

## 8. PROTECTION OF TRADITIONAL KNOWLEDGE AND TRADITIONAL CULTURAL EXPRESSIONS IN KENYA

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### ABSTRACT

Kenya, like many other countries, is in the process of developing a legal and administrative structure for the protection of traditional knowledge at the national level. This has been necessitated by the increased interest in the use of traditional knowledge. The purpose of the legal framework being developed is to protect and preserve Kenya's traditional knowledge, as well as to allow for access and sustainable use. The article examines the existing legal and policy framework and the proposed law, which draws from the ARIPO Swakopmund Protocol on the Protection of Traditional Knowledge.

**Keywords:** *traditional knowledge, policy, prior informed consent, access, sui generis protection.*

### I. INTRODUCTION

Every other day, the **kiondo**, **kikoi**, and **Maasai shuka handicrafts**, among others, are mentioned as having been misappropriated by third parties. While this may not necessarily be the case, the main issue that arises is the protection of traditional knowledge in Kenya. Traditional knowledge has gained currency in the rapidly globalized world and the demand for traditional knowledge has increased over the last 20 years. The various holders of traditional knowledge in the country and the government have been working towards a protection system to ensure that Kenya's traditional knowledge is preserved and protected against misappropriation by third parties. This may be through different legal regimes or a *sui generis* system of protection.

Kenya currently does not have a specific law that protects traditional knowledge although, as will be discussed later in this article, the current legal

regime may to a certain extent be used to protect traditional knowledge.

There is no universal definition of traditional knowledge, but according to the World Intellectual Property Organization (WIPO), traditional knowledge may be defined as knowledge, know-how, skills, and practices that are developed, sustained, and passed on from generation to generation within a community, often forming part of its cultural or spiritual identity.<sup>1</sup> These include traditional medicines and healing processes, rituals, preservation of food and diet, agriculture and animal husbandry, preservation of the ecological systems, as well as traditional cultural expressions such as music, art, handicrafts, folktales, and dances among others. For the purposes of this article, traditional knowledge shall be construed in the broader sense to include traditional cultural expressions.

### II. RATIONALE FOR PROTECTION

Kenya, like most countries in Africa, has a rich cultural heritage and many local communities are holders of traditional knowledge. There has been an increased interest in traditional knowledge recently, especially as it relates to genetic resources and traditional cultural expressions. Traditional knowledge has been used for commercial purposes by third parties and in some instances has been misappropriated. Any time the issue of traditional knowledge is raised in various forums within the country, the issue of the purported misappropriation of the **Kiondo**<sup>2</sup> or the **Kikoy**<sup>3</sup> always comes up. While the two are not necessarily cases of misappropriation, they raise pertinent issues. Is traditional knowledge protected in Kenya? How do the communities that are custodians/holders of the traditional knowledge control the use of their traditional Knowledge? Is there any specific legal regime that addressed these concerns?

There are several reasons why we should protect traditional knowledge in Kenya. First, as noted above, there is increased interest in the use of traditional knowledge in trade, pharmaceuticals, the creative industry, agriculture, animal husbandry, and management of the environment. This usage needs to be well defined and applied within the confines of a structured legal and administrative framework. Second, traditional knowledge is usually passed

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<sup>1</sup> WIPO Traditional Knowledge <<http://www.wipo.int/tk/en/tk/>> accessed 10 October 2014.

<sup>2</sup> Sylvance Sange Kiondo Idea Theft: An Intellectual Property Myth! (KIPI 2009) <[http://www.kipi.go.ke/images/docs/kiondo\\_idea\\_theft\\_a\\_n\\_%20ip\\_%20myth.pdf](http://www.kipi.go.ke/images/docs/kiondo_idea_theft_a_n_%20ip_%20myth.pdf)> accessed 31 October 2014.

<sup>3</sup> Sylvance Sange . Loss of the Kikoy to the UK; An intellectual Property Drama (KIPI 2010) <[http://www.kipi.go.ke/images/docs/loss\\_of\\_kikoi\\_to\\_the\\_uk\\_%20an\\_ip\\_drama.pdf](http://www.kipi.go.ke/images/docs/loss_of_kikoi_to_the_uk_%20an_ip_drama.pdf)> accessed 31 October 2014.

down from generation to generation and until recently was not captured in writing. This creates a risk of the knowledge being lost when the knowledge holder dies, without documentation of the same. There is need to preserve the knowledge. This also brings about the issue of providing access to this information for the public good.

Third, protection is needed from undue or uncontrolled exploitation by third parties. There are instances where the traditional knowledge is used for purposes that are contrary to the spiritual values of a community, especially as it relates to sacred traditional cultural expressions. It is important to preserve the moral integrity of the community as part of the cultural heritage. In summary, the main purpose for the protection of traditional knowledge is to guard against misappropriation and misuse, especially by third parties, preservation of genetic resources and cultural goods, and protection against unfair competition. This will in turn ensure access as well as benefit sharing.

The protection of traditional knowledge may either be defensive or positive. The former provides strategies that ensure that third parties are prevented from gaining intellectual property rights for the use of traditional knowledge.<sup>4</sup> Examples of defensive protection are the Traditional Knowledge Digital Library in India and documentation of traditional knowledge to prevent acquisition of patent rights or trademarks over the same.<sup>5</sup> Positive protection on the other hand, prevents unauthorized use and promotes active exploitation by the originating community. Positive protection of traditional knowledge includes the use of existing intellectual property systems, adaptations, and *sui generis* elements of existing intellectual property regimes, and wholly *sui generis* protection.<sup>6</sup> In Kenya, the proposed legal regime and administrative framework seeks to provide positive and defensive protection as will be discussed in the article.

### III. POLICY FRAMEWORK FOR THE PROTECTION OF TRADITIONAL KNOWLEDGE IN KENYA

The Government of Kenya recognized the need to have a clear policy framework for the protection of

traditional knowledge. The Task Force on Traditional Knowledge was established to come up with the policy framework. Members of the Task Force included representatives from the Office of the Attorney General, the National Museums of Kenya, the then National Council for Science and Technology, the Department of Culture, the Kenya Industrial Property Institute, and the Copyright Section within the department of the Registrar General. The Task Force successfully completed its work in 2009 and handed over its report to the Attorney General, who in turn mandated the Kenya Copyright Board to implement the policy.

The policy takes into account the various challenges, such as the lack of recognition and mainstreaming of traditional knowledge systems into national policies and decision-making processes, the lack of documentation, inadequate capacity, and the linkage between intellectual property, creativity, and innovation.

The main objective of the policy is:

to enhance and coordinate the application of traditional knowledge, innovations and practices in sustainable use of genetic resources and sustainable development in Kenya<sup>7</sup>.

This will:

- (a) Provide a legal and institutional framework to support the integration of various aspects of traditional knowledge, genetic resources, and traditional cultural expressions in national development planning and decision-making processes.
- (b) Promote the preservation, protection, and development of traditional knowledge, genetic resources, and traditional cultural expressions for multiple applications and use.
- (c) Promote and foster the documentation, use, and dissemination of traditional knowledge, genetic resources, and traditional cultural expressions with mechanisms to acknowledge, protect, and benefit the sources and/or custodians.
- (d) Promote the protection of traditional knowledge associated with conservation and sustainable use of biological diversity and equitable sharing of accrued benefits.

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<sup>4</sup> World Intellectual Property Organization (WIPO), 'Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions/Expressions of Folklore' Geneva (2003).

<sup>5</sup> WIPO has prepared a toolkit to provide practical assistance for the documentation by traditional knowledge holders.

<http://www.wipo.int/tk/en/resources/tkdocumentation.html> accessed 10 October 2014.

<sup>6</sup> WIPO, Consolidated Survey of Intellectual Property Protection of Traditional Knowledge, WIPO/GRTKF/IC/5/7, Geneva (2003).

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<sup>7</sup> Office of the Attorney General *National Policy for the Protection of Traditional Knowledge and Genetic Resources* (2009).

(e) Enhance collaboration and partnership in the generation, access to and utilization of traditional knowledge, genetic resources, and traditional cultural expressions.

The guiding principles underlying this policy include respect, full disclosure, prior informed consent, confidentiality, good faith, compensation, equitable benefit sharing, access, sustainable development, and international cooperation.

Another policy that, to a certain extent, addresses issues of traditional knowledge is the 2009 National Policy on Culture and Heritage, which requires the government to promote culture as a driving force for social and economic development and to ensure that appropriate measures are put in place for the protection, conservation and preservation of national heritage, both tangible and intangible. This would have a bearing especially on traditional cultural expressions and other knowledge systems that form part of the national heritage.

In 2012, the Natural Products Industry Policy was prepared by the Ministry of State for National Heritage and Culture to encourage the manufacturing of local products from natural resources including medicinal, cosmetic, household, and agricultural products. The main objective of the policy is to facilitate the requisite legal and administrative framework to enable the use of existing genetic resources and other natural products to spur economic growth and development. The policy to a certain extent espouses the positive protection of traditional knowledge.

The draft National Intellectual Property Policy of 2013 fails to provide clear policy direction for the protection of traditional knowledge in Kenya. The draft policy only proposes the administrative framework. This is a major oversight, as it mainly covers conventional intellectual property, namely copyright, industrial designs, and plant breeders' rights. However, as the policy is yet to be adopted, there is room for improvement to include clear policy directives for traditional knowledge protection.

These policies especially the National Policy on Traditional Knowledge and Genetic Resources form the basis of the proposed legal framework for the protection of traditional knowledge at the national level, as shall be discussed in the following paragraphs.

#### IV. LEGAL FRAMEWORK AND ADMINISTRATIVE FRAMEWORK

The legal protection of traditional knowledge can either be through the existing intellectual property framework or a *sui generis* system of protection. At the international level, norm setting for the protection of traditional knowledge is ongoing at WIPO through the Intergovernmental Committee (IGC) on Intellectual Property, Genetic Resources, Traditional Knowledge and Expressions of Folklore. The IGC was set up in 2000 to provide member states with a forum to discuss the various issues arising from the exploitation of genetic resources, including access and benefit sharing, and the protection of traditional knowledge.<sup>8</sup> The IGC is currently working on three different texts on the proposed protection for genetic resources, traditional knowledge and traditional cultural expressions. Kenya has been an active participant at the IGC and some of the discussions have influenced the draft law on the protection of traditional knowledge.

There have been several attempts at the regional level in Africa to address the issue of access and benefit sharing, especially as it relates to biological resources. In 2000, the African Union (then Organization of African Unity) adopted the African Model Legislation for the protection of the rights of local communities, farmers and breeders, and for the regulation of access to biological resources. The model law made provisions that could be adopted by African countries in relation to community rights, regulations of access, and benefit sharing of genetic resources and plant breeders' rights.

The model law, among other things, recognizes the rights of local communities over genetic resources, traditional knowledge, farmers' rights, local innovations and practices. It also recognizes the customary law, the collective rights of the local communities, and the need for prior informed consent.<sup>9</sup> The model law provides a strong basis for the formulation of national laws on the protection of traditional knowledge.

The Diplomatic Conference of Africa Regional Intellectual Property Organization (ARIPO) adopted the ARIPO Swakopmund Protocol in Swakopmund,

<sup>8</sup> WIPO Briefing Paper n 2 'The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources Traditional Knowledge and Folklore'.

[http://www.wipo.int/export/sites/www/tk/en/resources/pdf/tk\\_brief2.pdf](http://www.wipo.int/export/sites/www/tk/en/resources/pdf/tk_brief2.pdf) accessed 3 November 2014.

<sup>9</sup> Regional laws on traditional knowledge and access to genetic resources <http://biocultural.iied.org/regional-laws-traditional-knowledge-and-access-genetic-resources> accessed 6 November 2014.

Namibia, on 9 August 2010.<sup>10</sup> This was a result of negotiations within the ARIPO Member States. The Protocol covers the protection of traditional knowledge and traditional cultural expressions. It provides for exclusive rights for traditional knowledge holders to control the use and access of their traditional knowledge. The Protocol defines traditional knowledge in a narrower sense.

Under Article 2.1, traditional knowledge refers to:

... any knowledge originating from a 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, where the knowledge is embodied in the traditional lifestyle of a community, or contained in the codified knowledge systems passed on from one generation to another. The term shall not be limited to a specific technical field, and may include agricultural, environmental or medical knowledge, and knowledge associated with genetic resources.

Article 2.1 also defines expressions of folklore to include:

... any forms, whether tangible or intangible, in which traditional culture and knowledge are expressed, appear or are manifested, and comprise the following forms of expressions or combinations thereof:

(i) Verbal expressions, such as but not limited to stories, epics, legends, poetry, riddles and other narratives; words, signs, names, and symbols;

(ii) musical expressions, such as but not limited to songs and instrumental music;

(iii) expressions by movement, such as but not limited to dances, plays, rituals and other performances; whether or not reduced to a material form; and

(iv) tangible expressions, such as productions of art, in particular, drawings, designs, paintings (including body-painting), carvings, sculptures, pottery, terracotta, mosaic, woodwork, metal ware, jewelry, basketry, needlework, textiles, glassware, carpets, costumes; handicrafts; musical instruments; and architectural forms ... .

The Protocol provides for access and benefit sharing, prior informed consent, and exclusive rights for the

custodians/holders of traditional knowledge and traditional cultural expressions. The Protocol provides for positive protection. It clearly defines the beneficiaries of protection, exceptions and limitations, and compulsory licensing. It is important to note that this Protocol takes the format of conventional intellectual property laws but can still be used to guide national processes in drafting relevant laws. In Kenya, the draft law on the protection of traditional knowledge borrows heavily from the Swakopmund Protocol.

At the national level, the Constitution of Kenya 2010 provides a strong basis for the creation of enabling laws and policies for the protection of traditional knowledge. Article 260 of the Constitution specifically defines property to include intellectual property. In addition, the Constitution, under Article 11(1), recognizes culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and the State. Under Article 11(2), the Government of Kenya has a duty to promote all forms of national cultural expression, to recognize the role of indigenous technologies in development, and to promote the protection of intellectual property rights. In addition, the State is required to support, promote and protect the intellectual property rights of the people of Kenya under Article 40(5).

On the issues of sustainable management and use of natural resources and protection of biodiversity and genetic resources, Article 69(1) of the Constitution is very clear. These provisions provide the potential framework for drafting laws that will ensure not only the protection, but also the preservation of traditional knowledge in Kenya.

Already existing intellectual property laws may, to a certain extent, provide for the protection of traditional knowledge in Kenya. These include the Copyright Act, the Industrial Property Act, the Trademarks Act, and the Seeds and Plant Varieties Act. We shall examine each in the following paragraphs in relation to how they protect or may be used to protect traditional knowledge.

#### A. THE INDUSTRIAL PROPERTY ACT

The Industrial Property Act of 2001 provides for the protection of patents, industrial designs, and utility models. For a work or a process to qualify for patent protection, it must be new, non-obvious, and industrially applicable. Likewise, for the protection under industrial designs and utility models, the issue of novelty is key. Unfortunately, most of the traditional knowledge will fail the novelty test, as it already constitutes prior art.

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<sup>10</sup>[http://www.wipo.int/wipolex/en/treaties/text.jsp?file\\_id=201022](http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=201022).

## B. THE COPYRIGHT ACT

The Copyright Act<sup>11</sup> grants protection to works that are eligible for copyright protection, including literary, artistic and musical works. The Act provides exclusive rights to the authors/owners of copyright, subject to certain exceptions and limitations.<sup>12</sup> For works to be eligible for copyright protection, they shall be original and reduced to some tangible form. This protection is granted for a limited period of time. This would create a problem for traditional cultural expressions, as they are works that have been generated by a community and passed on from generation to generation. They would not be eligible for copyright protection on account of originality and in some instances the fixation requirement.<sup>13</sup> However, there are certain ways in which the copyright law may be used to protect traditional cultural expressions.

Section 28 of the Act provides for the protection of sound recordings. Where the traditional knowledge has been recorded in a sound recording, the sound recording shall enjoy protection under related rights, but protection does not extend to the underlying works.

The fixation of the work in a performance may also enjoy copyright protection under Section 29 of the Copyright Act, but this protection only extends to the fixed performance. The underlying work remains unprotected.

Section 49(d) of the Copyright Act requires that any person, who wishes to use expressions of folklore for commercial purposes, to obtain permission from the Attorney General. Several artists have used this provision to create performances and recordings that incorporate expressions of folklore such as lullabies, folk songs, and poetry. This helps in the documentation and preservation of traditional knowledge, a key policy objective. Several artists have taken advantage of these provisions to record folksongs and lullabies. An example is the group, Kayamba Africa, who has released several albums that contain folk songs from around the country. The sound recording is protected, but the underlying work is not.

The proposed amendments to the Copyright Act, which have recently been submitted to the Office of the Attorney General and Department of Justice for publication, seek to incorporate more provisions for the protection of traditional cultural expressions.

<sup>11</sup> Chapter 130 of the Laws of Kenya.

<sup>12</sup> Section 26 of the Copyright Act.

<sup>13</sup> Sections 22(3) and 23 of the Copyright Act.

## C. TRADEMARKS ACT

A trademark is a sign capable of distinguishing the goods or services of one enterprise from those of other enterprises; trademarks are protected by intellectual property rights.<sup>14</sup> The trademark can be a sign, a word, a combination of words and symbols, a smell, or colour. This is the closest that the conventional intellectual property system can be used to protect traditional knowledge. This is because the holder of the traditional knowledge can use a trademark to distinguish the goods or product. The protection of the trademark will last for as long as it is renewed.

In the recent case involving the **Kikoy**, a UK-based company would have succeeded in the registration of the trademark 'Kikoy' were it not for the intervention of the Kenya Intellectual Property Institute, with the help of the development charity, Traidcraft Exchange, and law firm, Watson Burton. The company subsequently dropped the trademark application.<sup>15</sup> The protection using trademarks may be applied to traditional knowledge, including traditional cultural expressions, pharmaceutical products, and cosmetics. However it is important to note that the trademark protection does not extend to the actual goods themselves, and protection will not stop a third party from using the traditional knowledge as a different product.

Communities that are custodians of traditional knowledge may use collective marks to protect their traditional knowledge. Collective marks refer to the signs, words, or a combination of both, to distinguish the goods of one group of people from those of another. These would be particularly useful for communities that are separated by geographical borders. Traditionally, some communities used symbols to brand their products; the same principle applies here.

## D. ENVIRONMENTAL MANAGEMENT AND COORDINATION ACT

This Act deals with access and benefit sharing under the Environmental Management and Coordination Regulations (2006) and was formulated by the Ministry of Environment and Natural Resources in accordance with Section 147 of the Environmental Management and Coordination Act (1999). The Act

<sup>14</sup> WIPO Trademarks  
<<http://www.wipo.int/trademarks/en/>>accessed 3 November 2014.

<sup>15</sup> M Torsen M and J Anderson, *Intellectual Property and the Safeguarding of Traditional Cultures: Legal Issues and Practical Options for Museums, Libraries and Archives* (WIPO 2010)  
<[http://www.wipo.int/edocs/pubdocs/en/tk/1023/wipo\\_pub\\_1023.pdf](http://www.wipo.int/edocs/pubdocs/en/tk/1023/wipo_pub_1023.pdf)> accessed 3 October 2014.

has articulated issues regarding access and benefit sharing.

#### **E. NATIONAL MUSEUMS AND HERITAGE ACT**

The Act provides for the identification, protection, conservation, and transmission of the cultural and natural heritage of Kenya. This Act may be extended to protect traditional knowledge as it relates to the cultural and natural heritage of Kenya. It would be limited to specific cultural goods identified by the National Museums of Kenya, which would have to work closely with the local and indigenous communities. This would also require the establishment of a database.

#### **F. GEOGRAPHICAL INDICATIONS BILL**

Geographical indications have traditionally been used to protect products such as wine and cheese. According to WIPO, a geographical indication is a sign used on goods that have a specific geographical origin and possess qualities, reputation, or characteristics that are essentially attributable to that place of origin.<sup>16</sup> A geographical indication includes the name of the place of origin of the goods. This may be extended to the protection of traditional knowledge and traditional cultural expressions that may be attributed to a particular geographical location, e.g. Kisii soapstone carvings. This also has limitations, as it will only apply to goods from a specific geographical area.

### **V. PROPOSED LEGAL FRAMEWORK**

#### **A. SUI GENERIS PROTECTION OF TRADITIONAL KNOWLEDGE?**

From the above discussion, it is clear that the existing intellectual property regime does not offer an effective solution for the protection of traditional knowledge in Kenya. The alternative is to have a *sui generis* system of protection, as set out in the African Union model law or the Swakopmund Protocol. Several countries, such as Peru, have a *sui generis* law on the protection of traditional knowledge.

The Kenya Copyright Board, in collaboration with the Kenya Industrial Property Institute, the National Museums of Kenya, the Department of Culture, the National Council of Science and Technology, and other government institutions, established a working group to draft the national law for the protection of traditional knowledge in Kenya. The task force, after

extensive consultations with the stakeholders, came up with a draft bill that was submitted to the Office of the Attorney General and Department of Justice for publication. The Bill borrows heavily from the Swakopmund Protocol.

The Bill, like the Swakopmund Protocol, defines traditional knowledge and traditional cultural expressions under Article 2. The Act also identifies the beneficiary persons, grants exclusive rights to the local community/custodians of the traditional knowledge, and provides for access and benefit sharing, administration, and enforcement of the rights.

Since it takes a rights-based approach, it also provides for exceptions and limitations as well as compulsory licensing. This, however, can be quite restrictive as it treats traditional knowledge like other intellectual property rights. The main aim of the *sui generis* type of protection is to offer protection that is unique to traditional knowledge systems, as well as to ensure that traditional knowledge is preserved, is protected against misuse and misappropriation, and allows for access and benefit sharing.

It is thus important to look at the traditional methods of protecting and preserving traditional knowledge. There were systems of customs and taboos that were used by various communities to ensure that the knowledge was preserved. For instance, in the case of the sacred forests among the Meru and Miji Kenda communities in Kenya, access to these forests was forbidden and the only persons allowed to access the same were the traditional healers and spiritual leaders. This served to preserve the genetic resources by restricting access. There were various customs, as well as customary laws, used to ensure the preservation and protection of the traditional knowledge against misappropriation and misuse.

#### **B. DEFENSIVE PROTECTION**

Defensive Protection involves the creation of databases to ensure that information is not used, e.g. to obtain patent protection without the authority of the rights holder. Examples include the Traditional Knowledge Digital Library and the documentation of traditional knowledge in other forms

##### **(i) THE TRADITIONAL KNOWLEDGE COMMONS**

The Traditional Knowledge Commons is based on the idea that there is continual movement and growth in knowledge for the benefit of those who generate it

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<sup>16</sup> WIPO Geographical Indications  
<[http://www.wipo.int/geo\\_indications/en/](http://www.wipo.int/geo_indications/en/)>  
accessed 3 November 2014.

as well as society at large.<sup>17</sup> A commons allows for the protection and preservation of traditional knowledge and, at the same time, allows for access by third parties within a certain framework, taking into account the existing cultural norms and practices. This is important, especially in areas where an individual holds the traditional knowledge and there is a risk of the knowledge disappearing once the person dies.

This Traditional Knowledge Commons is also a good basis for defensive protection of traditional knowledge in Kenya, and is already considered in the National Policy on Traditional Knowledge and Genetic Resources.

#### (ii) THE TRADITIONAL KNOWLEDGE DIGITAL LIBRARY

Another way of guarding against misappropriation by third parties is to ensure that the traditional knowledge and traditional cultural expressions are well documented. A good example is the Traditional Knowledge Digital Library in India.<sup>18</sup> India has successfully set up and uses the library to ensure that patents are not granted for works that have been produced from the use of traditional knowledge. The digital documentation of such information provides an avenue for dissemination, as well as cross-checking any applications that may be based on traditional knowledge, thus eliminating the grant of patents which will not fulfil the requirement of novelty.

The Kenya Copyright Board, in collaboration with the Kenya Industrial Institute and the National Museums of Kenya, are in the process of establishing a Traditional Knowledge Digital Library in Kenya. This will not only provide defensive protection especially in the area of patents, but will also help to preserve the knowledge and provide for access and equitable benefit sharing, where the knowledge is used after obtaining prior informed consent.

#### (iii) OTHER FORMS OF DOCUMENTATION

The documentation of traditional knowledge is also important, as illustrated in the recent project on the documentation and recording of Maasai Culture undertaken by WIPO and the Maasai Community in Laikipia, Kenya. The local community was provided with the training and equipment to record the

Maasai culture and archive it.<sup>19</sup> This ensures that knowledge, initially handed down by oral tradition, is documented and preserved, eliminating the risk of the knowledge holder taking it to the grave.

The Traditional Knowledge Digital Library and the documentation of culture all require a sound legal regime that (i) controls access to works and ensures that prior informed consent is obtained where necessary; and (ii) provides for equitable benefit sharing. Otherwise, the proposed *sui generis* system may be mainstreamed into existing intellectual property laws especially as it relates to patents.

## VI. SUMMARY AND CONCLUSION

The main objective of providing protection for traditional knowledge is to guard against misappropriation and misuse by third parties and to preserve the knowledge. In addition, the protection seeks to ensure that where access has been granted, there is prior informed consent and where the knowledge has been used, there is equitable benefit sharing. The local communities and individuals who are custodians of this knowledge should benefit from the commercial exploitation of the same.

In the absence of a specific legal regime in Kenya, the rights holders can only rely on existing laws, which do not offer effective protection. Although the Kenya's Constitution specifically provides that the government shall ensure that traditional knowledge is protected, there is still a need to have specific laws providing this protection. The draft Traditional Knowledge Bill offers a good basis, but it requires further work to ensure that it provides effective legal protection.

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<sup>18</sup> Traditional Knowledge Digital Library <<http://www.tkdlib.org/tkdlib/langdefault/common/Home.asp?GL=Eng>> accessed 16 October 2014.

<sup>19</sup> WIPO Digitizing Traditional Culture in Kenya <[http://www.wipo.int/portal/en/wipo\\_univ\\_maasai.html](http://www.wipo.int/portal/en/wipo_univ_maasai.html)> accessed 3 November 2014.

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