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A Comparative Assessment of South Africa's Proposed Legislation to Protect Traditional Knowledge

by

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Summary

The purpose of this study entitled, *A Comparative Assessment of South Africa's Proposed Legislation to Protect Traditional Knowledge*, is to examine how the protection intended to be afforded to traditional knowledge, by the Intellectual Property Laws Amendment Act 28 of 2013 (IPLAA) compares with the protection proposed by the Protection, Promotion, Development and Management of Indigenous Knowledge Systems Bill (IKS Bill). Furthermore, the dissertation aims to investigate how either of these proposed systems compare with established international and foreign initiatives. It is accepted for the purpose of this dissertation that the protection of traditional knowledge is advantageous, fair and reasonable in the context of South Africa today.

This dissertation seeks to analyse the most fair and appropriate way to protect traditional knowledge within South Africa and to determine the suitability of the IPLAA and the IKS Bill, and whether both pieces of legislation are necessary. There will also be an examination of international and foreign initiatives in order to gauge global standards and assess where South Africa lies in relation to such initiatives. Upon the findings of its analysis, this study aims to make recommendations and suggestions to improve the protection of traditional knowledge in South Africa.

Chapter 1: Introduction

1.1 Introduction:

This study aims firstly to compare the protection intended to be afforded to traditional knowledge by the IPLAA,¹ to the protection proposed by the IKS Bill,² in order to analyse which of these offers the most fair and appropriate way to protect traditional knowledge in South Africa. Secondly, the study will consider international standards and two foreign laws, in order to investigate whether either of the proposed systems is on par with international and foreign standards or whether improvements should be made to either of them. This study will also attempt to examine whether there is a need for both pieces of legislation to exist.

It is accepted for the purpose of this dissertation that the protection of traditional knowledge is advantageous, fair and reasonable in the context of South Africa today; therefore, the advantages and disadvantages of providing protection to traditional knowledge will not be considered.

1.2 A background on traditional knowledge

Initially, it is important to understand what traditional knowledge is; the terms “traditional knowledge”, “indigenous knowledge” and “indigenous cultural expressions” are often used interchangeably. Generally speaking, indigenous knowledge refers to traditional knowledge of indigenous people, and may be thought of as a category of traditional knowledge.³ For the purpose of this study these phrases are used interchangeably.

There is no global definition of traditional knowledge. However, according to the World Intellectual Property Organisation (WIPO), traditional knowledge is, “knowledge, know-how, skills and practices that are developed, sustained and

¹ Intellectual Property Laws Amendment Act, 28 of 2013 (hereinafter referred to as the "IPLAA").

² Protection, Promotion, Development and Management of Indigenous Knowledge Systems Bill (hereinafter referred to as the "IKS Bill").

³ Van der Merwe et al, “*Law of Intellectual Property in South Africa*” (2nd edition, 2016), Pg. 548 (hereinafter referred to as “Law of Intellectual Property in South Africa”).

passed on from generation to generation within a community, often forming part of its cultural or spiritual identity.”⁴ Traditional knowledge is a broad term, used to describe various knowledge systems held by traditional communities in an unsystematic way.⁵

1.3 The interface between traditional knowledge and intellectual property law

Traditional knowledge exhibits many of the characteristics of intellectual property, which is why intellectual property law has been proposed as a means to protect it within South Africa and elsewhere around the world. Although there are certain types or elements of traditional knowledge that may be protected by intellectual property law, there are also certain types of traditional knowledge which may not be protected by such law. Herein arise the difficulties.⁶ Intellectual Property Law is not perfectly suited to protect traditional knowledge. As a result, a large portion of the legal community is of the opinion that the current intellectual property law system is in itself inadequate to provide a comprehensive protection to traditional knowledge. Intellectual property law in its current state is incapable of catering to the autonomous nature of traditional knowledge.⁷

1.4 An understanding of the research problem

It is widely accepted that traditional knowledge should be protected. However, there is much debate surrounding the manner of protection.⁸ Although protecting

⁴ World Intellectual Property Organisation, <http://www.wipo.int/tk/en/tk/>, date accessed: 6 April 2018.

⁵ Blanco E and Razzaque J, "*Globalisation and Natural Resources Law: Challenges, Key Issues and Perspectives*" (2011), UK: Edward Elgar Publishing.

⁶ Cross J.T, "*Property Rights and Traditional Knowledge*", Pg. 12 (hereinafter referred to as "Property Rights and Traditional Knowledge").

⁷ Masango C, "*Indigenous Traditional Knowledge Protection: Prospects in South Africa's intellectual property framework*" (2010), South African Journal of Libraries and Information, Pg. 74 (hereinafter referred to as "Masango Traditional Knowledge Protection").

⁸ Van der Merwe A, "*Can Traditional Knowledge Be Effectively Covered Under A Single Umbrella?*" (Volume 13, No. 4, 2010), Potchefstroom Electronic Law Journal, Pg. 2 (hereinafter referred to as "Can Traditional Knowledge Be Effectively Covered Under A Single Umbrella?").

traditional knowledge with intellectual property law may prevent others from exploiting it for financial gain, intellectual property law has been widely criticised as a protective measure due to its limitations in not being able to protect all forms of traditional knowledge.⁹

The foundation of intellectual property law is individual property rights. Contrastingly, at the core of traditional knowledge are the concepts of collective creation and ownership.¹⁰ This fundamental difference may be viewed as the beginning of many more.

There are currently two proposed systems aimed at protecting traditional knowledge in South Africa, namely the IPLAA, which will come into operation on a date which is to be set by the President by way of proclamation in the Government Gazette. The IPLAA aims to incorporate the protection of traditional knowledge into existing intellectual property law legislation. The second proposed system aimed at protecting traditional knowledge in the Republic is the IKS Bill, which seeks to create a type of sui generis law, tailored to the needs of traditional knowledge. On 13 September 2018, the National Assembly approved the IKS Bill, the Bill is awaiting Presidential assent before being passed into law.¹¹

Pertinent questions remain as to how traditional knowledge may be most appropriately protected. Is it through existing, adapted or sui generis legislation? This study aims to address these questions.

⁹ Mpanza X, "*Protecting Traditional Knowledge*" <http://www.saflii.org/za/journals/DEREBUS/2014/110.pdf> (hereinafter referred to as "Protecting Traditional Knowledge").

¹⁰ Kumar N.V, "*Protection of Traditional Knowledge: International and National Initiatives and Possible Ways Ahead*", <https://ssrn.com/abstract=2012724>, date accessed: 1 August 2018 (hereinafter referred to as, "Protection of Traditional Knowledge: International and National Initiatives and Possible Ways Ahead").

¹¹ Protection of indigenous knowledge comes under spotlight at international conference <https://www.cnbcfrica.com/apo/2018/09/20/protection-of-indigenous-knowledge-comes-under-spotlight-at-international-conference/>, date accessed: 20 September 2018.

Chapter 2: An Analysis of the Intellectual Property Laws Amendment Act

2.1 An introduction to the IPLAA:

The IPLAA aims to incorporate the protection of certain forms of traditional knowledge into existing legislation by amending legislation such as the Copyright Act No. 98 of 1978, the Trade Marks Act No. 194 of 1993, the Designs Act No. 195 of 1993 as well as the Performer's Protection Act No. 11 of 1967.¹²

2.2 The purpose of the IPLAA:

The IPLAA aims to provide protection for traditional knowledge by recognising it as a type of intellectual property.¹³ The IPLAA comprises 15 sections which seek to protect certain forms of indigenous knowledge and allow for their commercialisation or licensing as species of intellectual property. The IPLAA is said to be a "guide for the recognition, understanding, integration and promotion of South Africa's wealth of indigenous knowledge resources"¹⁴ and is to be implemented by the Companies and Intellectual Property Commission (CIPC), when the Act comes in to force.

2.3 Terms of protection

It has been previously mentioned that the IPLAA amends four intellectual property law statutes. Each of these statutes is amended to recognise traditional knowledge as a form of intellectual property. There are therefore essentially four different terms of protection provided by the IPLAA, three of which will be discussed.

The IPLAA and copyright

Section 28B of the IPLAA states that in order for traditional works to be eligible for copyright they must be reduced to a material form or be capable of substantiation,

¹² Can Traditional Knowledge Be Effectively Covered Under A Single Umbrella? (see note 8 above).

¹³ World Intellectual Property Organisation, <http://www.wipo.int/wipolex/en/details.jsp?id=13714>, date accessed: 27 August 2018 (hereinafter referred to as "WIPO Website").

¹⁴ Protecting Traditional Knowledge (see note 9 above).

from the collective memory of the associated traditional community.¹⁵ Copyright will only be conferred on a traditional work if such work is a derivative indigenous work and was developed on or after the date the IPLAA commenced, or if such traditional work is an indigenous work (the same standard applies to trade marks and designs).¹⁶ No right in a derivative indigenous work, which is provided for in the IPLAA, will be eligible for registration unless: prior informed consent is obtained from the associated indigenous community or the relevant authorities; there has been disclosure of the indigenous knowledge involved to the CIPC and a benefit sharing agreement must have been concluded between the applicant and the relevant indigenous community or authority involved (the same standards apply to the registration of trade marks and designs).¹⁷ Section 28F of the IPLAA deals with the term of protection conferred on traditional works. Copyright protection will vest in derivative indigenous works for 50 years from the end of the year in which the work was either first communicated to the public with the permission of the author(s) or from the date of the death of the author(s), whichever is later. If the traditional work is an indigenous work then copyright will perpetually subsist in the work.¹⁸

The IPLAA and trade marks

Section 43(B) of the IPLAA states that a traditional term or expression will be capable of constituting a collective trade mark, certification mark or a geographical indication. Furthermore, in order to be registered as a certification or a collective mark, the traditional term or expression in question must be able to meet the “capable of distinguishing” criterion which is applied to ordinary trademarks.¹⁹

¹⁵ IPLAA (see note 1 above).

¹⁶ IPLAA (see note 1 above).

¹⁷ IPLAA (see note 1 above).

¹⁸ IPLAA (see note 1 above).

¹⁹ Van der Merwe A, “*The old and the new: A concise overview of the Intellectual Property Laws Amendment Act*”, <http://www.derebus.org.za/old-new-concise-overview-intellectual-property-laws-amendment-act/>, date accessed: 29 August 2018 (hereinafter referred to as “The old and the new”).

Section 43E provides for the duration of trade mark protection. It states that derivative indigenous terms or expressions and geographical indications will be protected for a period of ten years. It should be noted that protection may be renewed.²⁰ Indigenous terms or expressions and geographical indicators will however be protected perpetually.²¹

The IPLAA and designs

Section 53B provides that derivative indigenous designs may be registered if they are new.²² New, meaning they do not form part of the state of the art and have features which are derived from an indigenous design, belonging to an indigenous community.²³ Furthermore where derivative indigenous designs are subject to release dates, an application for registration should be made within two years of the release date.²⁴

Section 53E of the IPLAA deals with the duration of protection of derivative designs. It is stated that aesthetic derivative indigenous designs will be protected for a maximum of fifteen years and functional derivative designs will be protected for ten years. Indigenous designs, on the other hand will be protected perpetually.²⁵

2.4 Mechanisms, which assist in the functioning of the IPLAA

The IPLAA, when it is enacted, will establish a National Council in respect of indigenous knowledge, a National Database for the recording of indigenous knowledge, as well as a National Trust and Trust Fund for purposes of indigenous knowledge.²⁶ The National Council, National Database and National Trust Fund

²⁰ IPLAA (see note 1 above).

²¹ IPLAA (see note 1 above).

²² IPLAA (see note 1 above).

²³ IPLAA (see note 1 above).

²⁴ IPLAA (see note 1 above).

²⁵ IPLAA (see note 1 above).

²⁶ Companies and Intellectual Property Commission, <http://www.cipc.co.za/index.php/trade-marks-patents-designs-copyright/indigenous-knowledge-systems/>, date accessed: 27 August 2018 (hereinafter referred to as "Companies and Intellectual Property Commission").

will all aid the IPLAA in its undertaking to protect traditional knowledge in South Africa.

2.5 The National Council in respect of Indigenous Knowledge

The IPLAA states that the Minister of Trade and Industry is to establish a National Council for Indigenous Knowledge and the CIPC is to be responsible for the administration of said Council.²⁷ The Minister will appoint no less than 15 members to the Council, and will also appoint a single chairperson. The Council should represent traditional communities of different cultures within South Africa and should always have a minimum of two members with knowledge and expertise of traditional cultures and the values of traditional communities, traditional artistic works, literary works, musical works, performing arts and traditional law.²⁸

The National Council's functions are mostly of an advisory nature. The functions include, advising the Minister of Trade and Industry on issues relating to indigenous cultural expressions and knowledge.²⁹ Advising the registrars of copyright, designs, trade marks and patents on issues pertaining to the registration of indigenous cultural expressions or knowledge.³⁰ Providing advice to the Minister on topics dealing with performances of traditional works, as well as advising on the integrity of a database of intellectual property, which relates to indigenous knowledge and cultural expressions.³¹ The National Council will also perform other tasks which are stipulated in the Patents Act, Designs Act, Performer's Protection Act and the Trade Marks Act. The council will also have the authority to refer any disputes that it receives for dispute resolution.³²

2.6 The National Database for the Recording of Indigenous Knowledge

Section 4 of the IPLAA, inserts Chapter 2A into the Copyright Act which contains Section 28C. This section provides for the establishment of a National Database

²⁷ Companies and Intellectual Property Commission (see note 26 above).

²⁸ Companies and Intellectual Property Commission (see note 26 above).

²⁹ Companies and Intellectual Property Commission (see note 26 above).

³⁰ Companies and Intellectual Property Commission (see note 26 above).

³¹ Companies and Intellectual Property Commission (see note 26 above).

³² Companies and Intellectual Property Commission (see note 26 above).

for the recording of indigenous works. The purpose of the National Database is to allow access to information which pertains to indigenous intellectual property. Since the provision for the National Database is found within the Copyright Act, it follows that such indigenous databases will be kept in the offices of the registrars of copyright and these databases will be kept in electronic format.³³ It is important to note that the provisions of Section 28C will also apply to the national databases which are related to designs and trade marks.³⁴ The databases will contain different sections in order to record information on the various different types of traditional cultural expressions and knowledge. The CIPC will have the authority to decide what recorded information will be treated as confidential unless a community protocol (as explained below) states that certain information is sacred and must therefore be treated as confidential.³⁵

There will be a registration of traditional works in order to show that the owned and identified traditional works belong to a specific traditional community. It should be noted that this recording of traditional cultural expressions or traditional knowledge will not create any rights other than those which are provided for by the Performer's Protection Act, the Trade Marks Act, The Designs Act and the Copyright Act.³⁶ Any person who, is the author of a traditional work or is authorised to act on behalf of the author or has been appointed by the Minister to act on behalf of a traditional community which no longer exists, may request to have a traditional cultural expression or traditional knowledge recorded.³⁷ However, if the applicant requesting that a traditional cultural expression or traditional knowledge be recorded is an existing traditional community then the request for a recording must contain a community protocol.³⁸

³³ Companies and Intellectual Property Commission (see note 26 above).

³⁴ Companies and Intellectual Property Commission (see note 26 above).

³⁵ Companies and Intellectual Property Commission (see note 26 above).

³⁶ Companies and Intellectual Property Commission (see note 26 above).

³⁷ Companies and Intellectual Property Commission (see note 26 above).

³⁸ Companies and Intellectual Property Commission (see note 26 above).

A community protocol is a procedure developed by a traditional community. The protocol must describe the structure of the particular traditional community.³⁹ The protocol must also describe the claim the traditional community has to the traditional cultural expression or traditional knowledge in question.⁴⁰ The community protocol should also provide procedures for prospective users of the traditional cultural expression, or traditional knowledge so that prospective users acquire prior consent of the traditional community and negotiate upon the terms of the use.⁴¹ Any person may oppose a recording, as long as it is done within three months from the date of publication of the request for recording.

2.7 The National Trust and Trust Fund for Indigenous Knowledge

The CIPC is also responsible for the administration of the National Trust for Indigenous Knowledge.⁴² The purpose of the Trust is to allow for the facilitation of commercialisation of traditional knowledge and to ensure that the income generated by such commercialisation is used towards the benefit of the traditional communities.⁴³ The National Trust will also establish a Fund for the purpose of indigenous knowledge and the Minister will appoint a maximum of five trustees. The responsibilities of the Trust will include: the commercialisation and exploitation of traditional cultural expressions or knowledge in order to generate income; facilitating the development of traditional communities particularly with regards to their understanding of intellectual property and their associated rights; helping traditional communities to apply the IPLAA and other legislation which deals with traditional cultural expressions and knowledge.⁴⁴

2.8 Criticisms of the Intellectual Property Laws Amendment Act

The IPLAA continues to be the subject of scrutiny within the legal community. This scrutiny is grounded in the fact that the IPLAA attempts to protect manifestations

³⁹ Companies and Intellectual Property Commission (see note 26 above).

⁴⁰ Companies and Intellectual Property Commission (see note 26 above).

⁴¹ Companies and Intellectual Property Commission (see note 26 above).

⁴² Companies and Intellectual Property Commission (see note 26 above).

⁴³ Companies and Intellectual Property Commission (see note 26 above).

⁴⁴ Companies and Intellectual Property Commission (see note 26 above).

of traditional knowledge or cultural expressions as new forms of intellectual property.⁴⁵ This type of protection means that new forms of intellectual property will be inserted into already existing and well-established intellectual property law statutes.⁴⁶ It has been widely stated that these “new forms” of intellectual property do not belong within the existing intellectual property regime and that they are ill suited to it.⁴⁷ Many legal professionals in South Africa are of the opinion that amending existing intellectual property law statutes cannot attain the type of protection that the IPLAA seeks to achieve - this is largely because traditional knowledge does not always meet the requirements of the current Intellectual Property statutes and amending existing legislation to suit the needs of traditional law is viewed by many as adulterating intellectual property law.⁴⁸

The IPLAA amends four pieces of intellectual property law legislation individually. There are particular amendments made to the Copyright Act that are common and applicable to the other Acts. This lethargic attempt to amend the Acts creates difficult and tedious reading which requires constant referral between the Acts.

Intellectual property is founded on the concept of exclusive property rights.⁴⁹ As mentioned, this stands in stark contrast with the collective nature of traditional knowledge, which is often developed by a community. Traditional knowledge and traditional cultural expressions have been created to last perpetually whereas intellectual property rights generally have a limited lifetime.⁵⁰ Once again the protection afforded by intellectual property law does not entirely match the needs of protecting traditional knowledge, as such knowledge would not be perpetually protected by intellectual property rights.

There have also been criticisms of the Trust Fund which the IPLAA establishes. This fund may be viewed as a limitation since any revenue which is generated

⁴⁵ De Rebus, <http://www.derebus.org.za/old-new-concise-overview-intellectual-property-laws-amendment-act/>, date accessed: 29 August 2018.

⁴⁶ The old and the new (see note 19 above).

⁴⁷ Protecting Traditional Knowledge (see note 9 above).

⁴⁸ The old and the new (see note 19 above).

⁴⁹ Property Rights and Traditional Knowledge (see note 6 above).

⁵⁰ Property Rights and Traditional Knowledge (see note 6 above).

from the commercialisation of traditional knowledge is to be paid into the fund and not to the traditional communities themselves. Although the income paid into the fund is said to be used for the benefit of the communities, the question arises as to why the income generated is not paid directly to the traditional community itself?⁵¹ Furthermore, the IPLAA states that if a member of a traditional community generates any commercial value from traditional knowledge or a traditional work, that member must still pay a royalty into the fund.⁵² This provision essentially means that the traditional community in question could potentially be deprived of a part of their income for no clear benefit.

2.9 Conclusion

The IPLAA is regarded as a daring and complicated Act by many intellectual property law attorneys in South Africa.⁵³ Many jurists believe that implementing the IPLAA will be an arduous task as many of its provisions remain puzzling to attorneys. Courts continue to struggle with its provisions and the new forms of intellectual property which the Act creates.⁵⁴ The implementation of the IPLAA will require a great administrative effort as regulations for the National Database, National Trust and Fund and all the related systems and bodies are required.⁵⁵ The intellectual property law community has expressed its concerns in respect of the IPLAA and most remain in favour of using a sui generis approach to protect traditional knowledge as opposed to an approach based on intellectual property law.⁵⁶

⁵¹ Section 16, 40D (4) (b) of the Intellectual Property Amendment Bill 2010.

⁵² Section 10, 19C (3) of the Intellectual Property Amendment Bill 2010.

⁵³ The old and the new (see note 19 above).

⁵⁴ The old and the new (see note 19 above).

⁵⁵ The old and the new (see note 19 above).

⁵⁶ The old and the new (see note 9 above).

Chapter 3: An Analysis of the Protection, Promotion Development and Management of Indigenous Knowledge Systems Bill

3.1 An Introduction to the IKS Bill

The IKS Bill is a development of the Department of Science and Technology. Like the IPLAA, the IKS Bill deals with traditional knowledge and envisages a recordable system with the aim of preserving traditional knowledge. In similarity to the IPLAA, the IKS Bill has the intention to protect and promote indigenous knowledge within South Africa.⁵⁷

3.2 The purpose of the IKS Bill

The IKS Bill aims to protect and promote indigenous knowledge by introducing a sui generis approach to the legislative protection and commercialisation of indigenous knowledge systems.⁵⁸ According to intellectual property law, a sui generis approach means: an approach falling outside of the conventional trade mark, patent, design and copyright protections.⁵⁹ This proposed system includes the registration of indigenous knowledge, the establishment of the National Indigenous Knowledge Systems Office (NIKSO), as well as an Advisory Panel to NIKSO.⁶⁰

NIKSO would be an office which assists in the functioning of the IKS Bill, its responsibilities would include maintaining a register of indigenous knowledge, establishing a registration office, as well as being responsible for the accreditation and certification of indigenous knowledge practitioners who may be recorded in the register kept by NIKSO. NIKSO will also be responsible for the registration of

⁵⁷ Law Society of South Africa Annual Report 2016/2017, page 48.

⁵⁸ Van der Merwe, A "*Comments on the Protection, Promotion, Development and Management of the Indigenous Knowledge Systems Bill*", <https://www.golegal.co.za/iks-bill-indigenous-knowledge-systems/>, date accessed: 27 August 2018 (hereinafter referred to as "*Comments on the Protection, Promotion, Development and Management of the Indigenous Knowledge Systems*").

⁵⁹ Schuler L, "*Modern Age Protection: Protecting Indigenous Knowledge Through Intellectual Property Law*", (2013), Michigan State International Law Review, Pg. 755.

⁶⁰ Comments on the Protection, Promotion, Development and Management of the Indigenous Knowledge Systems (see note 58 above).

indigenous knowledge on behalf of indigenous knowledge holders.⁶¹ NIKSO may also make itself available to assist indigenous communities who require help with commercialising their indigenous knowledge.⁶² The IKS Bill will also assist in the facilitation of indigenous knowledge-based innovation.⁶³

The objectives of the IKS Bill are to protect the knowledge of traditional communities against misappropriation and unauthorised use. The Bill additionally seeks to promote public awareness and understanding of traditional knowledge.⁶⁴ The IKS Bill strives to grow and strengthen the potential of indigenous communities. It seeks to promote the commercial use of traditional knowledge in the creation of new products, services and processes while also trying to regulate the equitable distribution of benefits which are derived from the use of traditional knowledge.⁶⁵

3.3 Terms of protection

The IKS Bill seeks to protect indigenous knowledge whether it is cultural or functional. This includes medical, agricultural and scientific practices.⁶⁶ In order for traditional knowledge to be able to be protected in terms of the IKS Bill, such knowledge must have been passed from generation to generation within

⁶¹ Comments on the Protection, Promotion, Development and Management of the Indigenous Knowledge Systems (see note 58 above).

⁶² Comments on the Protection, Promotion, Development and Management of the Indigenous Knowledge Systems (see note 58 above).

⁶³ New TK Bill – South Africa, <https://afro-ip.blogspot.com/2016/04/new-tk-bill-south-africa.html>, date accessed: 30 August 2018.

⁶⁴ Ouma M, "*Why and How to Protect Traditional Knowledge at the International Level*", http://www.wipo.int/edocs/mdocs/tk/en/wipo_ipk_ge_2_16/wipo_ipk_ge_2_16_presentation_11ouma.pdf, date accessed: 30 August 2018 (hereinafter referred to as "Why and How to Protect Traditional Knowledge").

⁶⁵ The Anton Mostert Chair of Intellectual Property, "*A Better Second Attempt – Protection of Indigenous Knowledge*", <http://blogs.sun.ac.za/iplaw/2015/04/08/a-better-second-attempt-protection-of-indigenous-knowledge/>, date accessed: 29 August 2018 (hereinafter referred to as "A Better Second Attempt").

⁶⁶ IKS Bill (see note 2 above).

indigenous communities and must have been created within such community.⁶⁷ Furthermore, the indigenous knowledge in question must be connected to the cultural and social identity of the community.⁶⁸ The IKS Bill confers exclusive rights upon the holders of indigenous knowledge. These rights consist of the following, the rights to benefits which arise from the commercial use and exploitation of indigenous knowledge; the right to be acknowledged as the source from which such knowledge originated and to also prevent any unauthorised use of indigenous knowledge.⁶⁹ The duration of protection afforded by the IKS Bill to traditional knowledge will continue for as long as the indigenous knowledge in question meets the criteria of eligibility previously stated.⁷⁰

3.4 Criticisms of IKS Bill:

Many legal professionals view the IKS Bill as a step in the right direction. However, the Bill still needs much refinement in order to be effective in providing a specialised protection of traditional knowledge.

The Bill should aim to provide a coherent registration system and definitive criteria which establish what subject matter is eligible for protection.⁷¹

The IKS Bill remains ambiguous in its stance on registration. Clause 33 of the Bill allows indigenous knowledge holders twelve months to register their indigenous knowledge but does not express whether registration is a condition for protection in terms of the Bill.⁷² There ought to be clarity with regards to ownership, and an explanation as to how competing claims to ownership will be dealt with. Additionally, there should be a well-established dispute resolution system.⁷³ The

⁶⁷ IKS Bill (see note 2 above).

⁶⁸ IKS Bill (see note 2 above).

⁶⁹ IKS Bill (see note 2 above).

⁷⁰ IKS Bill (see note 2 above).

⁷¹ A Better Second Attempt (see note 65 above).

⁷² A Better Second Attempt (see note 65 above).

⁷³ A Better Second Attempt (see note 65 above).

IKS Bill also fails to sufficiently deal with the rights of people who have previously made use of the now protected traditional knowledge.⁷⁴

There is little clarity as to how the IKS Bill will function alongside the IPLAA. Many legal professionals who are concerned about preserving the integrity of intellectual property law hoped that the proposed IKS Bill would lead to the IPLAA being repealed. Perhaps at the very least that the proposed IKS Bill would result in the IPLAA never being brought into effect.⁷⁵ However, it should be noted that although the IPLAA is not yet in force, the IKS Bill has not resulted in its nullification. Furthermore, clause 32 of the IKS Bill essentially states that the provisions of the Bill will be eclipsed by any rights which are conferred by another statute regarding intellectual property. The problem here is in the fact that the IPLAA seeks to protect traditional cultural expressions or traditional knowledge as intellectual property.⁷⁶ The issue is, if conflict were to arise between provisions of the IPLAA and the IKS Bill, the IPLAA would prevail unless the IKS Bill provides for the repeal of the IPLAA.⁷⁷

3.5 Conclusion

The sui generis approach which the IKS Bill aims to establish is noted as an improvement. It is considered to be a positive change from the intellectual property law-based protection of the IPLAA.⁷⁸ It is established in the criticisms of the IKS Bill that there are issues which must be addressed before the Bill can be enacted into law. The IKS Bill remains the more sensible approach and is viewed by most jurists as the better suited approach between the IPLAA and itself. Chapters 2 and

⁷⁴ The Anton Mostert Chair of Intellectual Property, "*the Protection, Promotion Development and Management of Indigenous Knowledge Systems Bill, 2016: Has the DST Lost its Resolve?*" <http://blogs.sun.ac.za/iplaw/2016/04/18/the-protection-promotion-development-and-management-of-indigenous-knowledge-systems-bill-2016-has-the-dst-lost-its-resolve/>, date accessed: 29 August 2018 (hereinafter referred to as "Has the DST Lost its Resolve?").

⁷⁵ Has the DST Lost its Resolve? (see note 74 above).

⁷⁶ Has the DST Lost its Resolve? (see note 74 above).

⁷⁶ Has the DST Lost its Resolve? (see note 74 above).

⁷⁷ Has the DST Lost its Resolve? (see note 74 above).

⁷⁸ Schonwetter T, "*Protection, Promotion, Development and Management of Indigenous Knowledge Systems Bill*", General Notice 243 of 2015.

3 should be read in conjunction with chapter 8 which will provide a contrast and comparison between aspects of the IPLAA and the IKS Bill.

Chapter 4: A Brief Overview of International Initiatives to Protect Traditional Knowledge

4.1 International standards aimed at protecting traditional knowledge

Traditional knowledge has been used by local and indigenous groups for centuries. The scope of traditional knowledge is wide and includes a plethora of things which include but is not limited to: agricultural knowledge, medicinal knowledge, folklore and traditional designs.⁷⁹ There has been an increase in the use and commercialisation of traditional knowledge around the world.

Globalisation means that there needs to be an international standard for the protection of traditional knowledge in order to ensure that the custodians of traditional knowledge enjoy an adequate level of protection throughout the world. Such international standard need only provide a minimum level of protection for traditional knowledge throughout the world, which respective national laws may use as a foundation to build and expand upon. These “minimum” standards would also help to create certainty amongst the different national laws.⁸⁰ National laws play an important part in the protection of traditional knowledge. However, they are of course limited to a national level and are therefore territorial. Being territorial means that national laws cannot protect traditional knowledge outside the borders of the country in which they are enforced. This is where the international protection of traditional knowledge will be vital. A global protection mechanism would ensure that the protection of traditional knowledge is multilateral and not fragmented.⁸¹

There are many international discussions and negotiations taking place amongst various international organisations.⁸² These international initiatives have the aim of

⁷⁹ Ouma M, "*Traditional knowledge: the challenges facing international lawmakers*", http://www.wipo.int/wipo_magazine/en/2017/01/article_0003.html, date accessed: 30 August (hereinafter referred to as “The challenges facing international lawmakers”).

⁸⁰ The challenges facing international lawmakers (see note 79 above).

⁸¹ Why and How to Protect Traditional Knowledge (see note 64 above).

⁸² Muller M, "*Protecting Shared Traditional Knowledge: Issues, Challenges and Options*" (Issue Paper No. 39, 2013) ICTSD Programme on Innovation, Technology and Intellectual Property.

finding ways in which to preserve, promote and protect traditional knowledge at an international level. This study will look at a select few of these initiatives.

4.2 The Convention on Biological Diversity

In 1992 the United Nations held a conference called the Earth Summit in Rio de Janeiro. From the discussions of this conference stemmed the Convention on Biodiversity (CBD).⁸³ The CBD provides for, amongst other things, the recognition of local and indigenous knowledge. Article 8(j) of the CBD is relevant as it acknowledges traditional knowledge and its need to be globally protected. Article 8(j) of the CBD states that, “each contracting party shall as far as possible and as appropriate, subject to its national legislation respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biodiversity and promote the wider application, with the approval and involvement of the holders, of such knowledge, innovations and practices and encourage the equitable sharing of benefits arising from utilisation of such knowledge, innovations and practices”.⁸⁴ The CBD is subject to criticisms and it has been noted that it is not entirely perfect. Article 8(j) is subject to the criticism that it does not expressly deal with the protection of traditional knowledge, but rather it ambiguously asks parties to it to “respect, preserve and maintain” traditional knowledge.⁸⁵

Although the CBD does not create guaranteed rights for traditional communities, it is thought to be one of the most significant international instruments with regards to the protection of traditional knowledge, as it was the first international instrument to give recognition to traditional knowledge and call for its protection.⁸⁶

⁸³ Protection of Traditional Knowledge: International and National Initiatives and Possible Ways Ahead (see note 10 above).

⁸⁴ Convention on Biological Diversity, 1992.

⁸⁵ Protection of Traditional Knowledge: International and National Initiatives and Possible Ways Ahead (see note 10 above).

⁸⁶ Protection of Traditional Knowledge: International and National Initiatives and Possible Ways Ahead (see note 10 above).

4.3 The World Intellectual Property Organisation

The World Intellectual Property Organisation (WIPO) administers multiple international intellectual property treaties, however there is not yet a treaty, which focuses solely on addressing the issue of protecting, preserving and promoting traditional knowledge.⁸⁷ WIPO deals with intellectual property on an international level and by now it is clear that traditional knowledge does not meet all of the requirements to be protected by established intellectual property systems. Thus, trying to create an international protective measure based on intellectual property systems proves to be a difficult task for WIPO.⁸⁸ In light of the challenges, which WIPO is facing in creating a regime for the protection of traditional knowledge by using intellectual property systems, WIPO is choosing to focus on establishing a sui generis system of protection. This will be tailored to the needs of traditional knowledge.⁸⁹

4.4 The World Intellectual Property Organisation and the Intergovernmental Committee on Intellectual Property Genetic Resources and Traditional Knowledge

The WIPO General Assembly established the Intergovernmental Committee on Intellectual Property Genetic Resources and Traditional Knowledge (IGC) in 2000. The IGC was created as a forum for discussions pertaining to the protection of traditional knowledge, amongst other things.⁹⁰ The IGC functions as an international forum that allows for the debate of international policies and has an integral role in developing legal systems and tools aimed at protecting traditional knowledge.⁹¹ The IGC has been central to the protection of traditional knowledge. It has led to many positive outcomes, one of which includes the development of a toolkit which assists in the management of intellectual property and the

⁸⁷ The challenges facing international lawmakers (see note 79 above).

⁸⁸ The challenges facing international lawmakers (see note 79 above).

⁸⁹ The challenges facing international lawmakers (see note 79 above).

⁹⁰ Protection of Traditional Knowledge: International and National Initiatives and Possible Ways Ahead (see note 10 above).

⁹¹ Protection of Traditional Knowledge: International and National Initiatives and Possible Ways Ahead (see note 10 above).

documentation of traditional knowledge.⁹² The IGC aims to create an international understanding of the principles which they feel should lead the way in the protection of traditional knowledge. The IGC is still currently working on developing an appropriate international mechanism for the protection of traditional knowledge.⁹³ The IGC mandate for 2018 / 2019 essentially entails that the IGC must, among other things, “continue to expedite its work with the objective of reaching an agreement on an international legal instrument, without prejudging the nature of outcomes relating to intellectual property which will ensure the balanced and effective protection of genetic resources, traditional knowledge and traditional cultural expressions and build on the existing work carried out by the Committee, including text-based negotiations, with a primary focus on narrowing existing gaps and reaching a common understanding on core issues”.⁹⁴

There have been numerous proposals at the IGC negotiations about the way in which to protect traditional knowledge internationally. There have been several suggestions ranging from a single binding international instrument to the mere coordination of national legislations, however the IGC are yet to find practical solutions to this issue.⁹⁵ The work of the IGC continues to develop and improve the relationship between the current intellectual property system and traditional knowledge holders and this is one of the many reasons that the work of the IGC is critical to the international protection of traditional knowledge.⁹⁶

⁹² Protection of Traditional Knowledge: International and National Initiatives and Possible Ways Ahead (see note 10 above).

⁹³ Stoianoff N, “*The World Intellectual Property Organisation and the Intergovernmental Committee: Developments on Traditional Knowledge and Cultural Expressions*” (2014), UTS Faculty of Law Research Paper Series 37 (hereinafter referred to as “Stoianoff”).

⁹⁴ World Intellectual Property Organisation, “*Matters Concerning the Intergovernmental Committee on Intellectual Property Genetic Resources, Traditional Knowledge and Folklore*”, http://www.wipo.int/export/sites/www/tk/en/igc/pdf/igc_mandate_2018-2019.pdf, date accessed: 4 September 2018.

⁹⁵ Why and How to Protect Traditional Knowledge (see note 64 above).

⁹⁶ Protection of Traditional Knowledge: International and National Initiatives and Possible Ways Ahead (see note 10 above).

4.5 The United Nations Declaration on Rights of Indigenous Persons

In 2007 the United Nations (UN) adopted the UN Declaration of Rights of Indigenous Persons. The UN acknowledged the importance and need to respect and promote the rights and knowledge of traditional communities.⁹⁷ Although this declaration is not legally binding, it was a development in the right direction. It has created an international standard for the protection of traditional knowledge.⁹⁸

Article 31 of the Declaration is of great significance as it aims to protect traditional knowledge by providing that it is the rights of indigenous persons to “maintain, control, protect and develop” their traditional knowledge and their intellectual property rights over such knowledge.⁹⁹

4.6 The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits arising from their Utilisation

In 2010 parties to the CBD met in Nagoya, Japan to finalise this draft protocol. Although the primary aim of this protocol is not to protect traditional knowledge, it does however contain provisions which may aid the protection of traditional knowledge around the world.¹⁰⁰

Article 5 of the Nagoya Protocol requests parties to the protocol to take legislative and administrative measures in order to ensure that benefits which may arise from the use of traditional knowledge, which are connected to genetic resources are distributed in a fair and equitable manner amongst traditional communities who preserved such traditional knowledge.¹⁰¹

⁹⁷ Protection of Traditional Knowledge: International and National Initiatives and Possible Ways Ahead (see note 10 above).

⁹⁸ Protection of Traditional Knowledge: International and National Initiatives and Possible Ways Ahead (see note 10 above).

⁹⁹ UN Declaration on Rights of Indigenous People, 2007.

¹⁰⁰ Protection of Traditional Knowledge: International and National Initiatives and Possible Ways Ahead (see note 10 above).

¹⁰¹ Protection of Traditional Knowledge: International and National Initiatives and Possible Ways Ahead (see note 10 above).

The concept of “prior consent” is central to the Nagoya Protocol. The protocol proposes the idea that in order to effectively protect the interests of traditional communities, municipal legislation should strive to include the concept of “prior consent” before it grants any rights to access genetic resources which are associated with traditional knowledge and traditional communities.¹⁰² The Nagoya Protocol also places an importance on the development of a global multilateral benefit sharing mechanism. An international mechanism such as this would allow for fair and equitable benefit sharing – this means that traditional communities would still benefit from the use of genetic resources (which are connected to their traditional knowledge), which are used beyond its native borders, even though prior consent of the community may not have been granted.¹⁰³

4.7 Commentary on the attempts to provide international protection to traditional knowledge

Following the above discussions in the various international forums aimed at providing global protection to traditional knowledge, it can be seen that there is in fact no formal international instrument which definitively protects traditional knowledge. Traditional knowledge is not expressly protected under the international intellectual property system.¹⁰⁴

The nature and intrinsic characteristics of traditional knowledge suggest that it does not fit into the area of intellectual property however the protection of traditional knowledge may be guided by existing intellectual property laws.¹⁰⁵ For this reason a large portion of the international legal community recommends that a

¹⁰² Protection of Traditional Knowledge: International and National Initiatives and Possible Ways Ahead (see note 10 above).

¹⁰³ Protection of Traditional Knowledge: International and National Initiatives and Possible Ways Ahead (see note 10 above).

¹⁰⁴ Legal Measures for Protecting Traditional Knowledge, <https://www.abs-canada.org/food-for-thought/legal-measures-for-protecting-traditional-knowledge-tk/>, date accessed: 26 September 2018 (hereinafter referred to as "Legal Measures for Protecting Traditional Knowledge").

¹⁰⁵ Why and How to Protect Traditional Knowledge (see note 64 above).

sui generis system of protection, guided by the intellectual property law, be established in order to provide international protection for traditional knowledge.¹⁰⁶

There are two suggested forms of protection which may be used when establishing this particular type of sui generis system namely, positive protection and defensive protection.¹⁰⁷

Positive protection is a form of protection which aims to empower traditional communities by granting them rights to their traditional knowledge. This type of protection allows traditional communities to control the use of their knowledge and benefit from its commercial exploitation.¹⁰⁸

Defensive protection seeks to prevent unauthorised third parties from gaining rights over traditional knowledge.¹⁰⁹ It has been stated that neither one or the other form of protection is better however, there are seven different national initiatives which have adopted protective systems based on positive protection.

Positive protection seems to be the favoured of the two protective approaches. It would make sense that when an international instrument is established to protect traditional knowledge it would be a sui generis system, which considers the nature of traditional knowledge, and is based on a combination of both positive and defensive protection in order to provide a holistic protection for traditional knowledge. It is important to remember that traditional knowledge is found amongst traditional communities all over the world and that any international instrument which aims to protect traditional knowledge needs to acknowledge the multilateral nature of the protection which must be provided.¹¹⁰ In order to provide a multilateral protection for traditional knowledge it would be practical for an international system to have a legally binding effect on contracting parties. This

¹⁰⁶ Why and How to Protect Traditional Knowledge (see note 64 above).

¹⁰⁷ Legal Measures for Protecting Traditional Knowledge (see note 104 above).

¹⁰⁸ Legal Measures for Protecting Traditional Knowledge (see note 104 above).

¹⁰⁹ Legal Measures for Protecting Traditional Knowledge (see note 104 above).

¹¹⁰ Why and How to Protect Traditional Knowledge (see note 64 above).

would ensure that protection surpasses national borders and is not merely seen as a suggestion.¹¹¹

In the process of developing an international regime, it is important to keep in mind the needs of traditional communities around the world and the reasons as to why an international protection for traditional knowledge is needed. Then a uniform protection may be developed and the purpose of an international regulation would not be lost.¹¹²

4.8 Conclusion

In an analysis of which proposed South African system affords the most fair and appropriate protection it is important to consider international and foreign initiatives aimed at protecting traditional knowledge. South African initiatives may be able to use international initiatives and foreign national laws as guidelines for the protections which are intended to be afforded to traditional knowledge in South Africa. This will additionally ensure South African initiatives meet any international requirements for the protection of traditional knowledge.

¹¹¹ Why and How to Protect Traditional Knowledge (see note 64 above).

¹¹² Why and How to Protect Traditional Knowledge (see note 64 above).

Chapter 5: A Brief Discussion on Kenyan and Zambian Law to Protect Traditional Knowledge

5. A brief discussion on Kenyan and Zambian legislation aimed at protecting traditional knowledge

Although there is no formal international protection for traditional knowledge many countries have recognised the need and importance to provide protection to the knowledge of their traditional communities. Presently, there are several national initiatives that have been developed around the world with the objective of protecting traditional knowledge;¹¹³ I will be discussing two of those national initiatives.

5.1.1 Kenya: Protection of Traditional Knowledge and Cultural Expressions Act

The Traditional Knowledge and Cultural Expressions Act (TKCE Act) 2016 of Kenya, aims to provide a sui generis system of protection to traditional knowledge and cultural expressions in Kenya. Stated in the simple preamble of the TKCE Act, its purpose is to act as a framework for the protection and promotion of traditional knowledge and cultural expressions.¹¹⁴

This TKCE Act focuses on enabling traditional communities to have control over the use of their traditional knowledge and cultural expressions, particularly where such knowledge has cultural significance or economic value. The Act aims to do this by developing new forms of intellectual property rights.¹¹⁵

¹¹³ Why and How to Protect Traditional Knowledge (see note 64 above).

¹¹⁴ Nzomo V, "*Kenya's Protection of Traditional Knowledge and Cultural Expressions Act No. 33 of 2016*", <https://ipkenya.wordpress.com/2016/09/23/kenyas-protection-of-traditional-knowledge-and-cultural-expressions-act-no-33-of-2016-comes-into-force/>, date accessed: 20 September 2018.

¹¹⁵ Harrington J, "*Traditional Knowledge and Cultural Expressions Act 2016*", <http://www.katibainstitute.org/traditional-knowledge-and-culture-expressions-act-2016/>, date accessed: 20 September 2018 (hereinafter referred to as "Harrington article").

5.1.2 Significant provisions of the Traditional Knowledge and Cultural Expressions Act

Section 6 of the TKCE Act states the criteria which must be met in order for protection to be extended to traditional knowledge.¹¹⁶ The Act will afford protection to traditional knowledge which is created by either communities or individuals, so long as such knowledge is preserved and passed from generation to generation within a community for economic, ritual, narrative, decorative or recreational purposes.¹¹⁷ In order for protection to be afforded such knowledge must be distinctly connected to a traditional community and be integral to the cultural identity of such community who hold such knowledge “through a form of custodianship, guardianship or collective cultural ownership”, which has been developed by customary laws.¹¹⁸ Section 8 of the TKCE Act has also provided for a digital traditional knowledge archive which will allow registered traditional knowledge to be recorded.¹¹⁹

Section 9 stipulates that the owners and holders of traditional knowledge have the right for that knowledge to be protected.¹²⁰ Furthermore, section 10 of the TKCE Act states the traditional communities who are the custodians of traditional knowledge have exclusive rights to authorise the exploitation of their traditional knowledge and to also prevent such exploitation from occurring without prior informed consent.¹²¹ Section 11 of the Act deals with the recognition of traditional knowledge owners and provides that where traditional knowledge is used beyond the extent of its traditional context users must: recognise traditional knowledge owners, indicate the source of such traditional knowledge and use traditional knowledge in a way that respects the cultural values of the owner.¹²²

¹¹⁶ Protection of Traditional Knowledge and Cultural Expressions Act No.33 of 2016 (hereinafter referred to as "TKCE Act").

¹¹⁷ TKCE Act (see note 116 above).

¹¹⁸ TKCE Act (see note 116 above).

¹¹⁹ TKCE Act (see note 116 above).

¹²⁰ TKCE Act (see note 116 above).

¹²¹ TKCE Act (see note 116 above).

¹²² TKCE Act (see note 116 above).

In addition to these provisions, section 18 of the TKCE Act provides protection to traditional knowledge against unlawful acts. It provides that where the owners' prior informed consent is not obtained, traditional knowledge may not be exploited in any form.¹²³ This section goes on to state that Kenyan national government, together with county government must create mechanisms which will enable traditional communities to prevent any unlawful access, distortion or misappropriation of traditional knowledge.¹²⁴ However, it should be noted that section 19 of the Act provides exceptions and limitations to section 18. An important exception to note is that the Act does not prevent the use or dissemination of traditional knowledge by members of the traditional community, so long as it is done in line with customary law.¹²⁵

Section 20 of the TKCE deals with derivative works based on traditional knowledge. It is significant as it touches on the interface between intellectual property rights and traditional knowledge.¹²⁶ This section holds that any rights obtained under the established orthodox intellectual property regime, which subsist in relation to derivative works, will belong to the creator of such work.¹²⁷ However, where such work is exploited for commercial benefit, a user agreement must be concluded between the creator of the derivative work and the rights-holder of the traditional knowledge in question.¹²⁸ A user agreement of this nature will identify and disclose the traditional knowledge on which the derivative work is based and will also provide for a benefit sharing arrangement, which will compensate the right holders of the traditional knowledge. This will simultaneously ensure that there is no derogatory treatment of the traditional knowledge involved.¹²⁹

¹²³ TKCE Act (see note 116 above).

¹²⁴ TKCE Act (see note 116 above).

¹²⁵ TKCE Act (see note 116 above).

¹²⁶ TKCE Act (see note 116 above).

¹²⁷ TKCE Act (see note 116 above).

¹²⁸ TKCE Act (see note 116 above).

¹²⁹ TKCE Act (see note 116 above).

Section 37 of the TKCE Act is concerned with offences and penalties. It states that anyone who violates the provisions of the TKCE Act or the rights of traditional knowledge holders may be held criminally liable.¹³⁰ Furthermore, section 38 holds that traditional knowledge holders may take civil action against offenders.¹³¹

5.1.3 Conclusion on Traditional Knowledge and Cultural Expressions Act

The TKCE like most newly enacted laws contains various issues which require attention. The Act does however also have many positive aspects and can be viewed as a progressive and ambitious attempt to protect the traditional Kenyan communities and the knowledge they possess.¹³² The TKCE Act is a leading force in African law aimed at protecting traditional knowledge. It may even act as a helpful guideline to other countries, such as South Africa, which wish to protect traditional knowledge.

5.2.1 Zambia: Protection of Traditional Knowledge, Genetic Resources and Expressions of Folklore Act 2016

The Protection of Traditional Knowledge, Genetic Resources and Expressions of Folklore Act (PTK Act) was enacted in Zambia in 2016. For the purpose of this discussion I will only be focusing on the aspects of the Act which deal with traditional knowledge.¹³³ The PTK Act creates a legal framework allowing for the protection of traditional knowledge, also providing for access to traditional knowledge and allows for the use of such knowledge.¹³⁴ The PTK Act aims to guarantee equitable sharing of the benefits which stem from the use of traditional knowledge. The Act also seeks effective participation from right holders.¹³⁵

The preamble of the PTK Act goes on to further state that the Act aims to recognise the spiritual, cultural, social, political and economic value of traditional

¹³⁰ TKCE Act (see note 116 above).

¹³¹ TKCE Act (see note 116 above).

¹³² Harrington article (see note 115 above).

¹³³ Zambia: Protection of Traditional Knowledge, Genetic Resources and Expressions of Folklore Act No.16 of 2016, (hereinafter referred to as "Zambia: WIPO").

¹³⁴ Zambia: WIPO (see note 133 above).

¹³⁵ Zambia: WIPO (see note 133 above).

knowledge, while also promoting the preservation of traditional knowledge.¹³⁶ The Act strives to recognise, protect and support the inalienable rights that traditional communities, individuals and groups have over their traditional knowledge.¹³⁷

5.2.2 An overview of the Protection of Traditional Knowledge, Genetic Resources and Expressions of Folklore Act

Permits seem to be an integral part of the system established by the PTK Act. Permits are needed in order to use, access and explore Traditional Knowledge.¹³⁸

The Patents and Companies Registration Agency is responsible for issuing such permits. However, before any permits are issued, a written access agreement should be arranged with the traditional community who holds the sought after knowledge.¹³⁹ Article 67(a) of the PTK Act states that traditional communities should prohibit any person who does not belong to the traditional community from using its traditional knowledge beyond the traditional context without prior consent.¹⁴⁰ Article 67 essentially states that traditional communities are not authorised to allow the use of, or access to traditional knowledge without the required permit.¹⁴¹

The PTK Act establishes a system similar to that of trade mark protection. Article 15 (1) provides that the protection of traditional knowledge will not stem from registration or any other formalities, but will come into existence automatically from the time of creation.¹⁴² Registration in terms of this Act is therefore voluntary. Once

¹³⁶ The Protection of Traditional Knowledge, Genetic Resources and Expressions of Folklore Act No. 16 of 2016 (hereinafter referred to as "The PTK Act").

¹³⁷ The PTK Act (see note 136 above).

¹³⁸ Schultz A J, "*Zambia's New Traditional Knowledge, Genetic Resources and Expressions of Folklore Act*", <https://afro-ip.blogspot.com/2016/09/zambias-new-traditional-knowldeg.html>, date accessed: 5 September 2018 (hereinafter referred to as "Zambia's New Traditional Knowledge, Genetic Resources and Expressions of Folklore Act").

¹³⁹ Zambia's New Traditional Knowledge, Genetic Resources and Expressions of Folklore Act (see note 138 above).

¹⁴⁰ The PTK Act (see note 136 above).

¹⁴¹ Zambia's New Traditional Knowledge, Genetic Resources and Expressions of Folklore Act (see note 138 above).

¹⁴² The PTK Act (see note 136 above).

traditional knowledge is registered the Registrar will publish it in an Intellectual Property Journal concerned with protected traditional knowledge.¹⁴³ A Register containing all records of licences, access agreements and other contracts pertaining to the use of Traditional Knowledge will also be kept.¹⁴⁴

The PTK Act lists five different protections two of which will be discussed with reference to traditional knowledge.

Article 4(1) protects a holder against infringements of the holder's rights in relation to traditional knowledge and protects against the misappropriation of traditional knowledge, as well as against the improper grant and exercise of intellectual property rights in traditional knowledge.¹⁴⁵ This article also protects an equitable balance between the rights and interests of holders and users of traditional knowledge.¹⁴⁶

Article 4(4) of the PTK Act lists benefits and rights that are afforded to the holders of traditional knowledge. It states that holders may exercise the rights to register trans-boundary traditional knowledge and may also protect their intellectual property rights relating to traditional knowledge.¹⁴⁷ Furthermore, the holders of traditional knowledge may register their traditional knowledge with the African Regional Intellectual Property Organisation (ARIPO) and receive any benefits, which may arise from the commercial use of such knowledge. They may also use alternative dispute settlement procedures at ARIPO to settle disputes arising from traditional knowledge which may be shared by various traditional communities across national boundaries.¹⁴⁸ This article also states that holders of traditional

¹⁴³ Zambia's New Traditional Knowledge, Genetic Resources and Expressions of Folklore Act (see note 138 above).

¹⁴⁴ Zambia's New Traditional Knowledge, Genetic Resources and Expressions of Folklore Act (see note 138 above).

¹⁴⁵ The PTK Act (see note 136 above).

¹⁴⁶ The PTK Act (see note 136 above).

¹⁴⁷ The PTK Act (see note 136 above).

¹⁴⁸ The PTK Act (see note 136 above).

knowledge may give prior informed consent for the use of any information which relates to traditional knowledge that is licensed with ARIPO.¹⁴⁹

5.2.3 Conclusion on The Protection of Traditional Genetic Resources and Expressions of Act

The PTK Act has enjoyed a welcome reception in Zambia since its enactment as it has encouraged economic growth. Traditional communities have a comfort of sorts knowing that their traditional knowledge is protected. There is also reassurance in the fact that there are systems in place to deal with any misuse of their traditional knowledge.¹⁵⁰

¹⁴⁹ The PTK Act (see note 136 above).

¹⁵⁰ Singh A, "*Traditional Trade Secrets and the law for protection in Zambia*", <http://jurislawchamber.blogspot.com/2017/04/traditional-trade-secrets-and-law-for.html>, date accessed: 20 September 2018.

Chapter 6: A Comparison between International Standards for the Protection of Traditional Knowledge; Kenyan and Zambian Law and the IPLAA

6.1 The IPLAA compared to international standards for the protection of traditional knowledge

From the preceding discussions in chapter four, it is apparent that there is no formal international instrument which definitively protects traditional knowledge. It is also apparent that negotiations and discussions to create a comprehensive international protection for traditional knowledge are ongoing. However, there are a few international standards for the protection of traditional knowledge created by various international initiatives such as the CBD, the UN and the Nagoya Protocol. It is relevant to compare the IPLAA and IKS Bill to these international initiatives to ascertain whether South African initiatives aimed at protecting traditional knowledge are in line with global standards.

6.2 The IPLAA and the CBD

South Africa is party to the CBD.¹⁵¹ The CBD provides, among other things, for the recognition of local and traditional knowledge. The IPLAA states that it aims “to provide for the recognition and protection of certain manifestations of indigenous knowledge as a species of intellectual property...”¹⁵² The CBD does not necessarily set limitations on the types of local or traditional knowledge that should be recognised; it must of course be knowledge embodying traditional lifestyles.

However, it is apparent that the IPLAA does set such limitations, as it only provides for the recognition and protection of certain types of indigenous knowledge. Since the IPLAA elects to use intellectual property laws to protect traditional knowledge, only traditional knowledge which meets the eligibility requirements of the amended Performers’ Protection Act, Copyright Act, Trade Marks Act and Designs Act, will be recognised, as well as protected.¹⁵³ This

¹⁵¹ List of Parties, <https://www.cbd.int/information/parties.shtml>, date accessed: 2 October 2018.

¹⁵² IPLAA (see note 1 above).

¹⁵³ IPLAA (see note 1 above).

means that if there are manifestations of traditional knowledge which embody traditional lifestyles but do not fit neatly into the recognised forms of intellectual property in accordance with the IPLAA, these will not be protected. It is on this technicality that it may be argued that the IPLAA, is not entirely aligned with the CBD, as it does not adequately recognise all forms of traditional knowledge.

6.3 The IPLAA and the United Nations Declaration on Rights of Indigenous Persons

This non-binding Declaration provides in article 31, that it is the right of indigenous people to “maintain, control, protect and develop” their traditional knowledge, and their intellectual property rights over such knowledge”.¹⁵⁴ The IPLAA takes cognisance of the Declaration and the need to recognise and protect indigenous knowledge in the preamble of the Act.¹⁵⁵

Section 28I of the IPLAA provides for the establishment of the National Trust and Fund for Indigenous knowledge. The National Trust will be responsible for the promotion and preservation of indigenous knowledge. This includes being responsible for: the commercialisation and exploitation of traditional knowledge for the purpose of generating income, facilitating the development of indigenous communities and assisting them with training and awareness on their intellectual property rights. Furthermore, all income which is derived by the National Trust from the use of indigenous knowledge will be National Trust monies.¹⁵⁶

It can be seen from the above that, in terms of the IPLAA, traditional communities are not entirely in control of their traditional knowledge, since the National Trust essentially controls the commercialisation and exploitation of such knowledge. The Trust also has control over the income which is generated from such use and exploitation. It should be noted that although traditional communities do not have complete monopoly over their traditional knowledge, they do have some say in the way in which their traditional knowledge is used and essentially maintained or developed. A community protocol, developed by traditional communities, allows

¹⁵⁴ UN Declaration on Rights of Indigenous People, 2007.

¹⁵⁵ IPLAA (see note 1 above).

¹⁵⁶ IPLAA (see note 1 above).

communities to provide procedures for prospective users to follow. It allows traditional communities to prescribe the manner in which they wish for their traditional knowledge to be used.¹⁵⁷ Community protocols also require the community's prior informed consent before any use of their traditional knowledge occurs.¹⁵⁸ Although traditional communities do not have total control over their traditional knowledge, as they essentially share control with the National Trust, it may be argued that for the most part, the provisions of the IPLAA are aligned with those of the United Nations Declaration on Rights of Indigenous Persons.

6.4 The IPLAA and the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits arising from their Utilisation

As previously mentioned, South Africa is party to the Nagoya Protocol.¹⁵⁹

Article 5 of the Protocol deals with the concept of benefit sharing and asks that parties ensure that any benefits which arise from the use of the associated traditional knowledge is distributed in a fair and equitable manner between the traditional communities who developed and preserved such knowledge.¹⁶⁰

Prior consent is another concept important to the Protocol. It is asserted that, to effectively protect traditional communities and their knowledge, lawmakers should strive to include "prior consent" as a requirement before granting access to the related traditional knowledge.¹⁶¹

The functions of the National Trust and Fund established by the IPLAA have previously been discussed and it is known by now that income, which is received from the commercialisation of indigenous knowledge, is recognised as monies of

¹⁵⁷ IPLAA (see note 1 above).

¹⁵⁸ IPLAA (see note 1 above).

¹⁵⁹ Parties to the Nagoya Protocol, <https://www.cbd.int/abs/nagoya-protocol/signatories/>, date accessed: 2 October 2018.

¹⁶⁰ Protection of Traditional Knowledge: International and National Initiatives and Possible Ways Ahead (see note 10 above).

¹⁶¹ Protection of Traditional Knowledge: International and National Initiatives and Possible Ways Ahead (see note 10 above).

the National Trust and will be used to the benefit of indigenous communities.¹⁶² It can be seen that the IPLAA does in fact provide for benefit sharing, however the manner in which the Act does this has been criticised.

It is thought to be odd that the income generated from the use of traditional knowledge is paid to the National Fund albeit to be distributed, as opposed to being directly paid to the relevant traditional community. The question stands that if the money has been derived from the use of their traditional knowledge and is being used for the benefit of the traditional communities then why not allow them to decide how it is used? It can be seen that the IPLAA, through the National Trust and Fund, does provide for benefit sharing and although criticised, it does meet the standards of the Nagoya Protocol.

The Nagoya Protocol additionally advocates for prior consent. Prior informed consent requires that, before there is use of traditional knowledge, consent for such use should be gained from the relevant traditional community. Community protocols have been previously discussed and it should be noted that these protocols provide for the procedures through which prospective users may gain prior informed consent from the related traditional community.¹⁶³ It can therefore be concluded that the IPLAA provides for prior consent and meets this standard of the Nagoya Protocol.

6.5 The IPLAA as it compares to relevant provisions of the TKCE Act of Kenya

The TKCE Act of Kenya aims to protect and promote traditional knowledge by way of a sui generis system. Conversely the IPLAA bases its protection on the current (South African) intellectual property law framework, which it amends in order to recognise and protect certain manifestations of traditional knowledge. The TKCE Act affords protection to traditional knowledge so long as it is preserved and passed down from one generation to another and is assimilated into the cultural identity of the traditional community.¹⁶⁴ In terms of the IPLAA it is not simply enough for the traditional knowledge seeking protection to be passed

¹⁶² IPLAA (see note 1 above).

¹⁶³ IPLAA (see note 1 above).

¹⁶⁴ TKCE Act (see note 116 above).

down from generation to generation and to be an integral part of the community's identity. Traditional knowledge must satisfy the eligibility requirements of the individual (amended) intellectual property statutes from which it seeks protection. For example, if traditional knowledge seeks copyright protection from the IPLAA, it must be reduced to material form or be capable of substantiation from the collective memory of the related traditional community¹⁶⁵. If the traditional knowledge in question does not meet these requirements it will not be eligible for copyright protection in terms of the IPLAA.

The IPLAA recognises the need and importance of protecting, preserving and promoting the indigenous knowledge of the indigenous communities of South Africa,¹⁶⁶ however the Act does not contain a provision similar to that of section 9 of the TKCE which expressly states that it is the right of traditional knowledge owners and holders to have such knowledge protected. The TKCE Act also states that traditional communities who are the holders of traditional knowledge have the exclusive rights to authorise as well as prevent the exploitation of their knowledge without prior informed consent.¹⁶⁷ The IPLAA does not provide these exclusive rights to indigenous communities. As previously mentioned, it is the National Trust established by the IPLAA which is responsible for exploitation of traditional knowledge, although such exploitation should occur in accordance with a community protocol developed by traditional communities.²⁸

Section 18 of the TKCE states that where the owner's prior informed consent is not obtained, traditional knowledge may not be exploited in any form.¹⁶⁸ It has been established that the IPLAA introduces three requirements for the use of indigenous knowledge. These are disclosure of origin, benefit sharing agreements and prior informed consent.¹⁶⁹ The IPLAA states that no rights in respect of

¹⁶⁵ TKCE Act (see note 116 above).

¹⁶⁶ IPLAA (see note 1 above).

¹⁶⁷ TKCE Act (see note 116 above).

¹⁶⁸ TKCE Act (see note 116 above).

¹⁶⁹ Companies and Intellectual Property Commission, http://www.cipc.co.za/files/2114/5934/0816/IKS_PRESENTATION.pdf, date accessed: 7 October.

derivative indigenous knowledge (provided for in the IPLAA) will be eligible for registration unless prior informed consent has been obtained from the relevant authority or indigenous community.¹⁷⁰ The Act also states that traditional knowledge may be used without attaining prior consent if it is for: private study / use; professional review' reporting on current events; education; scientific research; legal proceedings or for recordings in archives.¹⁷¹

It can be seen that both pieces of legislation make provisions for prior informed consent, however the terms of each statute differ. The TKCE Act enforces a strict policy, whereas the IPLAA provides for prior informed consent in a manner which is less strict. The IPLAA provides for exceptions to prior informed consent and from observation it can be seen that none of the exceptions generate any income or prejudice traditional communities and their rights.

Section 37 of the TKCE, which deals with offences and penalties, provides that anyone who contravenes the provisions of the TKCE may be held criminally liable. Section 38 states that traditional knowledge holders may take civil action against offenders.¹⁷² The IPLAA does not provide for offences or non-compliance, which contravenes the Act. This would therefore mean that each individual intellectual property law statute must be consulted to determine the penalties and that non-compliance with the IPLAA is regulated by the provisions of these four statutes.

6.6 The IPLAA as it compares to relevant provisions of the PTK Act of Zambia

The PTK Act of Zambia is a sui generis type of legislation;¹⁷³ this once again differs from the intellectual property approach followed by the IPLAA.

Both these statutes provide for the protection of traditional knowledge, access to, and the use of traditional knowledge. The PTK Act strives to guarantee the equitable sharing of benefits which are derived from the use of traditional

¹⁷⁰ IPLAA (see note 1 above).

¹⁷¹ IPLAA (see note 1 above).

¹⁷² TKCE Act (see note 116 above).

¹⁷³ World Intellectual Property Organisation: Traditional Knowledge Laws in Zambia, http://www.wipo.int/tk/en/databases/tklaws/articles/article_0082.html, date accessed: 7 October 2018 (hereinafter referred to as "WIPO: Traditional Knowledge Laws in Zambia").

knowledge, and seeks effective participation from traditional knowledge rights holders. The PTK Act will protect traditional knowledge so long as it is preserved and passed down from one generation to another and is integral to the cultural identity of a traditional community. As discussed, this does not satisfy the intellectual property law requirements for protection set by the IPLAA.

This chapter has already established the IPLAA provides for benefit sharing. The IPLAA also seeks participation from traditional knowledge rights holders. This participation stems from implementation of community protocols.

An integral aspect of the PTK Act is the use of permits, which are necessary in order to use, access and explore traditional knowledge.¹⁷⁴ Licenses and permits should not be thought of synonymously in terms of the PTK Act. These are two different things; licensing in terms of the PTK Act deals with compulsory licenses. There are two types of permits provided for in the PTK Act: access as well as exploration permits.¹⁷⁵ The IPLAA does not make provisions for permits such as those of the PTK Act, however it makes provisions for licensing which essentially provides the same functions as permits do in terms of the PTK Act.

The PTK Act provides for the registration of traditional knowledge, however the Act states that such registration is voluntary and that protection will subsist in traditional knowledge from the moment it is created, irrespective of whether or not such knowledge is registered.¹⁷⁶ The IPLAA does not expressly state that registration of traditional knowledge is a condition for protection, this would therefore mean that each individually amended statute must be consulted to determine whether registration is a condition for protection.

The PTK Act states that traditional knowledge holders may register transboundary traditional knowledge and may also protect their intellectual property rights relating

¹⁷⁴ Zambia's New Traditional Knowledge, Genetic Resources and Expressions of Folklore Act (see note 138 above).

¹⁷⁵ Zambia's New Traditional Knowledge, Genetic Resources and Expressions of Folklore Act (see note 138 above).

¹⁷⁶ Zambia's New Traditional Knowledge, Genetic Resources and Expressions of Folklore Act (see note 138 above).

to such knowledge.¹⁷⁷The IPLAA when dealing with the compliance of international agreements states that, subject to a notice in the Government Gazette, a traditional cultural expression recognised in a specified country as a traditional cultural expression, may be deemed to be a traditional cultural expression in terms of the IPLAA, and that provisions of the IPLAA may be applied to such expressions at the discretion of the Minister of Trade and Industry.¹⁷⁸ Upon observation it may be said that the IPLAA does not provide for the registration of trans-boundary traditional knowledge, it simply recognises it as traditional knowledge.

6.7 Conclusion

The analysis process above has shed more light on where the IPLAA stands in comparison to international initiatives and Zambian and Kenyan laws. Going forward, this analysis will be helpful in providing suggestions and recommendations for improvements, as well as further discussing the question as to whether both the IPLAA and IKS Bill are necessary; both of which will be done in the concluding chapter.

¹⁷⁷ Zambia's New Traditional Knowledge, Genetic Resources and Expressions of Folklore Act (see note 138 above).

¹⁷⁸ IPLAA (see note 1 above).

Chapter 7: A Comparison between International Standards for the Protection of Traditional Knowledge; Kenyan and Zambian Law and the IKS Bill

7.1 A comparison between international standards for the protection of traditional knowledge and the IKS Bill

The preceding chapter conducted a comparison between international standards for the protection of traditional knowledge and the IPLAA; as well as a comparison between the IPLAA and Kenyan and Zambian law aimed at protecting traditional knowledge. This chapter will provide the same comparison using the IKS Bill and the previously mentioned systems.

7.2 The IKS Bill and the CBD

As previously discussed, it is important to the CBD that traditional or local knowledge, which embodies the lifestyles of traditional people, is recognised by its member parties. So long as the traditional knowledge which seeks protection, encompasses cultural content, is developed within traditional communities and is assimilated into the cultural identity of the traditional community, it will be recognised by the IKS Bill.¹⁷⁹ It can be seen that the IKS Bill is in line with the standards set by the CBD. It is not restrictive in its protection and affords a wide protection to traditional knowledge.

7.3 The IKS Bill and the United Nations Declaration on Rights of Indigenous Persons

The Declaration of Rights of Indigenous Persons strives to protect traditional knowledge by trying to ensure that indigenous people have the rights to “maintain, control, protect and develop,” their traditional knowledge, as well as their intellectual property rights over such knowledge.¹⁸⁰ According to section 12 of the IKS Bill, ownership of indigenous knowledge, which is eligible for protection, vests in the related indigenous community.¹⁸¹ The trustee of the indigenous community in question holds the indigenous knowledge in a trust on behalf of the

¹⁷⁹ IKS Bill (see note 2 above).

¹⁸⁰ UN Declaration on Rights of Indigenous People, 2007.

¹⁸¹ IKS Bill (see note 2 above).

community¹⁸². The trustee will be responsible to the community for the protection of the community's rights in the indigenous knowledge.¹⁸³ Section 13 of the IKS Bill further states that the holder of indigenous knowledge has the exclusive right, in respect of the indigenous knowledge, to: the benefits arising from its commercial use, to be acknowledged as the source of the knowledge in question and to restrain any unauthorised use of traditional knowledge.¹⁸⁴ Providing traditional knowledge holders with the right to restrain any unauthorised use of their knowledge empowers them to control the use of their traditional knowledge. Further, it helps to ensure that it is maintained and protected. The IKS Bill with its objectives of protecting traditional communities and their knowledge against unauthorised use and its aim of enhancing the potential of traditional communities to protect their knowledge is strongly aligned with the principles of the United Nations Declaration of Rights of Indigenous Persons.

7.4 The IKS Bill and the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits arising from their Utilisation

As explained above, the concepts of benefit sharing and prior consent are central to the provisions of the Nagoya Protocol. The IKS Bill recognises and aims to enforce the concept of benefit sharing. It is stated amongst the objectives of the IKS Bill that it aims to, "regulate the equitable distribution of benefits of the use of indigenous knowledge".¹⁸⁵ The IKS Bill defines benefit sharing as the fair and equitable sharing of benefits in terms of benefit sharing agreements between NIKSO and licence holders. One of the functions of NIKSO is in fact to assist indigenous communities in the negotiations of benefit sharing agreements for the use of their traditional knowledge.¹⁸⁶ There is not much more information provided on the functioning of the benefit sharing agreements however, it is apparent that the IKS Bill has made provisions for it as requested by the Nagoya Protocol.

¹⁸² IKS Bill (see note 2 above).

¹⁸³ IKS Bill (see note 2 above).

¹⁸⁴ IKS Bill (see note 2 above).

¹⁸⁵ IKS Bill (see note 2 above).

¹⁸⁶ IKS Bill (see note 2 above).

The concept of prior consent which is another central element of the Nagoya Protocol, is provided for in the IKS Bill. The Bill defines prior consent to be “granted by an indigenous community trustee and which has been obtained free from any manipulation, interference, coercion and after full disclosure of the intent and scope of the activity in a language and process understandable to the community”. The IKS Bill provides that any person wishing to acquire the right to use indigenous knowledge must apply to NIKSO for a license. Amongst the requirements to attain such license is prior informed consent.²²It can be seen that the IKS Bill meets the Nagoya Protocol’s request for prior consent and is therefore in line with its standards.

7.5 The IKS Bill in comparison to relevant provisions of the TKCE Act of Kenya

The TKCE Act of Kenya as well as the IKS Bill aim to protect and promote traditional knowledge by way of a sui generis system. This stands in contrast to the protection provided by the IPLAA. The TKCE Act as well as the IKS Bill afford protection to traditional knowledge so long as it is preserved and passed down from one generation to another and is assimilated into the cultural identity of the traditional community.¹⁸⁷

The IKS Bill recognises that indigenous knowledge is a national asset and that it is in national interest to protect such knowledge, however it does not expressly recognise that it is the right of traditional knowledge holders to have their knowledge protected. The TKCE Act states that traditional communities who are the holders of traditional knowledge have the exclusive rights to authorise as well as, prevent the exploitation of their knowledge without their prior informed consent.¹⁸⁸ The IKS Bill similarly provides in section 13(1)(c), that it is the exclusive right of traditional knowledge holders to restrain any unauthorised use of indigenous knowledge.¹⁸⁹

¹⁸⁷ TKCE Act (see note 116 above).

¹⁸⁸ TKCE Act (see note 116 above).

¹⁸⁹ IKS Bill (see note 2 above).

Section 18 of the TKCE Act states that where the owner's prior informed consent is not obtained, traditional knowledge may not be exploited in any form.¹⁹⁰ The IKS Bill also makes provisions for prior informed consent as previously mentioned, any person wishing to acquire the right to use indigenous knowledge must apply to NIKSO for a license; this application must consist of, amongst other requirements, evidence that prior informed consent has been obtained from the relevant indigenous knowledge holder.¹⁹¹ Similarly to the IPLAA, the IKS Bill provides for instances where prior informed consent for the use of indigenous knowledge is not required, namely where traditional knowledge is used for: face to face teaching, academic review, reporting on current events, judicial proceedings, academic purposes, any use that is incidental to the previously mentioned purposes and in circumstances of national emergencies, so long as traditional knowledge holders are compensated for the use of their indigenous knowledge.¹⁹²

It can be seen that the IKS Bill and the TKCE Act make provisions for prior informed consent, in different manners. The TKCE Act, as stated in chapter 6, enforces a strict policy whereas the IKS Bill provides for prior informed consent in a manner which is less strict; similar to the IPLAA. It can be observed that none of the exceptions generate any income or prejudice traditional communities and their rights.

Section 37 of the TKCE which deals with offences and penalties, provides that anyone who contravenes the provisions of the TKCE may be held criminally liable. Section 38 states that traditional knowledge holders may take civil action against offenders.¹⁹³ Section 28 of the IKS Bill deals with offences and penalties in terms of the Bill. It is stated that any person who uses indigenous knowledge in a manner which is inconsistent with the license they have obtained will be guilty of an offence and liable to any sanction which is determined by the Dispute Resolution Committee.¹⁹⁴ Furthermore, any person who uses indigenous

¹⁹⁰ TKCE Act (see note 116 above).

¹⁹¹ IKS Bill (see note 2 above).

¹⁹² IKS Bill (see note 2 above).

¹⁹³ TKCE Act (see note 116 above).

¹⁹⁴ IKS Bill (see note 2 above).

knowledge without authorisation will be guilty of an offence and liable on conviction to imprisonment not exceeding three years or a R30 000 fine (or both). The same penalties will apply to any person who falsely claims to be a certified indigenous practitioner or who hinders or interferes with the management of an official in the performance of their official duties.¹⁹⁵

7.6 The IKS Bill as it compares to relevant provisions of the PTK Act of Zambia

The PTK Act of Zambia, like the IKS Bill, is a sui generis type of legislation.¹⁹⁶ Both pieces of legislation provide for: the protection of traditional knowledge, access to, and the use of traditional knowledge. The PTK Act aims to guarantee the equitable sharing of benefits, which are generated from the use of traditional knowledge and seeks effective participation from traditional knowledge rights holders. The PTK Act like the IKS Bill, will protect traditional knowledge so long as it is preserved and passed down from one generation to another and is integral to the cultural identity of a traditional community.

This chapter has already established that the IKS Bill provides for benefit sharing. The IKS Bill also strives to gain participation from traditional knowledge rights holders. This participation stems from implementation of community protocols.

An integral aspect of the PTK Act is the use of permits, which are necessary in order to: use, access and explore traditional knowledge.¹⁹⁷ There are two types of permits provided for in the PTK Act: access permits and exploration permits.¹⁹⁸ The IKS Bill does not make provisions for permits such as those of the PTK Act however, it does provide for licensing which essentially serves the same functions as permits do in the PTK Act.

¹⁹⁵ IKS Bill (see note 2 above).

¹⁹⁶ WIPO: Traditional Knowledge Laws in Zambia (see note 173 above).

¹⁹⁷ Zambia's New Traditional Knowledge, Genetic Resources and Expressions of Folklore Act (see note 138 above).

¹⁹⁸ Zambia's New Traditional Knowledge, Genetic Resources and Expressions of Folklore Act (see note 138 above).

The PTK Act provides for the registration of traditional knowledge however, the Act states that such registration is voluntary and that protection will subsist in traditional knowledge from the moment it is created, irrespective of whether or not such knowledge is registered.¹⁹⁹ The IKS Bill in its objectives provides for the registration of traditional knowledge. The Bill however, does not state whether such registration is a condition for protection.²⁰⁰

The PTK Act states that traditional knowledge holders may register transboundary traditional knowledge and may also protect their intellectual property rights relating to such knowledge.²⁰¹ The IKS Bill recognises trans-border arrangements, stating that indigenous knowledge which originates in a foreign jurisdiction must be given the same protection that is afforded to indigenous knowledge originating in the Republic, so long as the laws of that foreign jurisdiction give reciprocal protection to indigenous knowledge of the Republic. Furthermore, the IKS Bill states that where indigenous knowledge originates in one or more indigenous communities (including foreign jurisdictions), NIKSO must assist relevant foreign authorities and the relevant indigenous community of the Republic in concluding an arrangement to share ownership of such knowledge. These provisions essentially imply that the IKS Bill allows for the registration of trans-boundary traditional knowledge.²⁰²

7.7 Conclusion

This chapter has juxtaposed the IKS Bill to international initiatives and Zambian and Kenyan laws. It has provided an insight as to how the Bill contrasts between international initiatives and the two particular national laws. South Africa can possibly learn from these international initiatives and the experiences of Kenya

¹⁹⁹ Zambia's New Traditional Knowledge, Genetic Resources and Expressions of Folklore Act (see note 138 above).

²⁰⁰ IKS Bill (see note 2 above).

²⁰¹ Zambia's New Traditional Knowledge, Genetic Resources and Expressions of Folklore Act (see note 138 above).

²⁰² IKS Bill (see note 2 above).

and Zambia as it attempts to provide a system for the protection of traditional knowledge.

Chapter 8: Comparative Analysis of the IPLAA and IKS Bill

8.1 Difference in approaches

A critical difference between the IPLAA and the IKS Bill is the manner in which they seek to protect traditional knowledge. The IPLAA attempts to extend protection to traditional knowledge by trying to include it in existing intellectual property regimes, thereby creating new forms of intellectual property. It does not however create a new form of protection for traditional knowledge and instead follows an intellectual property law based approach.²⁰³ On the other hand, the IKS Bill attempts to introduce a sui generis approach to the legislative protection and commercialisation of traditional knowledge, therefore establishing a new form of protection for traditional knowledge.²⁰⁴ The IKS Bill provides a broader protection to traditional knowledge than the IPLAA, as it does not only provide protection to “certain manifestations” of traditional knowledge. This broader protection exists because of the sui generis approach which the IKS Bill adopts, as opposed to the restrictive intellectual property requirements of the IPLAA.

8.2 Relevant definitions contained in the IPLAA

The IPLAA introduces many new definitions which will be next discussed. Many of the amendments made by the Act are based predominantly on these new definitions.²⁰⁵ It should be noted that most of the amendments contained in the IPLAA appear in the Copyright Act, and its amendments commonly apply to the other Acts altered by the IPLAA either directly or *pari passu*.²⁰⁶

The IPLAA defines an “indigenous community” as “any recognisable community of people originated in or historically settled in a geographic area or areas located within the borders of the Republic, as such borders existed at the date of commencement of this Act, characterised by social, cultural and economic

²⁰³ Comments on the Protection, Promotion, Development and Management of the Indigenous Knowledge Systems (see note 58 above).

²⁰⁴ Comments on the Protection, Promotion, Development and Management of the Indigenous Knowledge Systems (see note 58 above).

²⁰⁵ The old and the new (see note 19 above).

²⁰⁶ The old and the new (see note 19 above).

conditions that distinguish them from other sections of the national community, and who identify themselves and are recognised by other groups as a distinct collective”.²⁰⁷

“Indigenous cultural expressions” are defined as “any form, tangible or intangible, or a combination thereof, in which traditional culture and knowledge are embodied, passed on between generations, and tangible or intangible forms of creativity of indigenous communities, including, but not limited to: phonetic or verbal expressions; musical or sound expressions; expressions by actions; tangible expressions”.²⁰⁸

“Derivative indigenous works”, are defined in the IPLAA as “any work forming the subject of this Act, applied to any form of indigenous work recognised by an indigenous community as having an indigenous or traditional origin, and a substantial part of which, was derived from indigenous cultural expressions or knowledge irrespective of whether such derivative indigenous work was derived before or after the date of commencement of this Act”.²⁰⁹ It should be noted that a “traditional work” includes both an indigenous work and a derivative indigenous work.²¹⁰

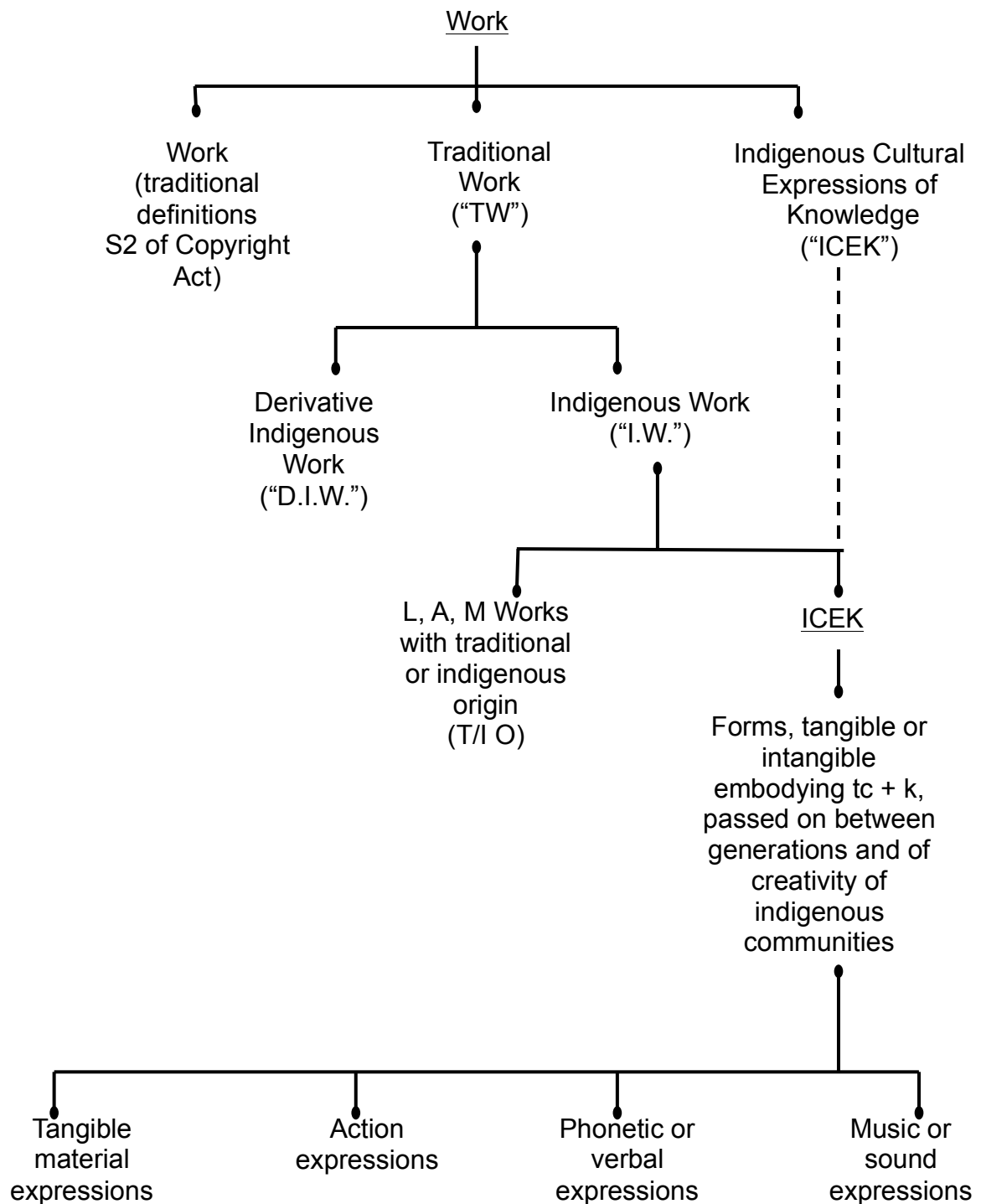
The subject matter of the IPLAA described in the definitions above is simplified for a better understanding by the graphic representation below.

²⁰⁷ IPLAA (see note 1 above).

²⁰⁸ IPLAA (see note 1 above).

²⁰⁹ IPLAA (see note 1 above).

²¹⁰ The old and the new (see note 19 above).

8.3 Subject Matter of Intellectual Property Laws Amendment ActThe Definitions Thicket ²¹¹

²¹¹ Job C, Copyright Law: IP-Related Laws, Pg. 27 – 30 (hereinafter referred to as " Copyright Law: IP-Related Laws").

8.4 Relevant definitions contained in the IKS Bill

The IKS Bill like the IPLAA introduces a plethora of new definitions, many of which the Bill centres around. In order to understand what the subject matter of the Bill is, and who or what it seeks to protect, it is important to become familiar with the definitions. It is also important to contrast the definitions of the IPLAA and the IKS Bill to understand the difference in what each seeks to protect.

The IKS Bill defines an “indigenous community” as “any recognisable community of people developing from, or historically settled in a geographic area or areas located within the borders of the Republic; characterised by social, cultural and economic conditions, which distinguish them from other sections of the national community; and *who* identify themselves as a distinct collective”.²¹²

“Indigenous cultural expression” is defined to mean “expressions that have a cultural content that developed within indigenous communities and have assimilated into their cultural and social identity, including but not limited to phonetic or verbal expressions; musical or sound expressions; expressions by action; and action tangible expressions”.²¹³

‘Indigenous knowledge’ is defined by the IKS Bill as “knowledge which has been developed within an indigenous community and has been assimilated into the cultural and social identity of that community, and include knowledge of a functional nature; knowledge of natural resources; and indigenous cultural expressions”.²¹⁴

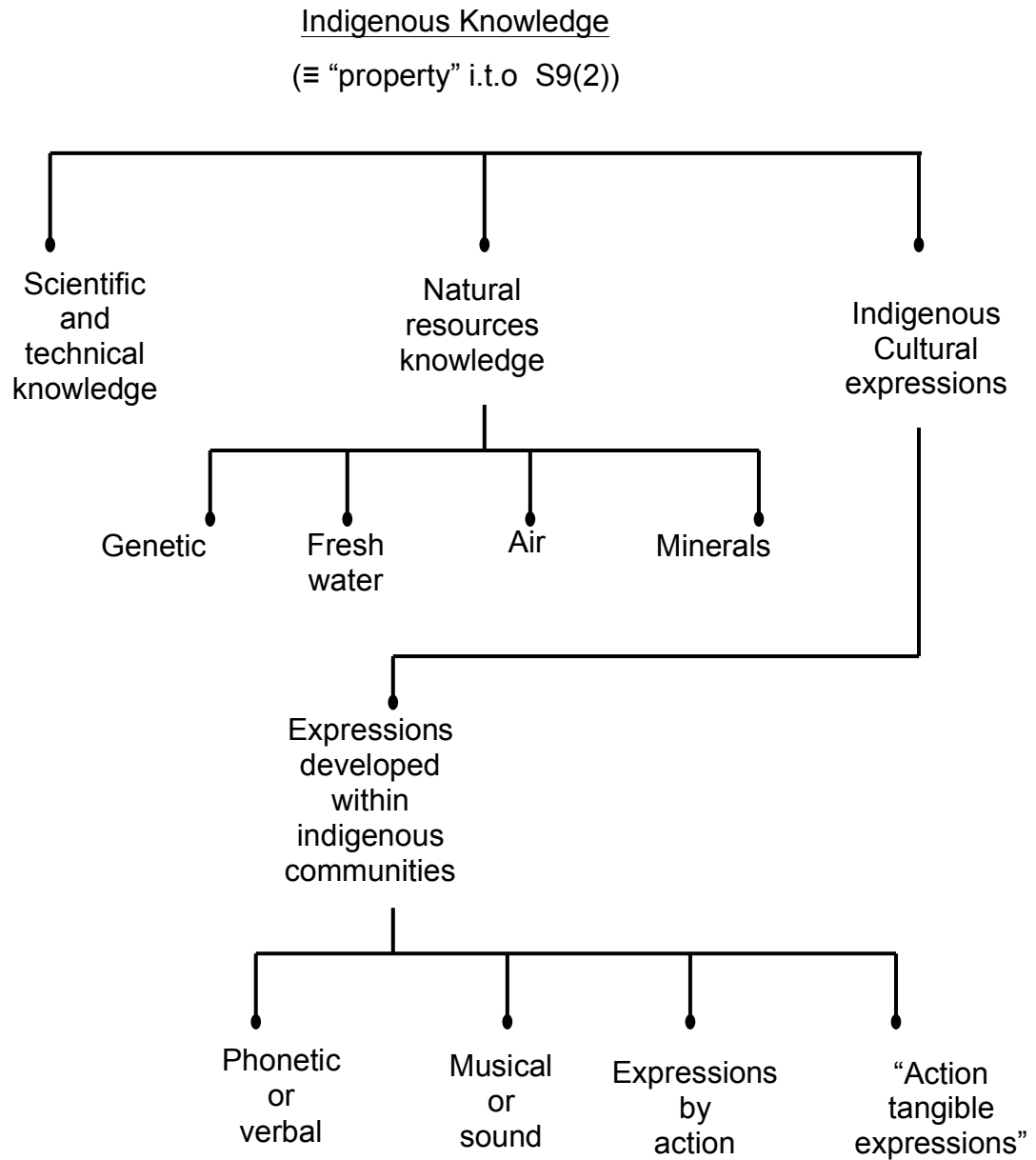
These definitions are simplified in the graphic representation below, to allow for an easy comparison between the IKS Bill and the IPLAA.

²¹² IKS Bill (see note 2 above).

²¹³ IKS Bill (see note 2 above).

²¹⁴ IKS Bill (see note 2 above).

8.5 Subject Matter of the Protection, Promotion, Development and Management of
Indigenous Knowledge Systems Bill 2014 ²¹⁵



²¹⁵ Copyright Law: IP-Related Laws (See note 210 above).

8.6 Conclusion: Are both pieces of legislation necessary?

When addressing this question, it is important to remember the different forms of protection which the IPLAA and the IKS Bill each aim to provide.

The IKS Bill strives to provide a tailored protection which is especially aimed at traditional knowledge.²¹⁶ The IPLAA alternatively views traditional knowledge as another variety of existing intellectual property and a large part of the legal community feels that it was adopted too soon, without enough time to assess the impact it will have.²¹⁷ The IKS Bill seems to be favoured between the two proposed systems, as it does not attempt to protect traditional knowledge as a manifestation of existing intellectual property - for the simple fact that traditional knowledge does not conform to the requirements of existing types of intellectual property.²¹⁸

If both pieces of legislation are enacted, South Africa will have a mixed approach to its protection of traditional knowledge. One being a protection based on the intellectual property law regime and the other, a form of sui generis protection.²¹⁹ The existence of two different approaches has the potential to create tension and confusion amongst the traditional communities of the Republic. It has been further submitted that a mixed approach is not suitable because the two separate systems of protection provided for in the IPLAA and the IKS Bill cannot co-exist.²²⁰ It has been suggested by many legal practitioners that the IKS Bill is the favoured approach, should it repeal the IPLAA upon its promulgation.²²¹

²¹⁶ A Better Second Attempt (see note 65 above).

²¹⁷ A Better Second Attempt (see note 65 above).

²¹⁸ Has the DST Lost its Resolve? (see note 57 above).

²¹⁹ Ncube C, "*Comments on South Africa's Protection, Promotion, Development and Management of Indigenous Knowledge Systems Bill*", <http://afro-ip.blogspot.com/2015/05/comments-on-south-africas-protection.html>, date accessed: 30 August 2018 (hereinafter referred to as "Ncube Comments on South Africa's IKS Bill").

²²⁰ Ncube Comments on South Africa's IKS Bill (see note 219 above).

²²¹ Ncube Comments on South Africa's IKS Bill (see note 219 above).

Chapter 9: Conclusions and Recommendations

9.1 Summary of analysis

This study set out to analyse which mechanism would prospectively provide the most appropriate and comprehensive protection to traditional knowledge in South Africa. In order to do this an analysis between the IPLAA and the IKS Bill has been conducted. These protective measures were also compared to international initiatives aimed at protecting traditional knowledge, as well as to two foreign initiatives, in order to gauge which one (if either) was more aligned to global standards.

This study was based on a number of research objectives, namely, to determine the suitability of the IPLAA and the IKS Bill for the protection of traditional knowledge; to examine selected international and foreign initiatives aimed at protecting traditional knowledge, in order to gauge global standards and assess where South African initiatives lie in correspondence with such standards; to establish if both the IPLAA and IKS Bill are necessary, or if one is preferred and to make recommendations or suggestions on how to improve the protection of traditional knowledge in South Africa.

9.2 Findings and suggestions

Sui generis protection

It is my view, based on the analysis undertaken by this study, that intellectual property systems are not entirely compatible with the nature of traditional knowledge and do not provide effective protection to traditional knowledge. It is therefore suggested that a sui generis approach, which is tailored to suit the particulars of traditional knowledge should be adopted. It can be seen that at the international level a sui generis approach is favoured and from the examination of Zambian and Kenyan laws aimed at protecting traditional knowledge it appears that a sui generis protection is once again favoured. If South Africa were to follow this global trend, as suggested, it would mean that the IKS Bill, with its sui generis, approach should be enacted and upon its enactment it must repeal the IPLAA.

Positive and defensive protection

Protection in terms of traditional knowledge should aim to maximise the rights of traditional communities in respect of their traditional knowledge. Bearing this in mind, it is suggested that a combination of defensive and positive protection be used in order to effectively protect traditional knowledge in South Africa. Protection should empower traditional communities to control and manage their traditional knowledge and afford them the rights to restrain any unauthorised use and exploitation of such knowledge. This is provided through positive protection. Defensive protection is focussed more on prevention and aims to stop unauthorised parties from using traditional knowledge. From the analysis of Zambian and Kenyan law it can be seen that there are two suggested defensive mechanisms: mandatory disclosure of the use of traditional knowledge and the implementation of traditional knowledge databases to ensure that all use of traditional knowledge is recorded and consented to.

Prior informed consent and benefit sharing

Upon analysing the provisions of the Nagoya Protocol as well as, the provisions of the PTK Act and the TKCE Act, it can be seen that prior informed consent and benefit sharing are integral to the protection and promotion of traditional knowledge.

Trans-boundary traditional knowledge

The trans-boundary nature of traditional knowledge should also be considered when affording protection to traditional knowledge. It is often found that traditional communities share traditional knowledge or that certain types of traditional knowledge originate from more one than nation. When this situation arises, it is important that protection is afforded to both traditional communities and benefit sharing as well as prior informed consent must be extended to both of the relevant groups.

9.3 Conclusion

It is certain that a sui generis protection is the preferred and more appropriate method for effectively protecting traditional knowledge. This indicates that the IKS

Bill is favoured over the IPLAA. Admittedly, the IKS Bill contains various challenges of its own, however these problems may still be addressed before it is enacted and it remains the more suitable option of the two for the protection of traditional knowledge within South Africa. This study supports the idea that the IKS Bill is the more suitable and favoured approach and should it be enacted it must repeal the IPLAA in order to function effectively.

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