

# Regional, National and Community Experiences Using Intellectual Property to Protect TK & TCEs (Zambia's Perspectives)

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Presented

by

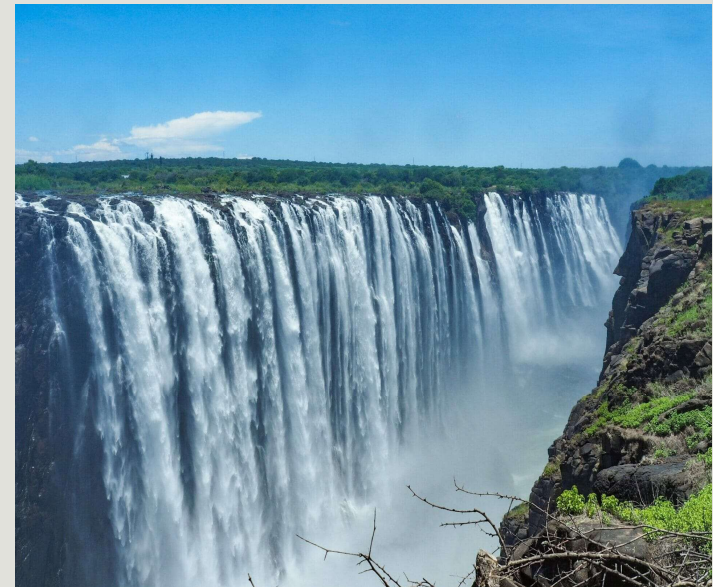
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# About Zambia



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# About Zambia: Ceremonial Expressions



# Setting the Context — Why Protection of TK and TCEs Matters in Zambia

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Zambia is culturally rich and diverse. Our TK and TCEs include:

- Traditional medicinal knowledge
- Ceremonial expressions (e.g., **NC'wala, Makishi, Kuomboka**)
- Indigenous crafts (baskets, beadwork, textiles)
- Folklore, music and dance

Zambia's TCEs are not static artefacts. They are living expressions governed by customary systems. However, globalization, tourism, and commercial markets have introduced new pressures that challenge authenticity and community control.

# Setting the Context — Why protection of TK and TCEs Matters in Zambia

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These are not merely heritage artifacts.

- They are:-
  - living economic assets
  - identity markers and
  - development tools

# National Experience: Zambia's Legal Framework – Overview

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Act No. 16 of 2016

Framework for protection, access and use

Defensive and positive protection

Aligned with Swakopmund Protocol of ARIPO

# Legal Framework

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## **Automatic Protection Without Formalities**

- Protection subsists automatically
- Registration is declaratory
- No requirement of fixation
- Protection for as long as criteria are fulfilled

# Key Features – Defensive Protection

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Prevents IP grants without PIC

Prohibits unauthorised IP acquisition

Legal barrier against biopiracy

# Key Features – Positive Protection

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Exclusive rights to authorise exploitation

Mandatory PIC

Benefit-sharing required

Licensing agreements required

# Protection of Traditional Knowledge

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- Broad definition across subject areas
  - Medicinal, agricultural, ecological knowledge

Exclusive right to authorise use

# Protection of Genetic Resources

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- Genetic material with actual or potential value
- Based on CBD and Nagoya Protocol
- PIC and equitable benefit-sharing required

# Protection of Expressions of Folklore

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- Verbal, musical, action-based and tangible forms
- Stories, songs, dances, attire, regalia
- Both tangible and intangible protected

# Community Rights in Zambia

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Inalienable rights

Right to participate in decisions

Right to benefits

Right to consent

Right to prevent misuse



# Benefit-Sharing Mechanism

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Access agreements required

Mandatory sharing of commercial benefits

Communities benefit collectively

# Why Zambia Enacted This Law

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From a policy perspective, we faced three real challenges:

- i. Commercial exploitation without benefit-sharing**
- ii. Misappropriation of cultural expressions**
- iii. Failure of conventional IP systems**
- iv. Weak capacity among communities to use IP strategically**

# Failure of Conventional IP Systems to Protect TK & TCEs: Evidence from Zambia's Nc'wala, Kuomboka, and Makishi Masquerade

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## The Conceptual Divide Fundamental Incompatibilities

### Conventional IP System

Individual ownership

Originality (novel creation)

Fixation (material form)

Limited duration

Registration formalities

Public domain logic

Economic rights focus

### TK/TCE Systems

Collective custodianship

Intergenerational transmission

Oral/per formative tradition

Perpetual continuity

Customary governance

Sacred/secret knowledge

Holistic (cultural/spiritual/economic)

# Failure of Conventional IP Systems to Protect TK & TCEs: Evidence from Zambia's Nc'wala, Kuomboka, and Makishi Masquerade

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## The Core Problem

### Why Conventional IP Fails

- IP systems were designed for industrial-age, individual-centric innovation
- They cannot accommodate knowledge that is:
  - Created **communally** over generations
  - Transmitted **orally** rather than through fixation
  - Held in **custodianship** rather than ownership
  - Intended for **perpetual** rather than temporary protection
  - Subject to **customary laws** rather than state formalities
  - Valued for **spiritual and cultural** significance, not merely economic utility

# Case Study 1: Nc'wala Ceremony

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Descendants of Nguni chiefdoms

Annual ceremony in Eastern Province of Zambia

Led by Paramount Chief Mpezeni



# Significance of Nc'wala Ceremony

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Celebration of first fruits

Honouring ancestors and warriors

Reaffirming Ngoni identity

Millions of viewers globally



**Challenge:** Growing tourism creates economic opportunities— and vulnerabilities

# Nc'wala Ceremony

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## Traditional Ngoni Harvest Ceremony

### Features:

- Animal-skin regalia (leopard skins, cattle hides)
- Warrior symbolism (spears, shields, headdresses)
- Oral narratives and praise poetry
- Communal performances
- Designs passed through generations



# Nc'wala: Manifestations of Failure

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## What Actually Happens

### Problem

- Synthetic regalia substitutes
- Mass-produced imitations
- Unauthorized commercial use
- False "authentic" claims
- Tourism benefiting outsiders
- Communities bear the cost;

### Consequence

- Cultural dilution
- Economic leakage from communities
- Loss of community control
- Consumer deception
- Communities excluded from value
- outsiders capture the benefit

# Nc'wala – Copyright Failures

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## Why Copyright Cannot Protect Nc'wala

Requirement	Problem	Consequence
Originality	Designs evolved over generations; no identifiable "author"	No protection for regalia designs
Fixation	Oral narratives, performances not fixed	Performative aspects unprotected
Derivative works	Third parties may record and claim copyright	Outsiders own rights in community heritage

# Nc'wala – Design & Trademark Failures

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## Other IP Systems Also Fail

<b>System</b>	<b>Requirement</b>	<b>Problem</b>
Design Law	Registration + novelty	Traditional designs are not "new"
Design Law	Individual applicant	Collective ownership not accommodated
Trademark	Registration + use in commerce	Certification marks possible but require formalities communities lack

**Result:** No mechanism to prevent imitation or authenticate genuine regalia

# Case Study 2: Kuomboka Ceremony

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## Traditional Lozi Royal Ceremony

### Features:

- *Nalikwanda* (royal barge) with symbolic decorations
- Royal insignia (crowns, scepters, ceremonial attire)
- Drumming and musical traditions
- Oral histories and praise songs
- Rituals associated with the Litunga (Lozi King)



**Challenge:** Imagery widely used in tourism branding and merchandise

# Kuomboka: The Standing Gap

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## **Problem**

Traditional governance structures

Lozi King (Litunga) - authority

Consent of traditional authority

## **Consequence:**

Royal symbols reproduced without authorization

Traditional authority bypassed

No legal mechanism requiring consultation

## **Conventional IP Response**

Not recognized as rights holders

No legal standing

Irrelevant to IP frameworks

# Kuomboka: Symbol Protection Failures

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## Trademark and GI Limitations

Tool

Barrier

Trademark

Royal symbols not inherently "trade marks"; requires individual applicant; registration costly

Geographical Indication

Requires registration, defined specifications; does not address ceremonial context

**Result:** No effective protection for royal symbols and insigni

# Kuomboka – Manifestations of Failure

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## What Actually Happens

### Problem

Royal symbols on merchandise

No attribution of source

Modifications without oversight

Tourism branding using imagery

Traditional authority bypassed

### Consequence

Unauthorized commercial use

Community unrecognized

Cultural distortion

Economic exclusion

Governance undermined

# Case Study 3: Makishi Masquerade

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## **Makishi Masquerade**

### **Sacred Luvale Tradition (UNESCO Heritage)**

#### **Features:**

- Masked performances representing ancestral spirits
- Initiation ceremonies (*Mukanda*) for young men
- Sacred knowledge with restricted access (initiates only)
- Elaborate masks with symbolic meanings
- Oral teachings, songs, and dances
- Carving traditions for mask-making

**Challenge:** Sacred, restricted nature creates unique vulnerabilities

# Case Study 3: Makishi Masquerade



# Makishi Masquerade: The Fundamental Problem

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## Sacred Knowledge Not Protected

IP Principle

Conflict

Disclosure and publication

IP systems require disclosure; no mechanism to protect knowledge because it is secret

Public domain logic

Treats disclosure as eventual goal

Spiritual harm

Not recognized as legal injury

### **Consequence:**

*Sacred knowledge intended only for initiates has no protected status*

*Once disclosed (even improperly), may enter public domain*

*No legal basis to prevent unauthorized disclosure*

# Makishi – Fixation & Originality Failures

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## Copyright's Structural Exclusions

<b>Requirement</b>	<b>Problem</b>	<b>Consequence</b>
Fixation	Makishi is performative,	oral Living tradition unprotected
Originality	Masks follow traditional forms	No copyright in masks
Derivatives	Third-party "inspired" may claim originality	Outsiders own works adaptations

**Irony:** *A third party recording the performance may own copyright in the recording—the community's own tradition becomes someone else's IP*

# Makishi – Duration & Ownership Failures

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## More Structural Mismatches

### IP Doctrine

Limited duration

Individual ownership (customary governance has no standing)

Public domain

### Problem

Copyright expires; tradition is perpetual

Makishi held collectively

What enters "public domain" is still living heritage to communities

**Result:** *Even if copyright could apply, it would expire—but community interest never expires*

# Makishi – Manifestations of Failure

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## What Actually Happens

### **Problem**

Sacred knowledge exposed

Tourist-market replicas

Third-party rights in recordings

Unauthorized adaptations

Export without oversight

### **Consequence**

Spiritual harm, no remedy

Cultural commodification

Outsiders own community's image

Community loses control

Heritage leaves community

# Systemic Failures – Overview

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## Structural Problems Across All Three Cases

<b>Doctrine</b>	<b>Problem</b>	<b>Examples</b>
Originality	Excludes communal, intergenerational creation	All three cases
Fixation	Excludes oral, performative traditions	Nc'wala praise poetry, Makishi rituals
Individual ownership	Excludes collective custodianship	All three cases
Limited duration	Incompatible with perpetual heritage	All three cases
Registration formalities knowledge	Procedural barriers; require disclosure	Makishi sacred
Public domain logic	Enables misappropriation	All three cases
Customary law ignored	Severs heritage from governance	Kuomboka authority, Makishi protocols

# The Consequences- Cultural!

## What Is Being Lost

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### Dilution of authenticity

- Nc'wala – Synthetic regalia
- Kuomboka – Commercialized imagery
- Makishi – Tourist replicas
  
- Erosion of meaning
- Nc'wala – Loss of symbolism
- Kuomboka – Commodification
- Makishi – Sacred exposed
  
- Loss of intergenerational transmission
- Youth see imitations / branding / disclosed knowledge
  
- Community control diminished
- No certification, no consent, no oversight

# The Consequences – Economic!

## Who Benefits? Who Loses?

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Tourism revenue leakage – Communities excluded from value chain

- Lost enterprise opportunities – Authentic products cannot compete
- Uncompensated use – Heritage treated as free resource
- Outsider appropriation – Profits flow outside the community
- No benefit-sharing – Communities bear costs, receive no benefits
  
- Conclusion: The current system transfers value from communities to outsiders

# Zambia's Legislative Response: Protection of Traditional Knowledge, Genetic Resources and Expressions of Folklore Act, 2016

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## **IP Failure**

Originality

Fixation

Individual ownership

Limited duration

Registration

Public domain

Customary law

Consent

Benefit-sharing

## **Zambian Act's Solution**

Protection based on community association (s.14, 46)

Automatic protection (s.15(1), 47(1))

Collective rights recognized (s.16, 48)

Duration linked to community (s.24, 51)

Declaratory only (s.15(5), 47(3))

Protected status maintained (s.15(3))

Guiding principle (s.4(5)(l), 18(2))

Prior informed consent mandatory (s.18, 29, 49)

Mandatory (s.20, 42, 53)

# What Zambia's Experience Demonstrates: Key Lessons!

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Failures are structural – require sui generis solutions

- Misuse is real and ongoing – protection must be enforceable
- Economic and moral rights must coexist
- Collective custodianship requires collective protection
- Customary laws must guide protection
- Tiered approaches reflect reality (sacred vs diffused heritage)

# Strategic Policy Directions

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- **Community awareness and capacity-building:** Regular awareness campaigns and ensuring that communities understand their rights.
- **Coordination among appropriate institutions:** Plans are underway to establish a National TK/TCE Economic Development Unit (Inter-agency) with the mandate to facilitate licensing and commercialization; oversee benefit-sharing agreements and to provide negotiation support to communities.
- **Documentation and Preservation:** Establishing decentralized documentation centers in each province, working directly with traditional leaders.
- **Validation and Research:** The center conducts rigorous academic research to validate the efficacy and scientific basis of certain indigenous practices, particularly in areas like traditional medicine and sustainable agriculture. This helps bridge the gap between traditional and modern scientific knowledge.
- **Curriculum Development:** A major goal is to integrate validated indigenous knowledge into the university's curriculum and, by extension, into Zambia's primary and secondary school syllabuses. This ensures that students learn about and appreciate their cultural heritage and its practical applications

# Conclusion

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## **The Evidence Speaks!!**

- Nc'wala, Kuomboka, and Makishi are not abstract examples
- They are living heritage—and living proof that:
  - Conventional IP systems structurally fail to protect TK/TCEs
  - Sui generis protection is possible (Zambia's Act No. 16 of 2016)
  - International action is necessary to support and reinforce national systems

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*Thank You!*

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