

NATIONAL COUNCIL FOR LAW REPORTING  
101-102  
103-104  
105-106  
107-108  
109-110  
111-112  
113-114  
115-116  
117-118  
119-120  
121-122  
123-124  
125-126  
127-128  
129-130  
131-132  
133-134  
135-136  
137-138  
139-140  
141-142  
143-144  
145-146  
147-148  
149-150  
151-152  
153-154  
155-156  
157-158  
159-160  
161-162  
163-164  
165-166  
167-168  
169-170  
171-172  
173-174  
175-176  
177-178  
179-180  
181-182  
183-184  
185-186  
187-188  
189-190  
191-192  
193-194  
195-196  
197-198  
199-200  
201-202  
203-204  
205-206  
207-208  
209-210  
211-212  
213-214  
215-216  
217-218  
219-220  
221-222  
223-224  
225-226  
227-228  
229-230  
231-232  
233-234  
235-236  
237-238  
239-240  
241-242  
243-244  
245-246  
247-248  
249-250  
251-252  
253-254  
255-256  
257-258  
259-260  
261-262  
263-264  
265-266  
267-268  
269-270  
271-272  
273-274  
275-276  
277-278  
279-280  
281-282  
283-284  
285-286  
287-288  
289-290  
291-292  
293-294  
295-296  
297-298  
299-300  
301-302  
303-304  
305-306  
307-308  
309-310  
311-312  
313-314  
315-316  
317-318  
319-320  
321-322  
323-324  
325-326  
327-328  
329-330  
331-332  
333-334  
335-336  
337-338  
339-340  
341-342  
343-344  
345-346  
347-348  
349-350  
351-352  
353-354  
355-356  
357-358  
359-360  
361-362  
363-364  
365-366  
367-368  
369-370  
371-372  
373-374  
375-376  
377-378  
379-380  
381-382  
383-384  
385-386  
387-388  
389-390  
391-392  
393-394  
395-396  
397-398  
399-400  
401-402  
403-404  
405-406  
407-408  
409-410  
411-412  
413-414  
415-416  
417-418  
419-420  
421-422  
423-424  
425-426  
427-428  
429-430  
431-432  
433-434  
435-436  
437-438  
439-440  
441-442  
443-444  
445-446  
447-448  
449-450  
451-452  
453-454  
455-456  
457-458  
459-460  
461-462  
463-464  
465-466  
467-468  
469-470  
471-472  
473-474  
475-476  
477-478  
479-480  
481-482  
483-484  
485-486  
487-488  
489-490  
491-492  
493-494  
495-496  
497-498  
499-500  
501-502  
503-504  
505-506  
507-508  
509-510  
511-512  
513-514  
515-516  
517-518  
519-520  
521-522  
523-524  
525-526  
527-528  
529-530  
531-532  
533-534  
535-536  
537-538  
539-540  
541-542  
543-544  
545-546  
547-548  
549-550  
551-552  
553-554  
555-556  
557-558  
559-560  
561-562  
563-564  
565-566  
567-568  
569-570  
571-572  
573-574  
575-576  
577-578  
579-580  
581-582  
583-584  
585-586  
587-588  
589-590  
591-592  
593-594  
595-596  
597-598  
599-600  
601-602  
603-604  
605-606  
607-608  
609-610  
611-612  
613-614  
615-616  
617-618  
619-620  
621-622  
623-624  
625-626  
627-628  
629-630  
631-632  
633-634  
635-636  
637-638  
639-640  
641-642  
643-644  
645-646  
647-648  
649-650  
651-652  
653-654  
655-656  
657-658  
659-660  
661-662  
663-664  
665-666  
667-668  
669-670  
671-672  
673-674  
675-676  
677-678  
679-680  
681-682  
683-684  
685-686  
687-688  
689-690  
691-692  
693-694  
695-696  
697-698  
699-700  
701-702  
703-704  
705-706  
707-708  
709-710  
711-712  
713-714  
715-716  
717-718  
719-720  
721-722  
723-724  
725-726  
727-728  
729-730  
731-732  
733-734  
735-736  
737-738  
739-740  
741-742  
743-744  
745-746  
747-748  
749-750  
751-752  
753-754  
755-756  
757-758  
759-760  
761-762  
763-764  
765-766  
767-768  
769-770  
771-772  
773-774  
775-776  
777-778  
779-780  
781-782  
783-784  
785-786  
787-788  
789-790  
791-792  
793-794  
795-796  
797-798  
799-800  
801-802  
803-804  
805-806  
807-808  
809-810  
811-812  
813-814  
815-816  
817-818  
819-820  
821-822  
823-824  
825-826  
827-828  
829-830  
831-832  
833-834  
835-836  
837-838  
839-840  
841-842  
843-844  
845-846  
847-848  
849-850  
851-852  
853-854  
855-856  
857-858  
859-860  
861-862  
863-864  
865-866  
867-868  
869-870  
871-872  
873-874  
875-876  
877-878  
879-880  
881-882  
883-884  
885-886  
887-888  
889-890  
891-892  
893-894  
895-896  
897-898  
899-900  
901-902  
903-904  
905-906  
907-908  
909-910  
911-912  
913-914  
915-916  
917-918  
919-920  
921-922  
923-924  
925-926  
927-928  
929-930  
931-932  
933-934  
935-936  
937-938  
939-940  
941-942  
943-944  
945-946  
947-948  
949-950  
951-952  
953-954  
955-956  
957-958  
959-960  
961-962  
963-964  
965-966  
967-968  
969-970  
971-972  
973-974  
975-976  
977-978  
979-980  
981-982  
983-984  
985-986  
987-988  
989-990  
991-992  
993-994  
995-996  
997-998  
999-1000

**SPECIAL ISSUE**

Kenya Gazette Supplement No. 154 (Acts No. 33)



REPUBLIC OF KENYA

***KENYA GAZETTE SUPPLEMENT***

**ACTS, 2016**

**NAIROBI, 7th September, 2016**

CONTENT

Act—	PAGE
The Protection of Traditional Knowledge and Cultural Expressions Act, 2016.....	64

NATIONAL COUNCIL FOR LAW REPORTING  
**RECEIVED**  
04 OCT 2016  
P. O. Box 10443-00100  
NAIROBI, KENYA  
TEL: 271 231 FAX: 2712694



**THE PROTECTION OF TRADITIONAL KNOWLEDGE  
AND CULTURAL EXPRESSIONS ACT, 2016**

**No. 33 of 2016**

*Date of Assent: 31st August, 2016*

*Date of Commencement: 21st September, 2016*

**ARRANGEMENT OF SECTIONS**

*Section*

**PART I—PRELIMINARY**

- 1—Short title.
- 2—Interpretation.
- 3—Guiding principles.
- 4—Responsibility of county governments.
- 5—Responsibilities of the national government.

**PART II—PROTECTION OF TRADITIONAL  
KNOWLEDGE**

- 6—Protection criteria for traditional knowledge.
- 7—Formalities relating to protection of traditional knowledge.
- 8—Maintenance of registers.
- 9—Right to protection.
- 10—Rights conferred to holders of traditional knowledge.
- 11—Recognition of traditional knowledge and cultural expression owners.
- 12—Compulsory licence.
- 13—Duration of protection of traditional knowledge.

**PART III—PROTECTION OF CULTURAL  
EXPRESSIONS**

- 14—Protection criteria of cultural expressions.
- 15—Formalities relating to cultural expressions.
- 16—Right of protection.
- 17—Duration of protection of cultural expressions.

**PART IV—GENERAL PROVISIONS**

- 18—Protection of traditional knowledge and cultural expressions against unlawful acts.

19—Exceptions and limitations.

20—Derivative works.

### **PART V—MORAL RIGHTS**

21—Meaning of moral rights.

22—Assignment and licensing.

23—Additional rights.

24—Equitable benefit sharing rights.

### **PART VI—MANAGEMENT OF RIGHTS**

25—Authorization for use of Traditional knowledge and cultural expressions.

26—Access to traditional knowledge associated with genetic resources.

27—Application for consent.

28—Public consultation.

29—Identification of holders.

30—Uncertainty or dispute of ownership.

31—No claim to ownership.

32—Authorized user agreements.

33—User agreements.

34—Terms and conditions of user agreement.

35—Authorized user agreement and prior informed consent.

36—Obtained consent from traditional knowledge holders.

### **PART VII—SANCTIONS AND REMEDIES**

37—Offences and penalties.

38—Civil action.

39—Civil remedies.

40—Other mechanisms to resolve disputes.

41—Other rights and remedies.

### **PART IX—TRANSITIONAL MEASURES AND MISCELLANEOUS**

42—Transition.

43—Regulations.

44—Recognition of other laws.

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

**ENACTED** by the Parliament of Kenya, as follows—

**PART I—PRELIMINARY**

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

Short title.

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

Interpretation.

“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. 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

Guiding principles.



shall be guided by the national values and principles of governance set out in Article 10 of the Constitution.

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

Responsibility of  
county  
governments

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

Responsibilities of  
the national  
government.

- (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 shall be extended to traditional knowledge that is—

Protection criteria for traditional knowledge.

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

Formalities relating to protection of traditional knowledge.

(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. (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.

Maintenance of registers.

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

Right to protection.

10. (1) Every community shall have the exclusive right to—

Rights conferred to holders of traditional knowledge.

- (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. 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.

Recognition of traditional knowledge and cultural expression owners.

12. (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.

Compulsory licence.

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

Duration of  
protection of  
traditional  
knowledge

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

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

Protection criteria  
of cultural  
expressions.

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

Formalities relating to cultural expressions.

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

Right of protection.

17. 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.

Duration of protection of cultural expressions.

#### **PART IV—GENERAL PROVISIONS**

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

Protection of traditional knowledge and cultural expressions against unlawful acts

(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.

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

Exceptions and limitations.

- (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.** (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.

Derivative works

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

Meaning of moral rights

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

Assignment and licensing.

(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 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.** (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,

Additional rights

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. (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.

Equitable benefit sharing rights.

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

Authorization for use of Traditional knowledge and cultural expressions.

- (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. (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.

Access to traditional knowledge associated with genetic resources.

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

27. (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.

Application for consent

(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.

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

Public  
consultation.

- (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, where the interested persons may obtain a copy of the application.

No. 17 of 2012

(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.** (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.

Identification of 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, 2012, where the interested persons may obtain a copy of the application

No. 17 of 2012

**30.** (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.

Uncertainty or dispute of ownership.

(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, 2012, where the interested persons may obtain a copy of the application.

No 17 of 2012

**31.** (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.

No claim to ownership

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

Authorized user agreements

- (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.** (1) The owners of traditional knowledge or cultural expressions shall, before entering into an authorized

User agreements.



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

Terms and conditions of user agreement.

- (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.** (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.

Authorized user agreement and prior informed consent.

(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.** (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.

Obtained consent  
from traditional  
knowledge holders.

(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.** (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;

Offences and  
penalties

- (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 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.** (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.

Civil action.

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

Civil remedies.

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

Other mechanisms to resolve disputes.

- (a) mediation;
- (b) alternative dispute resolution procedures; or
- (c) customary laws, practices and protocols not inconsistent with the Constitution.

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

Other rights and remedies.

## **PART IX—TRANSITIONAL MEASURES AND MISCELLANEOUS**

**42.** (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.

Transition.

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

Regulations.

(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.** 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.

Recognition of other laws.