

**THE PROTECTION OF TRADITIONAL KNOWLEDGE AND
TRADITIONAL CULTURAL EXPRESSIONS BILL, 2015**

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**THE PROTECTION OF TRADITIONAL KNOWLEDGE AND
TRADITIONAL CULTURAL EXPRESSIONS BILL, 2015**

A Bill for

AN ACT of Parliament to provide a unified and comprehensive framework for the protection and promotion of traditional knowledge and traditional cultural expressions; to give effect to Article 11, 40(5) and 69 of the Constitution; and for connected purposes

ENACTED by the Parliament of Kenya, as follows—

PART I – PRELIMINARY

Short title.

1. This Act shall be cited as the draft Bill on the Protection of Traditional Knowledge and Traditional Cultural Expressions Act, 2015.

Purpose of the Act.

2. The purpose of this Act is to—

- (a) protect holders of traditional knowledge against any infringement of their rights;
- (b) protect traditional knowledge and traditional cultural expressions against misappropriation, misuse and unlawful exploitation beyond their traditional context;
- (c) promote sustainable utilization of traditional knowledge and traditional cultural expressions and ensure communities receive compensation and/or royalties for the use of their cultures and cultural heritage;

- (d) recognize the intrinsic value of traditional cultures and traditional cultural expressions, including their social, cultural, economic, intellectual, commercial and educational value;
- (e) promote the fair and equitable sharing and distribution of monetary and non-monetary benefits arising from the use of traditional knowledge and traditional cultural expressions;
- (f) prevent the acquisition or exercise of intellectual property rights inappropriately acquired over traditional knowledge, traditional cultural expressions and their derivatives;
- (g) preserve and promote traditional knowledge and traditional cultural expressions for appreciation of cultural diversity, national pride and identity for posterity;
- (h) promote respect for traditional cultures in order to meet the needs of communities by empowering them;
- (i) promote the effective utilization of traditional knowledge and traditional cultural expressions for the development of culture and identity of communities; and
- (j) respect, preserve, and maintain knowledge, innovations and practices of the holders of traditional knowledge and traditional cultural expressions embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and

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practices.

Application. **3.**(1) This Act applies to traditional knowledge and traditional cultural expressions that—

(a) were in existence before the commencement of this Act; or

(b) are created on or after that commencement.

(2) This Act does not affect or apply to rights that exist immediately before the commencement of this Act, including intellectual property rights.

(3) This Act does not affect or apply to contracts, licenses or other agreements entered into by traditional owners before the commencement of this Act in relation to the use of traditional knowledge or traditional cultural expressions.

Interpretation. **4.** In this Act, unless the context otherwise requires—

“authorized user agreement” means a written agreement entered into under section 41 of this Act;

“artistic works” means any of the following or works similar thereto, irrespective of artistic quality,—

(a) paintings, drawings, etchings, lithographs, woodcuts, engravings and prints;

(b) maps, plans and diagrams;

(c) works of sculpture;

(d) photographs that are not comprised in audio-visual works;

- (e) works of architecture in the form of buildings or models;
- (f) works of artistic craftsmanship, pictorial woven tissues; and
- (g) articles of applied handicraft and industrial art;

“Cabinet Secretary” means the Cabinet Secretary responsible for matters relating to intellectual property rights;

“community” includes a local, traditional or indigenous community whose members reside in a specific locality, have a common cultural and historical heritage, share common characteristics and interests and is perceived as distinct in some respect from the larger society within which they exist;

“customary context” refers to the utilization of traditional knowledge or cultural expressions in accordance with the practices of everyday life of the community, such as, for instance, usual ways of selling copies of tangible expressions of folklore by local craftsmen;

“customary use” means the use of traditional knowledge or traditional cultural expressions in accordance with the customary laws and practices of the holders ;

“customary laws and practices” means customary laws, norms and practices of local and traditional communities that are legally recognized in Kenya;

“derivative work” means any intellectual creation or innovation based upon or derived from traditional knowledge or traditional cultural expressions;

“derogatory treatment”, includes, in relation to traditional knowledge or traditional cultural expressions, any act or

omission that results in a material distortion, mutilation or alteration of the traditional knowledge or traditional cultural expressions that is prejudicial to the honour or reputation of the holders, or the integrity of the traditional knowledge or traditional cultural expressions;

“exploitation” means the employment of the greatest possible advantage of traditional knowledge and traditional cultural expressions for selfish purposes, taking advantage of unwary Traditional Knowledge and Traditional Cultural Expressions holders and advertising or a publicity program, including—

(a) where the traditional knowledge is a product—

(i) manufacturing, importing, exporting, offering for sale, selling or using beyond the traditional context the product; and

(ii) being in possession of the product for the purposes of offering it for sale, selling it or using it beyond the traditional context;

(b) where the traditional knowledge is a process—

(i) making use of the process beyond the traditional context; and

(ii) carrying out the acts referred to under paragraph (a) of this subsection with respect to a product that is a direct result of the use of the process.

“genetic resources” means microorganisms, plant and animal material including indigenous seeds, genetic plant varieties and traditional animal breeds that contain functional hereditary units and whose management shall also be subject

of other relevant legislations;

“genetic material ” means genetic material of plant , animal, microbial or other origin containing functional units of heredity. The management of these resources are also subject of other relevant legislations;

“holder” means local and traditional communities, and recognized individuals or organizations within such communities in whom the custody or protection of traditional knowledge and traditional cultural expressions are entrusted in accordance with the customary law and practices of that community;

“intangible cultural heritage” means the practices, representations, expressions, knowledge and cultural spaces associated therewith that communities, groups and, in some cases, individuals recognized as part of their social cultural heritage;

“lead agency” means a government agency, with offices in the county, whose mandate includes the co-ordination or facilitation of-

- (a) the collection, development and documentation of traditional knowledge or traditional cultural expressions;
- (b) the securing and maintenance of maintaining comprehensive databases for traditional knowledge and traditional cultural expressions;
- (c) the acquisition of rights or interests inn technological invention and innovation of traditional knowledge and traditional cultural expressions;
- (d) the enlightenment and information of the public on

matters relating to traditional knowledge and traditional cultural expressions; and

- (e) the facilitation and sensitization and awareness creation to relevant;

“Library” means the Traditional Knowledge Digital Library maintained by the National Competent Authority and the lead agencies under section 6(4);

“National Competent Authority” means a body or agency entrusted with the responsibility of administering the provisions of this Act;

“person” means a natural or legal person;

“prior informed consent” means the giving of, by the prospective user, complete and accurate information, and based on that information, the prior acceptance, by the concerned communities, to the use of their traditional knowledge or traditional cultural expressions;

“traditional context” means the mode of using traditional knowledge or traditional cultural expressions in their proper artistic framework based on continuous usage by the community;

“traditional cultural expressions” means any forms, whether tangible or intangible, in which traditional culture and knowledge are expressed, appear or are manifested, and comprise of the following forms of expressions or combinations thereof–

- (a) verbal expressions including stories, epics, legends, poetry, riddles; other narratives; words, signs, names, and symbols;

- (b) musical expressions including songs and instrumental music;
- (c) expressions by movement, including dances, plays, rituals or other performances, whether or not reduced to a material form;
- (d) tangible expressions, including productions of art, drawings, designs, paintings, including body-painting, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metal ware, jewellery, basketry, needlework, textiles, glassware, carpets, costumes; handicrafts; musical instruments; and architectural forms;

“traditional knowledge” means any knowledge originating from an individual, local or traditional community that is the result of intellectual activity and insight in a traditional context, including know-how, skills, innovations, practices and learning, embodied in the traditional lifestyle of a community, or contained in the codified knowledge systems passed on from one generation to another and includes agricultural, environmental or medical knowledge, and knowledge associated with genetic resources or other components of biological diversity, and know-how of traditional architecture, construction technologies, designs, marks and indications.

PART II– PROTECTION OF TRADITIONAL KNOWLEDGE

Protection
criteria for
traditional
knowledge.

5.(1) Protection shall be extended to traditional knowledge that is–

- (a) generated, preserved and transmitted in a traditional and intergenerational context;

- (b) distinctively associated with a local or traditional community; and
- (c) integral to the cultural identity of a local or traditional community that is recognized as holding the knowledge through a form of custodianship, guardianship or collective and cultural ownership or responsibility. Such a relationship may be established formally or informally by customary practices, laws or protocols.

(2) The Traditional knowledge, as referred to in subsection (1), includes any knowledge that generally—

- (a) is or has been created, acquired or inspired for traditional economic, ritual, narrative, decorative or recreational purposes;
- (b) is or has been transmitted from generation to generation;
- (c) is regarded as pertaining to a particular traditional group, clan or community; and
- (d) is individually or collectively originated and held.

Formalities relating to protection of traditional knowledge.

6.(1) Protection of traditional knowledge shall not be subject to any formality.

(2) Notwithstanding subsection (1), in the interests of transparency, evidence and the preservation of traditional knowledge, the National Competent Authority and the lead agencies shall, where appropriate and subject to the relevant policies, laws and procedures and considering the needs and aspirations of the traditional knowledge holders, maintain

registers or other records of the knowledge in a database to be known as the Traditional Knowledge Digital Library.

(3) The registers maintained under subsection (2) may relate to specific forms of protection, and shall not compromise the status of undisclosed traditional knowledge or the interests of holders of traditional knowledge that relate to the undisclosed elements of their knowledge.

(4) The Library shall be a collaborative program between agencies responsible for copyright, industrial property rights, the Ministry responsible for culture, sports and performing arts, Ministry responsible for education, science and technology, the National Museums of Kenya, the National Commission for Science, Technology and Innovation, the Kenya Plant Health Inspectorate Service, the National Environmental Management Authority, Kenya Medical Research Institute.

(5) An inter-disciplinary team of traditional knowledge experts, intellectual property experts, information and communication technology experts, scientists and technical officers shall be involved in establishment of the Library.

(6) Where a local community and a community outside Kenya share the same traditional knowledge, the National Competent Authority and lead agencies shall register the owners of the traditional knowledge in Kenya and maintain relevant records.

(7) Where two or more communities in the same or different counties share the same traditional knowledge, National Competent Authority shall register the owners of the traditional knowledge and maintain relevant records.

(8) Where concurrent claims arise from different communities, the National Competent Authority shall

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determine the claims using customary law, local information sources and any other means that may be applicable.

(9) Registration shall have a merely declaratory function and shall not in itself constitute rights, nor shall it involve or require the documentation, recording or public disclosure of the traditional knowledge concerned.

Beneficiaries of protection of traditional knowledge.

7. The beneficiaries of protection shall be local and traditional communities, and recognized individuals within such communities, who create, preserve and transmit knowledge in a traditional and intergenerational context.

Rights conferred to holders of traditional knowledge.

8.(1) The beneficiaries of protection shall have the exclusive right to—

- (a) authorize the exploitation of their traditional knowledge; and
- (b) prevent any person from exploiting their traditional knowledge without their prior informed consent.

(2) In addition to all other rights, remedies and action available, the owners shall have the right to institute legal proceedings against any person who exploits traditional knowledge without the owner's permission.

Recognition of knowledge holders.

9. A person who uses traditional knowledge beyond its traditional context shall acknowledge the holder of the knowledge, indicate the source of the knowledge and where possible, the origin of the knowledge, and use such knowledge in a manner that respects the cultural values of the holders.

Compulsory licence.

10.(1) Where protected traditional knowledge is not being sufficiently exploited by the rights holder, or where the holder

of rights in traditional knowledge refuses to grant licenses for exploitation subject to reasonable commercial terms and conditions, the Cabinet Secretary may, on the recommendation of the National Competent Authority and in the interest of the public, grant a compulsory licence for exploitation.

(2) In the absence of an agreement between the parties on an appropriate amount of compensation for the compulsory licence, a court of competent jurisdiction shall on the application of the parties determine the compensation.

(3) The National Competent Authority may, in the case of a dispute where there is no agreement between the parties, refer the matter for determination through alternative dispute resolution mechanisms.

Duration of protection of traditional knowledge

11.(1) Traditional knowledge shall be protected for so long as the knowledge fulfils the protection criteria referred to under section 5.

(2) Where traditional knowledge exclusively belongs to an individual, protection shall last for the first twenty-five years of the fifty years following the exploitation of knowledge beyond its traditional context by the individual.

PART III- PROTECTION OF TRADITIONAL CULTURAL EXPRESSIONS

Protection of traditional cultural expressions.

12.(1) The owners of traditional cultural expressions shall be deemed to be the holders of the traditional cultural rights in the traditional cultural expressions.

(2) Traditional knowledge or traditional cultural expressions shall not, without the prior and informed consent of the traditional owners, be used for—

(a) the reproduction of the traditional knowledge or

traditional cultural expressions;

- (b) the publication of the traditional knowledge or traditional cultural expressions;
- (c) the performance or display of the traditional knowledge or traditional cultural expressions in public;
- (d) the broadcast of the traditional knowledge or traditional cultural expressions to the public by radio, television, satellite, cable or any other means of communication;
- (e) the translation, adaption, arrangement, transformation or modification of the traditional knowledge or traditional cultural expressions ;
- (f) the fixation of the traditional knowledge or traditional cultural expressions through any process, including making a photograph, film or sound recording;
- (g) the availing online or electronic transmission to the public (whether over a path or a combination of paths, or both) traditional knowledge or traditional cultural expressions;
- (h) the creation of derivative works; and
- (i) the making, use, offer for sale, sell, import or export traditional knowledge or traditional cultural expressions or products derived there from.

(3) Despite subsection (2), the owners of traditional cultural expression rights shall be entitled to use the traditional cultural

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expressions in the ways mentioned in subsection (2) in the exercise of their traditional cultural rights.

Protection
criteria
of
traditional
cultural
expressions.

13.(1) The protection for traditional cultural expressions under this Act shall relate to traditional cultural expressions, of whatever mode or form, which are—

- (a) the products of creative and cumulative intellectual activity, including collective creativity or individual creativity where the identity of the individual is unknown; and
- (b) characteristic of a community's cultural identity and traditional heritage and have been maintained, used or developed by such community in accordance with the customary laws and practices of that community.

Formalities
relating
to
traditional
cultural
expressions.

14.(1) The protection of traditional cultural expressions shall not be subject to any formality.

(2) Despite subsection (1), the holder of the traditional cultural expression rights may deposit a notification with the National Competent Authority.

(3) The notification shall be for declaratory purposes and shall not constitute rights, or involve or require the documentation, recording or public disclosure of the traditional cultural expressions to which it relates.

(4) Where a local community and a community outside Kenya share the same traditional cultural expressions the National Competent shall register the owners of the traditional knowledge in Kenya and maintain relevant records.

(5) Where more than one community in the same or

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different counties share the same traditional cultural expressions, the National Competent Authority shall register the owners of the traditional knowledge in each county and maintain relevant records.

Beneficiaries of protection of traditional cultural expressions.

15. The beneficiaries of protection of traditional cultural expressions shall be the local and traditional communities—

- (a) to whom the custody and protection of the traditional cultural expressions are entrusted in accordance with the customary laws and practices of the communities; and
- (b) that maintain and use the traditional cultural expressions as a characteristic of their traditional cultural heritage.

Protection of traditional cultural expressions against unlawful acts.

16.(1) A person shall not, in way, misappropriate, misuse or unlawfully access and exploit traditional cultural expressions.

(2) The National Competent Authority shall establish mechanisms that enable the communities to prevent the misappropriation, misuse or unlawful access and exploitation of traditional cultural expressions that are of particular cultural value or significance to a community, without prior consent, including in of such traditional cultural expressions other than words, signs, names and symbols—

- (a) the reproduction, publication, adaptation, broadcasting, public performance, communication to the public, distribution, rental, making available to the public and fixation (including by still photography) of the traditional cultural expressions or derivatives thereof;

- (b) any use of the traditional cultural expressions or adaptation thereof that does not acknowledge the community as the source of the traditional cultural expressions;
- (c) any distortion, mutilation or other modification of, or other derogatory action, in relation to the traditional cultural expressions; and
- (d) the acquisition or exercise of intellectual property rights over the traditional cultural expressions or adaptations thereof.

(4) A person shall not use words, signs, names and symbols that are traditional cultural expressions or derivatives thereof, or acquire or exercise intellectual property rights over the traditional cultural expressions or derivatives thereof, in a manner that disparages, offends or falsely suggests a connection with the community concerned, or brings the community into contempt or disrepute.

(5) The National Competent Authority shall establish mechanisms to ensure that—

- (a) the relevant community is identified as the source of any work or other production adapted from the traditional cultural expressions;
- (b) any distortion, mutilation or other modification of, or other derogatory action in relation to traditional cultural expressions can be prevented;
- (c) any false, confusing or misleading indications or allegations which, in relation to goods or services that refer to, draw upon or evoke the traditional cultural expressions of a community or suggest any endorsement by or linkage with that community;

(d) where the use or exploitation is intended to be gainful, equitable remuneration or benefit-sharing on terms determined and agreed with the relevant community and in the absence of such agreement as determined by the National Competent Authority in consultation with the relevant community.

(6) The National Competent Authority shall establish mechanisms to ensure that communities have the means to prevent the unauthorized disclosure, subsequent use of and acquisition and exercise of intellectual property rights over traditional cultural expressions that are held secret.

Duration of protection of traditional cultural expressions.

17. Traditional cultural expressions shall be protected against all acts of misappropriation, misuse, unlawful access or exploitation for as long as the traditional cultural expressions fulfil the protection criteria set out in section 10.

PART IV – GENERAL PROVISIONS

Exceptions and limitations.

18.(1) Notwithstanding sections 12, 13 and 16, the protection of traditional knowledge or traditional cultural expressions shall—

- (a) not restrict or hinder the normal usage, development, exchange, dissemination and transmission of traditional knowledge or traditional cultural expressions by members of a particular community within the traditional or customary context and in accordance with the customary law and practices of that community;
- (b) extend only to uses of traditional knowledge or traditional cultural expressions taking place outside their traditional or customary context, whether for commercial gain or not; and

- (c) be subject to such other exceptions as may be necessary to address the needs of non-commercial use, including teaching and research for educational purposes, personal or private use, criticism or review, reporting of current events, use in the course of legal proceedings, the making of recordings and reproductions of traditional knowledge or traditional cultural expressions for inclusion in an archive or inventory exclusively for the purposes of safeguarding knowledge or cultural heritage, and incidental uses.

(2) A user of traditional knowledge or traditional cultural expressions shall obtain prior informed consent and sufficiently acknowledge the traditional owners by expressly mentioning them or the geographical place from which the traditional knowledge or traditional cultural expressions originated in the course of use:

Provided that in each case, such use is compatible with fair practice and the relevant community is acknowledged as the source of the traditional knowledge or traditional cultural expressions and such use is not offensive to the relevant community.

Derivative works.

19.(1) Any copyright, trademark, patent, industrial design, geographical indication or other intellectual property right that exists in relation to a derivative work shall vest in the creator of the work as provided by the relevant intellectual property law.

(2) Where a derivative work that is based on traditional knowledge or traditional cultural expressions is to be used for a commercial or industrial purpose, an authorized user agreement shall be prepared between the rights holder and the authorised user.

(3) An authorized user agreement prepared under subsection (2) shall—

- (a) contain a benefit sharing arrangement that provides for equitable monetary or nonmonetary compensation to the right holders;
- (b) provide for identification and disclosure of the traditional knowledge or traditional cultural expressions on which the derivative work by mentioning the holders or the geographical place from which it originated; and
- (c) state that the traditional knowledge or traditional cultural expressions in the derived work will not be subject to derogatory treatment.

PART V – MORAL RIGHTS

Meaning of moral rights.

20.(1) The traditional owners of traditional knowledge or traditional cultural expressions shall be holders of the moral rights in the traditional knowledge or traditional cultural expressions.

(2) The moral rights of the owners of traditional knowledge and traditional cultural expressions shall include—

- (a) the right of attribution of ownership or paternity in relation to their traditional knowledge and traditional cultural expressions;
- (b) the right not to have ownership of traditional knowledge or traditional cultural expressions falsely attributed to them; and
- (c) the right not to have their traditional knowledge

and traditional cultural expressions subject to derogatory treatment including any act or omission that results in a material distortion, mutilation or alteration of the traditional knowledge or traditional cultural expressions that is prejudicial to the honor or reputation of the traditional owners, or the integrity of the traditional knowledge or traditional cultural expressions.

(3) The moral rights of traditional owners in their traditional knowledge and traditional cultural expressions shall exist independently of their traditional cultural rights.

(4) The moral rights shall continue in force in perpetuity and shall not be inalienable or transferable and incapable of being waived.

Assignment
and licensing.

21.(1) The holders of traditional knowledge or traditional cultural expressions rights shall have the right to assign and conclude licensing agreements.

(2) Despite subsection (1), traditional knowledge or traditional cultural expressions belonging to a local or traditional community shall not be assigned without the authorization of the custodian of the local or traditional community.

(3) The holders of traditional knowledge or traditional cultural expressions rights shall grant access, authorizations, assignments or licenses in respect of protected traditional knowledge or traditional cultural expressions in writing and copy submitted to the National Competent Authority.

(4) Access, authorizations, assignments or licenses in respect of protected traditional knowledge or traditional cultural expressions that have not been granted in writing shall have no effect.

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(5) A document drawn up for the purpose of this section shall be approved by the National Competent Authority, failing which the document shall be void.

(6) The National Competent Authority shall keep a register of all licenses and assignments granted under this section.

Additional rights.

22.(1) The traditional cultural rights in traditional knowledge or traditional cultural expressions shall be in addition to any rights that may subsist under any law relating to copyright, trademarks, patents, designs or other intellectual property and shall not in any way affect the subsisting rights.

(2) These are the rights to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions as well their manifestations.

Equitable benefit sharing rights.

23.(1) The protection of holders of traditional knowledge or traditional cultural expressions shall include the right to fair and equitable sharing of benefits arising from the commercial or industrial use of their knowledge, to be determined by mutual agreement between the parties.

(2) The National Competent Authority shall, in the absence of such mutual agreement, mediate between the concerned parties with a view to arriving at an agreement on the fair and equitable sharing of benefits.

(3) The right to equitable remuneration might extend to non-monetary benefits, such as contributions to community development, depending on the material needs and cultural preferences expressed by the communities themselves.

(4) The benefit sharing arrangement shall be spelt out in the regulations.

PART VI – MANAGEMENT OF RIGHTS

Authorization. **24.**(1) An authorization to exploit traditional knowledge and traditional cultural expressions shall be granted by the holders of traditional knowledge and traditional cultural expressions or where the holders so wish, from the National Competent Authority, on the request and behalf of the holders.

(2) Where the National Competent Authority is to grant an authorization under subsection (1)—

- (a) it shall not grant the authorization before undertaking appropriate consultations with the relevant communities, in accordance with their traditional processes for decision-making and public affairs management;
- (b) the authorization shall comply with the scope of protection provided for the traditional knowledge or traditional cultural expressions concerned and shall provide for the equitable sharing of the benefits arising from their use;
- (c) the uncertainties or disputes relating to the determination of the communities should be involved shall be resolved, in so far as is possible, in accordance with customary laws and protocols of the communities involved;
- (d) any monetary or non-monetary benefits arising from the use of the traditional knowledge or traditional cultural expressions shall be transferred directly by the National Competent Authority to the relevant community; and
- (e) the fees that the national competent authority may, where necessary, charge for its services, official

publication procedures, dispute resolution, and the terms and conditions governing authorizations that may be granted by the national competent authority, shall be in accordance with this Act or Regulation made hereunder.

(3) Where two or more communities in different counties share the same traditional cultural expressions, the national competent authority shall be responsible for raising awareness, education, guidance, monitoring, dispute resolution and other activities relating to the protection of traditional cultural expressions of those communities.

Access to traditional knowledge associated with genetic resources.

25.(1) An authorization granted under this Act to access protected traditional knowledge associated with genetic resources shall not be an authorization to access the associated genetic resources.

(2) The access to associated genetic resources shall be a subject matter of relevant legislations relating to genetic resources.

Application for consent.

26.(1) Where the National Competent Authority recommends for the grant of a compulsory licence under section 10(1), a prospective user of traditional knowledge or traditional cultural expressions for a non-customary use, whether for a commercial or industrial nature or not, the prospective user shall apply to the National Competent Authority for the consent of the holders for the use of the traditional knowledge or traditional cultural expressions.

(2) As application made under subsection (1) shall—

(a) be in the prescribed form;

(b) specify the way in which the applicant proposes to use the traditional knowledge or traditional cultural

expressions;

(c) clearly state the purpose for which that use is intended; and

(d) be accompanied by the prescribed fee.

(3) The consent shall be obtained on the basis of mutually agreed terms prescribed in the regulations made under this Act.

(4) Despite subsection (2) applications for access to and documentation of traditional knowledge or traditional cultural expressions by the National Competent Authority shall be free of charge and may be subject to sharing of financial and other benefits arising from the use of the traditional knowledge or traditional cultural expressions.

(5) The National Competent Authority shall upon receipt of the application under this section consider and determine the application within sixty days from the date of receipt.

Public
consultation.

27.(1) The National Competent Authority shall before determining an application for consent—

(a) give a copy of the application for consent to the holders of the traditional knowledge or traditional cultural expressions to which the application relates;

(b) publish a copy of the application in a newspaper with nationwide circulation stating how the interested persons may obtain a copy of the application; and

(c) broadcast, where if appropriate, details of the application on radio, television or any other appropriate communication channel stating how

interested persons may obtain a copy of the application; and

(2) Any person who claims to be a holder of the traditional knowledge or traditional cultural expressions, to which the application relates shall, in writing, make a representation to the National Competent Authority within twenty-eight days after the application is published or broadcasted, whichever is the later.

(3) The National Competent Authority shall record in writing the details of any written representation given under subsection (2).

Identification of holders.

28.(1) Where the National Competent Authority is satisfied that it has identified all of the holders of the traditional knowledge or traditional cultural expressions who are required to give consent before consent can be granted under section 26, the National Competent Authority make a written determination of an application for consent under section 26 containing the details identifying the holders.

(2) The National Competent Authority shall—

- (a) publish a copy of the determination in a newspaper having nationwide circulation;
- (b) if appropriate, broadcast details of the determination on radio or television; and
- (c) appropriate communication channel (e-government).

Uncertainty or dispute of ownership.

29.(1) Where the National Competent Authority is not satisfied that it has identified all of the holders or that there is a dispute about ownership of the rights, the National Competent Authority shall refer the matter to the parties for resolution in

accordance with customary laws and practices or such other means as are agreed to by the parties.

(2) Where a dispute has been resolved and all of the right holders have been identified in accordance with customary laws and practices or the means agreed by the parties, the holders shall inform the National Competent Authority of the resolution and identification, and the Authority shall record the determination containing and the details as to identify the holders.

(3) The National Competent Authority shall—

- (a) publish a copy of the determination in a newspaper having national circulation;
- (b) if appropriate, broadcast details of the determination on radio or television; and
- (c) appropriate communication channel (e-government).

Authorized
user
agreements.

30.(1) The holders shall consider a user agreement application and determine whether to—

- (a) reject the application; or
- (b) accept the application and enter into negotiations for a written authorized user agreement in relation to the application within a specified period of sixty days.

(2) The holders shall inform the National Competent Authority, either in writing or orally, of their decision and the Authority shall inform the applicant of the holders' decision, in writing.

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No traditional holder, owner or agreement about ownership.

31. Where the National Competent Authority is satisfied that there is no traditional holder or agreement about ownership and—

- (a) no holders can be identified; or
- (b) no agreement has been reached regarding ownership within the period specified in section 27(2),—
 - (i) the National Competent Authority may, after consultation with the Cabinet Secretary, determine that the National Competent Authority shall hold the traditional knowledge or traditional cultural on behalf of the people of Kenya; or
 - (ii) the National Competent Authority may enter into an authorized user agreement and any monetary or non-monetary benefits arising under the agreement shall be used for the purposes of traditional cultural development.

Referral of proposed agreement to National Competent Authority.

32.(1) The holders of traditional knowledge or traditional cultural expressions shall, before entering into an authorized user agreement, refer the proposed agreement to the National Competent Authority for its comments on the proposed terms and conditions of the agreement.

(2) The National Competent Authority may request the applicant and the holders to meet with the Authority to discuss the proposed agreement if the National Competent Authority is, after reviewing the proposed agreement, satisfied that—

- (a) the holders do not have sufficient information to make a full and informed decision about the proposed terms and conditions of the agreement; or

(b) the proposed terms and conditions of the agreement do not adequately protect the holders of traditional knowledge or traditional cultural expressions.

(3) The holders may accept, reject or vary any proposals made by the National Competent Authority in relation to the proposed agreement.

Terms and conditions of user agreement.

33. An authorized user agreement shall provide for, in its terms and conditions, all the following matters—

- (a) the sharing of financial and other benefits arising from the use of the traditional knowledge or traditional cultural expressions;
- (b) compensation, fees, royalties or other payments for the use;
- (c) whether the use will be exclusive or non-exclusive;
- (d) duration of the use to be allowed and rights of renewal;
- (e) disclosure requirements in relation to the use;
- (f) possible sharing by the holders of any intellectual property rights arising from the use of the traditional knowledge or traditional cultural expressions;
- (g) access arrangements for the holders;
- (h) education and training requirements for the applicant;
- (i) controls on publication;
- (j) assignment of rights, where appropriate;

- (k) dispute resolution mechanisms;
- (l) confidentiality and disclosure in relation to secret traditional knowledge or traditional cultural expressions; and
- (m) respect for moral rights of the traditional owners.

Authorized user agreement and prior informed consent.

34.(1) Where a prospective user and the holder of traditional knowledge or traditional cultural expressions enter into an authorized user agreement, the holders shall be deemed to have given consent to the proposed use and the holders shall inform the National Competent Authority of the agreement and submit a copy of the final agreement to the National Competent Authority.

(2) Where a party cannot read or write, or suffers from any physical disability, a verbal agreement may be recorded via video or digital technology may be accepted.

(3) The National Competent Authority is to keep a register of authorized user agreements. The register is to be in such form and contain such information as the National Competent Authority determines.

(4) Agreements not registered by the National Competent Authority shall be null and void.

(5) In the case of shared intellectual property rights between the holders and the users, such rights shall not be transferred except with the permission of the National Competent Authority.

(6) The intention to transfer such rights shall be communicated in writing or in such a manner as may be prescribed by the National Competent Authority. Upon receipt of the application the National Competent Authority may, in

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consultation with the relevant communities grant approval subject to the terms and conditions it deems fits, including imposition of charges by way of royalties or may for reasons recorded in writing reject the application.

(7) Applications for intellectual property rights, in or outside Kenya based on traditional knowledge and traditional cultural expressions obtained in Kenya shall require the prior approval of the National Competent Authority.

No authorized
user
agreement
reached.

35.(1) If the holders cannot agree on the terms and conditions of an agreement, in relation to the application, the holders shall inform the National Competent Authority of the failure to agree, in writing.

(2) The National Competent Authority shall upon receiving the information under subsection (1), notify the applicant, in writing, that the holders have rejected the proposed authorized user agreement; and

Obtained
consent from
traditional
knowledge
holders.

36.(1) A prospective user of traditional knowledge or traditional cultural expressions may obtain the prior informed consent of the holders without applying to the National Competent Authority under section 26.

(2) The prospective user shall inform the National Competent Authority that the prospective user has sought the consent of the holders and provide the National Competent Authority with a copy of the proposed authorized user agreement between the prospective user and the holders for comment, and advice.

(3) The prospective user shall provide a copy of the signed authorized user agreement to the National Competent Authority, for entry into the register, within thirty days of the agreement coming into force.

(4) If a prospective user and the holders enter into an authorized user agreement, the holders are deemed to have given their prior and informed consent to the proposed use; and

(5) The failure to provide the agreement under subsection (3) will render the agreement void.

PART VII- SANCTIONS AND REMEDIES

Offences and penalties.

37.(1) A person who—

- (a) has in possession or control in the course of trade ;
- (b) manufactures, produces or makes in the course of trade;
- (c) sells, barter or exchanges, offers or exposes for sale, disposes, distributes, hires out;
- (d) exposes or exhibits for the purposes of trade ;
- (e) imports into, transit through, trans ships within or exports from Kenya, except for private, domestic, industrial and commercial use of the importer or exporter, as the case may be; or
- (f) in any manner develops any goods or service using unauthorized traditional knowledge or traditional cultural expressions in the course of trade,

commits an offence and is liable on conviction to imprisonment for a term not exceeding five years, or to a fine of not exceeding five hundred thousand shillings in respect of each article or item involved or to imprisonment for a term not exceeding ten years or to a fine not exceeding one million shillings.

(2) A person who without authorization makes a non-customary use of traditional knowledge or traditional cultural expressions whether or not such use is of a commercial or industrial nature, commits an offence and is liable, on conviction, to a fine not exceeding one million shillings or imprisonment for a term not exceeding five years or both.

(3) A person who fails to acknowledge the source of the traditional knowledge or traditional cultural expression commits an offence and is liable, on conviction, to a fine not exceeding one million shillings or imprisonment for a term not exceeding five years or both.

(4) A person who distorts, mutilates or does other modification or derogatory action in a way prejudicial to the cultural interests of the community concerned commits an offence and is liable, on conviction, to a fine not exceeding one million shillings or imprisonment for a term not exceeding five years or both.

(5) A person who makes false, confusing or misleading indications or allegations which, in relation to goods and services that refer to, draw upon or evoke the traditional knowledge or traditional cultural expressions, in a way that suggests an endorsement or linkage with the holders commits an offence and is liable, on conviction, to a fine not exceeding two million shillings or imprisonment for a term not exceeding ten years or both.

(6) A person who without authorization acquires and exercises intellectual property rights over protected traditional knowledge or traditional cultural expressions commits an offence and is liable, on conviction, to a fine not exceeding two million shillings or imprisonment for a term not exceeding ten years or both.

(7) A person who without authorization, discloses, subsequently uses or acquires and exercises intellectual property rights over secret traditional knowledge or traditional cultural expressions commits an offence and is liable, on conviction, to a fine not exceeding two million shillings or imprisonment for a term not exceeding ten years or both.

(8) A person who imports an article or other thing into Kenya that relates to traditional knowledge or traditional cultural expressions of Kenya knowingly, or reasonably ought to have known, that the import would contravene this Act had the thing or article been created in Kenya commits an offence and is liable, on conviction, to a fine not exceeding five hundred thousand shillings or imprisonment for a term not exceeding three years or both.

(9) A person who without authorization exports an article or other thing out of Kenya that relates to traditional knowledge or traditional cultural expressions for a non-customary use whether or not such use is of a commercial or industrial nature commits an offence and is liable, on conviction, to a fine not exceeding five hundred thousand shillings or imprisonment for a term not exceeding three years or both.

(10) A person who makes or has in possession any contrivance used or intended to be used for the purpose of exploiting unauthorized traditional knowledge and traditional cultural expressions commits an offence and is liable, on conviction, to a fine not exceeding five hundred thousand shillings or imprisonment for a term not exceeding three years or both.

(11) A court that has convicted a person of an offence under this section—

- (a) shall, when considering which penalty to impose, take into account any risk that may arise from the presence or use of the traditional knowledge or traditional

cultural expressions in question;

- (b) may take consider, any evidence to the effect that such person had fully, truthfully and to the best of his ability disclosed to an inspector who investigated the offence, all information and particulars available to that person relating to—
 - (i) the source of the unauthorized traditional knowledge or traditional cultural expressions that is the subject of the offence;
 - (ii) the identity of the persons involved in the importation, exportation, manufacture, production or making of those unauthorized traditional knowledge or traditional cultural expressions;
 - (iii) the identity and the addresses or whereabouts of the persons involved in the distribution of the traditional knowledge or traditional cultural expressions; and
 - (iv) the channels for the distribution of those traditional knowledge or traditional cultural expressions.

(12) Where an offence under this Act is committed by a body corporate and there is proof that the offence was committed with the consent or connivance of, or is attributable to, negligence on the part of any director, manager, secretary or other similar officer of the body corporate, or any person who was purporting to act in any such capacity, both the responsible person and the body corporate commit an offence.

(13) A citizen of Kenya, or a person who permanently resides in Kenya, who commits an act outside Kenya that constitutes an offence under this Act if committed in Kenya, commits such an offence and is liable on conviction to the same penalty prescribed for such offence under this Act.

(14) Despite subsection (13) a person may not be convicted of an offence under subsection (12) if such a person has been acquitted or convicted in the country where that offence was committed.

Civil action.

38.(1) The holders of traditional knowledge and traditional cultural expressions may institute legal proceedings in a court of competent jurisdiction seeking any action provided in section 31 against any person who carries out any of the acts mentioned in section 12, without the holder's prior informed consent.

(2) Where a person—

- (a) makes a non-customary use of traditional knowledge or an traditional cultural expressions whether or not such use is of a commercial nature without the permission of the owner; or
- (b) acts in a manner or commits an omission that infringes the moral rights of the traditional owners of that traditional knowledge or an traditional cultural expressions,

the owners shall have the right to institute legal proceedings against any such person.

Civil remedies.

39.(1) The court may, in proceedings instituted under section 38, —

- (a) grant an injunction;
- (b) award damages for loss resulting from the unauthorized use;
- (c) make a declaration that the traditional cultural rights of

the holders have been contravened;

- (d) order that the infringer make a public apology for the contravention;
 - (e) order that any false attribution of ownership, or derogatory treatment, of the traditional knowledge or traditional cultural expressions cease or be reversed;
 - (f) order the account for profits made by the infringer in exploiting the infringing articles;
 - (g) order the delivery up or forfeiture to the holders of articles made in contravention of their rights, as provided for under this Act;
 - (h) order the seizure of any object made, imported or exported contrary to this Act;
 - (i) order the revocation or invalidation of intellectual property rights inappropriately acquired over traditional knowledge or traditional cultural expressions or derivatives thereof; or
 - (j) make such other orders as the Court considers appropriate in the circumstances or as it may deem fit.
- (2) The court may in deciding the relief to be granted consider—
- (a) whether the defendant was aware or ought reasonably to have been aware of the rights of the holders as provided for under this Act;
 - (b) the effect on the honor or reputation of the holders resulting from the unauthorized use;

- (c) anything done by the defendant to mitigate the effects of the unauthorized use;
- (d) any cost or difficulty that may have been associated with identifying the holders;
- (e) any cost or difficulty in ceasing or reversing any false attribution of ownership, or derogatory treatment of the traditional knowledge or traditional cultural expressions; or
- (f) whether the parties have undertaken any other action to resolve the dispute.

Other mechanisms to resolve disputes.

40. In addition to the remedies provided under this Act, any dispute may be resolved through—

- (a) mediation;
- (b) alternative dispute resolution procedures; or
- (c) Customary laws, practices and protocols.

Other rights and remedies.

41. The rights and remedies provided in this Act shall not affect any other rights of action or remedies provided under other written laws.

PART VIII– PROTECTION OF FOREIGN HOLDERS

Protection of eligible foreigner.

42. (1) Eligible foreign holders of traditional knowledge and traditional cultural expressions rights shall, considering as far is practicable the customary laws and protocols applicable to the traditional knowledge or traditional cultural expressions concerned, enjoy benefits of protection to the same level as holders of traditional knowledge and traditional cultural expressions who are nationals of Kenya.

(2) The National Competent Authority shall establish

mechanisms that as far as is practicable facilitate the management and enforcement of such protection for the benefit of the holders of traditional knowledge and traditional cultural expressions from foreign countries.

(3) The National Competent Authority may determine cases of concurrent claims from communities of different countries with regard to traditional knowledge or traditional cultural expressions through the application of customary law, local information sources, alternative dispute resolution mechanisms, and any other practical mechanisms.

PART IX - TRANSITIONAL MEASURES AND MISCELLANEOUS

Transition. **43.**(1) Upon the commencement of this Act, any person who, before the commencement of this Act, was involved in the exploitation and dissemination of traditional knowledge shall be required to comply with the provisions of this Act within twelve months, subject to equitable treatment of the rights acquired by third parties in good faith.

(2) The continued use of traditional cultural expressions rights acquired before the commencement of this Act shall, within twelve months of the commencement of this Act, be reviewed and harmonised with the provisions of this Act, subject to equitable treatment of the rights and interests acquired by third parties through prior use in good faith.

Regulations. **44.**(1) The Cabinet Secretary shall make Regulations for the implementation of this Act and may amend them where necessary.

(2) The Regulations may—

(a) stipulate any administrative requirements, or any necessary details for the implementation of the

provisions of this Act;

- (b) prescribe the procedure for applications of authorization to exploit traditional knowledge and traditional cultural expressions;
- (c) prescribe fees to be charged by the National Competent Authority and the details of the distribution of part of the fees;
- (d) provide for fair distribution of benefits derived from usage of traditional knowledge and traditional cultural expressions;
- (e) provide preventive mechanisms aimed at protecting traditional knowledge and traditional cultural expressions;
- (f) provide forms to be used for matters requiring forms under this Act; and
- (g) prescribe any other matters that are required or necessary be prescribed in order to give effect to this Act.

Recognition
of other laws.

45. In accordance with reciprocal arrangements, this Act may provide the same protection to traditional knowledge and traditional cultural expressions originating in other countries or territories as is provided to traditional knowledge and traditional cultural expressions originating in Kenya.

