devote my presentation to the role of intellectual property law as a mechanism for protecting humanity’s intangible cultural heritage, and to how it should serve as the means by which we can integrate the protection of communities’ cultural rights and traditions, the legal recognition of the origin of the idea in question, and the protection of the cultural distinctiveness derived from it. Intellectual property law not only safeguards individual human creations, but can also serve as a cornerstone for preserving the communal essence of humanity in an era of global challenges.

For decades, UNESCO and WIPO have sought to establish a comprehensive conceptual framework that ensures the protection of humanity’s cultural heritage and the intellectual property rights of the indigenous communities to which these works of human intellect belong. The fact is that, with a few exceptions such as the Federal Law on the Protection of the Cultural

Heritage of the Indigenous and Afro-Mexican Peoples and Communities of Mexico, laws on historical or cultural heritage fail to refer to intellectual property as a means of safeguarding intangible cultural heritage; conversely, intellectual property legislation does not provide for special treatment for expressions of intangible cultural heritage.

An interesting case study in this context is the Festa or Misteri d'Elx, a medieval sacred musical drama about the Dormition, Assumption and Coronation of the Virgin Mary, which is performed annually in August at the Basilica of Santa María de Elche, in the province of Alicante, Spain. Although it has been recognised by UNESCO as a Masterpiece of the Oral and Intangible Heritage of Humanity since 2001, its protection is also underpinned by a series of intellectual property provisions that take into account both the collective nature of the tradition and protection against misuse by unauthorised third parties.

This brings us to the 2003 UNESCO Convention, which defines intangible cultural heritage as those practices, expressions and forms of knowledge that communities recognise as their own and keep alive through transmission. The concept of “safeguarding” is recognised, which means identifying, documenting, teaching and revitalising such intangible cultural heritage —not “appropriating” what belongs to the collective. For this reason, when it comes to intangible cultural heritage, we seek to ensure its cultural viability, not its exclusive appropriation.

Within the framework of American constitutional law, the protection of intangible cultural heritage takes on a fundamental importance, as it is directly linked to human rights such as cultural identity and diversity. Constitutions in Latin America, such as those of Mexico, Bolivia and Ecuador, include provisions recognising the collective intellectual property rights of indigenous peoples, obliging the State to safeguard them.

For reference, in Mexico, the amendment to Article 2 of the Constitution recognises the right of indigenous and Afro-Mexican peoples to preserve their cultural heritage, obliging the State to “take the necessary measures to recognise and protect the cultural heritage, collective intellectual property, traditional knowledge and cultural expressions of indigenous peoples and communities, in accordance with the terms established by law”.

Articles 98 to 102 of the Bolivian Constitution recognise as part of the cultural heritage of the Bolivian people their natural, archaeological, palaeontological and historical wealth, as well as their documentary heritage and that derived from religious worship and folklore, worldviews, myths, oral history, dances, cultural practices, traditional knowledge and technologies. The State is obliged to protect knowledge and expertise through the registration of intellectual property, thereby safeguarding the intangible rights of indigenous and native peasant nations and peoples, as well as intercultural and Afro-Bolivian communities.

Article 379 of the Constitution of Ecuador stipulates that the following, amongst others, form part of the tangible and intangible cultural heritage that is significant to the memory and identity of individuals and communities, and are subject to protection by the State: 1. Languages, forms of expression, oral traditions and various cultural expressions and creations, including those of a ritual, festive and productive nature. 2. Buildings, urban spaces and complexes, monuments, natural sites, paths, gardens and landscapes that serve as symbols of identity for communities or that are of historical, artistic, archaeological, ethnographic or palaeontological value. 3. Documents, objects, collections, archives, libraries and museums of historical, artistic, archaeological, ethnographic or palaeontological value. 4. Artistic, scientific and technological

creations. The State's cultural heritage assets shall be inalienable, exempt from attachment and not subject to limitation.

Similarly, in Chile, regulatory frameworks have been developed that bring the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage into line with constitutional principles, emphasising protection against commercial exploitation.

In the Dominican Republic, Article 52 of the Constitution protects the exclusive right of ownership over all products of the human intellect; furthermore, Article 64 enshrines the fundamental right to culture, recognising that the nation's cultural heritage may be tangible or intangible, is protected by the State, and is inalienable and exempt from seizure, and that ownership of such heritage is indefeasible. Cultural property in private hands and underwater cultural heritage shall be equally protected against illicit export and looting.

This is where intellectual property law emerges as the solid foundation of intangible assets. According to the World Intellectual Property Organisation (WIPO), intellectual property law provides tools such as copyright, collective marks and patents to protect traditional cultural expressions, treating them not merely as common property but as intellectual creations deserving of exclusive recognition.

This approach is crucial because intangible heritage —practices, expressions and knowledge— is not static; it evolves and is passed on, and intellectual property law safeguards its integrity against commercialisation that could dilute it. The Regional Center for the Safeguarding of the Intangible Cultural Heritage of Latin America (CRESPIAL) incorporates intellectual property rights into its strategies, recognising that rights such as copyright protect traditional music and indigenous languages, thereby strengthening cultural diversity.

However, it is essential to address the inherent conflict between intellectual property rights and the concept of intangible cultural heritage, a complex and often contentious relationship. **Whilst intellectual property law protects individual creations for a limited period, intangible cultural heritage encompasses collective practices, knowledge and expressions passed down through the generations, giving rise to points of friction such as individual versus collective ownership** —where intellectual property law clashes with the communal nature of intangible cultural heritage, offering limited protection to folklore only when it gives rise to new works, but not to anonymous or collective creations.

Another point of contention in this area is the commercialisation and appropriation of elements that form part of humanity's cultural heritage, where the "traditional" application of intellectual property law can allow individuals or companies to register trademarks for traditional products, leaving communities with neither control nor benefits.

Furthermore, the current state of intellectual property law could "freeze" the evolution of intangible cultural heritage by protecting fixed versions, thereby hindering creative adaptations, whilst UNESCO emphasises safeguarding as a means of promoting vitality, not merely economic protection. This tension breeds mistrust between communities and institutions, as traditional intellectual property law is ill-suited to collective and perpetual rights.

To resolve these conflicts, solutions such as the *sui generis systems* adopted by WIPO and UNESCO are proposed; these combine intellectual property law with specific protections for traditional knowledge, whilst recognising indigenous collective rights.

In this regard, we must certainly mention the WIPO Draft Provisions for the Protection of Traditional Cultural Expressions and Traditional Knowledge.

This is not just another technical annex; it is the most serious attempt yet to give legal form — with international scope— to what communities have upheld for centuries through living practice and shared memory.

What is WIPO aiming to achieve with this proposal?

The drafts produced by the WIPO Intergovernmental Committee are based on a clear objective: to recognise the intrinsic value of Traditional Cultural Expressions and Traditional Knowledge; prevent misappropriation and misuse; require prior informed consent and the fair sharing of benefits; empower communities and respect their customary laws; and coordinate with other frameworks (biodiversity, TRIPS, etc.). That is the basic political structure.

With regard to Traditional Cultural Expressions, the text adds a crucial nuance: cultural diversity, intellectual and artistic freedom on an equitable basis, and an explicit ban on “unauthorised” intellectual property concessions relating to traditional cultural expressions or derivatives created by third parties.

The WIPO Intergovernmental Committee does not impose a single model: calls for responsiveness to the needs of communities, a balance of interests, flexibility in the instruments used, respect for customary laws and protocols, and accessible and effective measures. It also advocates for equity and the sharing of benefits with communities, consistency with systems for access to and sharing of genetic resources, and institutional support (collective management, repositories, capacity-building).

With regard to its definitions, WIPO proposes to define Traditional Cultural Expressions in a deliberately broad manner: all forms —tangible or intangible— in which culture and traditional knowledge are expressed or manifested, passed down from one generation to the next, such as verbal/oral, musical/sound, physical (dance, rituals, theatre) and tangible (arts, crafts, clothing, architecture) expressions. It doesn't have to be fixed.

In addition to the above, the following key criteria are proposed: (i) creativity (individual or collective); (ii) criteria that are characteristic of the community's cultural and social identity and heritage; and (iii) that they are maintained, used or developed by the community or by those who have the right or responsibility to do so under customary law.

The text allows each country to adapt the terminology relating to Traditional Cultural Expressions or folklore, and recognises that **this is not a matter of “traditional copyright”**; it does not require “individual authorship” but rather the contemporary creativity characteristic of cultural heritage, and places collective beneficiaries at the heart of the law.

With regard to Traditional Knowledge, defined as the wisdom, experience, skills and practices developed, maintained and passed down from generation to generation within a community, which often form part of its cultural or spiritual identity; the aim is to prevent, amongst other things:

- (1) access gained through theft, fraud or a breach of confidentiality;

- (2) use without prior informed consent or in breach of agreed conditions;
- (3) false claims of ownership or intellectual property rights;
- (4) commercial use without fair compensation;
- (5) offensive uses outside the traditional context;
- (6) patents granted without disclosure of origin or proof of consent and terms of benefit;

In short, the proposal is based on flexibility: combine preventive measures (such as databases or defensive publications) with positive measures (collective rights, remedies for unfair competition), always in a manner consistent with human rights and the freedom of research and creation “on a level playing field”. The duration and formalities are determined by national regulations, with the aim of reflecting the collective and intergenerational nature of heritage (see specific sections in the table of contents)

Other approaches include obtaining the prior and informed consent of communities before commercial use, enshrining indigenous cultural rights in national legislation, and the use of instruments such as collective or certification marks for traditional products.

In Latin America, countries have incorporated these protections into copyright laws for traditional popular cultures, offering a hybrid model. This refines my initial premise: INTELLECTUAL PROPERTY LAW is a key foundation, but it must evolve towards *sui generis* regimes in order to fully encompass collective intellectual property without contradictions, whilst preventing misappropriation.

In the Dominican context, the ratification of the 2003 UNESCO Convention emphasises the safeguarding of intangible cultural heritage through up-to-date inventories and measures to counter threats such as globalisation, whilst aligning with intellectual property law to protect expressions such as musical ones.

In a “global village” —a concept coined by Marshall McLuhan to describe an interconnected world— intellectual property law acts as a safeguard of peoples’ cultural distinctiveness. It safeguards past, present and future identity by recognising rights over traditional knowledge, cultural expressions and genetic resources, enabling indigenous and local communities to retain control over their heritage in the context of globalisation. In the Americas, this is vital for indigenous peoples, whose cultural identity is linked to collective ownership, thereby preventing the cultural homogenisation that globalisation might impose.

Intellectual property law not only prevents exploitation, but also fosters cultural innovation, ensuring that traditions such as those of our indigenous peoples endure as distinctive elements in the global tapestry.

Conclusion

I would like to conclude with the following points. If this tour makes one thing clear, it is that intangible cultural heritage is not a relic of a distant past: It’s a work in progress. That is why our task is not to preserve it in its current state, but to ensure its sustainability for future generations.

UNESCO's safeguarding and the protection of intellectual property are neither exclusive nor parallel paths: they need each other if we are to achieve those objectives. The first preserves the community spirit; the second provides legal tools to prevent misappropriation, acknowledge the origin and financially support the transfer.

For this reason, intellectual property rights designed solely for individual authorship and finite terms do not protect cultural, dynamic and transgenerational practices. However, the answer should not be to abandon intellectual property rights, but rather to develop them further: *sui generis* regimes, prior and informed consent from communities, equitable sharing of benefits, respect for customary norms, disclosure of the origin and use of collective cultural trademarks, certifications and geographical indications to distinguish authentic products without undermining living traditions.

Here in the Americas —and particularly in the Dominican Republic— we know that merengue, bachata, casabe and so many other forms of expression represent a shared identity, as well as value chains that can and should provide a livelihood for those who create them. In light of our Constitution, it is possible to reconcile cultural rights and intellectual property rights in such a way that legal protection strengthens —rather than undermines— communities.

I would like to propose three commitments:

1. Put communities at the heart of every decision (governance, consent and benefits).
2. Develop IP instruments tailored to intangible cultural heritage (*sui generis*, collective marks, geographical indications, transparent management).
3. Educate and cooperate: up-to-date inventories and records, fair compensation.

I would like to conclude by inviting you to promote and protect intellectual property —through a community-based and constitutional approach— as an effective safeguard of humanity's intangible cultural heritage. It is the best way to honour our past, serve the present and bequeath a sense of identity and dignity to future generations.