



**THE REPUBLIC OF KENYA**

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**PROTECTION OF TRADITIONAL KNOWLEDGE  
AND CULTURAL EXPRESSIONS ACT**

NO. 33 OF 2016

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**PROTECTION OF TRADITIONAL KNOWLEDGE  
AND CULTURAL EXPRESSIONS ACT**

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NO. 33 OF 2016

PROTECTION OF TRADITIONAL KNOWLEDGE  
AND CULTURAL EXPRESSIONS ACT

[Date of assent: 31st August, 2016.]

[Date of commencement: 21st September, 2016.]

**AN ACT of Parliament to provide a framework for the protection and promotion of traditional knowledge and cultural expressions; to give effect to Articles 11, 40 and 69(1) (c) of the Constitution; and for connected purposes**

[Act No. 33 of 2016, Act No. 18 of 2018.]

**(Consolidation of the following amendment ongoing :Act No. 18 of 2018)**

PART I — PRELIMINARY

**1. Short title**

This Act may be cited as the Protection of Traditional Knowledge and Cultural Expressions Act, 2016.

**2. Interpretation**

In this Act, unless the context otherwise requires—

**"authorized user agreement"** means a written agreement entered into under section 32 of this Act;

**"Cabinet Secretary"** means the Cabinet Secretary responsible for matters relating to intellectual property rights;

**"community"** means a homogeneous and consciously distinct group of the people who share any of the following attributes—

- (a) common ancestry;
- (b) similar culture or unique mode of livelihood or language;
- (c) geographical space;
- (d) ecological space; or
- (e) community of interest;

**"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, etchings, lithographs, engravings, prints, photographs, designs, paintings, including body-painting, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metal ware, jewelry, basketry, pictorial woven tissues, needlework, textiles, glassware, carpets, costumes; handicrafts; musical instruments, maps, plans,

diagrams architectural buildings, architectural models; and architectural forms;

**"cultural heritage"** means—

- (a) tangible cultural heritage including—
  - (i) movable cultural heritage;
  - (ii) immovable cultural heritage; and
  - (iii) underwater cultural heritage;
- (b) intangible cultural heritage;
- (c) natural heritage including natural sites with cultural aspects such as cultural landscapes, physical, biological or geological formations; or
- (d) heritage in the event of armed conflict;

**"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 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 cultural expressions;

**"derogatory treatment"**, includes, in relation to traditional knowledge or cultural expressions, any act or omission that results in a material distortion, mutilation or alteration of the traditional knowledge or cultural expressions that is prejudicial to the honour or reputation of the holders, or the integrity of the traditional knowledge or cultural expressions;

**"exploitation"** means the employment of the greatest possible advantage of traditional knowledge and cultural expressions for selfish purposes, taking advantage of unwary traditional knowledge and 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;

**"holder"** means recognized individuals or organizations within communities in whom the custody or protection of traditional knowledge and 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;

**"Repository"** means the Traditional Knowledge Digital Repository established and maintained by the national government under section 8(3);

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

**"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 owners, to the use of their traditional knowledge or cultural expressions;

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

**"traditional knowledge"** means any knowledge—

- (a) 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
- (b) contained in the codified knowledge systems passed on from one generation to another including agricultural, environmental or medical knowledge, knowledge associated with genetic resources or other components of biological diversity, and know-how of traditional architecture, construction technologies, designs, marks and indications.

### 3. Guiding principles

In the performance of the functions and exercise of powers under this Act, every person dealing with matters relating to traditional knowledge or cultural expressions shall be guided by the national values and principles of governance set out in Article 10 of the Constitution.

### 4. Responsibility of county governments

(1) A county government shall, through the county executive committee member responsible, for matters relating to culture, be responsible for—

- (a) in relation to the repository and for the purpose of collecting and compiling information relating to traditional knowledge and cultural expressions—
  - (i) the primary registration of traditional knowledge and cultural expressions within a county for the purposes of recognition under this Act;
  - (ii) the receipt, documentation, storage and updating of information relating to traditional knowledge and cultural expressions from communities within a county;
- (b) the preservation and conservation of traditional knowledge and cultural expressions;
- (c) the protection and promotion of the traditional knowledge and cultural expressions of communities within a county; and
- (d) the facilitation of collaboration, access to or the sharing of information and data relating to traditional knowledge and cultural expressions between county governments.
- (e) the allocation of financial resources for the promotion of cultural activities; and
- (f) subject to this Act or any other law, the establishment of mechanisms for using culture as a tool for conflict resolution and promotion of cohesion.

## **5. Responsibilities of the national government**

The national government shall, under this Act be responsible for—

- (a) the establishment and maintenance of the Repository at the Kenya Copyright Board;
- (b) the promotion and conservation of traditional knowledge and cultural expressions of communities in Kenya;
- (c) the protection of traditional knowledge and cultural expressions from misuse and misappropriation; and
- (d) the facilitation of access of information and the sharing of information and data relating to traditional knowledge and cultural expressions.

## **PART II — PROTECTION OF TRADITIONAL KNOWLEDGE**

### **6. Protection criteria for traditional knowledge**

Protection shall be extended to traditional knowledge that is—

- (a) generated, preserved and transmitted from one generation to another, within a community, for economic, ritual, narrative, decorative or recreational purposes;
- (b) individually or collectively generated;
- (c) distinctively associated with or belongs to a community; and
- (d) integral to the cultural identity of community that is recognized as holding the knowledge through a form of custodianship, guardianship or collective and cultural ownership or responsibility, established formally or informally by customary practices, laws or protocols.



**7. Formalities relating to protection of traditional knowledge**

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

(2) Notwithstanding subsection (1), county governments shall collect information, document and register traditional knowledge within the respective counties for the purposes of recognition.

(3) The Registration under subsection (2) shall be undertaken willingly by the owners of traditional knowledge upon obtaining prior informed consent but shall not require the public disclosure of the traditional knowledge concerned.

(4) Where a community in Kenya shares traditional knowledge with a community outside Kenya, the national and county government shall register the owners of the traditional knowledge in Kenya and maintain relevant records.

(5) Where more than one community in the same or different counties share the same traditional knowledge, respective county governments shall register the owners of the traditional knowledge and maintain relevant records.

(6) Where concurrent claims arise from different communities, the Kenya Copyright Board or county government shall, while determining the claim, consider customary law and protocol of the communities in question, local information sources and any other means that may be applicable.

(7) Registration shall have a mere declaratory function and shall not in itself confer rights.

**8. Maintenance of registers**

(1) Every county government shall, establish and maintain a register which shall contain information relating to traditional knowledge and cultural expressions collected and documented by the county government during the registration process.

(2) 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.

(3) The national government shall, in consultation with the relevant county government establish and maintain a comprehensive Traditional Knowledge Digital Repository which shall contain information relating to traditional knowledge and cultural expressions that have been documented and registered by county governments.

(4) Notwithstanding subsection (1), in the interests of transparency, evidence and the preservation of traditional knowledge, the national government 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 the Repository.

(5) The county governments and other institutions that deal with matters relating to traditional knowledge and cultural expressions shall co-operate with the national government in the establishment and maintenance of the Repository.

(6) Every county shall, upon collecting and documenting information on traditional knowledge and cultural expressions and registering the traditional knowledge or cultural expressions relating to any community, transmit the complete and validated information relating to the traditional knowledge of cultural

expressions for entry in the Repository in the form or manner prescribed by the Cabinet Secretary.

#### **9. Right to protection**

The owners and holders of traditional knowledge shall have the right to protection of that knowledge.

#### **10. Rights conferred to holders of traditional knowledge**

(1) Every community 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.

(3) Every community shall make and adopt its community rules prescribing the procedures for the authorization of the exploitation of their traditional knowledge.

(4) The rules shall be submitted to the county government during the registration of traditional knowledge.

#### **11. Recognition of traditional knowledge and cultural expression owners**

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

#### **12. Compulsory licence**

(1) Where protected traditional knowledge is not being sufficiently exploited by the owner or rights holder, or where the owner or holder of rights in traditional knowledge refuses to grant licenses for exploitation, the Cabinet Secretary may, with prior informed consent of the owners, grant a compulsory licence for exploitation subject to Article 40(3) (b) of the Constitution.

(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 Cabinet Secretary 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.

(4) The Cabinet Secretary shall make regulations prescribing the criteria and conditions for the grant of a compulsory licence.

#### **13. Duration of protection of traditional knowledge**

Traditional knowledge shall be protected for so long as the knowledge fulfils the protection criteria referred to under section 6.

### **PART III — PROTECTION OF CULTURAL EXPRESSIONS**

#### **14. Protection criteria of cultural expressions**

(1) The protection of cultural expressions under this Act shall relate to 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;
- (b) characteristic of a community's cultural identity and cultural heritage and have been maintained, used or developed by such community in accordance with the customary laws and practices of that community;
- (c) generated, preserved and transmitted from one generation to another, within a community, for economic, ritual, narrative, decorative or recreational purposes;
- (d) individually or collectively generated;
- (e) distinctively associated with or belongs to a community; and
- (f) integral to the cultural identity of community that is recognized as holding the knowledge through a form of custodianship, guardianship or collective and cultural ownership or responsibility, established formally or informally by customary practices, laws or protocols.

#### **15. Formalities relating to cultural expressions**

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

(2) Notwithstanding subsection (1), county governments shall collect information document and register cultural expressions within the respective counties for the purposes of recognition.

(3) The registration under subsection (2) shall be undertaken willingly by the owners of cultural expressions upon obtaining prior informed consent but shall not require the public disclosure of the cultural expressions concerned.

(4) Where a community in Kenya shares cultural expressions with a community outside Kenya, the national and county government shall register the owners of the cultural expression in Kenya and maintain relevant records.

(5) Where more than one community in the same or different counties share the same cultural expressions, respective county governments shall register the owners of the cultural expressions and maintain relevant records.

(6) Where concurrent claims arise from different communities, national government or county government shall while determining the claim consider customary law and protocol of the communities in question, local information sources and any other means that may be applicable.

(7) Registration shall have a mere declaratory function and shall not in itself confer rights.

#### **16. Right of protection**

The owners and holders of cultural expressions shall have the right to protection of those expressions.

#### **17. Duration of protection of cultural expressions**

Cultural expressions shall be protected against all acts of misappropriation, misuse, unlawful access or exploitation for as long as the cultural expressions fulfil the protection criteria set out in section 14.

### PART IV — GENERAL PROVISIONS

#### **18. Protection of traditional knowledge and cultural expressions against unlawful acts**

(1) A person shall not, in any way, misappropriate, misuse, abuse, unfairly, inequitably or unlawfully access and exploit traditional knowledge and cultural expressions.

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

- (a) the reproduction of the traditional knowledge or cultural expressions;
- (b) the publication of the traditional knowledge or cultural expressions;
- (c) the performance or display of the traditional knowledge or cultural expressions in public;
- (d) the broadcast of the traditional knowledge or 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 cultural expressions;
- (f) the fixation of the traditional knowledge or 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 cultural expressions;
- (h) the creation of derivative works; and
- (i) the making, use, offer for sale, sell, import or export traditional knowledge or cultural expressions or products derived there from.

(3) Despite subsection (2), the owners shall be entitled to use the cultural expressions in the ways mentioned in subsection (2) in the exercise of their cultural rights.

(4) The national government in consultation with county governments shall establish mechanisms that enable the communities to prevent the misappropriation, misuse or unlawful access and exploitation of traditional knowledge and cultural expressions, without prior consent, including of such cultural expressions other than words, signs, names and symbols including—

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

(5) A person shall not use words, signs, names and symbols that are cultural expressions or derivatives thereof, or acquire or exercise intellectual property rights over the 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.

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(6) The Cabinet Secretary in consultation with county governments shall establish mechanisms to ensure that—

- (a) the relevant community is identified as the source of any work or other production adapted from the cultural expressions;
- (b) any distortion, mutilation or other modification of, or other derogatory action in relation to 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 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, the use or exploitation is on terms determined and agreed with the relevant community and in the absence of such agreement as determined by the Cabinet Secretary in consultation with the relevant community.

(7) The Cabinet Secretary in consultation with county governments 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 cultural expressions that are held secret.

#### **19. Exceptions and limitations**

(1) Notwithstanding section 18, the protection of traditional knowledge or cultural expressions shall—

- (a) not restrict or hinder the normal usage, development, exchange, dissemination and transmission of traditional knowledge or cultural expressions by members of a particular community within the traditional and in accordance with the customary law and practices of that community;
- (b) extend only to uses of traditional knowledge or 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 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 cultural expressions shall obtain prior informed consent and sufficiently acknowledge the owners by expressly mentioning them or the geographical place from which the traditional knowledge or cultural expressions originated, in the course of use.

(3) The use of traditional knowledge or cultural expressions shall be compatible with fair practice, the relevant community's customary laws, protocols and practices and the relevant community shall be acknowledged as the source of the traditional knowledge or cultural expressions, and such use shall not be offensive to the relevant community.

#### **20. Derivative works**

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

#### PART V — MORAL RIGHTS

##### **21. Meaning of moral rights**

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

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

- (a) the right of attribution of ownership or paternity in relation to their traditional knowledge and cultural expressions;
- (b) the right not to have ownership of traditional knowledge or cultural expressions falsely attributed to them; and
- (c) the right not to have their traditional knowledge and 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 cultural expressions that is prejudicial to the honor or reputation of the traditional owners, or the integrity of the traditional knowledge or cultural expressions; and
- (d) the right to protection from false and misleading claims to authenticity and origin.

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

(4) The moral rights shall continue in force in perpetuity and shall be inalienable or transferable and incapable of being waived.

##### **22. Assignment and licensing**

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

(2) Despite subsection (1), traditional knowledge or 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 cultural expressions rights shall grant access, authorizations, assignments or licenses in respect of protected

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traditional knowledge or cultural expressions in writing and copy submitted to the Cabinet Secretary and the respective county executive committee member in charge of matters relating to traditional knowledge and culture.

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

(5) The parties to a licensing agreement may seek the advice of the Cabinet Secretary when drawing up a document for the purpose of this section.

(6) The Cabinet Secretary shall keep a register of all licenses and assignments granted under this section.

### **23. Additional rights**

(1) The cultural rights in traditional knowledge or 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 cultural expressions as well their manifestations.

### **24. Equitable benefit sharing rights**

(1) The protection of owners and holders of traditional knowledge or 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 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.

(3) The Cabinet Secretary may make regulations prescribing the matters that should be included in a benefit sharing arrangement.

## PART VI — MANAGEMENT OF RIGHTS

### **25. Authorization for use of Traditional knowledge and cultural expressions**

(1) The owners of traditional knowledge and cultural expressions may—

- (a) grant authorization for the exploitation and use of their traditional knowledge and cultural expressions; or
- (b) after necessary consultations, authorize the national government, county government or any other person to exploit their traditional knowledge and cultural expressions, on their behalf.

(2) The owners of traditional knowledge and cultural expressions shall notify the Cabinet Secretary, in writing, of every authorization agreements they enter into.

(3) Where the owners are to grant an authorization under subsection (1)—

- (a) they shall not grant the authorization before undertaking appropriate and documented consultations with the members of the 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 cultural expressions concerned and

shall provide for the equitable sharing of the benefits arising from their exploitation and 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 cultural expressions shall be transferred directly by the Cabinet Secretary or the person authorised under subsection (1)(b) to the relevant community after consultations with the person in charge of matters relating to traditional knowledge and culture in the relevant county; and
- (e) the fees that the national government 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 Cabinet Secretary, shall be in accordance with this Act or Regulation made hereunder.

## **26. Access to traditional knowledge associated with genetic resources**

(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.

## **27. Application for consent**

(1) Where the Cabinet Secretary is satisfied that there is need for the grant of a compulsory licence under section 12, a prospective user of traditional knowledge or cultural expressions for a non-customary use, whether for a commercial or industrial nature or not, shall apply to the Cabinet Secretary for the consent of the holders for the use of the traditional knowledge or cultural expressions.

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

- (a) be in the prescribed form;
- (b) specify the manner in which the applicant proposes to use the traditional knowledge or 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 cultural expressions by the Cabinet Secretary or relevant County Executive Committee member 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 cultural expressions.

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



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(6) The Cabinet Secretary may reject an application under subsection (1) if the application does not meet the requirements prescribed under subsection (2) and Article 40(3)(b) of the Constitution.

(7) If an authorization is granted under this Act, just compensation shall be paid promptly in full to the owners or holders.

(8) The Cabinet Secretary shall make rules to guide the determination of just compensation.

## **28. Public consultation**

(1) The Cabinet Secretary shall before determining an application for consent for the use of traditional knowledge or cultural expressions—

- (a) give a copy of the application for consent to the holders of the traditional knowledge or cultural expressions to which the application relates;
- (b) publish a notification of the application in a newspaper with nationwide circulation stating the website and other public information centres provided in sections 95 and 119 of the County Governments Act, 2012, (No. 17 of 2012), where the interested persons may obtain a copy of the application.

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

(3) The Cabinet Secretary shall record in writing the details of any written representation given under subsection (2).

## **29. Identification of holders**

(1) Where the Cabinet Secretary is satisfied that he or she has identified all of the holders of the traditional knowledge or cultural expressions who are required to give consent before consent can be granted under section 25, the Cabinet Secretary make a written determination of an application for consent under section 25 containing the details identifying the holders.

(2) The Cabinet Secretary shall publish a notification of the application in a newspaper with nationwide circulation stating the website and other public information centres provided in sections 95 and 119 of the County Governments Act, (No. 17 of 2012), where the interested persons may obtain a copy of the application.

## **30. Uncertainty or dispute of ownership**

(1) Where the Cabinet Secretary is not satisfied that he or she has identified all of the holders or that there is a dispute about ownership of the rights, the Cabinet Secretary 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 Cabinet Secretary of the resolution and identification, and the Authority shall record the determination containing and the details as to identify the holders.

(3) The Cabinet Secretary shall publish a notification of the application in a newspaper with nationwide circulation stating the website and other public

information centres provided in sections 95 and 119 of the County Governments Act, (No. 17 of 2012), where the interested persons may obtain a copy of the application.

### **31. No claim to ownership**

(1) Where a county government is satisfied that there is no owner or agreement about ownership and no owner can be identified, the county government shall refer the matter to the national government for determination.

(2) Where the national government determines that there is no owner and the county of origin is known, the county government shall hold the rights to the traditional knowledge or cultural expressions on behalf of the owners.

(3) Where the national government determines that there is no owner and the county of origin is known, the county government shall hold the rights to the traditional knowledge or cultural expressions on behalf of the people of that county.

(4) Where the national government determines that the county of origin is not known, the national government shall hold the rights to the traditional knowledge or cultural expressions on behalf of the people of Kenya.

(5) Where the national or county government holds the rights under subsection (2) and (3), the governments may enter into an authorized user agreement for use and any monetary or non-monetary benefits arising under the agreement for the promotion, maintenance and improvement of the traditional knowledge and cultural expressions.

### **32. Authorized user agreements**

(1) The owners 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 government and the county government, in writing, of their decision and the Authority shall inform the applicant of the holders' decision, in writing.

### **33. User agreements**

(1) The owners of traditional knowledge or cultural expressions shall, before entering into an authorized user agreement, consult the members of the community on the proposed terms and conditions of the agreement.

(2) The Cabinet Secretary shall make regulations prescribing the matters that should be included in a user agreement and the procedures to be followed before a user agreement is entered into.

### **34. Terms and conditions of user agreement**

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 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 owners of any intellectual property rights arising from the use of the traditional knowledge or cultural expressions;
- (g) access arrangements for the owners;
- (h) applicable controls on publication;
- (i) assignment of rights, where appropriate;
- (j) dispute resolution mechanisms;
- (k) confidentiality and disclosure in relation to secret traditional knowledge or cultural expressions; and
- (l) respect for moral rights of the traditional owners.

**35. Authorized user agreement and prior informed consent**

(1) Where a party cannot read or write, or suffers from any physical disability, a verbal agreement may be recorded via video or other communication formats or technologies may be used.

(2) Agreements not registered by the Cabinet Secretary shall be null and void.

(3) In the case of shared intellectual property rights between the holders and the users, such rights shall not be transferred except with the authorization of the Cabinet Secretary.

(4) The intention to transfer such rights shall be communicated in writing or in such a manner as may be prescribed by the Cabinet Secretary.

(5) Upon receipt of the application the Cabinet Secretary may, in 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.

(6) Applications for the transfer of intellectual property rights, in or outside Kenya based on traditional knowledge and cultural expressions obtained in Kenya shall require the prior approval of the Cabinet Secretary.

**36. Obtained consent from traditional knowledge holders**

(1) A prospective user of traditional knowledge or cultural expressions may obtain the prior informed consent of the holders, under section 25, without applying to the Cabinet Secretary.

(2) The prospective user shall inform the Cabinet Secretary that the prospective user has sought the consent of the holders and provide the Cabinet Secretary 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 Cabinet Secretary, 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.

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

PART VII — SANCTIONS AND REMEDIES

**37. Offences and penalties**

(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 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 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 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 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 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 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 cultural expressions of Kenya knowingly, or reasonably

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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 cultural expressions for a non-traditional 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 cultural expressions 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 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 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 cultural expressions;
  - (iii) the identity and the addresses or whereabouts of the persons involved in the distribution of the traditional knowledge or cultural expressions; and
  - (iv) the channels for the distribution of those traditional knowledge or 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.

### **38. Civil action**

(1) The holders of traditional knowledge and cultural expressions may institute legal proceedings in a court of competent jurisdiction seeking any action provided

in section 39 against any person who carries out any of the acts mentioned in section 18, without the holder's prior informed consent.

(2) Where a person—

- (a) makes a non-customary use of traditional knowledge or cultural expression 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 cultural expression,

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

### **39. Civil remedies**

(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 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 cultural expressions cease or be reversed;
- (f) order the account for profits made by the infringer in exploiting the infringing articles;
- (g) order the forfeiture of profits made by the infringer in exploiting the infringing articles to the owner;
- (h) order the delivery up or forfeiture to the holders of articles made in contravention of their rights, as provided for under this Act;
- (i) order the seizure of any object made, imported or exported contrary to this Act;
- (j) order the revocation or invalidation of intellectual property rights inappropriately acquired over traditional knowledge or cultural expressions or derivatives thereof; or
- (k) 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 honour 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 cultural expressions; or

- (f) whether the parties have undertaken any other action to resolve the dispute.

#### **40. Other mechanisms to resolve disputes**

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 not inconsistent with the Constitution.

#### **41. Other rights and remedies**

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 — TRANSITIONAL MEASURES AND MISCELLANEOUS

#### **42. Transition**

(1) Upon the commencement of this Act, any person who, before the commencement of this Act, was lawfully 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 cultural expression 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.

(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 cultural expressions.

#### **43. Regulations**

(1) The Cabinet Secretary may make Regulations for the better carrying into effect of this Act.

- (2) Despite the generality of subsection (1), the regulations may provide for—
- (a) administrative requirements necessary for the implementation of the provisions of this Act;
  - (b) the procedure for applications of authorization for the exploitation of traditional knowledge and cultural expressions;
  - (c) fees to be paid by the National Competent Authority and the details of the distribution of part of the fees;
  - (d) mechanisms for fair distribution of benefits derived from usage of traditional knowledge and cultural expressions;
  - (e) preventive mechanisms aimed at protecting traditional knowledge and cultural expressions;
  - (f) forms to be used for matters requiring forms under this Act; and
  - (g) any other matters that are required or necessary be prescribed in order to give effect to this Act.

(3) Whenever the Cabinet Secretary is required to make regulations or rules under this Act, the Cabinet Secretary shall make the regulations in consultation with the Council of County Governors.

**44. Recognition of other laws**

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

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